



NORTH CAROLINA
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FAMILY FORUM

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The Chair's Comments

A Word from Shelby D. Benton

In the last issue of the Family Forum I invited everyone to attend the Annual Meeting in historic Charleston, S.C. The Meeting was a huge success. More than 300 people were in attendance. The seminar entitled "In the Trenches: Understanding and Preparing for Custody Litigation," was excellent. If you missed it you should sign up for a video replay immediately. The case law updates are invaluable. The Cooper River Bridge Walk with **John Parker** and the



Shelby Benton

Charleston Harbor Cruise with the music of "The Green Army Men" were delightful and afforded many an opportunity to relax and network. Many thanks to our course planners **Heidi Bloom** and **Robin Stinson** for the program and **John Parker** and **Dan Bullard** for the social activities. Mark your calendars for the next Annual Meeting, scheduled for April 29-30, 2011 at the Marriott Grand Dunes in Myrtle Beach, S.C. We have had to move from the N.C. coast due to the fact that there is not a facility that can accommodate our growing numbers. We have been assured that we will have more than enough space for the number of attendees. I will look forward to seeing everyone there.

The Family Law Section Council ("Council") continues to monitor the House "Civil Guardian" Bill. This bill will now be considered in the short session. Council is opposed to this bill. **Kimberly Bryan** is the chair of the committee we have monitoring this Bill. If you have any interest in this legislation please contact Kimberly at kimberly.bryan@cheshirepark.com.

Council is currently developing its legislative agenda for the upcoming 2011 long session. We must have any proposed Bills ready

for submission to the NCBA Board of Governors by October 2010 for their approval. We are currently working on alimony and equitable distribution (divisible debt) legislation. If you are interested or have any suggestions for family law legislation please contact our legislation chair, **Charles Montgomery** at charles@montylaw.com.

Marcia Armstrong, former chair of this section and long time family law specialist from Smithfield, N.C., will be honored by the NCBA at its Annual Convention on June 25, 2011 with a "Citizen Lawyer Award." We are proud of her commitment to this profession and her community. Prior winners of this prestigious award from our section include **Lynn Burleson**, **Wade Harrison**, and **Doyle Early**.

Special thanks to all members of Council and Committee Chairs this year for all their efforts to make this year a success. **Michelle Reingold** is your incoming chair. She is a board certified family law specialist. She practices in Winston-Salem with **Robinson & Lawing, LLP**. She is a determined leader and has a great vision for the section. I look forward to serving as your immediate past chair. ■

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Mark Your Calendars . . .

Family Law Section Annual Meeting
Marriott Grand Dunes – Myrtle Beach, S.C.
April 29 - 30, 2011

(more information to follow in the coming year –
but don't forget to save the date!)

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NCBA Annual Meeting

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Appeal “Proof”

Suggestions for Drafting Orders & Judgments to Withstand Appellate Review

by Toby Hampson

At the close of a hearing, it is common practice, and statutorily permitted procedure, in North Carolina state courts for a trial judge to request, or instruct, a prevailing attorney to draft the order or judgment arising from the hearing. *See* N.C.G.S. § 1A-1, Rule 58. While certainly permissible in North Carolina practice, this instruction constitutes a very significant delegation of judicial authority to the attorney so assigned. The assigned attorney thus has a very real and substantial duty to the court, opposing and co-counsel, the parties, and our system of justice in general to carry this task out faithfully and accurately to fairly reflect the ruling of the court, and not just what the attorney would prefer the ruling to be. Nevertheless, in preparing an order that is well-crafted and thoughtful, an attorney still provides her client a valuable service and protects the client’s interests because a well-drafted order will be more likely to withstand appellate review. The following are some basic suggestions or reminders for approaching the preparation of a judgment or order.

Don’t wait until judgment is rendered to begin planning your order or judgment. As with any aspect of law practice, preparation is the key. From the very beginning of a case an attorney should have a strong idea, at least generally, of what result he wants (or thinks he can accomplish) for his client. The initial pleadings, and any subsequent amendments, frame the issues upon which the court may render judgment. In preparing the initial pleadings, one should envision the necessary findings and conclusions of the final judgment and draft the pleading accordingly. For example, if an attorney is seeking to modify child custody and, thus, desires an order which includes a conclusion of a substantial change of circumstances affecting the welfare of the child, the attorney should take care to allege the facts and law to support the eventual judgment. Similarly, an attorney should be careful in determining exactly what relief is being sought in the prayer for relief as it may ultimately limit the relief available at

judgment. Further, at the appellate level, an appellate court may reverse an order for relief which was not sought in the pleadings. *See Jackson v. Jackson*, 192 N.C. App. 455, 460, 665 S.E.2d 545, 549 (2008) (in absence of a motion to modify custody, trial court had no authority to modify custody, and amendment of pleadings to conform to the evidence was not proper).

Know and apply the elements of the case. Drafting a judgment or order is in a sense the perfect mirror image of drafting an initial pleading. In drafting a complaint, motion in the cause, or responsive pleading, an attorney should always take care to make sure she is alleging all the necessary legal elements so as to properly state a claim for relief or make sure no defense is waived. Similarly, in drafting a judgment, an attorney should again make sure the judgment addresses all the required and relevant elements of a successful claim or defense. It is a classic argument on appeal that the trial court failed to make findings and/or conclusions as to all the relevant elements of a claim. For example, in preparing an alimony order, the drafting attorney must make sure the order includes findings related to all the alimony factors upon which evidence has been presented and include some rationale for the amount, duration, and manner of payment of alimony – or request guidance on this from the trial court.

Know and apply the proper procedural posture and evidentiary standards. In drafting an order, make sure to be aware of the appropriate procedural posture. For example, if you are drafting a summary judgment or 12(b)(6) order, it should generally not include any “finding” of fact in which the court has had to judge or determine a fact from the competing versions thereof. The reason for this is in both of these procedural postures, a trial court should not make findings of fact and weigh evidence. Indeed, if a judge feels the need to resolve factual issues through findings of fact in a summary judgment order, summary judgment is not

appropriate. Likewise, on a 12(b)(6) motion to dismiss, the trial court is required to accept the factual allegations of a complaint as true – and, thus, cannot independently find fact based on outside evidence. Similarly, an attorney should always be aware of the requisite standard of proof. While most of the time in domestic cases the standard is, of course, the normal civil “preponderance of the evidence” standard, there are times when the proper standard is the higher “clear, cogent and convincing evidence” standard. This is true certainly in cases where a parent’s constitutionally protected status as a parent is in jeopardy. Failure to include a recitation in an order or judgment this higher standard of proof was applied to such a case can result in reversal.

Make sure the Findings of Fact are supported by evidence in the record. When preparing an order or judgment which requires the inclusion of findings of fact, an attorney should take care to include only those findings which are fully supported in the evidence. This can be hard to do at the end of an exhausting hearing and without the benefit of an expensive transcript. However, it emphasizes the importance of paying close attention to the evidence at trial, and being familiar with your own evidence. Drafting findings is also not the time to be creative or cute. Be careful in trying to characterize facts or cast them in a light more favorable than they really are. Descriptive adjectives and adverbs may capture your version of what happened but the characterization itself may not be supported by the evidence. In a well-crafted order, non-argumentative factual findings should lead logically to the correct conclusion. For example a finding that “Defendant fraudulently concealed the existence of property in the marital estate” may create an issue for appeal if not supported by evidence as to each element of fraud or constructive fraud. It may suffice to find: “The evidence demonstrates Defendant took title to property purchased

See “PROOF” page 4

“Proof” from page 3

with marital funds in the names of third parties or other entities.”

