Representing the Dependent Spouse

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Many attorneys are reluctant to take domestic relations cases under any circumstances, for the demands which a bitterly contested divorce and custody case make upon the lawyers involved are time-consuming, strenuous, and tension-creating. This is especially true of the demands which the penniless wife makes upon the time of her attorneys, for her dependence upon them is absolute. There are few lawyers who would be willing, or could afford, to take her case without the expectation of receiving adequate compensation in the end -- and recompense is frequently delayed. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221, 1967 N.C. LEXIS 1383 (N.C. 1967)

§ 50-16.1A. Definitions

- As used in this Chapter, unless the context clearly requires otherwise, the following definitions apply:
  - (1) "Alimony" means an order for payment for the support and maintenance of a **spouse** or former **spouse**, periodically or in a lump sum, for a specified or for an indefinite term, ordered in an action for divorce, whether absolute or from bed and board, or in an action for alimony without divorce.
  - (2) "**Dependent spouse**" means a **spouse**, whether husband or wife, who is actually substantially **dependent** upon the other **spouse** for his or her maintenance and support or is substantially in need of maintenance and support from the other **spouse**.
  - (3) "Marital misconduct" means any of the following acts that occur during the marriage and prior to or on the date of separation:
    - a. Illicit sexual behavior. For the purpose of this section, illicit sexual behavior means acts of sexual or deviate sexual intercourse, deviate sexual acts, or sexual acts defined in G.S. 14-27.20(4), voluntarily engaged in by a **spouse** with someone other than the other **spouse**;
    - b. Involuntary separation of the **spouses** in consequence of a criminal act committed prior to the proceeding in which alimony is sought;
    - c. Abandonment of the other **spouse**;
    - d. Malicious turning out-of-doors of the other **spouse**;
    - e. Cruel or barbarous treatment endangering the life of the other **spouse**;
    - f. Indignities rendering the condition of the other **spouse** intolerable and life burdensome;
    - g. Reckless spending of the income of either party, or the destruction, waste, diversion, or concealment of assets;
    - h. Excessive use of alcohol or drugs so as to render the condition of the other **spouse** intolerable and life burdensome;
    - i. Willful failure to provide necessary subsistence according to one's means and condition so as to render the condition of the other **spouse** intolerable and life burdensome.

- (3a) through (3d) Reserved for future codification purposes.
- (3e) "Payor" means any payor, including any federal, State, or local governmental unit, of disposable income to an obligor. When the payor is an employer, payor means employer as defined under 20 U.S.C. § 203(d) of the Fair Labor Standards Act.
- (4) "Post-separation support" means spousal support to be paid until the earlier of any of the following:
  - a. The date specified in the order for post-separation support.
  - b. The entry of an order awarding or denying alimony.
  - c. The dismissal of the alimony claim.
  - d. The entry of a judgment of absolute divorce if no claim of alimony is pending at the time of entry of the judgment of absolute divorce.
  - e. Termination of post-separation support as provided in G.S. 50-16.9(b).

    Post-separation support may be ordered in an action for divorce, whether absolute or from bed and board, for annulment, or for alimony without divorce. However, if post-separation support is ordered at the time of the entry of a judgment of absolute divorce, a claim for alimony must be pending at the time of the entry of the judgment of divorce.
- (5) "Supporting **spouse**" means a **spouse**, whether husband or wife, upon whom the other **spouse** is actually substantially **dependent** for maintenance and support or from whom such **spouse** is substantially in need of maintenance and support.

Whether and when to accept these cases

Size these cases up before they come in the door. You can do that by talking to a potential client on the phone or with an online intake sheet. Appendix 1. There is nothing wrong with sensibly screening cases, especially if you have a hard time saying "no" in person. You can begin gathering facts relevant to 50-16.2A (post-separation support) and 50-16.3A (alimony) factors before your initial consultation even begins.

Spend some time critically thinking about *why* your potential client is dependent. Marriages fail for various reasons. People become financially dependent for various reasons. It's not your job to save every potential client that comes through your door. Some clients can't be saved. Some would prefer not to be.

A minority of your clients will cause a majority of your problems. If you are representing a dependent spouse with a personality disorder, you may be their best friend today, and grieved tomorrow. If you see a potential for problems in your practice, don't let a sad story overcome better judgment.

You should accept these cases only when you are confident that you personally can be fair both to yourself and to your client. Let your client know that their perception of fairness is unlikely to square with the law and the outcome. You are better off preparing your client for the worst, from the beginning of representation. Too many lawyers over sell their ability to deliver in the early days of a case, only to be forced to back track later.

Ask the dependent spouse about whether they have been engaged in marital misconduct. If there are facts that might justify a bar to alimony, you need to know that in assessing your case and establishing your strategy. If there is reason to believe a supporting spouse is engaged in illicit sex, you need to consider and discuss gathering that evidence

To mitigate financial risk, spend some time in the initial consult talking with your client about their potential resources. Frequently, a dependent spouse will have family in the wings, ready to *lend* your client money to pursue the case; a *loan* that you can document on your income and expense affidavit. Don't be afraid to ask your client whether or not an interfamily *loan* is possible. Counsel your client on the potential negative impact of gifts from family and friends that could be construed as income in a support case, or corroborative of an extramarital relationship.

Additionally, if you receive payment from a third party for the benefit of a client, be careful to properly document and account for that payment. If you have a busy office, and the payment is not tagged to the right client, accounting problems can result. Finally, remember that just because a third party pays a client's bill does not mean your privileged relationship with that client is waived.

Also consider whether there are marital assets that a dependent spouse can access to build a war chest. Accessing joint accounts and joint lines of credit at or about the date of separation should be discussed and considered. Be aware, however, that taking self-help too far will blunt the dependency argument and could negatively impact an award of spousal support and attorney fees.

