MODIFICATION OF ALIMONY
FOR A SUBSTANTIAL CHANGE IN CIRCUMSTANCES

Jim Siemens
Siemens Family Law Group
Asheville, NC

Brett R. Turner
National Legal Research Group
Charlottesville, VA

Page

MODIFICATION OF ALIMONY
FOR A SUBSTANTIAL CHANGE IN CIRCUMSTANCES

Jim Siemens
Siemens Family Law Group
Asheville, NC

Brett R. Turner
National Legal Research Group
Charlottesville, VA

I. Introduction

A. Purposes and Limitations

This is an outline on modification of alimony. It will discuss in order, what forms of alimony can be modified (Part III); when they can be modified (Part IV); what must be proven to modify them (Part V); and what kinds of changes the court can make (Part VI).

B. Theories of Alimony

1. The North Carolina alimony statutes do not set forth a theory of alimony. Instead, they list factors that the court must consider. How the court considers those factors, and weaves them into an overall theory of alimony, is left to the discretion of the trial judge.

2. Stepping back briefly from the statute, the failure to specify a theory of alimony is odd. It is as if a construction worker reported to a job site and was given a selection of expensive and finely crafted tools, but then given no guidance as to what should be built with those tools.

3. The likely reason for the lack of statutory guidance is that the legislature itself did not have in mind a single theory of alimony. There was broad agreement that the court should have the power to award alimony, but no agreement as to what alimony is or when it should be awarded. The entire task of creating a theory of alimony has therefore been left to trial judges, subject only to the requirement that a list of factors be considered.

4. In an initial alimony case, the failure of the statute to set forth theories of alimony creates a good opportunity for creative lawyers to apply different theories of alimony in different cases.

5. In a modification case, that opportunity is much narrower.

a. When an unexpected material change in circumstances is proven, the court must reapply the statutory factors.

b. But some of the statutory factors will not change. In particular, the duration of the marriage and the roles played by the parties during the marriage are fixed as of the time the marriage ends, and cannot change thereafter.

c. Theories of alimony tend to turn very heavily upon these fixed facts. For instance, a traditional model of alimony is commonly used after a long marriage in which the parties raised several children. A rehabilitative model is more common when the marriage is short and both spouses worked.

d. Because theories of alimony tend to depend upon fixed facts, courts rarely reinvent alimony in modification cases. Rather, the court is likely to accept the established nature and purpose of the award, as set forth or reasonably discernible from the findings of fact that accompanied the initial award, and simply determine whether a change in amount or duration is required by any unanticipated material changes in circumstances.

e. Modification of alimony is therefore a more limited, less creative task than the making of an initial alimony award.

C. Sources of Authority

1. Statutes and Published Cases

This outline is based primarily upon statutes and published cases, both of which can be cited as authority in any North Carolina court.

2. Unpublished Cases

a. On issues not yet addressed by North Carolina published cases, this outline will sometimes cite unpublished cases.

b. Unpublished cases appear in tables in the book reporters. Their text is available only on Westlaw or Lexis, or from the court's website at http://appellate.nccourts.org/opinions.

c. All unpublished cases will be marked with the parenthetical ("unpublished").

d. Unpublished cases can be cited for their persuasive value when there is no equivalent published case, but unpublished cases lack precedential value:

> An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion, issue preclusion, or the law of the case. If a party believes, nevertheless, that an unpublished opinion has precedential value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court to which the citation is offered. This service may be accomplished by including the copy of the unpublished opinion in an addendum to a brief or memorandum. A party who cites an unpublished opinion for the first time at a hearing or oral argument must attach a copy of the unpublished opinion relied upon pursuant to the requirements of Rule 28(g). When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

N.C. R. App. P. 30(e)(3).

e. In other words, cite North Carolina unpublished authority as you would authority from another state. Such authority can help persuade a court to adopt a position, but it is not authority that the court is legally required to follow.

f. This outline does not purport to cover all North Carolina unpublished cases. It cites unpublished cases in only a few issues where no published authority exists.

II. Controlling Statute

> An order of a court of this State for alimony or postseparation 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 postseparation 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.

G.S. § 50-16.9(a).

III. *What* Can Be Modified?

A. General Rule: Only *Orders* Can Be Modified

1. G.S. § 50-16.9(a) applies only to alimony set by "[a]n order of a court."

2. Alimony that is set by an agreement only, with no court order, is not within the scope of the statute, and cannot be modified. "Where a separation agreement is neither submitted, by one or both parties thereto, to the trial court for its approval, nor specifically incorporated into a court order or judgment, the separation agreement is preserved as a contract and remains enforceable and modifiable only under traditional contract principles." *Jones v. Jones*, 144 N.C. App. 595, 601, 548 S.E.2d 565, 569 (2001).

3. G.S. § 50-16.9(a) applies to alimony, "whether contested or entered by consent." Thus, alimony set in a consent order is generally subject to modification. *See Barr v. Barr*, 55 N.C. App. 217, 219, 284 S.E.2d 762, 763 (1981) ("The August 1978 order is a consent judgment which may be modified if it is an order of the court to pay alimony.").

4. There is an express exception for consent orders entered before October 1, 1967. Most, if not all, support required by these older consent orders has terminated by now.

B. Critical Exception: Merged Agreements Under *Walters*

1. Remember, however, that 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. Under *Walters*, when a private agreement is presented to the court, the agreement ceases to exist, and the rights of the parties are governed only by the divorce decree—which is an order of the court and which is modifiable under § 50-16.9(a).

3. Therefore, the only way to prevent modification of agreement-based alimony is to agree that the agreement will not be presented to the court. This procedure is effective to make support non-modifiable. But the parties lose other benefits of merger, such as the ability to enforce the agreement by contempt.

4. If an agreement is presented to the court and merges into the judgment, it is modifiable *even if the agreement expressly forbids modification*:

> [W]e hold that the alimony provisions of the separation agreement, under discussion, which were separable and independent, and which were incorporated into the divorce judgment were modifiable *notwithstanding any express language to the contrary*.

Acosta v. Clark, 70 N.C. App. 111, 115, 318 S.E.2d 551, 554 (1984) (emphasis added). Language prohibiting modification, in an agreement that merges into a court order, is an invalid attempt to deprive the court of its statutory power to modify alimony.

5. Because so many alimony agreements are presented to the court, the scope of the *Walters* exception is enormous. In practice, the *Walters* exception tends to wag the dog of the general rule that only alimony *orders* are modifiable.

C. Partial Merger

1. Can an agreement be partly presented to the court, and partly not presented to the court? In at least one situation, the answer is yes:

> Through this decision we intend to clarify an aspect of family law which has suffered through many years of confusion. However, except as herein stated, consenting parties may still elect any of the options available to them prior to this opinion. For example, *the parties may keep the property settlement provision aspects of their separation agreement out of court and in contract, while presenting their provision for alimony to the court for approval*. The result of such action would be that the alimony provision is enforceable and modifiable as a court order while the property settlement provisions would be enforceable and modifiable under traditional contract methods.

Walters v. Walters, 307 N.C. 381, 386-87, 298 S.E.2d 338, 342 (1983) (emphasis added).

2. When the parties desire to make alimony non modifiable, but present the property division to the court so that it can be enforced by contempt, it is common procedure

to sign two separate agreements. The property settlement agreement is presented to the court, but the separation agreement (setting alimony) is not presented to the court. *See, e.g.*, *Brown v. Brown*, 91 N.C. App. 335, 371 S.E.2d 752 (1988) (noting in passing that this procedure was used).

3. But the above-quoted passage from *Walters* does speak of "agreement" in the singular, so it may not be absolutely necessary to draft two agreements. It might be possible, for example, to take the alimony provisions out from the copy of the agreement presented to the court. But preparing two agreements is the more common and safer procedure.

D. Exception to the Exception: Integrated Bargain Agreements

1. G.S. § 50-16.9(a) applies only to court orders "for alimony or post-separation support."

2. When an agreement requires monthly payments as consideration for division of property, the payments are not "alimony." *This is true even if the payments are labeled as alimony*:

> Support provisions, although denominated as "alimony," do not constitute true alimony within the meaning of N.C.G.S. § 50-16.9(a) if they actually are part of an integrated property settlement. The test for determining if an agreement is an integrated property settlement is whether the support provisions for the dependent spouse "and other provisions for a property division between the parties constitute reciprocal consideration for each other." *White v. White*, 296 N.C. 661, 666, 252 S.E.2d 698, 701.

Marks v. Marks, 316 N.C. 447, 454-55, 342 S.E.2d 859, 864 (1986).

> If a consent judgment unambiguously conveys that the parties intended support payments to constitute alimony, and relevant statutory requirements are met, then the support payments are in fact alimony. *See Marks*, 316 N.C. at 454-58, 342 S.E.2d at 864-66; *White*, 296 N.C. at 666, 670-71, 252 S.E.2d at 701, 703-04. However, merely labeling support payments as "alimony" does not make them alimony for purposes of section 50-16.9. *Marks*, 316 N.C. at 454, 342 S.E.2d at 864. For example, support provisions exchanged for property settlement provisions are part of a non-modifiable division of property.

Underwood v. Underwood, 365 N.C. 235, 238, 717 S.E.2d 361, 364-65 (2011).

3. Thus, when alimony provisions in an agreement are part of the consideration for the property division, the alimony provisions do not require payment of "alimony" for purposes of § 50-16.9, and they are not modifiable.

4. Agreement in which the alimony provisions are part of the consideration for the property division provisions are called *integrated bargain agreements*, because property division and alimony are a single integrated bargain, rather than two separate and distinct independent bargains.

5. The burden of proof is on the party who claims that an integrated bargain was present. "[T]he burden was on the defendant to show that the property settlement clause . . . was given in consideration for the support payments." *Lemons v. Lemons*, 112 N.C. App. 110, 112, 434 S.E.2d 638, 640 (1993). In other words, the property division and alimony provisions of an agreement are presumed to be severable, unless it is proven that they are not severable. *Marks*.

6. Determining whether the alimony provisions of an agreement are part of an integrated bargain can be factually challenging.

a. Even if the agreement expressly addresses this point, its language is not automatically controlling. *Underwood* held that payments made under an agreement were actually alimony, even though the agreement recited that they were consideration for the property division. An express recital may be some evidence, but it is not controlling.

b. A good starting point is to look at the property division and ask whether it is the sort of provision that the parties might have agreed to in an agreement that allowed the court to set alimony. If the property division is inequitable when viewed in isolation, in favor of the spouse paying alimony, that is probably a good indication that the alimony provisions were consideration for the property division.

c. North Carolina courts favor modifiability of alimony, and close cases are likely to be resolved in favor of modifiability.

E. Specific Performance

1. When a private agreement is not presented to the court, it does not merge into the judgment, and the terms of the agreement cannot be modified.

2. Such an unmerged agreement cannot be enforced by contempt. It can, however, be enforced by specific performance:

> The Court cannot alter the terms of the contract. The Court can, in the exercise of its powers in equity, order specific performance of only such amount as it finds to be proper. This, however, does not alter defendant's rights at law under the agreement.

Erhart v. Erhart, 67 N.C. App. 189, 191, 312 S.E.2d 534, 535 (1984).

3. Specific performance is a useful remedy because "[a]n order of specific performance . . . is enforceable through the contempt powers of the court." *Baxley v. Jackson*, 179 N.C. App. 635, 639, 634 S.E.2d 905, 908 (2006). Specific performance is therefore a way to enforce the *content* of an unmerged agreement (though not the agreement directly) by contempt.

4. Where the court enforces an unmerged agreement by specific performance, it can later modify *the order of specific performance*. The court cannot, however, modify the underlying contractual obligation:

> [W]here the trial court orders the specific performance of a separation agreement, the court may subsequently modify the specific performance order, but such modification affects *only* the order of specific performance, and does not affect the rights and obligations of the parties under the original separation agreement.

Jones v. Jones, 144 N.C. App. 595, 599, 548 S.E.2d 565, 568 (2001).

5. Example: An unmerged agreement requires a spouse to pay $500 per month in alimony. The spouse does not pay, and an order of specific performance is entered. Then the spouse's income drops substantially. The court may reduce the amount of the specific performance order to less than $500, so that the spouse is no longer required to pay the full amount or be imprisoned for contempt. But the agreement cannot be modified, so the spouse remains liable for the full $500 in an action on the contract. The full $500, however, cannot be enforced by contempt.

F. Summary

The alimony provisions of an agreement that was not presented to the court are not modifiable. The alimony provisions in an agreement that was presented to the court are modifiable, unless those alimony provisions were consideration for property division provisions.

Most alimony provisions are presented to the court, and most alimony provisions are not consideration for the property division, so in practice, most agreement-based alimony is subject to modification.

IV. *When* Can Alimony Be Modified?

A. No Alimony Order Issued

1. Only alimony *orders* can be modified. If the court in a divorce decree does not order alimony, there is no alimony order, and nothing can be modified at a later date.

2. "After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease." G.S. § 50-11(a).

3. "[W]hen a party has secured an absolute divorce, it is beyond the power of the court thereafter to enter an order awarding alimony." *Stark v. Ratashara*, 177 N.C. App. 449, 450, 628 S.E.2d 471, 473 (2006).

4. "[A] dependent spouse whose alimony . . . never existed . . . should no longer be entitled to alimony." *Cathey v. Cathey*, 210 N.C. App. 230, 233, 707 S.E.2d 638, 640 (2011).

5. Therefore, it the court does not order alimony in the divorce decree, it cannot make an award of alimony at any later time.

6. Where no alimony award was made initially, the court cannot later modify alimony even if a divorce decree or consent order purports to allow modification. "The fact that both parties apparently agreed to the entry of the consent order does not negate this deprivation; this Court has consistently held that such jurisdiction cannot be granted to a court upon assertion by the parties." *Magaro v. Magaro*, 206 N.C. App. 762, 699 S.E.2d 141, 2010 WL 3466419, at *2 (2010) (unpublished). (But see Part IV(D) *infra* on express reservations of jurisdiction and nominal alimony awards.)