Draft Findings of Fact not recitations of the evidence. When a trial court is required to make findings of fact, it is required to determine the true facts of a case and make the requisite findings. The court must determine the veracity and weight of the evidence. It is not sufficient for a trial court to merely recite the testimony of witnesses. Appellate courts often criticize and reverse judgments and orders which are mere recitations of the evidence. Nevertheless, many orders still contain recitation of testimony and evidence rather than findings of fact. A recitation of the evidence is usually seen in the form: “Dr. Smith testified the children suffered from post-traumatic stress disorder.” A true finding of fact, on the other hand requires the trial court to reach the same factual finding itself, and would state “the children have been diagnosed with post-traumatic stress disorder” or “based on the medical evidence presented by Dr. Smith, the court finds the children suffered from post-traumatic stress disorder.”

Be careful incorporating prior orders or documents. Likewise, findings of fact should be careful when incorporating prior orders or documents. This is an easy way to simplify complicated orders and cases in which the same or similar issues may have been previously litigated. Ultimately, however, the purpose of factual findings is to allow an appellate court to determine what facts the trial court relied on to reach its decision. If the appellate court cannot determine what facts

where relied on reversal and remand is likely. This is the problem with broad incorporation of prior orders and other documents – it becomes very difficult, if not impossible, for an appellate court to determine exactly what the trial court was relying upon from those documents. *Crocker v. Crocker*, 190 N.C. App. 165, 660 S.E.2d 212 (2008). This becomes an even greater issue when the prior documents contain evidence which was not submitted to the trial court in the most recent hearing.

Less is more or less. The classic advice given to lawyers is to draft orders simply and broadly. The idea being the less material one provides an appellate court to review in an order, the less the appellate court has to pick apart. While this may be true in certain procedural postures, a well-crafted order will make sure to include everything necessary for an appellate court review. If findings are required, findings should be made to support the conclusions of law. If an order does not contain sufficient content to facilitate appellate court review, it will be, at a minimum, remanded for further proceedings and findings. On the other hand, an attorney should also be careful to include those findings of fact which do, in fact, support the conclusion. An order may contain extensive findings of fact but still be defective if those facts do not support the decision. *See Dixon v. Dixon*, 67 N.C. App. 73, 77, 312 S.E.2d 669, 672 (1984) (“A custody order may contain extensive findings of fact and still be fatally defective – when the findings of fact are not supported by the evidence”).

Include alternative bases for winning. If an attorney has included alternative bases for the same relief, consideration should be given to requesting the trial court to include more than one basis as an alternative supporting the court’s ruling. For example, a trial court could determine it was entering an initial child custody order in the best interests of the child. In the alternative, the trial court could also determine, in the event an earlier unfiled consent order constituted an initial custody determination, there was sufficient evidence of a substantial change of circumstances affecting the welfare of the child to warrant a change of custody in line with its decree. The keys to such alternative bases, however, are they must be actually found by the trial court, pled by the party, and supported by the record to be truly effective. However, where these keys are met, it may provide an appellee with multiple ways to uphold the order on appeal.

Be careful in drafting interlocutory orders. While interlocutory orders are generally not directly appealable, they may often be appealed as part of a final judgment. For example, an award of post-separation support may be reviewed upon entry of a final alimony order. *Crocker*, 190 N.C. App. at 168, 660 S.E.2d at 215. As an order is interlocutory, and not immediately appealable, it is very easy for an attorney to take less care in drafting such orders. However, it is important to remember interlocutory orders are also governed by important legal principles – and often form the basis in whole or in part for the final judgment. If the interlocutory order is unsound, it may well undermine the validity of the final judgment.

Of course, the mere drafting of a judgment or order cannot guarantee success on appeal. The ultimate test of any order or judgment is whether the trial court properly applied the correct law to the correct facts. Indeed, the real key to an “appeal-proof” order or judgment is an “appeal-proof” trial or litigation. A well-crafted order or judgment, however, may go a long way to convincing an appellate court to reach a favorable result. ■

Toby Hampson is an attorney with Wyrick, Robbins, Yates & Ponton, LLP in Raleigh, North Carolina whose practice focuses primarily on appellate litigation.

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any and all ideas to your editors today!

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QDRO Basics

Ten Things Every Divorce Lawyer Should Know

by Emily Widmann McBurney

You're in the middle of complicated settlement negotiations. The parties have finally worked through their volatile custody issues, and now they're tackling financial matters. Bank accounts, debts, sale of the marital home – all of these issues are resolved after much debate between the parties and counsel. Retirement funds? Both sides agree to simply split them in half: "Husband shall transfer 50 percent of his retirement funds to Wife by Qualified Domestic Relations Order (QDRO)." That was easy. You move on to the next issue, and start making detailed lists of who gets each item of the parties' china, silver, and household appliances. At the end of a long day, the parties have reached agreement on all issues, and you breathe a sigh of relief. You just have a few loose ends to tie up, like the QDRO, before you can close the case.

For too many lawyers, that sigh of relief turns out to have been premature. It seems that more often than not, QDROs cause problems long after the case should be finished. Although the parties' agreement seemed simple and clear at the settlement conference, months after the Final Judgment, all sorts of arguments have arisen over retirement issues. What is supposed to be the date of division: the date of the mediation or the date of the divorce (which ended up being four months later, and the market tanked in the interim)? Is the Wife supposed to be treated as the surviving spouse? Who is responsible for the outstanding loan balance in the account? Months later, these "loose ends" are costing your client a fortune to resolve, and taking up precious hours of your time. Meanwhile, your client is angry that she's been divorced for six months but somehow you are still billing her monthly because you can't seem to finish up that QDRO.

It doesn't have to be this way. A little preparation on the front end can save you and your client a lot of time and money at the end of the case. Here are 10 things for attorneys to keep in mind while preparing for settlement conferences and drafting settlement agreements. Some QDRO issues will always rear their ugly heads when you least expect them, but paying attention to these ten issues

early in the case will save you countless hours and headaches later.

1) What kind of plan(s) do the parties have?

Most settlement agreements just refer to the parties' "retirement plans," without specifying whether they are defined benefit or defined contribution plans, or both. In simplest terms, a "defined benefit" plan is what people commonly refer to as a "pension." A defined benefit plan is what an employee has if, after working for a company for a certain number of years, she will get a guaranteed amount of money every month for the rest of her life after she retires. There are many variations in the form of defined benefit plans, but the basic idea is that the employee has a guaranteed ("defined") benefit, normally based on years of service with the company. Most defined benefit plans pay out the benefits in the form of monthly payments of a specific dollar amount, but some defined benefit plans provide for a lump sum payment and many other options.

The most common type of "defined contribution" plan is a 401(k) plan. The basic idea is that the employee has a specific account into which funds are contributed over time. The amount in the account will fluctuate with the market and the amount of contributions made by the employee and the employer. Thus, there is no guarantee of how much money will be in the account when the employee retires.