An interim distribution, more particularly addressed below, may also provide the dependent spouse financial assistance to survive litigation and to pay fees and costs. As in the case of draws against joint accounts and joint lines of credit, however, be careful about accepting or pursuing an interim distribution that may impact the dependency inquiry.

Securing fees is harder than it was before the "North Carolina Secure and Fair Enforcement (S.A.F.E.) Mortgage Licensing Act." N.C. Gen. Stat. § 53-244.010. Appendix 2. A lawyer who takes a deed of trust and promissory note secured by the residence a dependent spouse lives in is violating S.A.F.E. A lawyer can, however, still take a note and deed of trust against non-residential property. Appendix 3.

Taking a percentage of the marital estate distributed to a dependent spouse is an alternative fee arrangement that you may explore, when you are confident that marital estate will ultimately yield some liquidity and that you will be in the case for that blessed event. Incentive based fee structures align your interest with that of the dependent spouse in a way that the client may appreciate.

It may seem crass to focus on getting paid when a client seems so worthy of your many talents. When you start thinking this way, consider that the supporting spouse is going to be well

represented, and that starving you and your dependent client into submission may be their strategy.

Put first things first as you build a dependent spouse's case. Provide them with an income and expense affidavit and an equitable distribution affidavit at the inception of representation, so that they can get to work. Explain to them the importance of supporting their income, expenses and assets with statements and documents. Appendix 4.

Help them gather evidence by discussing what might be maintained on a marital computer in a home office, for example. If they need computer forensics or accounting forensics, and resources allow, engage the consulting experts and experts that will be needed to prove dependency and to value the marital estate. Appendix 5.

Remind the supporting spouse not to make evidence that could be adverse to their case. For instance, discuss the poor appearance and potential ramifications of dating while trying to establish dependency. Discuss the use of social media. Encourage them to change passwords, open separate accounts and obtain PO boxes.

Ask your client whether they are in therapy. If they are not, consider making a referral to therapy. A good therapist will keep you out of that role, and may be a source of corroborating evidence or diagnosis.

Introduce your dependent client to support staff as soon as possible. The dependent client will appreciate knowing that there is a team available to support him or her, and that certain tasks, such as affidavit preparation, can occur through support staff at lesser rates.

Don't take a case you can't see yourself finishing; that won't serve your reputation and it won't serve your client. If you can't financially bear the risk that you might not get paid according to the terms of your fee agreement, don't take the case. The potential that a dependent spouse is going to be disappointed in your services is real, regardless of the result. Compound that with not getting paid, and you have a perfect storm of mutual regret.

On the other hand, if you do have the financial wherewithal to see a dependent spouse through a case, the opportunity to help a client and to advance the law might be worth the financial risk. Much of North Carolina law pertaining to the dependent spouse is untested, antiquated, and arguably regressive. Practicing law might be about more than money, and if you can afford to help a dependent spouse and shape the law, even if you don't get paid the way you would like, that might be worth doing.

§ 50-16.2A. Post-separation support

- (a) In an action brought pursuant to Chapter 50 of the General Statutes, either party may move for post-separation support. The verified pleading, verified motion, or affidavit of the moving party shall set forth the factual basis for the relief requested.

- (b) In ordering post-separation support, the court shall base its award on the financial needs of the parties, considering the parties' accustomed standard of living, the present employment income and other recurring earnings of each party from any source, their income-earning abilities, the separate and marital debt service obligations, those expenses reasonably necessary to support each of the parties, and each party's respective legal obligations to support any other persons.

- (c) Except when subsection (d) of this section applies, a dependent spouse is entitled to an award of post-separation support if, based on consideration of the factors specified in subsection (b) of this section, the court finds that the resources of the dependent spouse are not adequate to meet his or her reasonable needs and the supporting spouse has the ability to pay.

- (d) At a hearing on post-separation support, the judge shall consider marital misconduct by the dependent spouse occurring prior to or on the date of separation in deciding whether to award post-separation support and in deciding the amount of post-separation support. When the judge considers these acts by the dependent spouse, the judge shall also consider any marital misconduct by the supporting spouse in deciding whether to award post-separation support and in deciding the amount of post-separation support.

- (e) Nothing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation.

Post-separation support

The statute poses (among others) these questions:

What are the financial needs of the parties?

What was the accustomed standard of living?

What are the income and recurring earnings?

You can answer these questions, at least in part, with an income and expense affidavit. Focusing only on income and expense affidavits, however, will not adequately appraise the trial court of standard of living issues. If your district is accustomed to ruling by affidavits alone, therefore, you may want to consider supplementing an income and expense affidavit with a narrative affidavit that addresses the marital standard of living and your client's future hopes and dreams.

If you practice in a district where hearings on post-separation support are routine, outlining proposed findings that support the conclusions and orders that you hope to achieve might be a good way to prepare your client and to organize your case. Begin preparations with the end in mind, and then consider what facts will best support that end.

Post-separation support can be determined based upon affidavits alone in some districts. But, if marital misconduct is going to be advanced by the supporting spouse as a basis for denying support, demand a hearing. The statute seems to provide that that evidence be received in a "hearing" as opposed to affidavit.

District 15B has established a pilot program of advisory guidelines for post-separation support. The post-separation support guidelines were drafted over 10 months by a committee of family law attorneys in the district, which includes Chatham and Orange counties. The committee, chaired by Melissa Averett, drafted the guidelines using historical data, formulas from other states and in consultation with local attorneys and judges.

Read more here: http://www.newsobserver.com/news/local/community/chapel-hill-news/article49657765.html#storylink=cpy Appendix 6.

http://averettfamilylaw.com/local-rules-on-post-separation-support/ Appendix 7.

§ 50-16.8. Procedure in actions for post-separation support

When an application is made for post-separation support, the court may base its award on a verified pleading, affidavit, or other competent evidence. The court shall set forth the reasons for its award or denial of post-separation support, and if making an award, the reasons for its amount, duration, and manner of payment.