7. Exception: Foreign Divorce Decrees

a. G.S. § 50-11(d):

> A divorce obtained outside the State in an action in which jurisdiction over the person of the dependent spouse was not obtained shall not impair or destroy the right of the dependent spouse to alimony as provided by the laws of this State.

b. This is an important exception. Jurisdiction to issue a divorce decree is proper in any state in which either spouse is domiciled, even if that state has no personal jurisdiction over the defendant spouse. *Williams v. North Carolina*, 317 U.S. 287 (1942). But to award alimony, or to deprive a spouse of alimony, a court must have personal jurisdiction over both spouses. *Estin v. Estin*, 334 U.S. 541 (1948). Absent this statute, a supporting spouse could avoid alimony forever simply by obtaining an ex parte divorce in another state.

c. The Supreme Court has upheld similar provisions. *See Estin*; *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957).

B. Alimony Request Pending at Divorce

If a request for alimony is pending at the time of divorce, even in another action, the court may rule upon the request, even after the divorce is granted:

> A divorce obtained pursuant to G.S. 50-5.1 or G.S. 50-6 shall not affect the rights of either spouse with respect to any action for alimony or postseparation support pending at the time the judgment for divorce is granted. Furthermore, a judgment of absolute divorce shall not impair or destroy the right of a spouse to receive alimony or postseparation support or affect any other rights provided for such spouse under any judgment or decree of a court rendered before or at the time of the judgment of absolute divorce.

G.S. § 50-11(c).

C. Alimony Order Entered

1. General Rule: No Time Limit

a. G.S. § 50-16.9(a):

> An order of a court of this State for alimony or postseparation support, whether contested or entered by consent, may be modified or vacated *at any time*[.]"

(Emphasis added.) Thus, where an alimony order was entered *and alimony remains payable*, there is no time limit on the court's power to modify.

2. **Exception: Alimony Terminated by Prior Order**

a. The court is only permitted to modify *orders* for alimony. G.S. § 50-16.9(a); *see* Part III(A) *supra*.

b. When an order for alimony is terminated by court order, the original alimony order no longer exists, and there is nothing for a future court to modify. *Alimony therefore cannot be modified after it has been terminated.*

c. In other words, the fact situation in which an order of alimony has terminated is really no different from the fact situation in which no alimony was awarded initially. In both situations, there is no *current* order, and therefore nothing to be modified. "[A] dependent spouse whose alimony had either never existed *or ceased to exist* should no longer be entitled to alimony." *Cathey v. Cathey*, 210 N.C. App. 230, 233, 707 S.E.2d 638, 640 (2011) (emphasis added).

3. **Exception: Alimony Terminated by Passage of Time and Payment in Full**

a. In cases filed after October 1, 1995, the courts may award rehabilitative alimony—alimony for a defined duration.

b. No North Carolina case expressly considers whether the court's power to modify a defined duration award is subject to a time limit.

c. Under *Cathey*, alimony cannot be awarded after alimony "ceased to exist." 210 N.C. App. at 233, 707 S.E.2d at 640. On the facts, the original order of support was a pre-1995 order for lump-sum alimony, payable at $500 per month for 42 months. The court held that support could not be modified after the 42 months ended and the award was paid in full.

d. There is no logical difference between a pre-1995 award of lump-sum alimony, payable in installments, and a post-1995 award of periodic alimony for a limited duration. In both situations, when the duration ends and the award is paid in full, the alimony order ceases to exist, and then there is no existing order to modify.

e. This is the strong majority rule in other states. *See generally* Russell G. Donaldson, Annotation, *Power to Modify Spousal Support Award for a Limited Term, Issued in Conjunction with Divorce, so as to Extend the Term or Make the Award Permanent,* 62 A.L.R.4th 180, §§ 11, 15 (1988); *see also* 2 Suzanne Reynolds, *Lee's North Carolina Family Law* § 9.81(5th ed. 2002) (discussing the case law).

f. Exception: Termination After the Date of Filing

(1) North Carolina courts can generally modify alimony retroactively back to the date on which a petition to modify is *filed*. *Hill v. Hill*, 335 N.C. 140, 435 S.E.2d 766 (1993).

(2) As long as support was still payable *when the modification action is filed*, there is probably an existing support order that can be modified, even if the term of support ends between the date of filing and the date of decision.

(3) If this were not the law, then whenever a petition to modify is filed close to the time of termination, the supporting spouse would have a great incentive to take all possible measures to delay the case. Such an incentive would probably not assist in efficient operation of the judicial system.

(4) This is also the strong majority rule nationwide. *See, e.g, Myrick v. Myrick*, 402 So. 2d 452 (Fla. Dist. Ct. App. 1981); *Richardson v. Richardson*, 868 P.2d 259 (Wyo. 1994). *See generally* Donaldson, *supra*, 62 A.L.R.4th 180, § 11.

(5) A few states hold that an award of alimony for a defined duration does not end until the time period expires *and* support is paid in full. *See, e.g., Anderson v. Anderson*, 438 So. 2d 510 (Fla. Dist. Ct. App. 1983); *Siragusa v. Siragusa*, 108 Nev. 987, 843 P.2d 807 (1992). *See generally* Donaldson, *supra*, 62 A.L.R.4th 180, § 12. In these states, a petition to modify can be filed even after the stated date of termination, if the supporting spouse is in arrears in making payments. The practical effect is to give supporting spouses a strong incentive to remain current on defined duration awards.

(6) North Carolina may recognize a similar rule with regard to lump-sum alimony support awards, which are modifiable until paid in full. *See Cathey v. Cathey*, 210 N.C. App. 230, 235, 707 S.E.2d 638, 642 (2011) ("[A] fixed term alimony award is [not] subject to modification after it has been satisfied in full[.]").

D. Nominal Awards and Reservation of Jurisdiction

1. In some states, when the court finds no present need for support, but finds a reason why a need for support might exist in the future, it can make a nominal award of support (e.g., $1 per year).

2. The court can make a nominal award either by itself, or as a residual permanent award following an award of alimony for a defined duration. *See Purin v. Purin*, No.

2D13-6070, 2015 WL 774604, at *1 (Fla. Dist. Ct. App. Feb. 24, 2015) ("The trial court could consider awarding a nominal amount of permanent periodic alimony in conjunction with the durational alimony award.").

3. Some states dispense with the formality of a nominal award and simply allow the court to reserve jurisdiction to modify alimony in the future. *See, e.g.*, *Edwards v. Edwards*, 2009 Ark. 580, at 7, 357 S.W.3d 445, 449 (2009) ("[T]he chancellor may reserve jurisdiction, without assigning a nominal amount."); *Losyk v. Losyk*, 212 Va. 220, 222, 183 S.E.2d 135, 137 (1971) ("[A] court may expressly reserve the right to revise alimony provisions to meet changed conditions.").

4. There is presently no North Carolina appellate decision approving a nominal alimony award. But normal principles of alimony modification suggest that a nominal award would be effective to preserve the right to modify the award. If the court orders $1 per year in alimony, there is an existing alimony award that can be modified in the future.

5. North Carolina has not recognized an express reservation or jurisdiction in a reported appellate decision. The effect of such a reservation is therefore unknown.

6. In other states, it is generally error to use a nominal award in an ordinary case where the parties show only normal levels of uncertainty regarding future need and ability to pay:

> [T]he chancellor was trying to address an actual deficit in the property award. Rather, he admits he was simply leaving the door open in case future events prove Jane has a need and John has an ability to pay. Such a contingency plan, while well-meaning, simply is not supported by our law.

Jones v. Jones, 155 So. 3d 856, 865 (¶ 36) (Miss. Ct. App. 2013), *cert. denied*, 131 So. 3d 577 (Miss. 2014).

7. Instead, nominal awards are used when a spouse's *present* economic situation suffers from unusual uncertainty. *See, e.g.*, *Byers v. Byers*, 149 So. 3d 161, 162 (Fla. Dist. Ct. App. 2014) ("This nominal award is likely based on the fact that Mr. Byers had filed bankruptcy, is currently working in a job paying far less than his prior bank positions, but that his financial position is likely to change in the future."); *Seale v. Seale*, 150 So. 3d 987, 993 (¶ 23) (Miss. Ct. App. 2014) ("The chancellor awarded Cherie rehabilitative alimony for a transitional period and then awarded her permanent alimony in a nominal amount 'as a remedy to an actual insufficiency in the marital assets,' rather than 'as a contingency for a possible insufficiency in the future.'" (quoting *Jones*, 155 So. 3d at 865 (¶ 36))).

8. To the extent that a nominal award of alimony or an express reservation of jurisdiction remains in force, it is possible that the court may modify alimony even after support has mostly (for a nominal award) or completely (for a reservation) terminated.

E. Effective Date of Modification

1. At a minimum, a modification of alimony is effective forward from the date of the order granting modification.

2. The court may, in its discretion, modify alimony retroactively back to the date on which a petition to modify is *filed*. *Hill v. Hill*, 335 N.C. 140, 435 S.E.2d 766 (1993).

3. Under G.S. § 50-13.10, the court cannot modify child support retroactively to a date before the date of filing. The statute is silent on alimony. No North Carolina published appellate decision expressly considers retroactive modification of alimony as of a date before the filing of the petition. *See Hill* (expressly refusing to rule upon the point).

4. The strong majority rule in other states bars such modification. 2 Suzanne Reynolds, *Lee's North Carolina Family Law* § 9.73 (5th ed. 2002). No past reported North Carolina decision has ever modified alimony retroactively back to a date before the filing of the petition.

V. *What* Is Needed To Modify Alimony?

A. "[A] Motion in the Cause"

1. General Rule

> An order of a court of this State for alimony or post-separation support . . . may be modified or vacated . . . upon motion in the cause[.]

G.S. § 50-16.9(a). "A motion in the action in which the judgment of subsistence was rendered was the proper procedure." *Rayfield v. Rayfield*, 242 N.C. 691, 696, 89 S.E.2d 399, 403 (1955); *see also Van Nynatten v. Van Nynatten*, 113 N.C. App. 142, 438 S.E.2d 417 (1993) (error to modify where no motion in the cause had been filed).

2. **"[T]he Cause"**

"[T]he cause" in which a motion to modify must be filed is the case in which the original award was made. No other court has jurisdiction to modify alimony:

> As to the defendant's motion to dismiss the action for money judgments for arrearages in alimony and child support and to modify the alimony decree because of a change in circumstances, we hold it was error not to grant this motion. There is a judgment in Cumberland County as to these matters. The District Court of Mecklenburg County has no jurisdiction as to them.

Lessard v. Lessard, 68 N.C. App. 760, 762, 316 S.E.2d 96, 97 (1984).

3. **Interstate Cases**

a. **Uniform Interstate Family Support Act ("UIFSA")**

(1) Text

> A tribunal of this State issuing a support order consistent with the law of this State has continuing, exclusive jurisdiction over a spousal support order throughout the existence of the support obligation. A tribunal of this State may not modify a spousal support order issued by a tribunal of another state having continuing, exclusive jurisdiction over that order under the law of that state.

G.S. § 52C-2-205(f).

(2) The above statute is a uniform act that has been passed in every state. It provides that a state that makes a permanent alimony award thereby acquires continuing exclusive jurisdiction over the obligation, and it prohibits all other states from modifying that obligation.

(3) The intent of this section was to abolish interstate alimony modification cases, on the ground that states have too much difficulty applying each others' alimony laws. The drafters believed that all modification actions should be brought in the state that made the initial award. This intent is stated directly in the official comments. *See* UIFSA § 211 cmt. (2001 version).

(4) *Hook v. Hook*, 170 N.C. App. 138, 611 S.E.2d 869 (2005) (holding that North Carolina had no jurisdiction to modify New Jersey alimony order, as exclusive jurisdiction remained in New Jersey).

b. G.S. § 50-16.9(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.

c. Reconciling the Conflict

(1) Given UIFSA, § 50-16.9(c) is narrower than it appears. In most fact situations involving modification of out-of-state alimony orders, the court that made the award will have continuing, exclusive jurisdiction, and under UIFSA, *North Carolina will lack jurisdiction to modify the award.*

(2) There is some possibility that the jurisdictional limitation of § 52C-2-205(f) can be waived. The drafters of UIFSA were strangely silent on this issue, but the general rule is that the parties are permitted to agree as which court shall hear a given matter, so long as the forum chosen has a reasonable relationship to the transaction. *See, e.g.*, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

(3) There is a good argument that the parties may transfer continuing exclusive jurisdiction over alimony by contract, and that § 50-16.9(c) is not completely superfluous. *See* Brett R. Turner, *Interstate Modification of Spousal Support Under UIFSA*, 17 Divorce Litig. 125 (Aug. 2005) (available on Westlaw). But in most situations, § 50-16.9(c) is supplanted by UIFSA.

B. Jurisdiction

1. As a general rule, to issue orders on matters concerning alimony, the court must have personal jurisdiction over both spouses. *Estin v. Estin*, 334 U.S. 541 (1948).

2. A motion to modify must be filed in the same cause as the original award of alimony. If the original alimony award was valid, that court must necessarily have had personal jurisdiction over both parties. Because the modification action is a continuation of the original proceedings, there is no need for a new determination of personal jurisdiction. The court's personal jurisdiction over the original proceedings carries forward into the modification proceedings. *See Kinross-Wright v. Kinross-Wright*, 248 N.C. 1, 102 S.E.2d 469 (1958).

3. There is, accordingly, no need for the court to conduct a second jurisdictional inquiry at the time of modification. If North Carolina had jurisdiction to make the original award, it has jurisdiction to modify that award.

C. "Changed Circumstances"

1. Statutory Text

> An order of a court of this State for alimony or postseparation support . . . may be modified or vacated . . . upon . . . a showing of changed circumstances[.]

G.S. § 50-16.9(a).

2. Burden of Proof

"[T]he moving party bears the burden of proving that the present award is either inadequate or unduly burdensome." *Britt v. Britt*, 49 N.C. App. 463, 470, 271 S.E.2d 921, 926 (1980).