The distinction between the two types of plans is important because you need to know what you are really dividing. Is it the right to receive monthly payments in the future, or part of an account with an identifiable balance that is fluctuating over time? The relevance of various issues, such as surviving spouse benefits, cost of living increases, earnings and losses, and loans depends on whether you are dealing with a defined benefit or defined contribution plan. It is surprising how often settlement agreements contain statements such as, "Wife shall receive one half of Husband's Pension Plan as of the date of the divorce, plus or minus earnings and

losses from that date until the date the account is divided." This presents a problem, since the concept of "earnings and losses" does not apply to pension (defined benefit) plans. As discussed above, payments under defined benefit plans do not fluctuate with the market, and thus there are no "earnings and losses."

2) Do they need a QDRO?

Not every retirement plan requires a QDRO. Settlement agreements often provide that an IRA ("Individual Retirement Account") will be divided by QDRO, but a QDRO is not necessary to divide up an IRA or SEP ("Simplified Employee Plan") account. Division of an IRA should normally only involve a letter of instruction from the Participant, along with a copy of the Final Judgment and Decree. Of course, needless confusion results when the agreement states that there will be a QDRO when none is actually needed.

Another point to consider is that it often does not make financial sense to agree to a division of assets which will require a QDRO when the (defined contribution) account to be divided does not have enough money in it to make a QDRO worthwhile. If the account is only worth \$5,000, it is foolish to go through the lengthy and expensive QDRO process (which often costs more than \$1,000 in attorney's fees) to give each party \$2,500. Although there are some cases in which the parties insist that every account be divided in half, regardless of the cost and inefficiency involved, in many cases the parties could save themselves some money and aggravation simply by agreeing to transfer funds from an IRA or other asset rather than from a defined contribution plan. If the parties have other assets to choose from, consider whether it is absolutely necessary before agreeing to divide a small retirement plan by QDRO.

3) Can you do a QDRO for this plan?

Sometimes attorneys learn the hard way

See QDRO page 6

that some plans are simply not divisible by QDRO. Under some state laws, state and local government plans cannot be divided by QDRO or other means. North Carolina is fortunate to have an unusually accessible, well-designed state government retirement plan system, which accepts Domestic Relations Orders to divide state retirement benefits. The North Carolina Department of Treasury website found at www.nctreasurer.com is extremely useful and contains model orders for most North Carolina government retirement benefits. Note that, since the state plans are exempt from ERISA, they do not contain certain protections found in ERISA plans. For example, participants in North Carolina public retirement plans do not have to notify their spouses of any changes made to their benefits (such as the designation of beneficiaries, or withdrawal of funds) if there is no Domestic Relations Order in place. Divorce lawyers should take steps during the divorce process to ensure that the employee spouse does not make substantive changes that would affect the benefits to be awarded to the non-employee spouse.

In contrast to North Carolina's state retirement plan system, Georgia State or county pensions, such as the Georgia Teachers Retirement Plan, are not subject to QDROs and cannot be divided. The same is true for retirement plans offered through many religious organizations ("church plans"). It is never pleasant to learn this after the divorce is final. In some unfortunate cases, a pension plan is literally the parties' only asset. Imagine the reaction of the client who learns that there is no way for her to obtain the pension payments awarded to her in the divorce decree. In such cases, often the only option is for the employee spouse to write a check to his former spouse for her share of each pension payment as he receives it. Obviously, there are many serious drawbacks to this scenario and it is to be avoided if at all possible.

Many employees participate in "non-qualified" retirement plans which are also not divisible by QDRO. A non-qualified plan is a retirement plan which is not subject to ERISA, and thus not required to accept QDROs. These plans are usually set up by corporations in addition to their qualified retirement plans in order to provide higher-paid employees with more retirement benefits than the tax code will permit under qualified plans. They are sometimes referred to as

"supplemental" plans because they are intended to supplement the retirement funds the employee will receive from the company's qualified retirement plans. Some non-qualified retirement plans accept QDROs, but many do not, so it is a good idea to find this out before agreeing to divide a non-qualified plan in a divorce action.

If you can't find out whether a particular plan is subject to a QDRO before the agreement is finished, it is good practice to set up an alternative mechanism in the settlement agreement for dividing the funds. "In the event that the Wife's XYZ Corporation Non-Qualified Supplemental Retirement Plan ('the Plan') cannot be divided by Qualified Domestic Relations Order, the parties agree that the Husband shall receive \$15,000 from the Wife's IRA in lieu of the funds awarded to him herein from the Plan."

4) Do you have the correct name of the plan?

Believe it or not, knowing the correct name of the plan can be the key to finding crucial information. For example, if the parties have been talking about the Husband's "retirement plan," but no one has specified what sort of plan it is, you can learn a lot from finding out that the plan is called the "ABC Corporation 401(k) Plan," as opposed to the "DEF Corporation Qualified Pension Plan," or even the "GHI Corporation Non-Qualified Supplemental Income Plan for Highly Compensated Employees." These plan names tell you a lot about the parties' retirement assets (specifically, whether they participate in a defined contribution, defined benefit, or non-qualified plan).

Specific plan names also provide information regarding which retirement plans the employee participates in. In many cases, the parties simply refer to the employee spouse's "retirement plan," when he actually participates in the company's 401(k) plan, a pension plan, and a non-qualified plan. If the settlement agreement awards the Wife half of Husband's "retirement plan," what will happen when you discover, post-divorce, that there are actually three plans, all of which have very different features? Further, if the Agreement refers only to the "JKL Retirement Plan," and it turns out that the employee participates in three retirement plans with the company, one of which is actually called the "JKL Retirement Plan," the

employee might later take the position that the non-employee spouse is only entitled to a portion of the "JKL Retirement Plan," since that is what the plain language of the settlement agreement specifies and refuse to divide the funds in the other plans. Simply put, it pays to find out in advance the exact names of all of the plans in which the employee spouse participates.

5) What is the date of division?

Many settlement agreements fail to state a precise date for the division of retirement assets, and believe it or not there is quite a bit of QDRO litigation on this issue. Always state the date as of which the funds are to be divided ("Husband is awarded one-half of the account balance as of May 31, 2010 (or, "the date of the Final Judgment and Decree," or any other date to which the parties have agreed))." If you don't include this simple information in the agreement, you may find yourself litigating the issue of whether the parties intended the benefits to be divided as of the date the divorce was filed, the date of the mediation, the date the agreement was signed, the date of the Final Judgment and Decree, or some other date. For a defined contribution plan, if the market spikes up or down during this period, and the agreement is not specific, the parties may fight relentlessly over which date of division should control. Thousands of dollars could be at stake for your client.

The only exception to this rule is when a specific dollar amount is awarded in a defined contribution plan, and the parties do not intend for this amount to be adjusted for earnings and losses. If the parties have agreed that the Wife shall receive exactly \$50,000 from the Husband's plan, then the date of division is not relevant.

6) Will the amount awarded be adjusted for earnings and losses?

There is usually a delay of several months between the date of division and the date that the funds in a defined contribution plan are actually divided. That is, an agreement may specify that the funds shall be divided as of July 1, 2010 but this division does not actually take place until the QDRO is entered the following December. If the Agreement states that Wife shall receive 50 percent of the Husband's 401(k) plan balance as of July 1, 2010, and the account was worth \$100,000

on July 1, 2010, but has grown to \$106,000 by December, what should the Wife receive when the account is divided? Fifty thousand dollars, or fifty-three thousand dollars? The agreement must specify what happens to earnings and losses on the amount awarded to the Wife between the date of division and the date the funds are actually distributed to her.