Post-separation support procedural considerations

50-16.8 is worth noting because 1. It provides that the court can rule on the issue of post-separation support by affidavit; and, 2. Like the alimony statute, it requires the Court to make findings of fact in regard to amount, duration and manner of payment.

It is unlikely that a supporting spouse will be entirely forthcoming regarding his or her income and recurring earnings, given an opportunity not to be. Test the contentions of the supporting spouse made by way of affidavit by issuing subpoenas to employers, lenders and financial institutions.

If you have evidence that a supporting spouse has been less than candid to the tribunal, begin the credibility contest. Establish the credibility of your dependent spouse with sound affidavits and challenge the credibility of the supporting spouse. A hearing on spousal support can be a good way of making important initial impressions on your judge.

If you have prevailed, and you have the privilege of drafting the order on behalf of a dependent spouse, this is an opportunity to tell your client's story. Include the findings that you think will guide the case along the narrative you have established, including the standard of living, the present expenses of each party, the present incomes and recurring earnings of each party, and any other fact you can include that will help you later, in equitable distribution or alimony hearings. Be certain you have presented these facts at the hearing so they can be included in the order.

If you aren't satisfied with the ruling you achieved, remember that it is subject to modification based upon changed circumstances. For example, a supporting spouse may elect to file bankruptcy during the pendency of an action. If the supporting spouse is successful in discharging debt, his disposable income should increase, with a greater share then available to pay support. The same would be true if a supporting spouse elects to default on a mortgage, eliminating his housing expense. Pay attention to shifts in income and expense during the life of the case that you might use to the dependent spouse's benefit.

§ 50-16.4. Counsel fees in actions for alimony, post-separation support

At any time that a dependent spouse would be entitled to alimony pursuant to G.S. 50-16.3A, or post-separation support pursuant to G.S. 50-16.2A, the court may, upon application of such spouse, enter an order for reasonable counsel fees, to be paid and secured by the supporting spouse in the same manner as alimony.

On attorney fees

At any time that a dependent spouse is entitled to support (spousal or alimony), the trial court may enter an order for reasonable attorney fees. As a matter of course, therefore, file a claim for attorney fees and expenses as part of your post-separation support and alimony claims. Here is some law on the subject:

1. When allowable, the amount of attorney fees in an alimony case is within the sound discretion of the court below and is unappealable except for abuse of that discretion. Within the rule of reasonableness the court must consider along with other things the condition and circumstances of the defendant.
   Stadiem v. Stadiem, 230 N.C. 318, 52 S.E.2d 899, 1949 N.C. LEXIS 618 (N.C. 1949)

2. The clear and unambiguous language of G.S. 50-16.3 and 16.4 requires that to receive attorney fees in an alimony case it must be determined that (1) the spouse is entitled to the relief demanded; (2) the spouse is a dependent spouse; and (3) the dependent spouse has not sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof. Rickert v. Rickert, supra. The facts required by this statute must be alleged and proved to support an order for attorney fees, whether these requirements have been met is a question of law that is reviewable on appeal, and if attorney fees may be properly awarded, the amount of the award rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion. Id.
   Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719, 1980 N.C. LEXIS 940 (N.C. 1980)

3. In Schloss v. Schloss, 273 N.C. 266, 160 S.E. 2d 5 (1968), it was held that the purpose of the allowance of attorney fees pursuant to G.S. 50-16 in an alimony case is to enable the dependent spouse, as litigant, to meet the supporting spouse, as litigant, on substantially even terms by making it possible for the dependent spouse to employ adequate counsel. G.S. 50-16 was subsequently repealed but the above requirement in Schloss was brought forward and preserved under G.S. 50-16.1 et seq. by our decision in Rickert. This same requirement was most recently applied by this Court in Williams v. Williams, 299 N.C. 174, 261 S.E. 2d 849 (1980), where the wife was found to be a dependent spouse entitled

to alimony although she was not entitled to attorney fees. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719, 1980 N.C. LEXIS 940 (N.C. 1980)

4. An award of attorney fees, pursuant to N.C. Gen. Stat. Sec. 50-16.4, in an action for alimony must be supported by findings that establish that the plaintiff (1) is entitled to alimony pendente lite under G.S. 50-16.3, Presson v. Presson, 13 N.C. App. 81, 185 S.E. 2d 17 (1971), and (2) is unable to defray the expense of prosecuting the suit. Davis v. Davis, 62 N.C. App. 573, 302 S.E. 2d 886 (1983). Before a court may award attorney fees under N.C. Gen. Stat. Sec. 50-13.6 in a proceeding for modification of child support, the court must find as facts (1) that the party seeking modification is acting in good faith, (2) that the party has insufficient means to defray the expenses of the suit, and (3) that the party ordered to pay support has refused to pay support which is adequate under the circumstances existing at the time of the institution [584] of the action. E.g., Quick v. Quick, 67 N.C. App. 528, 313 S.E. 2d 233 (1984).

   Once the party's entitlement to attorney fees has been shown, the court then decides, in its discretion, on a reasonable fee. Peak, 82 N.C. App. at 706, 348 S.E. 2d at 357. However, the order must contain findings as to the basis of the award, including the nature and scope of the legal services, the skill and time required, and the relationship between the fees customary in such a case and those requested. See, e.g., id.; Coleman v. Coleman, 74 N.C. App. 494, 328 S.E. 2d 871 (1985).