3. Baseline

a. The concept of changed circumstances requires the court to determine whether one set of circumstances is different from another.

b. The second set of circumstances is the circumstances existing in the present, at the time of the motion to modify.

c. 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).

d. "[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).

e. 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).

f. The set of circumstances that existed at the time of the original award is therefore the baseline for measuring changed circumstances.

g. Measuring the Baseline

(1) "Where the original alimony order is pursuant to N.C.G.S. §§ 50-16.1 *et seq.*, the trial judge will usually have made findings of fact and conclusions of law in reference to the circumstances or factors set out in N.C.G.S. § 50-16.5(a)." *Cunningham*, 345 N.C. at 436, 480 S.E.3d at 406.

(2) 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.

Self, 93 N.C. App. at 327, 377 S.E.2d at 802.

(3) "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." *Id.*

(4) Therefore, when modifying an award of support based on an agreement (normally one that merged into the decree under *Walters*), before considering changed circumstances, the court must make express findings of fact identifying the circumstances that existed when the agreement was

signed—the baseline for determining whether present circumstances are different.

4. **Financial Changes**

a. "As a general rule, the changed circumstances necessary for modification of an alimony order must relate to the financial needs of the dependent spouse or the supporting spouse's ability to pay." *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982).

b. This is true because, in most cases, financial circumstances are the major facts that change over time. Other factors, such as marital misconduct, are fixed at the time of the original award and do not change after that.

5. **Substantial Change**

a. "[I]t is apparent that not *any* change of circumstances will be sufficient to order modification of an alimony award; rather, the phrase is used as a term of art to mean a *substantial* change in conditions[.]" *Britt v. Britt*, 49 N.C. App. 463, 470, 271 S.E.2d 921, 926 (1980) (emphasis added); *see also Self v. Self*, 93 N.C. App. 323, 325, 377 S.E.2d 800, 801 (1989) ("[T]hese changes must be substantial[.]").

b. "The change in circumstances must be substantial with a final decision based on a comparison of the facts existing at the original order and when the modification is sought." *Broughton v. Broughton*, 58 N.C. App. 778, 781, 294 S.E.2d 772, 775 (1982).

6. **Unanticipated Change**

a. "Where the change in the circumstances is one that the trial court expected and probably made allowances for when entering the original decree, the change is not a ground for a modification of the decree." *Britt v. Britt*, 49 N.C. App. 463, 472, 271 S.E.2d 921, 927 (1980) (quoting M.L. Cross, Annotation, *Change in Financial Condition or Needs of Husband or Wife as Ground for Modification of Decree for Alimony or Maintenance*, 18 A.L.R.2d 10, 13 (1951).

b. "In the original order, the court clearly calculated the amount of alimony on the assumption that plaintiff would be able to secure a job paying at least minimum wage. That plaintiff has now done so has not substantially altered the relative positions of the parties. " *Hightower v. Hightower*, 85 N.C. App. 333, 336, 354 S.E.2d 743, 745 (1987).

c. "Minor fluctuations in income are a common occurrence and the likelihood that they would occur must have been considered by the court when it entered a decree for alimony." *Britt*, 49 N.C. App. at 472, 271 S.E.2d at 927 (quoting Cross, *supra*, 18 A.L.R.2d at 13).

d. Even if a change is generally foreseeable, an unanticipated change can still occur if there was no way to determine the *extent* of the change:

> [W]hile it was foreseeable that child support payments would terminate upon Sarah reaching the age of 18, it was not necessarily foreseeable that plaintiff-wife's living expenses would be double what they were at the time that the original PSS award was entered; here, the trial court found it reasonable that plaintiff-wife continue to live in the same house in which she had been living. However, if plaintiff-wife had moved from the family house to a less expensive residence, her housing expenses might not have increased substantially enough to warrant a modification of the award. Thus, the extent to which plaintiff-wife's reasonable expenses have changed was not necessarily foreseeable at the time that the 2002 PSS order was entered.

Harris v. Harris, 188 N.C. App. 477, 484, 656 S.E.2d 316, 320 (2008).

7. **Dependent Spouse**

a. The court need *not* consider whether the recipient meets the definition of a dependent spouse:

> We conclude that defendant's status as the dependent spouse is not properly reconsidered upon a motion to modify[.]

Cunningham v. Cunningham, 345 N.C. 430, 435, 480 S.E.2d 403, 406 (1997).

> [T]he defendant's status as the dependent spouse would not be at issue on remand or in future modification hearings; at issue would be only whether any change of circumstances justified a modification or termination of the alimony order.

Id. at 437, 480 S.E.2d at 407.

> Plaintiff's status as a dependent spouse, however, was "permanently adjudicated by the original order," *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982), and "the trial court, on a modification hearing,

> does not retry the issues tried at the original hearing," *Cunningham*, 345 N.C. at 435, 480 S.E.2d at 406. Although dependent spouse status is not properly reconsidered on a section 50-16.9(a) motion to modify, the trial court is required, as noted above, to consider whether there has been a change in the circumstances of the parties which relates to the "factors used in the original determination of the amount of alimony awarded." *Id.*

Kowalick v. Kowalick, 129 N.C. App. 781, 786, 501 S.E.2d 671, 675 (1998).

b. In other words, once the court determines in the original order that the recipient is a dependent spouse, and therefore eligible to receive alimony, the recipient is eligible to receive alimony at all points in the future.

8. **Effect of Changed Circumstances**

a. "Upon a showing of changed circumstances, the trial court must consider the current circumstances with regard to the factors listed in N.C.G.S. § 50-16.5 and determine whether the original alimony order should be modified." *Cunningham v. Cunningham*, 345 N.C. 430, 436, 480 S.E.2d 403, 406 (1997).

b. In other words, if the courts finds no changed circumstances, the original alimony order is res judicata, and the court hearing the modification case is not permitted to depart from the original order's terms.

c. If the court does find changed circumstances, by contrast, then the original order is not res judicata, and the court is free to reach a different result. In reaching that different result, the court is not bound by the original order. Rather, *the court must reapply the procedures set forth in G.S. § 50-16.3A to determine a new support award.*

d. "The same factors used in making the initial alimony award should be used by the trial court when hearing a motion for modification." *Pierce v. Pierce*, 188 N.C. App. 488, 489, 655 S.E.2d 863, 864 (2008). "[M]odification of an alimony award requires consideration of G.S. Section 50-16.5 standards." *Self v. Self*, 93 N.C. App. 323, 327, 377 S.E.2d 800, 802 (1989).

e. The court must consider *all* of the statutory factors:

> [I]t is error to modify alimony based on only one factor, such as a change in a party's income. *Id.* at 474, 271 S.E.2d at 928. Rather, "[t]he present overall circumstances of the parties must be compared with the

circumstances existing at the time of the original award in order to determine if there has been a substantial change." *Id.*

Dodson v. Dodson, 190 N.C. App. 412, 416, 660 S.E.2d 93, 96 (2008) (quoting *Britt v. Britt*, 49 N.C. App. 463, 474, 271 S.E.2d 921, 928 (1980)).

f. Therefore, once the court finds changed circumstances, a modification case is similar to an initial award case. The court must reconsider and rebalance the statutory alimony factors.

9. **Balancing the Factors**

a. As many other commentators and judges have observed, balancing the statutory alimony factors is extraordinarily difficult. The court is instructed to consider certain factors, but it is given no overall theory for their application.

b. As a result, counsel in an initial alimony case have considerable room for creativity in arguing different theories of alimony. As long as all the statutory factors are considered, the court has very broad discretion to follow a permanent support theory, a rehabilitation theory, a reimbursement theory, or any other theory a creative attorney can develop.

c. A modification case tends to be more limited. The court has broad discretion to balance the factors, but many judges prefer not to reinvent the entire theory of alimony every time an award comes up for modification. If the initial award of alimony states a theory and a purpose—for example, awards permanent alimony or rehabilitative alimony or reimbursement alimony—modification cases tend to be analyzed within the same framework.

d. This is not a rule of law, and in theory a court modifying alimony (once a material change in circumstances is proven) has broad discretion to rebalance the factors and adopt any theory of alimony that fits the facts. But more commonly, the theory of alimony applied on modification will be the same theory applied initially.

e. This is not necessarily a bad thing. The most important variables in determining a theory of alimony are probably the nature and duration of the marriage. For example,

(1) If the marriage lasted 30+ years and raised multiple children and the wife did not work, the court is more likely to adopt a traditional theory of alimony.

(2) If the marriage is short and both parties worked, a rehabilitative model is more likely.

(3) If one spouse put the other through professional school and divorce follows soon after, a reimbursement model is more likely.

f. Because the facts that tend to determine the applicable theory of alimony tend not to change over time, it is probably appropriate in many situations that a modifying court apply the same general theory of alimony that was applied when the initial award was made.

g. It is always possible that the court may find sufficient changed circumstances to permit modification, but then find on the facts that the equitable amount of support under present circumstances is the same as the amount of the existing support order.

(1) "Even where the moving party has met her burden to show relevant changed circumstances, however, the trial court is not required to modify an alimony award, but may do so in its discretion." *Kowalick v. Kowalick*, 129 N.C. App. 781, 785, 501 S.E.2d 671, 674 (1998).

(2) Simple example: An alimony payor loses employment through no fault of his own, and the best job he can find earns $1,000 per month less than his former position. But a rich uncle dies, leaving him as income beneficiary of a trust producing $1,000 per month in actual income. There are clearly two material changes in circumstances, but they offset one another and support is likely to remain unchanged.

(3) In other words, the ultimate amount of modification depends upon the *net* effect of all changes in circumstances—which may, on the facts of the case, be zero.

10. **Specific Potential Changes**

a. **Changes in Income**

(1) **General Rule**

(a) An increase in either spouse's income, if material in amount, is potentially a sufficient basis to modify alimony.

(b) "[A] conclusion as a matter of law that changed circumstances exist, based only on the parties' incomes, is erroneous and must be reversed. The present overall circumstances of the parties must be compared with the circumstances existing at the time of the original award in order to determine if there has been a substantial change." *Britt v. Britt*, 49 N.C. App. 463, 474, 271 S.E.2d 921, 928 (1980); *see also Frey v. Best*, 189 N.C. App. 622, 627, 659 S.E.2d 60, 66 (2008) (substantial increase in wife's income was not a sufficient basis to reduce alimony, where trial court did not consider any other factors).

(2) **Actual Income**

(a) A spouse's income includes, at a minimum, that spouse's actual earnings.

(b) Income includes not only active earnings (e.g., salary), but also passive earnings, such as interest on investment accounts and dividends received from stock holdings. "Investment income is certainly an important component of a party's total income." *Parsons v. Parsons*, N.C. App. ___, , 752 S.E.2d 530, 535 (2013).

(c) The trial court does not err, however, if it chooses to treat increases in value of property—capital gains—as property, rather than income. *Parsons*.

(d) Retirement Benefits

i) Periodic payments of retirement benefits that a spouse is actually receiving (e.g., that are in pay status) are income for purposes of alimony. *See Gamewell v. Gamewell*, 203 N.C. App. 572, 692 S.E.2d 890, 2010 WL 1542566 (2010) (unpublished) (trial court properly reduced husband's monthly alimony obligation from $3,214 to $2,250, where husband's income dropped after he was diagnosed with Alzheimer's disease; support was not completely terminated, because husband still had income from Social Security payments, a monthly IRA distribution, and a trust fund).

ii) When a spouse owns an IRA, 401(k) plan, or other defined contribution retirement account, the extent to which withdrawals from that account should be treated as income is a difficult issue.

a) Actual withdrawals are certainly income. *Gamewell*.

b) Any minimum withdrawal required by federal law is certainly income.

c) Withdrawals are usually not required when they would be subject to an early withdrawal penalty.

d) The hard question is whether a spouse who prefers not to make withdrawals, after retirement age, should nevertheless be charged with withdrawals. This issue has not arisen in North Carolina. Case law in other states begins with the proposition than a spouse should normally withdraw income and should not withdraw principal. But the courts have sometimes held that income can be retained, and that principal should be withdrawn, when a retirement planner credibly testifies that these courses of action are reasonable under the circumstances. *See, e.g.*, *Hill v. Hill*, 53 S.W.3d 114 (Mo. 2001). *See generally* Brett R. Turner, *Recent Case Law on Imputation of Passive Investment Income Under the Law of Spousal Support*, 18 Divorce Litig. 69 (May 2006) (available on Westlaw).

(e) Income reported for tax purposes can be a useful starting point in determining income for alimony purposes, but it is not controlling.

i) "Although the amount of income reported for tax purposes is relevant evidence, this amount is not necessarily equivalent to annual gross income for alimony purposes." *Barham v. Barham*, 127 N.C. App. 20, 27, 487 S.E.2d 774, 778-79 (1997), *aff'd*, 347 N.C. 570, 494 S.E.2d 763 (1998).

ii) In particular, the income tax deduction for alimony paid must obviously be added back before using taxable income for alimony purposes.

iii) The trial court is also free to treat capital gains as property and not income. *Parsons*.

iv) Also, be wary of accelerated depreciation, which is often greater than the actual real depreciation in the value of equipment. *Barham*.

(3) **Imputed Income**

(a) In addition, a court may under certain conditions impute to a spouse more income than his or her actual earnings.

(b) Imputation of income requires, first, proof that a spouse's earning capacity is actually higher than his or her current actual earnings.

i) Measuring earning capacity is a pure question of fact.

ii) Testimony from a vocational expert always helps, and is often essential, in proving how much a spouse is capable of earning.

iii) Actual income includes not only cash earnings, but also fringe benefits of employment. *See Kelly v. Kelly*, N.C. App. , , 747 S.E.2d 268, 277 (2013) (in determining husband's financial resources, court noted "that his law firm purchased his 2009 Lexus and 2009 Suburban vehicles, pays for his car insurance, his cell phone, his car maintenance, and most of his gasoline expense").

(c) In addition, imputation of income also requires proof that the spouse acted in bad faith:

> When the evidence shows that a party has acted in "bad faith," the trial court may refuse to modify the support awards. *Chused v. Chused*, 131 N.C.App. 668, 671, 508 S.E.2d 559, 561-62 (1998). If a husband has acted in "good faith" that resulted in the reduction of his income, application of the earnings capacity rule is improper. *Wachacha*, 38 N.C.App. at 508, 248 S.E.2d at 377-78. *See also Chused*, 131 N.C.App. 668, 508 S.E.2d 559 (held no evidence that husband acted in bad faith by deliberately depressing his income, and the evidence was sufficient to prove husband was "involuntarily" terminated from his employment).
>
> The dispositive issue is whether a party is motivated by a desire to avoid his reasonable support obligations. To apply the earnings capacity rule, the trial court must have sufficient evidence of the proscribed intent.