Obviously, your position on this matter may depend on which party you represent and the facts of the case. If you agree on a specific dollar amount or percentage of the account as of a certain date, with no adjustment for earnings and losses, then the employee spouse is going to bear all of the potential risk and potential benefit of the market falling or rising. If the market goes up dramatically, he will be very happy. If it goes down, he may resent having to transfer \$50,000 to his ex-wife, because this now represents a greater percentage of the account balance. Conversely, the Wife will be happy with her guaranteed \$50,000 if the market falls, but unhappy that she is not getting a share of the gains if the market goes up.

If you agree that the awarded amount will be adjusted for earnings and losses, then neither party's percentage interest should be affected by the amount of time it takes to complete the QDRO process. Even if the plan does not actually divide the account until, say, Dec. 15, 2010, each party will still get the same percentage interest he or she would have received if the account had been divided on July 1, 2010. Essentially, the plan will do calculations which will make it just as if a separate account had been established for the Wife on July 1, 2010, and then her account independently rose and fell with the market between that date and Dec. 15, 2010.

7) Who is the surviving spouse?

One of the trickiest QDRO issues is that of the surviving spouse designation. This is a complicated topic, but there are ways to address it in your settlement agreements to avoid QDRO agony later on. Attorneys often stumble over the surviving spouse issue because it seems like a moving target. Perhaps this is because there is a great difference in the nature and meaning of the surviving spouse designation between defined contribution plans and defined benefit plans. Further, there is an important distinction in defined benefit plans between surviving spouse benefits before the employee retires and after retirement.

In a defined contribution plan, surviving

spouse benefits are relatively simple: there generally aren't any. There is a certain amount of money in the account, and once the funds are transferred, the death of either spouse will not affect either party's account. When you designate the non-employee spouse as the "surviving spouse" of a defined contribution plan, you are really just making sure that she gets the portion awarded to her, even if the employee spouse dies before the funds are transferred to her. The agreement should state that "Wife shall receive her portion of the MNO Corporation 401(k) Plan without regard to the death of the Husband." If you designate the non-employee spouse as the surviving spouse with respect only to her benefit, she will receive exactly what she was awarded in the agreement. If you designate her as the surviving spouse with respect to the Husband's entire benefit, she will probably get the whole account balance if Husband dies before her portion is transferred to her.

Defined benefit plans present much more complicated issues with regard to surviving spouse benefits. The consequences of handling this incorrectly can be enormous, so it is important to grasp the basic issues. In many defined benefit plans, if the non-employee spouse is not designated as the surviving spouse in the event of the employee spouse's death before retirement, the non-employee spouse will get nothing if the employee spouse happens to die prior to retirement. This is often something that neither the parties nor counsel understand or intend, and it is almost always irrevocable by the time this mistake is discovered.

There are too many variables in this area to discuss adequately here, but it is important for attorneys to understand that, under ERISA and the terms of most plans, if the employee spouse dies prior to retirement, his surviving spouse will receive a Qualified Pre-Retirement Survivor Annuity ("QPSA") which is equal to fifty percent of his benefit. Assume that you are negotiating a settlement in which the parties have agreed that the non-employee Wife should receive one half of the pension. In most cases, if the Husband dies before he reaches retirement, Wife will either receive nothing, or twenty-five percent of the benefit, or fifty percent. Under most plans, she will get nothing if she is not designated as the surviving spouse for the QPSA. She will get 25 percent of the benefit, instead of the fifty percent she expected, if she is designated as the surviving spouse for only her portion of the benefit. She will only get the full 50 per-

cent that she expects if she is designated as the surviving spouse for the entire QPSA.

To make matters even more complicated, the death of the employee spouse after retirement presents a whole different set of issues. In many defined benefit plans, the non-employee spouse receives a completely separate benefit, such that the death of the employee spouse following retirement has no effect on the benefit. Then there is no need for the non-employee spouse to be designated as the surviving spouse after retirement. In other plans, however, the parties' benefits are linked, and the death of the employee spouse can affect the non-employee spouse's benefit, so the surviving spouse issue must be addressed.

This is a topic that could be the subject of a seminar on its own. The bottom line is that, when you are dealing with a defined benefit plan, you need to specify whether and to what extent the non-employee spouse is to be designated as the surviving spouse, before and after retirement.

8) Is there a loan balance?

Existing loan balances in defined contribution plans are often overlooked when drafting settlement agreements. In fact, account statements frequently make it difficult to determine whether an account has an existing loan balance. This is because defined contribution plans often use confusing terms to refer to the total balance. Statements may show a "total balance" of \$50,000 in bold type, but show elsewhere that the "total account value" is \$75,000, due to an outstanding loan on the account. In most plans, an outstanding loan is considered an asset which should be added to the total balance when determining the true value of the account. However, most plans cannot award any portion of a loan balance through a QDRO.

To protect your client from a post-divorce loan surprise, you should determine whether there are any existing loans on the defined contribution plan you are dividing. If there are not, be sure to include language in the settlement agreement (especially if you represent the non-employee spouse), asserting that there are no loans on the account and prohibiting the employee from taking any until after the completion of the QDRO and division of the account.

If there is an existing loan, find out what the loan was used for. If the funds were used

See QDRO page 8

to repair the gutters on the marital home to prepare it for sale, the parties might agree that the loan balance should be equally shared. In this case, the agreement should provide that the loan be excluded from calculations of the non-employee's share. If, however, Wife has taken \$25,000 out of her 401(k) plan to pay your fees or to buy gifts for her boyfriend, the parties may agree that the loan balance should be included when calculating Husband's share. This means that if there is \$50,000 in the account, plus a \$25,000 loan balance, Husband will receive \$37,500, while the Wife will receive \$12,500 plus the \$25,000 loan balance, which represents funds she has already received from the plan. You may also want to include a prohibition on any further loans while the QDRO is pending, depending on which party you represent.

Further, in cases in which one spouse is to receive 100% of a defined contribution plan, you must determine whether there is an outstanding loan because the plan will generally not transfer a loan to the non-employee spouse. The plan may also need to hold back sufficient funds to cover the loan. Thus, "100%" can be substantially less than that, and it pays to find this out in advance.

9) Who is entitled to subsequent contributions?

In some defined contribution plans, employer and/or employee contributions are not made monthly or with each paycheck. Many profit sharing plans make no employer contributions until after December 31. Receipt of a contribution for the calendar year may be dependent on whether the employee is employed by the company on

December 31. In some situations, this may prevent the non-employee spouse from receiving a considerable amount of money. For example, if the parties are dividing their assets as of Nov. 30, 2010, and they agree to split the Husband's 401(k) plan in half, but the employer's contributions for 2010 will not be made until January or February, 2011, Wife may lose out on a substantial sum of money which is arguably marital property to be divided. For example, if the employer contribution will be \$20,000, Wife might be entitled to 50 percent of 11/12 of \$20,000, or \$9,166.66. In this case, the agreement should specify that Wife shall be entitled to a proportionate share of contributions made to the plan for the 2010 plan year attributable to the period ending Nov. 30, 2010. This way she will get half of the contributions accrued during the first 11 months of the year, (50 percent of 11/12). If not, you may want to specify that Wife shall not be entitled to a share of any funds contributed to the plan following Nov. 30, 2010.