   Moreover, attorney fees are not recoverable in an action for equitable distribution. Patterson v. Patterson, 81 N.C. App. 255, 343 S.E. 2d 595 (1986); see also Conrad v. Conrad, 82 N.C. App. 758, 348 S.E. 2d 349 (1986); In re Deed of Cooper, 81 N.C. App. 27, 344 S.E. 2d 27 (1986). Because this is a combined action for alimony, child support, and equitable distribution, findings should also reflect that the fees awarded are attributable to work only on the alimony and/or child support actions. See Patterson at 262, 343 S.E. 2d at 600. Holder v. Holder, 87 N.C. App. 578, 361 S.E.2d 891, 1987 N.C. App. LEXIS 3283 (N.C. Ct. App. 1987)

5. Like all orders decided by the court, Rule 52 of the Rules of Civil Procedure requires the court to "find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." In order to withstand appellate review, the record must contain evidence that supports the findings of fact, which in turn support the conclusions of law, which support the order to pay attorney fees. The findings must also support the conclusion to deny the motion for attorney fees. As the North Carolina Supreme Court has explained,

   Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

   Applied to the order for attorney fees in the action for post-separation support or alimony, these principles require the record to contain evidence that supports the necessary findings of fact, and the order must contain findings of fact, conclusions of law, and an order for the payment of attorney fees in a certain amount and manner. The necessary conclusions of law to support an award of attorney fees for post-separation support or alimony are 1) the spouse is entitled to either post-separation support or alimony; 2) the spouse is a dependent spouse; 3) the dependent spouse needs the award, as litigant, to meet the supporting spouse, as litigant, on substantially even terms; and 4) the award is reasonable. If the award of attorney fees covers claims besides post-separation support or alimony, the findings must indicate to which portion of the award the services are attributable. The decretal section of the order must direct the supporting spouse to pay the designated amount in the manner prescribed. For an order denying attorney fees, the evidence must support the findings of fact that support one or more of the negative conclusions of law. The appellate courts review these requirements as a question of law.

   If the lawyer provided services not only to establish a claim for alimony but also for equitable distribution, the order must include

> findings that the award of fees does not include services for the equitable distribution claim.
>
> For the conclusions of law on entitlement to post-separation support or alimony and on the status as dependent spouse, see the discussions of those issues in §§ 8.45 and 9.69, the content of the order in actions for post-separation support and alimony. On the conclusion of law that the dependent spouse needs the award to meet the supporting spouse as litigant, on substantially even terms, see § 9.91. On the conclusion of law on the reasonableness of the award, see § 9.92. 2-9 Lee's North Carolina Family Law § 9.95

In alleging a claim for attorney fees under NCGS 50-16.4 the foregoing cases and treatise provide some guidance. Although the cases predate the current form of N.C.G.S. 50-16.4, the statute has only been amended to accommodate new cites to N.C.G.S. 50-16.2A (post-separation support) and 3A (alimony), as opposed to former N.C.G.S. 50-16.3 (alimony). Therefore, allege that:

1. The dependent spouse is entitled to support
2. The dependent spouse is entitled to fees;
3. That the dependent spouse has insufficient means to subsist during the prosecution of the suit and to defray the necessary expense thereof;
4. That a reasonable award of fees is necessary to enable the dependent spouse to meet the supporting spouse, as litigant, on substantially even terms by making it possible for the dependent spouse to employ adequate counsel;
5. That the supporting spouse has the ability to pay costs and fees.

Attorney fee awards are not automatic and after finding dependency, it remains in the discretion of the trial court to make an award and to determine what award is reasonable. Make sure your client knows that attorney fees are not a given in their case, and plan for that.

The application for fees may occur at any time according to the statute, but the procedure for making that application may vary by district. In the 28th judicial district, if attorney fees are awarded, the award is typically made at the conclusion of a hearing on a claim that would allow for fees (post-separation support; child support; child custody; alimony, contempt) at or about the time that the order addressing said claim is entered. Application for fees in the 28th judicial district is by affidavit, with supporting time entries being submitted to the Court. Opposing counsel is entitled to submit a response, review time entries *in camera*, and to make argument.

Make the preparation of fee affidavits easy on your staff by billing specifically. If you are preparing for a spousal support hearing, say so on your time entry. If you are doing legal research related to alimony, say so. Include key words (spousal support, alimony, child support,

child custody, contempt) in your billing records that staff can identify when preparing affidavits and supporting billing records.

Much of your fee affidavit will be the same from claim to claim and case to case. To support the fact that your fees are reasonable, support your expertise. Update your fee affidavit like you would a resume. Tell your client, the court, the opposing party and counsel who you are, what you have done, and why you have earned what you are asking for. If there are unusual reasons for the fee request, state them in the affidavit. Appendix 8.

Make sure that your fee orders provide that fees are to be paid for the benefit of your client. You want to protect your fee awards from discharge in bankruptcy. Fee awards paid for the benefit of the client in the context of their support or alimony case are more likely to be viewed as domestic support obligations, than fees paid to your firm. Appendix 9. When bankruptcy is filed, a dependent spouse should file a proof of claim. Appendix 10.

§ 50-19.1. Maintenance of certain appeals allowed

Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action. A party does not forfeit the right to appeal under this section if the party fails to immediately appeal from an order or judgment described in this section. An appeal from an order or judgment under this section shall not deprive the trial court of jurisdiction over any other claims pending in the same action.

What can you appeal during the life of the case?

On June 13th of 2013, the Supreme Court, in Duncan v. Duncan, ruled that an unresolved attorney fee claim is not a substantive claim rendering an appeal of substantive issues interlocutory. Duncan v. Duncan, 732 S.E.2d 390; 2012 N.C. App. LEXIS 1132 (N.C. Ct. App., 2012). Justice Newby characterized an unresolved attorney fee claim related to alimony as "collateral" to a final judgment and "not part of the substantive claims". Unless Justice Newby's comments on attorney fees can be construed as dicta, Webb has been effectively reversed wherein the Court of Appeals characterized attorney fees in the context of alimony to be a "claim", the disposition of which is necessary before an entire controversy is determined and an appeal ripe. Webb v. Webb, 196 N.C.App. 770; 677 S.E.2d 462; 2009 N.C.App. Lexis 518, 2009.

In August of 2013, two months after the Justice Newby's ruling in Duncan, NCGS 50-19.1 became law, authorizing the maintenance of appeals of individual enumerated family law claims, notwithstanding pending claims in the trial court. The claims enumerated in NCGS 50.19.1 which may be appealed while other claims remain pending are:

1. Absolute divorce;
2. Divorce from bed and board;
3. Child custody;
4. Child support;
5. Alimony;
6. Equitable Distribution.