Wolf v. Wolf, 151 N.C. App. 523, 527, 566 S.E.2d 516, 519 (2002).

(d) "[U]nless the trial court makes findings of fact that husband was 'deliberately depressing his . . . income or indulging in excessive spending because of a disregard of [his] marital obligation to provide support for [his] dependent spouse,' . . . the court may *not* use husband's 'capacity to earn' as the basis for its alimony award." *Frey v. Best*, 189 N.C. App. 622, 628-29, 659 S.E.2d 60, 67 (2008) (emphasis added) (quoting *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982)).

(e) "Ordinarily the husband's ability to pay is determined by his income at the time the award is made[] '[i]f the husband is honestly engaged in a business to which he is properly adapted and is in fact seeking to operate his business profitably.' Capacity to earn, however, may be the basis of an award if it is based upon a proper finding that the husband is [1] deliberately depressing his income or [2] indulging himself in excessive spending because of a disregard of his marital obligation to provide reasonable support for his wife and children." *Beall v. Beall*, 290 N.C. 669, 674, 228 S.E.2d 407, 410 (1976) (quoting *Conrad v. Conrad*, 252 N.C. 412, 418, 113 S.E.2d 912, 916 (1960)).

(f) Most imputed income cases rely upon a finding of positive bad faith—a deliberate reduction in income for the purpose of manipulating support. But some cases in the child support context hold that income can be imputed when acts are taken with reckless or naive indifference to the support needs of a dependent.

i) *Roberts v. McAllister*, 174 N.C. App. 369, 379, 621 S.E.2d 191, 198 (2005) (mother's failure to seek work for 11 years showed "naive indifference" to the welfare of her children; imputing income even though mother's intent was not to reduce support or harm children).

ii) *McKyer v. McKyer*, 179 N.C. App. 132, 146, 632 S.E.2d 828, 836 (2006) (bad faith can be shown "by a sufficient degree of indifference to the needs of a parent's children"; imputing income to former NFL player who was working only one day per week, even though there was no evidence that father intended to harm mother or children).

iii) "The trial court may refuse to modify support and/or alimony on the basis of an individual's earning capacity instead of his actual income when the evidence presented to the trial court shows that a husband has disregarded his marital and parental obligations by: (1) failing to exercise his reasonable capacity to earn, (2) deliberately avoiding his family's financial responsibilities, (3) acting in deliberate disregard for his support obligations, (4) refusing to seek or to accept gainful employment, (5) wilfully refusing to secure or take a job, (6) deliberately not applying himself to his business, (7) intentionally depressing his income to an artificial low, or (8) intentionally leaving his employment to go into another business." *Wolf v. Wolf*, 151 N.C. App. 523, 526-27, 566 S.E.2d 516, 518-19 (2002).

iv) The extent to which the naive or reckless indifference theory will be applied in spousal support cases remains to be seen. But there is no logical reason why the definition of bad faith would be different for alimony, as opposed to child support. *Wolf*'s list of bad-faith actions applies expressly to both "[child] support and/or alimony." *Id.*

v) The broader issue with regard to bad faith and imputation of income is whether bad-faith conduct must be *subjectively* intended to harm the other spouse or the children, or whether bad faith can include conduct with is *objectively* unreasonable, especially where the level of unreasonableness is very high. A purely subjective bad-faith test is subject to manipulation by payors who can avoid imputation of income simply by plausibly denying any positive intent to harm their dependents.

vi) The above cases suggest that North Carolina law is moving toward finding bad faith when a spouse's conduct is extremely objectively unreasonable, even in the absence of actual subjective intent to harm dependents. This change is consistent with developments in other states, *see* Brett R. Turner, *Imputing Income Under the Law of Spousal and Child Support: A Move Toward Objective Reasonableness?*, 18 Divorce Litig. 209 (Dec. 2006) (available on Westlaw), and it is probably a good development. How far the courts will take the change, in both the alimony and child support contexts, remains to be seen.

(g) It is unclear whether bad faith must be proven when one spouse seeks to impute *investment* income to the other.

i) In *Honeycutt v. Honeycutt*, 152 N.C. App. 673, 677-78, 568 S.E.2d 260, 263 (2002), the court held that trial court can consider earning capacity based on "potential investment income and social security, rather than earning capacity from working," without a finding of bad faith. Judge Greene dissented, arguing expressly that a finding of bad faith was required. "It is true that, as the majority states, earning capacity is typically used in reference to a person's occupation; however, the concept is equally applicable where a trial court imputes income to a spouse based on the earning capacity of her investment portfolio, which, if used more effectively, could yield a higher return." *Id.* at 679, 568 S.E.2d at 264 (Greene, J., dissenting). An appeal to the North Carolina Supreme Court was filed, but the appeal was withdrawn. *Honeycutt v. Honeycutt*, 356 N.C. 671, 577 S.E.2d 298 (2003).

ii) In *Francis v. Francis*, 169 N.C. App. 442, 444, 612 S.E.2d 141, 142 (2005), the court held that the trial court "acted properly in considering plaintiff's investment portfolio when calculating the amount of alimony" without a finding of bad faith. It is possible that what was considered was the portfolio as an asset, not the income from the portfolio. It has been reported that the defendant's attorney in *Francis* was told at oral argument not to address bad faith. C. Ray Grantham & Kimberly S. Taylor, *Alimony Factors* at VI-7.

iii) But in *Cook v. Cook*, 159 N.C. App. 657, 583 S.E.2d 696 (2003), the Court of Appeals held it was error to impute investment income without finding bad faith:

> Here again, the trial court found that plaintiff intentionally decreased his income and then applied the earning capacity rule. The trial court failed here to even make a finding as to potential motive of plaintiff behind such an investment strategy. Thus, we sustain plaintiff's assignment of error.

Id. at 663-64, 583 S.E.2d at 700. There was an argument in *Cook* that the owner had voluntarily restructured the composition of his investment portfolio in a way that reduced the income. Perhaps the result would have been different if the owner had been charged with failure to take affirmative steps to increase income, rather than taking negative steps that decreased income.

iv) There is no easy way to reconcile *Honeycutt*, *Francis*, and *Cook*. The careful practitioner should read all future cases citing these decisions before relying upon any of them.

(h) The effect of imputed income may of course be to negate a drop in actual income, so that there are in effect no material changes in circumstances and modification should be denied. *See Wolf* (affirming trial court order holding that husband's loss of employment was voluntary, and in conscious disregard of his support obligation, so that no real change in circumstances was present).

(i) Burden of Proof

i) Where income was imputed to a spouse in the original support award, that imputation is probably binding upon modification, and the burden of proof is on the party who seeks to attack it.

ii) For instance, if the original decree imputed income on the basis that a spouse who had lost employment had not yet conducted a reasonable job search, and that spouse seeks modification, that spouse bears the burden of proving that a reasonable job search was conducted.

iii) Otherwise, the burden of proof is on the spouse who seeks to impute income to prove the critical element of bad faith. *See Mittendorff v. Mittendorff*, 133 N.C. App. 343, 344, 515 S.E.2d 464, 466 (1999).

(j) The imputed income cases are really a single body of case law, which applies regardless of whether the case involves an initial award or a modification, and regardless of whether the case involves alimony or child support. This outline has stated the basic rules and cited representative cases, but imputed income is really a topic unto itself.

(4) **Increases in the Payor's Income**

(a) An increase in the income of the payor may, or may not, be a material change in circumstances.

(b) Where the recipient is already living at the marital standard of living, an increase in the payor's income does not justify an increase in alimony.

i) "It is well established that, as much as possible, alimony should allow the dependent spouse to maintain his or her accustomed standard of living that was attained during the marriage." *Dodson v. Dodson*, 190 N.C. App. 412, 417, 660 S.E.2d 93, 97 (2008). If the recipient is already being supported at the marital standard of living, a further increase in the payor's income is not a material change.

ii) In other words, a recipient of alimony, unlike a recipient of child support, is not entitled to share in the payor's future prosperity. "The purpose of alimony is to care for the wife's needs after divorce, not to provide her with a lifetime profit-sharing plan." 2 Homer H. Clark Jr., *The Law of Domestic Relations in the United States* § 17.6, at 282 (2d ed. 1987); *see Arnold v. Arnold*, 332 Ill. App. 586, 76 N.E.2d 335 (1947) (the leading case nationwide); *Cole v. Cole*, 44 Md. App. 435, 443, 409 A.2d 734, 740 (1979) ("The 'needs' of the obligee spouse do not ordinarily include the 'need' or the right to have his or her standard of living keep pace with that of the other spouse after a final divorce.").

iii) Example: The husband earns $100,000 per year during the marriage. Upon divorce, the court awards the wife sufficient support to allow her

to live at the marital standard of living. The husband then gets a promotion, and his salary increases to $150,000 per year. The wife's support needs are fully met at the marital standard of living; the husband's increased income is not a material change in circumstances.

(c) If the recipient is not living at the marital standard of living, then an increase in the payor's income is a material change in circumstances.

i) *Bowes v. Bowes*, 43 N.C. App. 586, 589-90, 259 S.E.2d 389, 392 (1979) (affirming an increase in alimony, where "the condition, estate, and earning capacity of the defendant [payor] had substantially increased [and] defendant's accustomed standard of living was substantially better"; expressly finding that recipient's standard of living had declined).

ii) *Pierce v. Pierce*, 188 N.C. App. 488, 492, 655 S.E.2d 863, 866 (2008) (increasing support due to recipient's increased needs; finding that payor had increased income and could afford to pay an increase; but no suggestion that wife was entitled to live above the marital standard of living).

(5) **Increases in the Recipient's Income**

(a) An increase in the recipient's income, if material in amount, is always a material change in circumstances.

(b) It is error to reduce support based upon an increase in the recipient's income, without considering other relevant factors, including most importantly any changes in the recipient's needs. "While the trial court correctly found that plaintiff's income increased, the trial court failed to consider all factors surrounding the increase in plaintiff's income, such as how her change in income affects her 'need for support' when determining the modified alimony payment." *Dodson v. Dodson*, 190 N.C. App. 412, 416, 660 S.E.2d 93, 96 (2008) (quoting *Rowe*, 52 N.C. App. at 655, 280 S.E.2d at 187).

(6) **Decreases in Income**

(a) Material decreases in either spouse's income are generally a material change in circumstances for purposes of modifying alimony.

i) *Gamewell v. Gamewell*, 203 N.C. App. 572, 692 S.E.2d 890, 2010 WL 1542566 (unpublished) (trial court properly reduced husband's

monthly alimony obligation from $3,214 to $2,250, where husband's income dropped after he was diagnosed with Alzheimer's disease).

ii) *Swain v. Swain*, 179 N.C. App. 795, 635 S.E.2d 504 (2006) (reducing husband's alimony from $4,300 monthly to $3,600 monthly, where he lost employment through no fault of his own and was unable to find a new position at the same salary).

(b) Courts are reluctant to hold that a mild decrease in the income of a spouse with a fluctuating income represents a real change. *See Kelly v. Kelly*, ___ N.C. App. ___, ___, 747 S.E.2d 268, 277 (2013) ("[T]he actual numbers presented to the trial court in the income tax returns of the defendant and his law firm support the trial court's finding that defendant's income has fluctuated but not decreased substantially."). To convince the court to find a real reduction in fluctuating income, it is generally necessary to show a material drop in average income over a period of time.

b. **Changes in Expenses**

(1) **Actual Expenses**

(a) A change in the actual expenses of a spouse is evidence of a material change in circumstances.

(b) A party's financial affidavit is some relevant evidence of a party's expenses, and the trial court is permitted to find it credible even if there is no other supporting evidence:

> Plaintiff fails to recognize that the [Defendant's] affidavit itself is evidence of defendant's expenses. . . . Plaintiff's argument simply goes to the credibility and weight to be given to the affidavit. Plaintiff was free to attack defendant's affidavit at trial by cross-examination and by presentation of evidence which may contradict her claims, and he did so. Such determinations of credibility are for the trial court, not this Court.

Parsons v. Parsons, ___ N.C. App. ___, ___, 752 S.E.2d 530, 533 (2013).

(c) But the trial court also has discretion, as finder of fact, to disbelieve a party's evidence as to his or her actual expenses, especially if that testimony is not supported by documentary evidence. The better approach is to support the client's financial affidavit and personal testimony with as much

documentary and third-party corroborating evidence as possible. Otherwise, you are gambling that the trial court will find your client credible.

(d) The court cannot conclude that either spouse's expenses have increased, merely because the economy is inflationary and the cost of living has risen. *Barham v. Barham*, 127 N.C. App. 20, 31, 487 S.E.2d 774, 781 (1997) *aff'd*, 347 N.C. 570, 494 S.E.2d 763 (1998). There must be evidence of an actual change in the actual living expenses of one or both spouses in the particular case at hand.

(e) The court may consider reasonable projections of future expenses:

> It is, of course, appropriate for the trial court to make findings on and consider reasonable future expenses in awarding or modifying alimony, including those relating to upkeep of defendant's residence. In attempting to estimate future expenses, the trial court must necessarily base its determination on relevant past expenses and predictions of future expenses. Although it is nearly certain that these types of expenses will arise, the exact timing and amounts can only be predicted based on past experience. This kind of prognostication is, by nature, somewhat "hypothetical." So long as there is evidence to support the trial court's finding, however, that finding will not be disturbed by this Court.

Parsons, ___ N.C. App. at ___, 752 S.E.2d at 534.

(2) **Reasonable Expenses**

(a) Note also that alimony depends upon a spouse's *reasonable* expenses, not a spouse's actual expenses.

(b) "The determination of what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge, and he is not required to accept at face value the assertion of living expenses offered by the litigants themselves." *Whedon v. Whedon*, 58 N.C. App. 524, 529, 294 S.E.2d 29, 32 (1982).