10) Who is drafting the QDRO?

A frightening number of agreements do not specify this, and in some cases, this means that the QDRO is never drafted or completed. QDROs can easily fall through the cracks, since they are not something most clients are familiar with, and each attorney may assume that the other is taking care of it and then forget about it as time passes. Some attorneys think they do not need to worry about this if they represent the employee, since he will get his money regardless of whether a QDRO is entered. However, part of the attorney's role is to protect her client

from future complications or claims. You don't want to leave your client's estate (or his new wife) facing a costly legal battle after his ex-wife realizes that his new wife has (irrevocably) received all of his pension benefits following his death, even though his ex-wife was awarded those benefits in a settlement agreement.

Ideally, the settlement agreement should spell out who is going to be responsible for drafting and submitting the QDRO to the Court and Plan. It is also a good idea to set forth who is going to pay for the preparation of the QDRO, and to make it clear that the other attorney will have the opportunity to review and approve the QDRO before it is submitted to the Court by the attorney who prepares it.

Conclusion

QDROs are almost always going to be complicated, but they don't have to be painful. The key to avoiding QDRO hassles is to be as specific as possible in drafting the agreement. If you take the time to investigate and agree on these issues before the divorce is final, you will find yourself dealing with fewer QDRO problems down the road. Although it may not seem like it in the heat of negotiations, it is better to address these issues during settlement than to leave the agreement vague and then fight about them when they arise after the divorce is final. ■

Emily Widmann McBurney, Esq. presented her paper on "Dividing IRAs, Non-Qualified, and Qualified Retirement Plans" at the North Carolina Bar Association's Intensive Equitable Distribution Seminar, "The Uh-Oh Moments..." on Oct. 29-30, 2009 and Feb. 4-5, 2010. Ms. McBurney is a shareholder at Davis, Matthews and Quigley, P.C., Atlanta, Georgia and can be reached at emcburney@dmqlaw.com or (404) 261-3900. Her practice is substantially devoted to Qualified Domestic Relations Orders. Prior to joining the Firm, she served as Staff Attorney to Judge Cynthia D. Wright in Fulton County Superior Court's Family Division. Ms. McBurney graduated cum laude from Harvard Law School in 1995.

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Family Jewels

O.V.O.L.

by Judge Tim Finan

So far in the Family Jewels column, you have had retired Judge Shelly Holt give you her “Not Top 10,” so you know some extremes to avoid in dealing with your Judges. Judge Denise Hartsfield tells you what Judges actually hear and learn from those in camera conversations with your client’s children, and Judge Tom Taylor enlightens you with his Three Rules to persuade a Judge to rule in your favor (or at least increase the odds). I have only been on the bench a little over three years – so I read their articles first from my recent perspective as an attorney, then from my present perspective as a Judge who spends most of three weeks each month hearing domestic cases in two of my district’s three counties. As an attorney, I found some of the information helpful, much of it basic but definitely worth a reminder, and a bit of it struck me as “gee, Judges, are we really that short on common sense?” As a Judge, I hope their insights were helpful to you, and I hope mine will be also.

I’ll cover four topics with you that I am certain will help you be more effective advocates in court. My points can be abbreviated “OVOL” = Opening, Visual, Objective, Law.

1. Make an Opening Statement.

I am still new at judging, and I spend time reading every file before each trial, taking notes, and jotting down questions that the pleadings raise in my mind. I expect you to be prepared so I feel strongly that I should be prepared too. Nevertheless, I do not know how you are going to prove your case and I do not have any projection of your evidence other than the notice pleadings in the file. An opening statement, especially if you represent the plaintiff, gives you an opportunity to tell me about your case before you start your evidence, and you can outline for me what it is you are going to prove and how you are going to do it. Usually, I do not know this until you complete your evidence. Don’t you see a wonderful tactical advantage in objectively telling me what your evidence will be, rather than have me try to figure it out as we go along? Be brief. Be organized.

Do not argue.

There are two times you should not make an opening statement: (1) if you are not organized and prepared to the extent you can give me a brief, objective, organized overview of your case; or (2) if you will be unable to prove what you tell me you can prove in your opening statement. One or both of those reasons may explain why so few of you make opening statements. Get prepared, get up and open.

2. Increase Your Effectiveness by Presenting Your Case Visually, Too.

Sitting as a Judge, it is very helpful in an equitable distribution case or in a contested custody case (especially during opening statement and closing argument) for you to walk me through your case visually while you talk about it. PowerPoint is not difficult to learn to use. If I can do it, I know you can. Such a presentation is easier for me to follow, increases the persuasiveness of your presentation (you’ve got to have substance, of course), and is impressive to the court and to your client and may be “depressive” to your opponent.

Two other comments on exhibits – first, please pre-mark your exhibits. It is a waste of time for me to sit in court while you search your table for those ever elusive exhibit stickers or come up to the courtroom clerk and ask her to mark exhibits that you knew you were going to introduce, or have you approach a witness and hand them something to identify that has not already been marked. Come to court early enough to get your exhibits marked or get the stickers and mark them in your office.

Regarding photos, I need more than one but less than 1,000. It is helpful to see photos of the inside of the house and the outside showing the yard, the street in front, the neighborhood, the child interacting with family, the school, etc. I know many (most? all?) of these photos are staged but they can increase the persuasiveness of your case. Am I going to decide a case based on which par-

ent can stage these family photos better? No, but if one side presents photos showing where the child is living or will be living and the other side presents none, I only have a picture (literally) to illustrate one side’s evidence. And I have seen photos in an equitable distribution case which were helpful in trying to decide between two widely disparate values.

3. Be Zealous Objectively, Not Emotionally.

When you are arguing to a Judge, not a jury, tell your client that you are going to argue the case but explain to your client that this is not a television movie and your client is not going to hear an emotional harangue. Here is what does and does not work in your closing argument:

a. Do not tell me how you feel, what you know, what you believe, how sure you are about something – you are not a witness, and quite frankly, I do not care how you personally feel as I do not decide cases based on a lawyer’s personal assurances that a particular client is “the best parent I have ever met, maybe the best person I have ever met.” If you are going to do this, withdraw, get sworn in and testify about this person. I’ve heard from the witnesses. Now I need to hear from you, the lawyer.

b. Tell me objectively what your facts prove and why I should rule in your favor.

c. Do not spend all your time tearing down the other side without telling me what is so good about your side. I have heard a number of custody cases where I was convinced that “the other parent” was a sorry, angry, no good son of a gun who couldn’t be trusted to take care of a dog much less a child (for dog lovers, please insert “cat” in the preceding phrase), but I had hardly any evidence about the lawyer’s own client who wanted custody.