Claims not enumerated include:

1. Spousal support awards;
2. Declaratory rulings on date of marriage;
3. Declaratory rulings on date of separation;
4. Declaratory rulings on the validity of contracts;
5. Attorney fee awards;
6. Orders of interim distribution.

The original legislative proposal that became Section 50-19.1 included claims for post-separation support and interim distribution in the list of covered claims. There is precedent that is conventionally taken to hold that a post-separation support order is interlocutory

(*Rowe v. Rowe*, 131 N.C. App. 409, 507 S.E.2d 317 (1998)) and likewise, that an interim distribution order is interlocutory (*Brown v. Brown*, 112 N.C. App. 15, 434 S.E.2d 873 (1993) (Greene, J., dissenting); *Hunter v. Hunter*, 126 N.C. App. 705, 486 S.E.2d 244 (1997)) for purposes of immediate appeal, even though a plausible argument can be made that either of these claims meets the test for "finality" under Rule 54(b). It remains to be seen whether the omission of these claims from Section 50-19.1 will adversely affect future challenges to these precedents. *Take Two: An Update on Family Law Appellate Jurisdiction Issues by Jonathan McGirt.*

Whether the appellate courts will construe these non-enumerated claims as interlocutory is being answered on a case by case basis:

1. Although orders allowing ***post-separation support*** do not affect a substantial right, that rule may not apply where the dependent spouse's request for post-separation support was denied by the trial court. Sorey v. Sorey, 233 N.C. App. 682, 757 S.E.2d 518, 2014 N.C. App. LEXIS 417, 2014 WL 1797576 (N.C. Ct. App. 2014). In a January 2016 unpublished opinion, however, the Court of Appeals has said that not every denial of post-separation support would be immediately appealable, but that sufficient facts were alleged to establish a substantial right to appeal. Epley v. Ingber, 2016 N.C. App. LEXIS 69 (N.C. Ct. App. Jan. 19, 2016).

2. The dispositive issue on appeal is whether defendant's appeal [***challenging date of marriage***] is premature. An order is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the rights of all parties involved in the controversy. See Veazey v. Durham, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Generally, there is no right to immediate appeal from an interlocutory order. See id. In the instant case, the trial court's order requires further action, as it did not resolve the parties' claims for divorce from bed and board, equitable distribution, alimony, post-separation support, custody, or child support. Thus, the order is interlocutory. Duncan v. Duncan, 2008 N.C. App. LEXIS 2035 (N.C. Ct. App. Nov. 18, 2008)

3. An appeal from a divorce judgment was dismissed where plaintiff sought an absolute divorce and equitable distribution, the trial court determined the ***date of separation***, granted an absolute divorce, and reserved the remaining issues for later hearing, and defendant appealed. While the trial court's determination of the date of separation may have an impact on the unresolved issue of equitable distribution, the same factual issues are not involved, the threat of inconsistent verdicts is not present, and no substantial right of defendant would be prejudiced absent immediate appellate review. Stafford v. Stafford, 133 N.C. App. 163, 515 S.E.2d 43, 1999 N.C. App. LEXIS 361 (N.C. Ct. App. 1999).

In dissent, Judge Greene stated that:

In this case, the "Partial Judgment" is, despite its caption, a final judgment because it disposes of the parties' action for divorce, leaving nothing to be judicially determined in the trial court on that action. The divorce action was expressly "severed from the remaining issues in this cause" with the consent of the parties and is a "separate and distinct branch" of the parties' litigation which is final in nature. Accordingly, the trial court's judgment as to divorce is a final judgment and is immediately appealable.

In any event, even assuming the "Partial Judgment" entered in this case is interlocutory, it affects a substantial right which would be prejudiced absent immediate appeal. "An order which completely disposes of one of several issues in a lawsuit affects a substantial [167] right." Case v. Case, 73 N.C. App. 76, 78, 325 S.E.2d 661, 663 (1985) (allowing immediate appeal of the trial court's entry of summary judgment on the defendant's counterclaim for equitable distribution, even though claims for absolute divorce and child custody and support were still pending in the trial court, because it affected a substantial right), disc. review denied, 313 N.C. 597, 330 S.E.2d 606 (1985). In addition, the trial court's determination of the date of separation in the divorce action precludes relitigation of that issue for purposes of equitable distribution, see, e.g., Garner v. Garner, 268 N.C. 664, 665, 151 S.E.2d 553, 554 (1966) (noting that res judicata is applicable to divorce proceedings), and it cannot be modified by another district court judge upon a showing of changed conditions because it is not a discretionary ruling, but rather is a ruling on a matter of law which can only be reversed on appeal, see, e.g., Calloway v. Motor Co., 281 N.C. 496, 501-03, 189 S.E.2d 484, 488-89 (1972). As such, the trial court's determination in this case affects a substantial right and is immediately appealable.
Stafford v. Stafford, 133 N.C. App. 163, 515 S.E.2d 43, 1999 N.C. App. LEXIS 361 (N.C. Ct. App. 1999)

4. We hold that the trial court's finding regarding defendant's gross income is not supported by the evidence, and, consequently, we reverse and remand both the child support and the alimony orders for recalculation of defendant's gross income. Further, with respect to the alimony order, the trial court's finding [2] regarding plaintiff's expenses is not supported by the evidence, and the order lacks sufficient findings of fact to explain the amount and duration of the alimony award. Finally, because the trial court's order awarding attorney fees was entered after defendant filed this appeal, the trial court lacked jurisdiction to enter the attorney fee order, and we must vacate it. McKeown v. Castagno, 2015 N.C. App. LEXIS 168, 771 S.E.2d 634, 2015 WL 967560 (N.C. Ct. App. 2015). *This opinion is unpublished.*

Enforcing an order directing the payment of money on appeal

NCGS 1-294 provides the general rule that the trial court is deprived of jurisdiction during the pendency of an appeal. At least as to the claims enumerated at 50-19.1, then, that rule appears to be effectively amended.