(c) "Implicit in [*Whedon*] is the idea that the trial judge may resort to his own common sense and every-day experiences in calculating the reasonable needs and expenses of the parties." *Bookholt v. Bookholt*, 136 N.C. App. 247, 250, 523 S.E.2d 729, 731 (1999).

(d) In determining the reasonableness of expenses, it is important to remember again that the dependent spouse is entitled to be supported at the marital standard of living.

> i) "It is well established that, as much as possible, alimony should allow the dependent spouse to maintain his or her accustomed standard of living that was attained during the marriage." *Dodson v. Dodson*, 190 N.C. App. 412, 417, 660 S.E.2d 93, 97 (2008).
>
> ii) "[T]he precise amount of the award in a given case is subject to the principle that the wife of a wealthy man should be awarded an amount commensurate with the normal standard of living of a man of like financial resources. " *Clark v. Clark*, 301 N.C. 123, 131, 271 S.E.2d 58, 65 (1980).
>
> iii) *Clark* is subtly different from *Dodson*. *Dodson* speaks in terms of the actual subjective marital standard of living; *Clark* speaks in terms of an objectively reasonably standard of living for the incomes involved.
>
> iv) In the great majority of cases, both measures will be the same. When the marital standard of living is unusually high (e.g., based on accumulation of debt) or unreasonably low, however, *Clark* suggests that the court may measure the reasonableness of expenses using an objectively reasonable standard of living. *See generally* Brett R. Turner, *The Effect of Artificially High and Low Standards of Living on Spousal Support Awards*, 9 Divorce Litig. 125 (July 1997) (available on Westlaw).

(e) It is not unreasonable for older persons to acquire private health insurance to supplement Medicare:

> [W]e do not believe the evidence supports the finding that plaintiff's expenses "should be reduced by $239.16 for medical insurance since Plaintiff is now eligible for Medicare." The record reflects that plaintiff's health care costs are for supplemental insurance to cover health care needs and prescription medications which Medicare does not cover. The record reflects no reason for the court to require her to lessen her standard of living by reducing the quality or availability of health care in this manner. To the contrary, the record reflects that by carrying this insurance, the plaintiff has taken reasonable steps to provide for her known health care needs.

Honeycutt v. Honeycutt, 152 N.C. App. 673, 677, 568 S.E.2d 260, 263 (2002).

(f) When the court finds that expenses are excessive, they must be reduced to reasonable levels for purposes of modifying alimony.

i) "Here, the trial court apparently felt the $2100 in projected housing costs was unreasonable and then reduced that figure to an amount it felt was more reasonable. By doing so, we find no abuse in the exercise of its discretion." *Id.*

ii) *Martin v. Martin*, 207 N.C. App. 121, 698 S.E.2d 491 (2010) (finding that excessive lump-sum withdrawal from a retirement account was an unreasonable expense).

iii) *Broughton v. Broughton*, 58 N.C. App. 778, 787, 294 S.E.2d 772, 779 (1982) (trial court properly held that wife's stated need of $92,000 per year was inconsistent with the marital standard of living; "[P]laintiff's total income in the early 1970's was less than half of what defendant now seeks.").

(g) Expenses of supporting adult children are generally unreasonable, as no legal duty of support exists:

Defendant testified that he and his wife bought the property to give his son a place to live. However, no evidence was presented to show that defendant was under any legal obligation to do so. As the support of his adult son is a discretionary expense, the trial court did not err in finding that the mortgage payment and condominium fee should not be considered in defendant's reasonable monthly expenses.

Martin, 207 N.C. App. at 125, 698 S.E.2d at 494.

(3) **Payor's Expenses**

(a) Payors should limit their claimed expenses to those incurred at the marital standard of living. "But I really *need* to make the payments on that red Corvette convertible!" is unlikely to be a winning argument.

(b) When the payor's expenses exceed the payor's income, there is authority that he should not be forced to pay alimony.

i) *Dodson v. Dodson*, 190 N.C. App. 412, 417, 660 S.E.2d 93, 97 (2008) ("Since it appears from the record that defendant's current salary is insufficient to pay his reasonable monthly expenses in addition to his alimony payments, we conclude the trial court abused its discretion in the alimony award."; "Alimony payments cannot reduce the supporting spouse to poverty.").

ii) *Hudson v. Hudson*, 193 N.C. App. 454, 667 S.E.2d 340, 2008 WL 4630520, at *7 (2008) (unpublished) ("[T]he trial court erred by entering an order awarding alimony requiring an immediate depletion of Defendant's estate and reducing him to poverty.").

iii) *Beaman v. Beaman,* 77 N.C. App. 717, 722, 336 S.E.2d 129, 132 (1985) ("Ordinarily, the parties will not be required to deplete their estates to pay alimony or to meet personal expenses.").

(c) Be aware, however, that the trial court can avoid the above point by discrediting the payor's evidence as to his actual expenses, or by finding that some of his actual expenses were unreasonable.

(d) Also, in some cases, the incomes of the parties may be so modest that neither party can have their reasonable needs fully met. In these cases, the order is equitable if it leaves both parties with similar shortfalls. "Because the award requires both parties to deplete their estates to meet their living expenses, the trial court's reduction of alimony was fair to both parties, and the trial court did not abuse its discretion." *Swain v. Swain*, 179 N.C. App. 795, 799, 635 S.E.2d 504, 507 (2006).

(4) **Recipient's Expenses**

(a) The recipient should also claim expenses only at the marital standard of living. The court is likely to disregard excessive expenses.

(b) "[A]n increase in the wife's needs, or a decrease in her separate estate, may warrant an increase in alimony." *Sayland v. Sayland*, 267 N.C. 378, 383, 148 S.E.2d 218, 222 (1966). For specific cases granting an increase in support, based upon increased expenses, see *Parsons v. Parsons*, __N.C. App.___, ___, 752 S.E.2d 530, 534 (2013), and *Broughton v. Broughton*, 58 N.C. App. 778, 294 S.E.2d 772 (1982).

(c) "A decrease in the wife's needs is a change in condition which may also be properly considered in passing upon a husband's motion to reduce her allowance." *Sayland*, 267 N.C. at 383, 148 S.E.2d at 222.

(d) Particular problems are posed by the recipient who is spending *less* than the marital standard of living, often because an existing award is insufficient due to changed circumstances, and the has been unable to spend more. In these cases, the recipient should be allowed to claim expenses up the full marital standard of living.

(e) When the recipient has not been able to live at the full marital standard of living, it may be advisable to submit evidence not only of actual current expenses, but also of amounts spent during the marriage at the marital standard of living. It is worth considering filing two expense statements—one at current levels and one at the marital standard of living.

c. **Changes in Assets**

(1) **General Rule**

Changes in assets are one relevant fact that can potentially constitute a change in circumstances.

(2) **Increases in Assets**

(a) "[A]n increase in the wife's needs, or a decrease in her separate estate, may warrant an increase in alimony." *Sayland v. Sayland*, 267 N.C. 378, 383, 148 S.E.2d 218, 222 (1966).

(b) "We have held that an increase in the value of the dependent spouse's property after the entry of the alimony decree is an important consideration in determining whether there has been a change in circumstances." *Cunningham v. Cunningham*, 345 N.C. 430, 440, 480 S.E.2d 403, 409 (1997).

(c) "The fact that the wife has acquired a substantial amount of property, or that her property has increased in value, after entry of a decree for alimony or maintenance is an important consideration in determining whether and to what extent the decree should be modified." *Sayland*, 267 N.C. at 383, 148 S.E.2d at 222 (quoting M.L. Cross, Annotation, *Change in Financial Condition or Needs of Husband or Wife as Ground for Modification of Decree for Alimony or Maintenance*, 18 A.L.R.2d 10, 74

(1951); *Marks v. Marks*, 316 N.C. 447, 342 S.E.2d 859 (1986) (terminating wife's alimony, based upon a substantial increase in her net worth since the divorce).

(3) **Decreases in Assets**

(a) "[A]n increase in the wife's needs, *or a decrease in her separate estate*, may warrant an increase in alimony." *Sayland v. Sayland*, 267 N.C. 378, 383, 148 S.E.2d 218, 222 (1966) (emphasis added).

(b) A decrease in assets is sufficient not only in itself, but also as evidence that a spouse's expenses may exceed actual income, showing either a need for support (for the recipient) or an inability to pay (for the payor).
(c) This is true, however, only if the court finds that the spouse's expenses were all reasonable.

d. **Retirement**

(1) **Retirement Alone**

(a) Retirement, by itself, is not a change in circumstances. If a paying spouse earning $100,000 per year retires, and starts receiving $100,000 per year in retirement benefits, and no retirement benefits are shared with the alimony recipient, there is no material change in circumstances. All financial facts are the same, both before and after retirement.

(b) Nevertheless, it is very uncommon that retirement causes no changes in financial circumstances. Ordinarily, the payor's income drops upon retirement. In some cases, the payor's retirement may give both parties retirement benefits under a QDRO or other deferred distribution of retirement benefits. The financial changes which normally accompany retirement are often a very good reason to modify alimony.

(2) **Decreases in the Payor's Income**

(a) A decrease in the payor's income, occurring upon retirement, is a reduction in the payor's actual earnings.

(b) The court must first consider whether the reduction in actual earnings is a sufficient basis to impute income.

i) Some retirements are involuntary. For example, airline pilots generally have a mandatory retirement age. Involuntary retirement is not, in itself, a sufficient basis for imputing income.

ii) In some fields where retirement is normally early, a spouse may have a duty to seek work after retirement. A common example is the military, as many former service members work after retirement, especially in the defense industry. If a spouse retires very early (e.g., mid-50s) and fails to seek work, there is an increased risk that the failure to seek work may be a sufficient basis for imputing income.

iii) Most retirements are voluntary. Under general imputed income principles discussed above, voluntary retirement is not a valid basis for imputing earned income after retirement unless the recipient proves that the payor retired in bad faith.

iv) Be aware that courts in other states have been especially willing to impute income to payors who retire at unreasonably early ages, especially if they continue to engage in activity similar to paid work.

a) *Stubblebine v. Stubblebine*, 22 Va. App. 703, 473 S.E.2d 72 (1996) (en banc) (imputing postretirement income to husband who retired at age 64 from the military to perform free work investigating paranormal phenomena and managing his girlfriend's psychiatric practice)

b) *See generally* Jane Massey Draper, Annotation, *Retirement of Husband as Change of Circumstances Warranting Modification of Divorce Decree—Early Retirement*, 36 A.L.R.6th 1 (2008).

v) North Carolina's bad-faith requirement may make it harder to impute upon early retirement. But unreasonable early retirement is a fact pattern in which courts may be especially likely to apply the rule, discussed above, that reckless or naive indifference to the support needs of a dependent is a form of bad faith.

vi) When retirement occurs at normal retirement age and is objectively reasonable on the facts, the general nationwide rule is that income should not be imputed. *See Pimm v. Pimm*, 601 So. 2d 534, 537 (Fla. 1992); *Bogan v. Bogan*, 60 S.W.3d 721 (Tenn. 2001); *Misinonile v. Misinonile*, 35 Conn. App. 228, 645 A.2d 1024 (1994). *See generally* Jane Massey Draper, Annotation, *Retirement of Husband as Change of*

Circumstances Warranting Modification of Divorce Decree—Conventional Retirement at 65 Years of Age or Older, 11 A.L.R.6th 125 (2006).

vii) If income is imputed to the retiring spouse, a drop in income that accompanies retirement is not a valid reason to modify alimony.

(c) Where income is not imputed, a valid reduction in the payor's earnings may or may not be a sufficient basis for modifying support.

i) Assuming that income is not imputed, a real drop in earnings exists.
ii) But North Carolina case law generally holds that a drop in earnings does not require a reduction in support. Rather, the court must consider all of the § 50-16.3A factors.

iii) In any given fact situation, it is possible that a decrease in the payor's earnings will be offset, partly or totally, by other factors, including most importantly the recipient's support needs.

iv) "The fact that the husband's salary or income has been reduced substantially does not automatically entitle him to a reduction in alimony or maintenance. If the husband is able to make the payments as originally ordered notwithstanding the reduction in his income, and the other facts of the case make it proper to continue the payments, the court may refuse to modify the decree." *Britt v. Britt*, 49 N.C. App. 463, 472, 271 S.E.2d 921, 927 (1980) (quoting M.L. Cross, Annotation, *Change in Financial Condition or Needs of Husband or Wife as Ground for Modification of Decree for Alimony or Maintenance*, 18 A.L.R.2d 10, 43 (1951 & Westlaw database updated weekly).

v) Note also that even where the payor's reasonable expenses exceed the payor's income, modification is still not required if the recipient likewise has more reasonable expenses than income.

vi) Overall, when the payor reasonably retires, the court must probably rebalance the § 50-16.3A factors in light of both parties' postretirement incomes. Support should be set so that the reasonable support needs of both spouses are met from the income available. If the available income is not sufficient to cover both parties' reasonable expenses, support should be set so that both parties share the shortfall.

vii) If the payor and recipient retire on materially different dates, as they will in at least some cases, the court may need to rebalance the factors twice, once after each spouse retires. If the parties are of similar ages, it is much more efficient to consider both parties' retirements in the same action.

(d) The most common result of retirement is a reduction in support, but not complete termination.

i) Most alimony awards paid by older payors are based upon a traditional theory of permanent alimony. Rehabilitative awards tend to last for shorter periods and terminate before retirement age.

ii) The traditional theory of permanent alimony assumes that the dependent spouse is entitled to remain at the marital standard of living until death or remarriage.

iii) Retirement limits the income of the supporting spouse, and therefore limits the amount of assistance that the supporting spouse can afford to provide.

iv) But unless substantial retirement benefits have been divided by QDRO, retirement will not reduce the dependent's needs to zero. In fact, the dependent spouse's retirement may well cause the dependent spouse's needs to increase. As long as the dependent spouse continues to have need, a complete termination of support is unlikely.