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d. Do not personally attack opposing counsel even if he or she really deserves it. I used to tell clients before jury trials that the uglier that other lawyer treats you on the witness stand, you remain cool and calm, because if that jury gets back in the deliberation room and starts talking about who acted like an absolute jerk, I want them to be talking about the other lawyer, not about my client.

e. You do not have to yell to let me know I really need to listen to this part of your argument. One of the most effective lawyers I have ever heard makes her arguments in a softer than normal tone of voice, except when she gets to an important point. Then she raises her voice but does not scream because she does not have to scream. Everyone knows when she is making a key point and it grabs your attention.

f. Do not argue everything. The best arguments I ever made and the best I have heard have been 5 to 10 minutes, not an hour or two. I really do listen to the

evidence and at most need a summary from you, not a complete recitation.

g. To misquote Tom Hanks in *A League of Their Own* – “There’s no crying by the lawyers in the courtroom!” Yes, I have had an attorney cry and it’s not effective. It’s disgusting. There is a time to get emotional – if you are trying to keep custody away from a parent who has physically or sexually abused, I understand why even the most objective advocate can get emotional under those circumstances, but those cases are exceptional and not the norm.

4. Know the Law.

No, you don’t have to memorize the North Carolina General Statutes, but if you are coming into court to try a custody case, you need to know the custody statutes and be up to date on the case law that may impact your case. It is absolutely amazing what you can learn if you open up those green books (or use your computers) and read what the law actually is instead of what

you think it might be, or what it was when you started practicing law years ago. When you are telling me why I should rule in your favor, cite the statute and the case law, bolster your position by accurately telling me what the law is and how your facts fit into it. If you cite a case, give me a copy and provide one to opposing counsel.

I know firsthand the emotions, the long hours, and the challenges of practicing in domestic court. I respect you for it and hope you take all of the above as my thoughts on how to help you be more effective for your clients. ■

Tim Finan is a District Court Judge for the 8th Judicial District (Wayne, Lenoir & Greene Counties). He is also a retired Colonel / JAG who spent the last several years of his Air Force Reserve career traveling to bases around the world to conduct trial advocacy training workshops. He is most proud of his work as the attorney advocate for the Guardian ad litem program in two counties advocating for neglected, abused and dependent children for over 20 years.

Mistakes Anonymous

After briefly reviewing an oppressive set of interrogatories and requests for production of documents, many of us task our paralegal with working with the client to respond to the discovery. Boxes of documents are brought in by the client, bates stamped, and written responses prepared for the attorney to review and finalize. To what extent do we then take the time to go through each interrogatory and request for production of documents and review specifically what is being turned over to the other side?

I was defending an alienation of affections and criminal conversation case and we requested all evidence against our client that had been gathered by the other party or his private detective including photos, audio tapes, videos, notes, cards, diaries, journals, and calendars. On many occasions we have received journals or diaries of the opposing party which not only documented the affect of the alleged affair but also recorded other difficulties with the marriage that did not involve our client. These problems in the marriage were useful to support the defense

that there was not any genuine love and affection to be “alienated.”

We received such a diary that was shockingly candid and devastating to the plaintiff’s case. It contained detailed admissions by the plaintiff of his own indiscretions and described in graphic language, worthy of Penthouse publication, the sexual orgy involving the plaintiff, his wife, and his best friend. The menage a trois occurred approximately six weeks prior to the plaintiff’s wife meeting my client.

We later discovered that the diary or journal was prepared by the plaintiff at the instruction of the attorney representing him in his initial litigation with his wife who had become enamored with his best friend. The diary had been turned over to the plaintiff’s attorney in that case and then when the plaintiff hired another attorney to represent him in the alienation of affections and criminal conversations case, the complete file was provided. Unfortunately for the plaintiff, his subsequent attorney was never told and never realized that the diary arguably may

have been “work product,” immune from discovery.

At trial, the plaintiff’s attorney objected vigorously to the introduction of the journal, attempting to assert the “work product” immunity at trial. Of course, the court ruled the immunity was an immunity, if at all, from discovery which had waived. The incriminating confessions in the diary were admitted into evidence and then read to the jury by the plaintiff himself. It was a classic “in their own words” moment. Needless to say, the plaintiff lost.

So, several lessons are learned from this disaster. First, anytime you request a client to prepare anything, from a time line to a journal, from a list of expenses to a list of prior affairs, always mark the document as “Attorney Work Product.” Second, check and double check anything that your client has prepared if it is being provided to the other side. Last, understand that certain privileges and immunities may be waived, especially if the above two lessons are ignored. ■

Family Law Forum Case Updates

March 16, 2010 – May 4, 2010

by Rebecca K. Watts & Steve Mansbery

Alimony

Crowley v. Crowley,
decided Court of Appeals,
April 6, 2010, No. 09-898.

The wife filed a compliant for custody, child support, post separation support, alimony, and equitable distribution. The husband filed an answer and counterclaims for custody, child support, and equitable distribution. In his answer, the husband set out affirmative defenses to the wife's alimony claims. In the husband's counterclaims he incorporated the allegations contained in his affirmative defenses. The wife did not file a reply to the husband's counterclaims. At trial, the judge dismissed the wife's alimony claim because the wife had failed to respond to the husband's counterclaims and therefore the allegations in the husband's counterclaims, which included the incorporated statements defending against the alimony counterclaim, were deemed admitted.

On appeal, the wife argues that the husband did not assert a counterclaim on the issue of alimony "to which a reply was either required or permitted." The court of Appeals states that the question before them is:

"whether allegations in a defendant's counterclaim, which in part state in the affirmative mere denials of allegations originally made in a compliant, are deemed admitted if the plaintiff fails to re-allege those facts in a reply by denying the defendant's allegations."

The Court of Appeals reverses the trial court's dismissal of the wife's alimony claim and holds:

"that a plaintiff's failure to file a reply re-asserting allegations already made in the complaint in response to averments in a defendant's counterclaim which do no more than present "denials in affirmative form of the allegations of the complaint" does not amount to an admission pursuant to N.C.G.S. §1A-1, Rule 8(d)."

Interlocutory Appeal

Crowley v. Crowley,
decided Court of Appeals,

April 6, 2010, No. 09-898

In addition to the underlying issue of dismissal of the wife's alimony claim presented in this case, there was an issue whether the appeal was interlocutory. At the time the wife filed her notice of appeal (March 13, 2009) from the trial court's dismissal of her alimony claims, the issues of child support and equitable distribution were still pending at the trial court level. On July 7, 2009, the trial court entered an order resolving child support, attorneys' fees, and equitable distribution. A motion was made to the Court of Appeals to amend the record to reflect the developments in the case that had occurred subsequent to the filing of the notice of appeal and the Court of Appeals granted that motion to amend the record. The Court of Appeals then determined that the appeal from the issue dismissing the wife's alimony claim, which had been interlocutory when the notice of appeal was filed, was no longer interlocutory because the remaining issues had been resolved at the trial court level, therefore "the rationale for dismissing interlocutory appeals does not apply in this case..."

Musick v. Musick,
decided Court of Appeals,
April 6, 2010, No. 09-557

The wife's alimony claim and the parties' equitable distribution claims were to be heard the week of Sept. 3, 2008. Alimony was heard, but equitable distribution was continued to a later date. An alimony and attorney fee order was entered. The alimony order specifically reserved equitable distribution for a later hearing. The husband filed a Rule 59 motion for a new trial, a Rule 60 motion for relief from attorney fee order, and a notice of Objection and Exception to the permanent alimony order. The husband's motions were denied and he then appealed.