North Carolina Rule of Civil Procedure 1-289 and Rule 8 of the North Carolina Rules of Appellate Procedure provide that an order of a trial court directing a payment of money is not stayed unless the appellant posts an appropriate bond pursuant to said rules.

An alimony order is an order of a trial court directing the payment of money. Faught v. Faught, 50 N.C. App. 635, 274 S.E.2d 883 (1981).

Equitable distribution awards are orders of a trial court directing the payment of money:

> As a general proposition, although child support and alimony orders are entered under different statutory provisions than a distributive award, all are under Chapter 50 and all are orders for periodic payments of a fixed amount and are, in the plain language of N.C. Gen. Stat. § **1-289**, "judgment[s] directing the payment of money[.]" As the defendant herein did not "put[] up an execution bond[,]" see Quick, 305 N.C. at 462, 290 S.E.2d at 663, as directed by N.C. Gen. Stat. § **1-289**, the appeal of the **equitable distribution** order did not stay enforcement of the order "by ordinary execution against the [defendant's] property . . . even though the case has been appealed." Romulus v. Romulus, 216 N.C. App. 28, 715 S.E.2d 889, 2011 N.C. App. LEXIS 2052 (N.C. Ct. App. 2011)

Unfortunately, this opinion goes on to state that:

> [A]lthough an **equitable distribution** distributive award is theoretically a "judgment directing the payment of money" which is enforceable during the pendency of an appeal unless the appealing spouse posts a bond pursuant to N.C. Gen. Stat. § **1-289**, the trial court does not have jurisdiction after notice of appeal is given to *determine the amount of periodic payments which have come due and remain unpaid during the pendency of the appeal and to reduce that sum to an enforceable judgment.* Romulus v. Romulus, 216 N.C. App. 28, 715 S.E.2d 889, 2011 N.C. App. LEXIS 2052 (N.C. Ct. App. 2011). *Emphasis added.*

To avoid the periodic payment problem identified by the Romulus Court, consider that the court may provide that "any distributive award payable over a period of time be secured by a lien on specific property." N.C. Gen. Stat. § 50-20(e). Advocate that any distributive award be secured by a lien against property if property against which a lien can be attached exists in your case. You may execute upon a lien during the pendency of an appeal.

Judgments directing the delivery of documents or personal property are not stayed absent an undertaking. "If the judgment appealed from directs the assignment or delivery of documents or personal property, the execution of the judgment is not stayed by appeal, unless the things required to be assigned or delivered are brought into court, or placed in the custody of such officer or receiver as the court appoints, or unless an undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the court or a judge thereof directs, to the effect that the appellant will obey the order of the appellate court upon the appeal." N.C. Gen. Stat. § 1-290

Judgments directing a conveyance are not stayed absent an undertaking. "If the judgment appealed from directs the execution of a conveyance or other instrument, the execution of the judgment is not stayed by the appeal until the instrument has been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court." N.C. Gen. Stat. § 1-291

Judgments directing the sale or delivery of real property are not stayed absent an undertaking. "If the judgment appealed from directs the sale or delivery of possession of real property, the execution is not stayed, unless a bond is executed on the part of the appellant, with one or more sureties, to the effect that, during his possession of such property, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment is affirmed he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of this deficiency." N.C. Gen. Stat. § 1-292

Orders for periodic payments of child support which have been appealed are enforceable by the trial court by proceedings for civil contempt. N.C.G.S. 50-13.4(f)(9).

You may bring a contempt action, at least for prospective payments of spousal support or alimony, during the pendency of an appeal. "Notwithstanding the provisions of G.S. 1-294 or G.S. 1-289, an order for the periodic payment of alimony that has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal. Upon motion of an aggrieved party, the court of the appellate division

in which the appeal is pending may stay any order for civil contempt entered for alimony until the appeal is decided if justice requires. N.C. Gen. Stat. § 50-16.7."

When the trial court will not act during the pendency of an appeal, consider pursuing a writ of mandamus. Applications for the **writs of mandamus** or prohibition directed to a judge, judges, commissioner, or commissioners shall be made by filing a petition therefor with the clerk of the court to which appeal of right might lie from a final judgment entered in the cause by the judge, judges, commissioner, or commissioners to whom issuance of the **writ** is sought. N.C. R. App. P. Art. V, Rule 22

§ 50-16.3A. Alimony

- (a) Entitlement. -- In an action brought pursuant to Chapter 50 of the General Statutes, either party may move for alimony. The court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors, including those set out in subsection (b) of this section. If the court finds that the dependent spouse participated in an act of illicit sexual behavior, as defined in G.S. 50-16.1A(3)a., during the marriage and prior to or on the date of separation, the court shall not award alimony. If the court finds that the supporting spouse participated in an act of illicit sexual behavior, as defined in G.S. 50-16.1A(3)a., during the marriage and prior to or on the date of separation, then the court shall order that alimony be paid to a dependent spouse. If the court finds that the dependent and the supporting spouse each participated in an act of illicit sexual behavior during the marriage and prior to or on the date of separation, then alimony shall be denied or awarded in the discretion of the court after consideration of all of the circumstances. Any act of illicit sexual behavior by either party that has been condoned by the other party shall not be considered by the court.

  The claim for alimony may be heard on the merits prior to the entry of a judgment for equitable distribution, and if awarded, the issues of amount and of whether a spouse is a dependent or supporting spouse may be reviewed by the court after the conclusion of the equitable distribution claim.