(e) Proposed Legislation

i) A bill addressing this issue passed the House during the 2011-2012 legislative session. It was supported by the North Carolina State Bar. The bill died in the Senate Judiciary Committee and has not been introduced again.

ii) The bill provided as follows:

> There is a rebuttable presumption that the voluntary retirement of the supporting spouse after the supporting spouse attains the age of 67 years is not an action in bad faith. Unless the presumption is rebutted, the voluntary retirement of the supporting spouse after the supporting spouse attains the age of 67 years constitutes a change of circumstances when

> determining whether to modify an alimony or postseparation support order. This subsection applies to any order of alimony, alimony pendente lite, or postseparation support, including any order entered pursuant to a repealed statute.

H.B. 706, § 2 (2011-2012 Sess.).

iii) Observation: If this bill had been enacted, it may not have had much practical effect upon modification of alimony.

a) When a spouse retires at age 67, bad faith is normally not an issue. Most courts recognize that there are valid, good-faith reasons to retire at normal retirement age.

b) The factor that limits reductions in alimony at normal retirement age is not the good faith or bad faith of the supporting spouse, but rather the ongoing support needs of the dependent spouse. Those needs are unlikely to drop upon retirement, and may well increase. The supporting spouse will have less income after retirement, but will still have some income (retirement benefits) from which a lesser amount of support can be paid. When the dependent spouse has need for support, and the supporting spouse can afford to pay something (although usually a smaller amount than before retirement), termination of alimony is unlikely.

c) As an exception, support may well be substantially reduced or terminated when the retirement of the supporting spouse causes the dependent spouse to receive substantial benefits under a QDRO or other deferred distribution of retirement benefits, and those benefits reduce or eliminate the need for support. But again, the receipt of these benefits has nothing to do with whether the supporting spouse retired in good or bad faith.

d) Because the real issue is the ongoing need of the dependent spouse and not imputation of income to the supporting spouse, the proposed statute may not have had much effect upon the number of alimony awards that are modified after retirement.

e) If interest remains in increasing the number of support awards that terminate upon retirement, it would probably be better to simply enact a presumption that alimony should be reduced or terminated upon retirement at normal retirement age. A presumption of

termination would not be good policy, because need for support often will remain after retirement. A presumption of reduction might be worth discussing, if there is evidence that the courts are not granting reductions in actual practice. *See* Olivia M. Hebenstreit, *Retiring Alimony at Retirement: A Proposal for Alimony Reform*, 33 Quinnipiac L. Rev. 781 (2015) (arguing for a presumption).

f) Upon good-faith retirement, the reduction in the supporting spouse's income, from a larger amount of salary to a smaller amount of retirement benefits, should normally justify a reduction in alimony. But it should not justify complete termination unless a QDRO or other deferred distribution of retirement benefits eliminates the dependent spouse's need for support.

(3) **Increases in the Recipient's Income**

(a) Upon the payor's retirement, the payor's income often drops.

(b) If a deferred distribution pension award becomes payable upon the payor's retirement, the payor's retirement may well *increase* the recipient's income.

(c) Be aware, however, that an increase in the recipient's income may be offset, partly or totally, by the decrease in income upon the recipient's retirement, if the recipient is employed and both parties retire at the same time.

(d) An increase in retirement benefits payable to the recipient, upon the payor's retirement, is clearly a change in circumstances that can reduce the amount of alimony payable, or even terminate it entirely. *See McGuire v. McGuire*, 10 Va. App. 248, 391 S.E.2d 344 (1990) (where wife's share of husband's retirement benefits was larger amount per month than his preretirement spousal support payments, trial court did not err in terminating support completely).

(4) **Advancing Age Generally**

(a) Advancing age, like retirement, is not itself a change in circumstances. The change in circumstances is the financial change that accompanies advancing age—most commonly a reduction in income.

(b) As with retirement, the first question is whether the reduction in income was a product of bad faith. If bad faith is present, there will be no reduction. Keep in mind that reckless or naive indifference to a dependent's support needs may be a form of bad faith. The payor's position will be strongest if the court finds that the reduction in income was objectively reasonable under the facts.

(c) Reductions in income before normal retirement age are clearly a setting in which there is a particular risk that the court will find bad faith.

(d) Even where there is no bad faith, the court must still balance the drop in the payor's income against other factors, including the recipient's support needs. In other states, this balance process has sometimes led to a reduction in support, but often has not led to complete termination. But courts disfavor retirement that is not reasonable under the circumstances, and the balancing test is probably more likely to favor the recipient when reductions in income occur before normal retirement age.

e. **Disability**

(1) Where disability is not accompanied by an actual loss of income—e.g., where disability benefits completely replace former earned income—there may be no financial change at all.

(2) Loss of income upon disability is a classic example if an involuntary drop in income. As long as the disability is genuine—which can be a material issue of fact in some cases—the courts generally do not impute income.

(3) But as noted throughout this outline, a genuine drop in the payor's earnings does not automatically translate into a modification of support. The court must rebalance the § 50-16.3A factors, taking into account any reduced income arising from disability, but also considering both parties' reasonable needs, including any increased medical expenses arising from the disability.

(4) If a need for support remains, it is possible that support will continue at a reduced level.

(5) There are no reported North Carolina decisions involving disability as a basis for reducing alimony. Decisions from other states often grant reductions, but outright terminations of support are rare.

(a) *Scott v. Scott*, 109 So. 3d 804, 804 (Fla. Dist. Ct. App. 2012) (error to reduce alimony from $700 per month to $500 per month; larger reduction required; "Former Husband is no longer employed or employable and has been determined to be totally disabled.").

(b) *Miles v. Miles*, 393 S.C. 111, 121, 711 S.E.2d 880, 885 (2011) (reduction in support required; husband "underwent a triple bypass, tore his rotator cuff, and was diagnosed with colon cancer, all of which required seven operations; as a result of his medical conditions, he is no longer employed and is totally disabled"; but not terminating support entirely, and remanding case to determine extent of the reduction).

(c) *Zemla v. Zemla*, 2010-Ohio-3938, ¶ 17, 2010 WL 3294284, at *4 (Ct. App.) (reducing spousal support where "[h]usband was occupationally disabled and unable to return to any work resembling his former employment").[1]

(d) *In re Marriage of Pagano*, 147 Or. App. 357, 362, 935 P.2d 1246, 1249 (1997) ("[T]he limitations on a party's earning capacity from physical and emotional disabilities are an appropriate consideration in establishing spousal support that is just and equitable.").

f. **Contributions from Other Persons**

(1) **General Rule**

(a) "When determining the amount and duration of alimony, the court, when relevant, shall consider the contribution of others to assess a dependent spouse's financial need." *Dodson v. Dodson*, 190 N.C. App. 412, 418, 660 S.E.2d 93, 97 (2008).

(b) "[I]n order for third-party income to substantially contribute to a dependent spouse's income, the additional income must be reliable . . . and the income must be used for household support. *Id.*, 660 S.E.2d at 98.

(c) Third-payments are not income when they are not reliable:

---

[1]Unlike most other states, Ohio gives full precedential value to all appellate cases, even those not published in book reporters. "All opinions of the courts of appeals issued after May 1, 2002 may be cited as legal authority and weighted as deemed appropriate by the courts *without regard to whether the opinion was published or in what form it was published*." Ohio Sup. Ct. R. for Reporting of Opinions 3.4 (emphasis added).

> Evidence presented revealed that plaintiff and her siblings have received gifts of money from their father each Christmas since the death of their mother. The amounts have varied, but in recent years single children have been given $2,000.00 and married children $1,000.00. On the Christmas following her divorce, plaintiff received a $2,000.00 credit towards the debt owed her father for her automobile. Plaintiff testified she had no way of knowing whether her father planned to continue his monetary gifts, and that she felt "sure that if he would have a medical problem, something that money was needed for something else, [the payments] could easily [be] stopped. . . ." At the time of hearing, plaintiff's father was 78 years old and in fair health, having undergone open heart surgery. No evidence indicated either that the payments to plaintiff from her father would continue or that the amount would necessarily remain constant. We therefore discern no error in the trial court's refusal to include the monetary Christmas gifts from plaintiff's father in calculating her income.

Fink v. Fink, 120 N.C. App. 412, 426, 462 S.E.2d 844, 854 (1995).

(2) **Type of Contributors**

(a) **Future Spouses**

> Plaintiff's present wife is a member of his current household, and she is the mother of all three children residing in that household. Under these circumstances, it was proper for the court to consider the substantial income received by a member of that household who shared in the responsibility for its support.

Wyatt v. Wyatt, 35 N.C. App. 650, 651-52, 242 S.E.2d 180, 181 (1978).

> Here, as in *Wyatt*, plaintiff and his present wife live together. The fact that the husband raised the issue of his present wife's income in *Wyatt*, unlike in this case where the former wife raised the issue, is not enough to dissuade our reliance in part on it.

Broughton v. Broughton, 58 N.C. App. 778, 786, 294 S.E.2d 772, 778 (1982).

(b) **Adult Children**

> In this case, the contributions by the parties' adult children may [constitute income], though it is unclear what amount each child used for his or her own needs, and what amount was used to supplement plaintiff's needs. This also hinges on a determination of the change in standard of living. If the court determines that the dependent spouse has raised her standard of living, these contributions by the adult children may be a means of supporting that increase.

Dodson v. Dodson, 190 N.C. App. 412, 418, 660 S.E.2d 93, 98 (2008).

(c) **Parents**

Another possible source of third-party contributions is the spouses' parents. Under *Dodson*, there would seem to be an argument that a reliable pattern of gifts from a parent can be treated as a financial resource for purposes of alimony. *Cf. State v. Williams*, 179 N.C. App. 838, 635 S.E.2d 495 (2006) (gifts from a parent were income for child support).

g. **Termination of Child Support**

Termination of child support may be a change in circumstances for purposes of modifying alimony. Termination itself is probably an anticipated change, but the effect of termination upon the alimony recipient's financial condition is often unforeseeable:

> [W]hile it was foreseeable that child support payments would terminate upon Sarah reaching the age of 18, it was not necessarily foreseeable that plaintiff-wife's living expenses would be double what they were at the time that the original PSS award was entered; here, the trial court found it reasonable that plaintiff-wife continue to live in the same house in which she had been living. However, if plaintiff-wife had moved from the family house to a less expensive residence, her housing expenses might not have increased substantially enough to warrant a modification of the award. Thus, the extent to which plaintiff-wife's reasonable expenses have changed was not necessarily foreseeable at the time that the 2002 PSS order was entered.

Harris v. Harris, 188 N.C. App. 477, 484, 656 S.E.2d 316, 320 (2008).

h. **Remarriage of the Payor**

The payor's remarriage is generally not a valid basis for reducing alimony. "Payment of alimony may not be avoided merely because it has become burdensome, or because the husband has remarried and voluntarily assumed additional obligations." *Sayland v. Sayland*, 267 N.C. 378, 383, 148 S.E.2d 218, 222 (1966).

i. **Discharge in Bankruptcy**

(a) "We join these courts [from other states] and hold that a discharge in bankruptcy can constitute a 'change in circumstances' warranting reconsideration or modification of an alimony or child support award." *Sloan v. Sloan*, 151 N.C. App. 399, 407, 566 S.E.2d 97, 102 (2002).

(b) In particular, if the trial court's division of marital property is materially frustrated because a spouse declares bankruptcy, that spouse's discharge may be a material change in circumstances justifying modification of alimony. *Sloan*.

(c) Modification of alimony after discharge in bankruptcy is less important under post-2005 bankruptcy law, which prevents discharge of property division obligations in Chapter 7 cases. 11 U.S.C. § 5233(a)(15). But property division debts remain dischargeable in Chapter 13 cases, *see id.* § 1328(a); *see generally* 3 Brett R. Turner, *Equitable Distribution of Property* § 9:22 (3d ed. Supp. 2014), so a need for modification may remain in some situations.

D. Findings of Fact

1. When the trial court decides a motion to modify, it must make findings of fact identifying the reasons why a substantial change in circumstances is or is not present. *See, e.g.*, *Dodson v. Dodson*, 190 N.C. App. 412, 416, 660 S.E.2d 93, 96 (2008) ("[T]he trial court's failure to make findings of fact regarding plaintiff's reasonable current financial needs and expenses and the ratio of those needs and expenses to her income constituted error.").

2. If the court finds a substantial change in circumstances, it must make findings of fact supporting both the amount and duration of the new award. "Although we conclude that the trial court in this case made sufficient findings to support the amount of the alimony award under N.C. Gen.Stat. § 50-16.3A(b), we remand the alimony portion of the order to the trial court to make further findings of fact

explaining its reasoning for the duration of the alimony award and its manner of payment as required by N.C. Gen.Stat. § 50-16.3A(c)." *Hudson v. Hudson*, 193 N.C. App. 454, 667 S.E.2d 340, 2008 WL 4630520 (2008) (unpublished).

E. Termination

1. Modification Versus Termination

a. Modification is governed by G.S. § 50-16.9(a). Whether to modify depends upon whether changed circumstances are present. The amount of modification is left to the trial court's discretion after a full review of the statutory alimony factors.

b. Termination is governed by G.S. § 50-16.9(b). When the grounds set forth in this statute are met, alimony terminates automatically, with no trial discretion and no review of the statutory factors.

c. In a termination case, the trial court does have its usual discretion to determine what evidence is and is not credible for purposes of determining whether grounds to terminate are present. If grounds are present, support must be terminated.

(1) Example: If one witness testifies that the dependent spouse is staying overnight with her boyfriend seven nights per week, and another witness testifies that the dependent spouse never stayed overnight with her boyfriend, the trial court has discretion to determine which witness is telling the truth.

(2) Example: If the court finds that the first witness is credible, and that the wife is staying overnight with her boyfriend seven nights per week, the court must terminate support. It has no discretion to do otherwise.

2. Statutory Text

> If a dependent spouse who is receiving postseparation support or alimony from a supporting spouse under a judgment or order of a court of this State remarries or engages in cohabitation, the postseparation support or alimony shall terminate. Postseparation 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.

G.S. § 50-16.9(b).