Neither party raised the issue of the interlocutory nature of the appeal, but the Court of Appeals addressed the issue sua sponte. The Court of Appeals dismisses the husband's appeal as interlocutory because the denial of his Rule 59 and 60 motions does

not alter the interlocutory nature of the underlying permanent alimony order and he will not lose a substantial right if he is not able to appeal the alimony issue prior to the determination of equitable distribution.

Civil Procedure

Muter v. Muter,
decided Court of Appeals,
March 16, 2010, No. 09-974

The trial court did not abuse its discretion by refusing to stay action in North Carolina where action in Ohio was also pending. The burden was on the movant to persuade the trial court that "allowing the North Carolina action would 'work a substantial injustice' on her."

Termination of Parental Rights

In Re: A.C.V.,
decided Court of Appeals,
April 20, 2010, No. 09-1199

The trial court terminated unwed father's parental rights after petition from adoption agency, as father failed to provide substantial financial support or consistent care to the mother during pregnancy or the child in utero. Whether father provided substantial financial support or consistent care requires a subjective analysis by the trial court. Of particular note was the Court of Appeals discussion on what it perceived to be "an underlying tension between the constitutional rights of putative fathers and the requisites of section 7B-1111(a)(5) as this State's appellate courts have interpreted it."

The court cited **Owenby**, where "the North Carolina Supreme Court noted that a finding under any of the provisions in section 7-B-1111 will result in a parent 'forfeiting his or her constitutionally protected status.'" Therefore, the trial court's application of the "best interests of the child" standard was proper, and a finding of unfitness or neglect is unnecessary. The court affirmed the termination of parental rights; however, the court stated the following in the last paragraph of its opinion:

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Updates *from page 11*

[T]emporarily placing a child with an adoptive family before the father has been able to demonstrate that he is capable of maintaining a familial relationship appears to provide unequal treatment to a father of a newborn as opposed to the father of an abused, neglected, and dependent child.

Adoptions

Norris, et al. v. Norris v. Midkiff,
decided Court of Appeals,
April 20, 2010, No. 09-1329.

The clerk's orders setting aside the clerk's decrees of adoption were interlocutory; therefore, petitioners could not appeal the orders to the district court and as a result, the district court lacked subject matter jurisdiction to review the clerk's orders pursuant to

an appeal. The case was remanded for a determination of whether the adoption was still contested and if so, the clerk should transfer the adoption proceedings to district court.

The dad was charged with first degree murder of the mom and was incarcerated. The paternal grandparents filed a complaint for custody of their son's children. The trial court granted them custody.

Without notice to the maternal grandmother, paternal grandparents filed petitions for adoption. The maternal grandmother filed a motion to intervene and a motion for visitation. The clerk of superior court entered decrees of adoption; subsequently, however, the clerk set aside the decrees because of lack of notice to the maternal grandmother.

Notice of the petitions was issued, and another visitation motion filed. Additional procedural motions were filed, and a motion to reinstate the adoption decrees, which the trial court granted on the basis that the clerk lacked authority to enter the orders setting aside its decrees. The trial court then concluded that it did not have subject matter jurisdiction over any issue in the case, as the children were legally adopted. The maternal grandmother's motions for visitation were dismissed. She appealed. ■

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Supreme Court Adopts Changes in Mediation Rules

On February 17, the Supreme Court adopted revisions to the Mediated Settlement Conference (MSC), Family Financial Settlement (FFS), and Clerk Mediation (Clerk) Program Rules. The effective date for the revisions was March 1, 2010. The changes to the Rules were recommended by the N.C. Dispute Resolution Commission.

MSC, FFS and Clerk Rule 2, which set forth the process by which parties may select a mediator, were revised to now require parties to serve a copy of the Designation of Mediator form on their party-selected mediator. Program forms have now been updated to reflect the new requirement (*See* AOC-CV-812 (MSC), AOC-CV-825 (FFS) and AOC-G-302 (Clerk)) and are posted on the court's (www.nccourts.org) and Commission's (www.ncdrc.org) websites. Rule 2 has long required parties to verify a mediator's willingness to serve and compensation prior to advising the court of his/her selection. However, court staff and the Commission have continued to hear from mediators about instances where they were party selected, but were never informed of their selection until after the deadline for

completion had passed and they were contacted by court staff. The Commission hopes that requiring service of a copy of the Designation form on party selected mediators will help to reduce or eliminate this problem.

Enabling legislation for the programs and MSC, FFS and Clerk Rule 5 were revised to clarify that judges not only have authority to hold parties in contempt for their failure to appear for mediation, but also for their failure, without good cause, to pay mediator fees, whether the mediator was party selected or court appointed. Calls to the Commission's office from mediators who have not received payment for their services have increased substantially during the economic downturn. The Commission encourages attorneys to remind their clients to bring their checks to mediation so that the mediator may be paid at the conclusion of the conference. In situations where clients do not come prepared to pay, the Commission asks that attorneys actively follow up to insure that mediators are eventually compensated for their services. The Commission also asks that attorneys be mindful that this Program is intended to expedite litigation

and to help make the courts more efficient. If a mediator must file a Motion for Show Cause Hearing (AOC-CV- 815) in order to collect his/her fee, the Program is, contrary to its mission, spawning litigation. If an attorney is representing a client who is indigent, the client should bring a copy of his/her Petition And Order For Relief From Obligation To Pay Mediator's Fee (AOC-CV-814 (MSC), AOC-CV-828 (FFS), or AOC-CV-306T (Clerk)) to the mediation and give it to the mediator at the conclusion of mediation. The mediator, should, in turn, attach the copy to his/her Report of Mediator and forward it to the court. If the court determines that the client is, in fact, indigent and cannot pay any or all of the fee, the mediator must, in accordance with program rules, waive his/her fees or accept a partial payment as approved by the court.

Lastly, MSC, FFS and Clerk Rule 7 were revised to increase the fees due court appointed mediators. The one time, per case administrative fee (case scheduling fee) was increased from \$125 to \$150. The fee for hourly services was increased from \$125 to \$150. Given the current economic situation in North Carolina, the Commission appreci-

ates that this is a difficult time to raise fees on parties participating in court ordered mediated settlement conferences. However, the Commission also recognizes that this is only the second increase in mediator fees to occur since the inception of the superior court's Mediated Settlement Conference Program in October of 1991, nearly 20 years ago. As the Commission's Chair, Senior Resident Superior Court Judge W. David Lee, observed, "Our court-appointed mediators work hard. Very often the cases they mediate involve pro se parties or attorneys who are not communicating or who are, at best, disinterested in mediating the matter. Scheduling often poses a challenge and parties are more likely to fail to appear. Often fee collection becomes an issue. These mediators have been patient and are long over due for an increase." Judge Lee also noted that over the past few years, court staff have expressed concern to the Commission that some of our State's more talented and respected mediators have been leaving court

appointed mediator lists because they could no longer afford to serve. It is imperative, he believes, that experienced and successful mediators be available for court appointment in all judicial districts.

In addition to the above fee increases, the cost to substitute a mediator was increased from \$125 to \$150 in instances where the parties fail to designate a mediator timely, the court appoints one and now the parties are seeking to substitute another of their own choosing. MSC, FFS and Clerk Rule 7 all require parties to provide proof to the court that they have paid the court appointed mediator before the substitution is approved. A copy of a check can serve as proof. In addition to revising this rule, the old *Substitution of Mediator* form has been replaced with a new *Consent Order for Substitution of Mediator* (AOC-CV-836). The new form allows not only for the substitution of an MSC or FFS party selected mediator for a court appointed one, but also for the substitution of a party selected mediator for another

party selected mediator in instances where the mediator who was originally selected can no longer serve.