- (b) Amount and Duration. -- The court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony. The duration of the award may be for a specified or for an indefinite term. In determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors, including:

  - (1) The marital misconduct of either of the spouses. Nothing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation;

  - (2) The relative earnings and earning capacities of the spouses;

  - (3) The ages and the physical, mental, and emotional conditions of the spouses;

  - (4) The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;

  - (5) The duration of the marriage;

- (6) The contribution by one spouse to the education, training, or increased earning power of the other spouse;
- (7) The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child;
- (8) The standard of living of the spouses established during the marriage;
- (9) The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs;
- (10) The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;
- (11) The property brought to the marriage by either spouse;
- (12) The contribution of a spouse as homemaker;
- (13) The relative needs of the spouses;
- (14) The federal, State, and local tax ramifications of the alimony award;
- (15) Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper.
- (16) The fact that income received by either party was previously considered by the court in determining the value of a marital or divisible asset in an equitable distribution of the parties' marital or divisible property.

- (c) Findings of Fact. -- The court shall set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment. Except where there is a motion before the court for summary judgment, judgment on the pleadings, or other motion for which the Rules of Civil Procedure do not require special findings of fact, the court shall make a specific finding of fact on each of the factors in subsection (b) of this section if evidence is offered on that factor.

- (d) In the claim for alimony, either spouse may request a jury trial on the issue of marital misconduct as defined in G.S. 50-16.1A. If a jury trial is requested, the jury will decide whether either spouse or both have established marital misconduct.

Some comments on alimony

The North Carolina alimony statute does not set forth one consistent theory of alimony. Instead, the statute provides factors that the court must consider. Theories suggested by the factors include rehabilitative alimony, punitive alimony, and permanent alimony. In representing the dependent spouse, your job is to guide the court through the factors supporting the most compelling theory you can identify.

If you have been through a divorce from bed and board hearing, and/or a post-separation support hearing, you have probably already considered your alimony theory, or it has already emerged through the Court's findings in those prior hearings. For instance, if marital misconduct was found in a divorce from bed and board proceeding, you will likely consider using that finding under a punitive theory of alimony. If spousal support was awarded so that a dependent spouse can complete a course of education and re-enter the job market, you may be dealing with a rehabilitative theory.

If you have prevailed in a spousal support hearing, you have established your client's status as a dependent spouse. You may need to be prepared in a hearing on alimony, following equitable distribution, to re-establish that status. It is clear, however, that after dependent status is determined in the course of an alimony trial, that status is not properly reconsidered upon a motion to modify. Cunningham v. Cunningham, 345 N.C. 430, 435, 480 S.E.2d 403, 406 (1997).

The trial court must set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment in its order. When you are representing the dependent spouse, the trial court's ruling is the end you should have in mind when you begin your work. What facts do you want to emerge in your case that will lead the Court to award alimony in the amount and duration desired? Marshall those facts and get them in front of your trial judge.

If you resolve alimony by consent, it is still important to establish the facts upon which the order is based so that in the event of a future modification hearing, the court understands the circumstances existing at the time of the consent order. "To determine whether a change of circumstances under G.S. 50-16.9 has occurred, it is necessary to refer to the circumstances or factors used in the original determination of the amount of alimony." Rowe v. Rowe, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982).

Constitutional challenges to heart balm torts have been presented recently in various section CLEs. It has been suggested that Justice Stevens' reasoning in Obergefell v. Hodges be extended to the effect that not only a right to marry, but a right to sex, is a fundamental right, which the state has no compelling interest to regulate. If that is true, could it be argued that the bar to alimony associated with sex, is likewise unconstitutional?

§ 50-16.9. Modification of order

- (a) An order of a court of this State for alimony or post-separation support, whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested. This section shall not apply to orders entered by consent before October 1, 1967.

  Any motion to modify or terminate alimony or post-separation support based on a resumption of marital relations between parties who remain married to each other shall be determined pursuant to G.S. 52-10.2.

- (b) If a dependent spouse who is receiving post-separation support or alimony from a supporting spouse under a judgment or order of a court of this State remarries or engages in cohabitation, the post-separation support or alimony shall terminate. Post-separation support or alimony shall terminate upon the death of either the supporting or the dependent spouse.

  As used in this subsection, cohabitation means the act of two adults dwelling together continuously and habitually in a private heterosexual relationship, even if this relationship is not solemnized by marriage, or a private homosexual relationship. Cohabitation is evidenced by the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations. Nothing in this section shall be construed to make lawful conduct which is made unlawful by other statutes.

- (c) When an order for alimony has been entered by a court of another jurisdiction, a court of this State may, upon gaining jurisdiction over the person of both parties in a civil action instituted for that purpose, and upon a showing of changed circumstances, enter a new order for alimony which modifies or supersedes such order for alimony to the extent that it could have been so modified in the jurisdiction where granted.

Modification of spousal support and alimony awards

50-16.9 pertains to both alimony and post-separation support.

If you aren't satisfied with your first spousal support award, consider filing a modification motion when circumstances warrant. The one constant in life is change, and in the life of a case, financial circumstances can change rapidly. If your case is not developing along a reasonable timeline, and if you have a good faith basis to argue for an increase in spousal support, do it.

In the spousal support context for instance, you may learn that the supporting spouse has reduced his or her expenses by defaulting on a mortgage, discharging marital debt in bankruptcy, or sharing a household with a new partner, such that the supporting spouse's expenses should be re-considered.

Modification of alimony is a much broader topic than is modification of spousal support. For a complete treatment of alimony modification, see "There's Money on the Table: Issues in High-end Family Law Cases" (Family Law Intensive Seminar), Chapter 8 – Retirement of the Supporting Spouse and Modification of Alimony. From that manuscript, the following points:

1. When a private agreement is presented to a court in a divorce case, it automatically *merges* into the divorce decree:

   > Instead of following [the prior] approach in family law, we now establish a rule that *whenever the parties bring their separation agreements before the court for the court's approval, it will no longer be treated as a contract between the parties*. All separation agreements approved by the court as judgments of the court will be treated similarly, to-wit, as court ordered judgments. These court ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case. *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983) (emphasis added).