3. **"[U]nder a judgment or order of a court"**

a. Section 50-16.9(b) applies only to alimony paid "under a judgment or order of a court." If support is being paid only under an agreement, the statute does not apply and support does not terminate upon cohabitation. *See Patterson v. Patterson*, No. COA14-830, 2015 WL 4082056 (N.C. Ct. App. July 7, 2015) (agreement that failed to state that alimony stops upon cohabitation did not violate public policy, and alimony due under the agreement continued despite cohabitation).

b. Remember that any agreement that is presented to the court *merges* into the judgment, and becomes subject to the rules governing modification and termination of court-ordered alimony. *See supra* Part III.

4. **Remarriage**

a. Remarriage is normally easy to identify. If the dependent spouse enters into a relationship that constitutes a valid marriage, alimony automatically terminates. In most states, a valid marriage will require a marriage license.

b. The requirements for a valid marriage turn upon the law of the jurisdiction in which the remarriage takes place. *Harris v. Harris*, 257 N.C. 416, 126 S.E.2d 83 (1962)

c. In particular, support *does* terminate if the dependent spouse enters into a common-law marriage in a state that recognizes this form of marriage. *Harris*. In the United States, common-law marriages are recognized in Alabama, Colorado, Iowa, Kansas, Montana, Rhode Island, South Carolina, Texas, Utah, and the District of Columbia. *See* https://en.wikipedia.org/wiki/Common-law_marriage_in_the_United_States.

d. Requirements for a valid common-law marriage vary, but most states require both a common residence and intent to be married, as shown through a couple publicly holding themselves out as married. *A valid common-law marriage requires much more than proof of cohabitation.*

5. **Cohabitation**

a. The cohabitation language was added in 1995, and it does not apply to "future motions in the cause seeking to modify orders or judgments in effect on October 1, 1995." 1995 N.C. Sess. Laws ch. 316, § 12.

b. Support terminates if the dependent spouse cohabits with anyone—including the supporting spouse. *Schultz v. Schultz*, 107 N.C. App. 366, 420 S.E.2d 186 (1992).

c. Cohabitation does not occur until a court finds that it is occurring. The supporting spouse therefore cannot stop paying unilaterally:

> In cases in which the dependant spouse receives alimony or postseparation support pursuant to a judgment or court order, cohabitation or remarriage terminates that spouse's right to receive payments. G.S. § 50-16.1. This is not to say that a supporting spouse can automatically cease paying the dependant spouse without a court order. The supporting spouse must first file a motion with the trial court, notify the dependant spouse, and obtain a court order authorizing termination of payments as of a date certain.

Williamson v. Williamson, 142 N.C. App. 702, 705, 543 S.E.2d 897, 898 (2001).

d. Note that the statute on its face applies equally to heterosexual and homosexual cohabitation. Cohabitation does not depend in any way upon the sexual preference of the dependent spouse.

e. For cases in which the statute applies, the courts have adopted a two-pronged definition of cohabitation:

> Our courts use one of two methods to determine whether the parties have resumed their marital relationship, depending on whether the parties present conflicting evidence about the relationship. *See Schultz v. Schultz*, 107 N.C.App. 366, 420 S.E.2d 186 (1992), *disc. review denied*, 333 N.C. 347, 426 S.E.2d 710 (1993). In the first test, developed from *Adamee*, where there is objective evidence, that is not conflicting, that the parties have held themselves out as man and wife, the court does not consider the subjective intent of the parties. *Schultz*, 107 N.C.App. at 373, 420 S.E.2d at 190. The other test grew out of the opinion in *Hand v. Hand*, 46 N.C.App. 82, 264 S.E.2d 597, *disc. rev. denied*, 300 N.C. 556, 270 S.E.2d 107 (1980), and addresses cases where the objective evidence of

cohabitation is conflicting and thus allows for an evaluation of the parties' subjective intent. *Schultz*, 107 N.C.App. at 371, 420 S.E.2d at 189.

Oakley v. Oakley, 165 N.C. App. 859, 863, 599 S.E.2d 925, 928 (2004).

f. First Prong: Objective Test

(1) If there is undisputed evidence that objectively establishes cohabitation, the court is required to find cohabitation without regard to the subjective intent of the parties.

(2) Living together by itself is not sufficient proof of cohabitation. There must also be proof that the parties assumed the normal rights and duties of married persons:

> Plaintiff's argument focuses on statutory language from the first sentence, "dwelling together continuously and habitually." Plaintiff discounts that the statute's second sentence provides that cohabitation is evidenced by certain acts. . . . N.C. Gen.Stat. § 50-16.9(b) clearly says that 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." N.C. Gen.Stat. § 50-16.9(b). In order for the trial court to conclude that cohabitation has occurred, it should make findings that the type of acts included in the statute were present.

Long v. Long, 160 N.C. App. 664, 667, 588 S.E.2d 1, 3 (2003).

(3) Cases Finding Cohabitation

(a) *Schultz v. Schultz*, 107 N.C. App. 366, 373, 420 S.E.2d 186, 190 (1992):

> [T]he undisputed evidence presented to the trial court showed, among other things, that on his return, defendant kept his automobile at the residence; lived in the residence continuously; moved his belongings into the house; paid the utility bills and other joint bills; mowed the lawn, and kept his animals at the house. The evidence further showed that after defendant's return, plaintiff did defendant's laundry; went shopping with him; dined at restaurants with him; worked in the yard with him; filed a joint tax return with him and engaged in sexual relations with the defendant about once

a week for at least two or three months after his return. We conclude that this case involves a question of law arising from undisputed facts; consequently, it falls within the first line of cases represented by *Adamee*. When the parties objectively have held themselves out as man and wife and the evidence is not conflicting, we need not consider the subjective intent of the parties.

(b) *Rehm v. Rehm*, 104 N.C. App. 490, 409 S.E.2d 723 (1991):

i) The wife had an exclusive sexual relationship with another man, and he stayed in her home "as many as five times per week." *Id.* at 492, 409 S.E.2d at 724. They took trips together lasting more than one day, and often included the wife's child.

ii) The trial court found cohabitation and the Court of Appeals affirmed.

iii) *Rehm* construed a separation agreement that provided that alimony would terminate "if the wife cohabits with someone of the opposite sex." *Id.* at 491, 409 S.E.2d at 723.

iv) There was not much evidence of assumption of common duties of married persons in *Rehm.* The case may be some evidence that regular living together (five nights per week) plus a sexual relationship is alone sufficient to meet the objective test.

(4) Cases Finding No Cohabitation

(a) *Russo v. Russo*, 217 N.C. App. 400, 720 S.E.2d 28, 2011 WL 6035580 (2011) (unpublished)

i) "[W]hile Ms. Russo and Mr. Fisher had engaged in a primarily exclusive sexual relationship from March 2009 to June 2010 and Mr. Fisher had stayed overnight at Ms. Russo's home two to three nights per week during October and November 2009, he had spent the night with Ms. Russo on an infrequent basis during the remainder of the relationship. The trial court further found that during the relationship, Mr. Fisher continued to live with his parents and since August 2009 (after he had worked for three to four months out of town), he had spent the majority of his time at his parents' home. Mr. Fisher kept his clothes at his parents' house, he showered there, and he ate his meals there." *Id.*, 2011 WL 6035580, at *1.

ii) "[N]o one had observed Ms. Russo and Mr. Fisher showing any display of love and affection towards each other. According to the trial court's findings, the two did not exchange gifts or purchase items without being reimbursed for money spent. Ms. Russo and Mr. Fisher did not share bills or financial obligations and did not have a joint checking account. Mr. Fisher did not have a key to Ms. Russo's residence or his own key to Ms. Russo's car. When other people were present at Ms. Russo's house, Mr. Fisher would, at times, call Ms. Russo before coming over, and he would knock or ring the doorbell before entering." *Id.*

iii) The trial court found no cohabitation, and the Court of Appeals affirmed, expressly stating that it did so under the objective prong of the test.

iv) The facts showed two to three overnights per week for two months, and that was the peak of the curve. Overnights were "infrequent" during other months. *Id.* With such a low level of dwelling together, the husband needed strong evidence that wife and her boyfriend shared marital obligations, but the evidence of shared obligations was sparse. It is extremely difficult to prove cohabitation when the evidence shows less than two overnights per week.

(b) *Smallwood v. Smallwood*, ___ N.C. App. ___, 742 S.E.2d 814 (2013)

i) "[T]he trial court found, on the one hand, that: (1) plaintiff and Robinson have been in a sexual relationship since February 2011, and Robinson spends the night at her house five to seven nights a week; (2) Robinson has a key to plaintiff's house and has occasionally used her garage door opener; (3) Robinson has helped plaintiff prepare meals, eaten at her house, and helped clean up after the meals in which he 'participated'; (4) Robinson and plaintiff go out to eat several times a week, and Robinson sometimes pays for the meal; (5) Robinson has helped take care of plaintiff's dogs; (6) Robinson, on one occasion, helped fix the fence in plaintiff's backyard; (7) Robinson has mowed plaintiff's lawn on occasions when she has not had the time to do so; (8) Robinson has collected plaintiff's mail and taken out the trash and recycling on occasion; (9) Robinson occasionally visits plaintiff at her place of work; (10) Robinson and plaintiff attend church together; (11) Robinson, plaintiff, and her son went on one trip together; and (12) Robinson and plaintiff kiss each other goodbye when they leave each other's company." *Id.* at ___, 742 S.E.2d at 819.

ii) "On the other hand, the court found that: (1) Robinson maintains his own residence; (2) Robinson does not keep clothes, a toothbrush, or medicine at plaintiff's residence; (3) although Robinson has a key to plaintiff's house, she has also given keys to her mother and a female friend; (4) although plaintiff allows Robinson to use her garage door opener on occasion, he does not keep one and does not use one on a regular basis; (5) Robinson does not pay any expenses for plaintiff's residence; (6) plaintiff and Robinson do not exchange gifts with each other; (7) Robinson does not shower or bathe at plaintiff's residence; (8) he often brings his own food to plaintiff's house due to dietary restrictions; (9) plaintiff does her own laundry; (10) plaintiff, not Robinson, vacuums her house; (11) although Robinson went with plaintiff and her son on a trip, it was with a 'larger group' participating in a sporting event; and (12) Robinson and plaintiff are not engaged to be married and do not refer to each other as husband and wife." *Id.*

iii) The trial court found no cohabitation, and the Court of Appeals affirmed. "We conclude that these findings are sufficient to support the trial court's conclusion that plaintiff and Robinson have not voluntarily assumed those rights, duties, and obligations which are usually manifested by married people. While the court did determine that plaintiff and Robinson have engaged in some domestic activities, it did not find an assumption of marital rights and duties extending beyond those found in an intimate friendship—such as, for example, joint financial obligations, sharing of a home, combining of finances, pooling of resources, or consistent merging of families." *Id.*

iv) *Smallwood* is an odd case. Five to seven overnights per week is normally strong evidence of cohabitation. Yet the trial court found that the boyfriend did not keep clothes or a toothbrush or medicine at the wife's house, and did not bathe or shower there. It is difficult to see how one could spend five to seven nights per week in a home without keeping clothes there or bathing or showering there, and one is led to wonder whether the five- to seven-night-per-week number might have been overstated. To the extent that there were five to seven overnights per week, they were clearly not accompanied by the sort of actions that would normally accompany overnights of that frequency.

g. Second Prong: Subjective Test

(1) When the evidence does not objectively show cohabitation, the court can still find cohabitation based upon the subjective intent of the parties.

(2) Because the state of mind of the parties is almost always a disputed material issue of fact, summary judgment is generally not appropriate under the subjective test. *Bird v. Bird*, 363 N.C. 774, 783, 688 S.E.2d 420, 425 (2010); *Craddock v. Craddock*, 188 N.C. App. 806, 813, 656 S.E.2d 716, 720 (2008).

(3) Cases Potentially Finding Cohabitation

(a) *Bird v. Bird*, 363 N.C. 774, 783, 688 S.E.2d 420, 425 (2010), *aff'd*, 363 N.C. 774, 688 S.E.2d 420 (2010)

i) Husband's private investigator submitted an affidavit stating that wife and her boyfriend spent 11 consecutive nights together. They commonly drove each other's cars, and the boyfriend allowed workers to enter the wife's house and supervised them while they were there. The wife and her boyfriend were seen going out to dinner, walking the wife's dog, and unloading vehicles together. The affidavit was sufficient to avoid summary judgment that the wife was not cohabiting, and a trial court decision granting summary judgment for the wife was reversed.

ii) But the wife submitted an affidavit from her boyfriend, stating that he stayed with the wife only occasionally, did not move property into the wife's home, did not share finances with the wife, and did not cohabit with her. This affidavit was sufficient to avoid summary judgment that the wife was cohabiting, and the case was remanded for trial.

iii) The private investigator's affidavit in *Bird*, if credible, was probably sufficient to show cohabitation. The problem was that the credibility of the affidavit was a material issue of fact, because the investigator's affidavit was contradicted by the boyfriend's affidavit. Conflicting testimony is common in cohabitation cases; that is why they are often not good candidates for summary judgment.

(b) *Craddock v. Craddock*, 188 N.C. App. 806, 656 S.E.2d 716 (2008)

i) "[T]he undisputed facts show that plaintiff and Picarsic maintained a mutually exclusive relationship from September 2002 until the time of the summary judgment hearing, nearly five years later. During their relationship, plaintiff and Picarsic went out to eat dinner or cooked meals together on the weekends, went to movies, traveled together on

overnight vacations, spent holidays together, exchanged gifts, and engaged in monogamous sexual activity." *Id.* at 811-12, 656 S.E.2d at 720.

ii) But "[c]onflicting evidence was presented regarding (1) how many times per week Picarsic stayed overnight at plaintiff's residence; (2) whether Picarsic permanently kept his clothes at plaintiff's residence; and (3) to what extent Picarsic used plaintiff's residence as his 'base of operations' for his real estate appraisal business." *Id.* at 812, 656 S.E.2d at 720.

iii) Summary judgment in favor of the wife was reversed, and the case was remanded for trial.

iv) The evidence of cohabitation in *Craddock* was strong, but a denial of that evidence, especially as to the number of overnights per week, was sufficient to create a material issue of fact.