The Commission has advised certified mediators that the fee increases noted above are applicable only in cases referred to mediation after March 1, 2010. The old rates are to be charged in cases referred prior to March 1.

Copies of the new rules are posted on the Commission's website at www.ncdrc.org. (Click on a program name from the left-hand menu and then click on "program rules" from the next menu that appears.) Revised program forms can be obtained by clicking on the forms button at the top of the screen and either entering a form number to view a particular form or selecting the "Mediated Settlement/DRC" option from the "Category" field to see list of all forms related to mediation.

Any questions about the rule revisions or form changes, may be addressed to Commission staff at (919) 890-1415. ■

Dispute Resolution Commission Website Updated

In response to comments and suggestions from certification applicants, mediators, lawyers and other users, the Dispute Resolution Commission has now reorganized material on its website and added some new postings. The website can be viewed at www.ncdrc.org. Because the Commission has a small staff, it relies heavily on its web site to help with mediator certification administration, program interface and support and public outreach. Because of the large volume of material posted, many callers expressed frustration over their inability to locate specific information they were seeking. To address this concern, material has now been organized under subject matter headings and certification application materials have been broken out separately from program operations information. The new headings are:

NCDRC

Information about the Commission including contact information and Commission Rules are posted here. The most recent and archived copies of the

Commission's newsletter, *The Intermediary*, are also posted under this subheading.

Finding A Mediator

The Commission's lists of certified Mediated Settlement Conference (superior court), Family Financial Settlement (district court), and Clerk Program mediators are posted here. Each list can be searched three ways: 1) by the first or last name of a mediator to locate contact or other information for that mediator, 2) by judicial district (or by county in the case of the Clerk Program list) to see a list of all certified mediators available to conduct mediations in a particular district or county or 3) by key word search to identify mediators who have particular work experience or interests.

Tips for Searching the List More Efficiently

To search for a particular mediator by name, you need type in only the first few letters of the mediator's first or last name and

hit enter. Typing the full name sometimes results in spelling errors and the system will advise you of no matches. A match will reveal an abbreviated listing for the mediator including his/her telephone number, email address and city of residence.

Once a mediator's name appears on the screen, a viewer may access additional information for the mediator by either: clicking on "detail listing report" in the upper right hand corner (this option will reveal additional information for the mediator, including a U.S. mailing address and districts or counties that the mediator serves) or clicking on the mediator's name to reveal a full listing for the mediator including full contact, availability and, if s/he has provided it to the Commission, biographical information for the mediator.

If you are looking for a mediator with particular skills or interests, you can search the Commission's database by selecting terms from the key word list. You can narrow your search even further by asking the data-

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Website *from page 13*

base to search for mediators who match “all” the terms you selected and/or by tying your key word search to a particular district or a county (if you are searching the Clerk Program list). Once you have submitted your search and a list of mediators that match your search criteria appears, you can then hit the “detailed search key” in the upper right corner, to print an alphabetized list of your matches along with their contact information or you may click on individual names to review biographical information describing the mediator’s education, work experience and interests.

Training

Lists of Commission certified and approved training programs are posted here as well as information on how a training program can become certified by the Commission.

Apply for Mediator Certification

Certification information and materials,

including certification packets, are posted here.

Tip: A fillable application form is posted separately from the packet to permit applicants, who wish, to type their responses.

Program Information

Program enabling legislation, program rules, and lists of forms by program are posted here. Actual forms are obtained by clicking on the forms button at the top of the page and either entering a form number to view a particular form or selecting the “Mediated Settlement/DRC” option from the “Category” field to see a list of all forms related to mediation.

Tips: Information that can help your clients better understand the mediation process is also posted here. Included in that information is a printable program brochure and a more comprehensive Q&A section that answers basic questions about the mediation process and the role

of the mediator. It also explains why cases are referred to mediation and the benefits the process offers. (The printable brochure is also available at no charge through the Commission’s office.)

A list of contact information arranged by judicial district for court staff administering the MSC and FFS Programs is also included. (Court staff has advised the Commission that they prefer to be contacted in writing, so generally only U.S. Mail, fax and e-mail addresses are provided).

Ethics/Complaints/ Continuing Ed

The Standards of Professional Conduct for Mediators and Commission adopted Advisory Opinions are posted here as well as other information pertaining to mediator conduct and ethics. In the event an attorney or party believes that a mediator did not conform his/her conduct to ethical requirements or failed to follow program rules, he or she may download the complaint packet found here and file it with the Commission. Continuing education materials posted here include lists of Commission members’ favorite books on mediation, lists of respected dispute resolution websites and mediation blogs.

Other Information/Resources

As a convenience for the public, contact information for additional mediation programs operating in North Carolina is posted here, including information for the Industrial Commission’s extensive mediation program and the AOC’s Custody and Visitation Mediation Program.

Tip: A link to the current Guidelines for Resolving Scheduling Conflicts (effective March 4, 2004) is also posted under this subheading to assist lawyers in resolving scheduling conflicts which involve mediations in which they are participating.

The Commission invites all lawyers to visit www.ncdrc.org. Comments or suggestions aimed at further refining or improving the site are always welcome. ■

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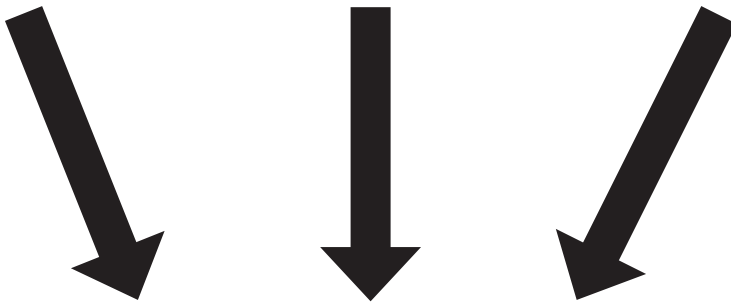
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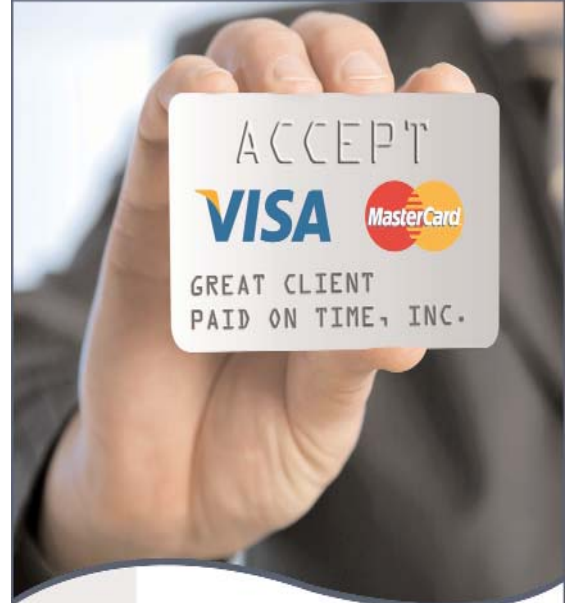


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