2. The concept of changed circumstances requires the court to determine whether one set of circumstances is different from another. The second set of circumstances is the circumstances existing in the present, at the time of the motion to modify. The first set of circumstances is the circumstances that existed in the past, when the original award of alimony was made. "To determine whether a change of circumstances under G.S. 50-16.9 has occurred, it is necessary to refer to the circumstances or factors used in the original determination of the amount of alimony." *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982). "[T]he reference to the

circumstances or factors used in the original determination is for the purpose of comparing the present circumstances with the circumstances as they existed at the time of the original determination in order to ascertain whether a material change of circumstances has occurred." *Cunningham v. Cunningham*, 345 N.C. 430, 435, 480 S.E.2d 403, 406 (1997).

A finding of changed circumstances must be "based on a comparison of facts existing at the time of the original order and the time when the modification is sought." *Self v. Self*, 93 N.C. App. 323, 325, 377 S.E.2d 800, 801 (1989). The set of circumstances that existed at the time of the original award is therefore the baseline for measuring changed circumstances.

While the court may rely on findings made in the original alimony order, it may also make additional findings as to the circumstances of the parties at the time of the original award:

> [M]odification of an alimony award requires consideration of G.S. Section 50-16.5 standards. We do not believe this mandate limits a modifying court to only those findings of fact made by the court which entered the original alimony order or that the modifying court cannot make additional and independent findings of fact under G.S. 50-16.5 as to the parties' health and financial needs existing at the time of the original alimony order based on evidence presented at the modification hearing.
>
> Where, on the other hand, the alimony order originates from a private agreement between the parties, there may be few, if any, findings of fact as to these circumstances or factors set out in the court decree awarding alimony. In the latter case, determining whether there has been a material change in the parties' circumstances sufficient to justify a modification of the alimony order may require the trial court to make findings of fact as to what the original circumstances or factors were in addition to what the current circumstances or factors are." *Self*, 93 N.C. App. at 327, 377 S.E.2d at 802.

If you are representing the dependent spouse, and you draft the alimony order or incorporated agreement, make sure that you are including all of the baseline facts that you would want the Court to consider in a future modification hearing. This should include facts pertinent to the financial circumstances of both the dependent spouse and the supporting spouse. Appendix 11.

3. Again, the modification motion can be made at any time, based upon a variety of changed circumstances including, but not limited to:

    a. Changes of income of the supporting spouse or the dependent spouse;
    b. Changes of expense of the supporting spouse or the dependent spouse;
    c. Changes in assets of the supporting spouse or the dependent spouse;
    d. Retirement;
    e. Disability;
    f. Contributions from other persons;
    g. Termination of child support;
    h. Remarriage of the payor;
    i. Discharge in bankruptcy.

    The modification motion might be brought by either the dependent or supporting spouse. Modification is within the discretion of the court and even after finding changed circumstances, the trial court may decline to modify alimony.

    Both amount and duration are subject to modification, though there is little case law to support the latter proposition. The unpublished opinion of Hudson v. Hudson suggests that duration can be modified in that the Court of Appeals remanded a modification decision to the trial court due to the trial court's failure to make specific findings in support of confirming the original duration of 10 years. Hudson v. Hudson, 2008 N.C. App. Lexis 1834.

    An alimony order that has terminated, however, cannot be modified. Any motion to modify must be filed before the order terminates.

4. Termination of alimony is governed by 50-16.9(b). If a dependent spouse who is receiving post-separation support or alimony from a supporting spouse under a judgment or order of a court of this State remarries or engages in cohabitation, the post-separation support or alimony shall terminate. Post-separation support or alimony shall terminate upon the death of either the supporting or the dependent spouse. You need to educate your dependent spouse as to these terminating events.

Interim Distribution

(i1) Unless good cause is shown that there should not be an **interim distribution**, the court may, at any time after an action for equitable **distribution** has been filed and prior to the final judgment of equitable **distribution**, enter orders declaring what is separate property and may also enter orders dividing part of the marital property, divisible property or debt, or marital debt between the parties. The partial **distribution** may provide for a distributive award and may also provide for a **distribution** of marital property, marital debt, divisible property, or divisible debt. Any such orders entered shall be taken into consideration at trial and proper credit given. Hearings held pursuant to this subsection may be held at sessions arranged by the chief district court judge pursuant to G.S. 7A-146 and, if held at such sessions, shall not be subject to the reporting requirements of G.S. 7A-198. N.C. Gen. Stat. § 50-20(i1).

Interim distribution may be a way to aid a dependent spouse during the pendency of a case. When parties are retired and marital defined benefit plans are in pay status, interim distribution is a way to divide that income stream. This provision of the equitable distribution statute also allows for a "distributive award" of cash.

When spousal support awards are barred, denied, or inadequate, an interim distribution may be an alternative means of making financial provision for the benefit of a dependent spouse during the course of litigation, enabling that dependent spouse to pay legal fees and expenses necessary to conclude the case.

An interim distribution does not entitle a dependent spouse to an attorney fee award. An interim distribution will be factored in equitable distribution. Unlike a spousal support and attorney fee award, an interim distribution from a supporting spouse to a dependent spouse may do little to encourage the supporting spouse to come to the table to resolve the case.

Concluding thoughts

If you represent the dependent spouse, you have signed up for a tough race. Good. To win it, use your resources wisely. Suffer the starved spouse tactics and respond with targeted attacks for support and fees. When the supporting spouse feels financial pain, it's time to sprint to the finish.

Appendix

1. Online Client Intake Sheets
2. Safe Act statutes
3. Promissory Note
4. Form 4 Financial Affidavit
5. Expert letter in support of spousal support
6. Orange and Chatham pilot program to simplify support – News & Observer
7. Post-Separation Support Local Rules – Averett Family Law
8. Fee Affidavit
9. Fee Order
10. Proof of Claim
11. Proposed Consent Order