(4) Cases Finding No Cohabitation

(a) *Oakley v. Oakley*, 165 N.C. App. 859, 599 S.E.2d 925 (2004)

i) "As defendant in the instant case presented no evidence of activities beyond plaintiff's and Smith's sexual relationship and their occasional trips and dates, we see no assumption of any 'marital rights, duties, and obligations which are usually manifested by married people,' such as those outlined in *Schultz.* Thus, the trial court did not err in concluding that plaintiff had not cohabited. " *Id.* at 863, 599 S.E.2d at 928.

ii) The "occasional trips and dates" in *Oakley*, *id.*, were much less than the five nights per week of cohabitation in *Rehm.*

iii) Sex alone is therefore clearly not sufficient to show cohabitation under any test. In addition to sex, there must also be some minimum amount of living together. Unless there is a very large amount of living together (*e.g., Rehm*), there must also probably be some evidence of sharing the duties and obligations of married persons, such a sharing chores, rearing children together, or attending social functions together. The precise volume of these activities that is necessary remains to be determined by future cases.

iv) "[I]n none of our appellate cases has the Court held that the existence of a sexual relationship, without more, was sufficient to show cohabitation. Rather, the Court has looked for *additional* indicia of the 'voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people.' These have included evidence that the couple shared in day-to-day activities and responsibilities." *Bird v. Bird*, 193 N.C. App. 123, 127, 668 S.E.2d 39, 42 (2008), *aff'd*, 363 N.C. 774, 688 S.E.2d 420 (2010).

h. The North Carolina cases have only begun to consider the wide variety of fact situations presented in cohabitation cases. But North Carolina's definition of cohabitation is very similar to definitions used in other states, and this is an issue on which out-of-state law can be persuasively cited. For research starting points, see the following:

(1) Suzanne Reynolds, *Lee's North Carolina Family Law* § 9.85 (5th ed. 2002) (discussing a fair number of out-of-state cases);

(2) Diane M. Allen, Annotation, *Divorced or Separated Spouse's Living with Member of Opposite Sex as Affecting Other Spouse's Obligation of Alimony or Support Under Separation Agreement*, 47 A.L.R.4th 38 (1986 & Westlaw database updated weekly)

(3) Annotation, *Woman's Subsequent Sexual Relations or Misconduct as Warranting, Alone or with Other Circumstances, Modification of Alimony Decree*, 98 A.L.R.3d 453 (1980 & Westlaw database updated weekly)

(4) West Key Number: Divorce 609(2), "Sexual Relations, Cohabitation or Remarriage"

i. Extremely Rough, Very General Guidelines for When Cohabitation Will Result in Termination of Alimony

(1) Two overnights per week or less: Cohabitation is unlikely. Example: *Russo*. A successful argument for cohabitation would require very strong proof of sharing of marital duties and acting like married persons.

(2) Three to five overnights per week: This is a gray area, in which different cases reach different results. The degree to which marital duties were shared is a crucial fact, and is probably more important than the raw number of overnights. Successful arguments for cohabitation will tend to involve larger amounts of sharing.

(3) More than five overnights per week: This level of overnights is strong evidence of cohabitation. Example: *Rehm*, where five overnights per week was held sufficient to terminate support without much evidence of sharing of marital duties. But see *Smallwood*, where five to seven overnights were not sufficient—but they were very unusual overnights, with no storage of clothing at the wife's residence and no bathing or showering there. In many of these cases, it will take significant evidence that marital duties were not shared to convince a court to find no cohabitation.

(4) *Smallwood* might be some evidence that North Carolina is reluctant to find cohabitation without clear facts. *Rehm* is to the contrary, but *Rehm* was a prestatute case. Also, it is very important that the trial courts in both cases were affirmed.

(5) Remember to measure overnights as a long-term average. *Russo* featured 2-3 overnights per week for two months, and it is easy to see how an attorney who wants to believe in his or her own case could see two to three overnights as shading into the gray area. But there were only infrequent overnights outside those two months; the long-term average was certainly less than two. *See also Bird*, where 11 consecutive overnights looked strong, but the long-term average may well have been materially weaker. Cohabitation is a conclusion based upon a *long-term* course of conduct; it is usually not proven by a few weeks of activity.

j. If you cannot prove cohabitation as a ground for termination, remember that you may still be able to prove grounds for modification. If the dependent spouse is not cohabiting with a companion, but still receives support from that companion, the additional support may be a financial resource that justifies downward modification. *See* Reynolds, *supra*, §§ 9.78-.79. A new relationship that has an economic impact may be a ground for modification, even if it not a ground for termination.

6. **Death**

Postseparation support or alimony shall terminate upon the death of either the supporting or the dependent spouse.

G.S. § 50-16.9(b).

VI. *How* Can Alimony Be Modified?

A. General Rule: Unlimited Changes

1. G.S. § 50-16.9(a) states only that "[a]n order of a court of this State for alimony or postseparation support . . . may be modified." The word "modified" is not further defined.

2. Modify: "1. To make somewhat different; to make small changes to (something) by way of improvement, suitability, or effectiveness . . . 2. To make more moderate or less sweeping; to reduce in degree or extent; to limit, qualify, or moderate." *Black's Law Dictionary* "modify" (10th ed. 2014).

3. To modify is clearly "[t]o make . . . different," *id.*, but nothing in the common definition limits in any way the nature of the change.

4. The common meaning of "modify" therefore suggests that the court can change any part of any alimony award.

B. Termination as Modification

1. "[T]he power to modify includes, in a proper case, power to terminate the award absolutely." *Sayland v. Sayland*, 267 N.C. 378, 383, 148 S.E.2d 218, 222 (1966) (quoting 2A Nelson, *Divorce and Annulment* § 17.01 (2d ed. 1961)).

2. *See also Self v. Self*, 93 N.C. App. 323, 325, 377 S.E.2d 800, 801 (1989) ("Th[e] power to modify includes the power to terminate alimony altogether.").

C. Duration

1. The court clearly has the power to modify the duration of an alimony award in at least one respect; it can terminate the award, thereby reducing its duration to zero. See the preceding subsection of this outline.

2. Beyond the power to terminate, the North Carolina published appellate cases do not address the court's power to modify the duration of alimony.

3. *Hudson v. Hudson*, 193 N.C. App. 454, 667 S.E.2d 340, 2008 WL 4630520 (2008) (unpublished).

a. The court initially awarded the wife alimony for 10 years. The husband filed a petition to reduce support. The trial court reduced the amount, and left the duration constant. The Court of Appeals held that the trial court made sufficient findings of fact as to amount (although those findings were ultimately reversed on the merits). The court held that the trial court had not made sufficient findings as to the duration of support, and it remanded the case with instructions to make those findings.

b. If the trial court were powerless to modify the duration of support, the lower court's failure to make findings as to the duration of the award would have been harmless error. By finding that the failure to make findings on the duration of the award was reversible error, *Hudson* necessarily suggests that the duration of the award was modifiable.

4. A strong majority of courts in other states allow the duration of an alimony award to be modified. *See* Russell G. Donaldson, Annotation, *Power to Modify Spousal Support Award for a Limited Term, Issued in Conjunction with Divorce, So as to Extend the Term or Make the Award*, 62 A.L.R.4th 180 (1988); 2 Suzanne Reynolds, *Lee's North Carolina Family Law* § 9.81 (5th ed. 2002) (discussing some of the cases).

5. Reynolds claims that only a "slim majority" of states allow modification of the duration of support without an express reservation in the original order. 2 Reynolds, § 9.81. The present author disagrees. Reynolds cites §§ 5 and 8 of the Annotation cited above, but many of the states cited in § 5 of that Annotation have divided cases, or cases which the author reads to indirectly require a reservation.

6. It is also important to note that some states do not have a strong modification statute at all, so that the court's entire power to modify alimony depends upon a reservation. In North Carolina, by contrast, § 50-16.9(a) is a strong grant of authority to modify any alimony award upon a showing of changed circumstances—and the nature of the modification is not qualified in any way. There is no basis for holding that North Carolina law requires any form of reservation of jurisdiction to modify the duration of an alimony award.

7. In the majority of states that permit modification of the duration of alimony, the duration can be changed in either direction.

a. Cases Extending the Duration

(1) *In re Marriage of Carpel*, 232 Ill. App. 3d 806, 830, 597 N.E.2d 847, 864 (1992) ("The *gross* disparity in Susan and Ronald's potential incomes and the

apparently drastic change in Susan's lifestyle support her claim that her maintenance should be extended and increased." (court's emphasis)).

(2) *Deeds v. Deeds*, 115 N.M. 192, 848 P.2d 1119 (Ct. App. 1993) (trial court erred by holding that it lacked jurisdiction to extend term of support).

(3) *Wood v. Wood*, 190 W. Va. 445, 455-56, 438 S.E.2d 788, 798-99 (1993) ("Circumstances between the parties can substantially change once rehabilitative alimony is awarded, and where such change of circumstances justify an award of rehabilitative alimony, the award can be extended or modified to a permanent alimony award.").

b. Cases Shortening the Duration

(1) *In re Marriage of Francis*, 442 N.W.2d 59, 64 (Iowa 1989) ("Because self-sufficiency is the goal of rehabilitative alimony, the duration of such an award may be *limited* or extended depending on the realistic needs of the economically dependent spouse, tempered by the goal of facilitating the economic independence of the ex-spouses." (emphasis added)).

(2) *Harris v. Harris*, No. M200800601COAR3CV, 2009 WL 416007, at *1 (Tenn. Ct. App. Feb. 18, 2009) (unpublished) (affirming a trial court decision that "reduced the husband's transitional alimony payments and shortened the duration of the alimony by one year").

c. The power to extend the duration of a defined duration award includes the power to extend the duration indefinitely, thereby converting the award into permanent alimony.

(1) *Wood v. Wood*, 190 W. Va. 445, 455-56, 438 S.E.2d 788, 798-99 (1993) ("Circumstances between the parties can substantially change once rehabilitative alimony is awarded, and where such change of circumstances justify an award of rehabilitative alimony, the award can be extended or modified to a permanent alimony award.").

(2) *Fobes v. Fobes*, 124 Wis. 2d 72, 368 N.W.2d 643 (1985) (trial court properly converted time-limited contractual alimony into permanent alimony).

d. Remember that a motion to extend the duration of defined-duration alimony must be filed *before the defined period ends.* *See* Part IV(C)(3), *supra.*

8. While the duration of alimony can be extended, it cannot be extended lightly.

a. To extend the duration of alimony, the spouse seeking to extend it must prove a change in circumstances that requires a longer duration.

(1) All defined-duration alimony award are not created alike. Rather, they can be made for very different reasons. The reasons for the award are crucial to determining the basis for modification. (Stated differently: the modifying court is likely to give considerable weight to the theory of alimony applied when the initial award was made.)

(2) If defined-duration alimony was awarded because the marriage was too short to generate a right to permanent support, it seems unlikely that a change in circumstances could be proven. The duration of the marriage is a fixed fact.

(3) If defined-duration alimony was awarded to bridge the gap between the time of divorce and the expected future maturing of retirement benefits, a change in duration would normally have to relate to the retirement benefits.

(a) For example, if the relevant pension plan unexpectedly goes bankrupt, that might be a reason to extend the duration—although the bankruptcy might also effect the payor's ability to pay if both spouses receive benefits from the same plan.

(b) An increase in the recipient's needs, beyond the level of the retirement benefits, might justify conversion to permanent alimony, but the amount of support would be seriously reduced, as support would be based upon the difference between the retirement benefits and the recipient's needs.

(4) If the court awarded rehabilitative alimony—defined-duration alimony intended to give a spouse time to obtain training and find employment—the duration can be extended if training and finding employment take longer than expected, AND the additional time was not a result of the moving spouse's actions.

(5) This situation is a large part of the reason why courts, when making a defined-duration alimony award, are required to make findings on the reasoning behind the limited-duration award. G.S. § 50-16.3A(c). Upon modification, the court must revisit those reasons and see whether any unforeseen substantial change in circumstances changes the effect of the original court's reasoning.

(6) When the original court awards rehabilitative alimony, its findings constitute what courts in other states call a "rehabilitative plan"—a series of steps that the recipient can take, and that the court finds will improve the recipient's earning capacity. *See, e.g.*, *Lovell v. Lovell*, 14 So. 3d 1111, 1115 (Fla. Dist. Ct. App. 2009) ("Rehabilitative alimony, however, cannot be awarded absent a rehabilitative plan."). If these steps are taken, and fail through no fault of the recipient, the duration of alimony can be extended. "[M]odification of rehabilitative alimony may become a necessity where the dependent spouse is unable to meet the rehabilitative plan." *Wood v. Wood*, 190 W. Va. 445, 455, 438 S.E.2d 788, 798 (1993).

(7) Specified, detailed findings as to the reasons for the original defined-duration award make future modification cases much easier to decide. It is generally in the interests of both spouses that the basis for a defined-duration award be stated as explicitly as possible in the original findings.

(8) Example: At the time of divorce, the wife is a first-year law student. The court awards her three years of alimony so that she can complete law school and find a job as an attorney.

(a) Assume that the wife is injured in an automobile accident that was not her fault and misses a year of school. This is a classic unforeseen material change in circumstances, and the court should probably extend the wife's alimony by another year.

(b) Assume that the wife actually receives a large inheritance after her second year of law school and no longer needs financial assistance to pay tuition and living expenses. There is no more need for support, and the court may immediately terminate the award.

(c) Assume that the wife's father leaves her a large inheritance after her second year of law school. The amount of the inheritance is easily sufficient to pay her tuition and living expenses, but the estate is tied up in probate for the next six months. The court may shorten the duration of the award, so that it terminates when the probate process is expected to end. (If third parties contest the will and probate takes longer than six months, that would be a valid reason to extend the duration of the award.)

(d) Assume that the wife decides she would rather live off alimony, drops out of law school, and moves that the court extend her alimony indefinitely. This is a classic example of a change in circumstances that is attributable to the wife's own conduct. The court should refuse to

extend the term of the award. Indeed, if the wife is failing to do anything to improve her future earnings, that may be a sufficient change in circumstances to shorten the duration or even terminate the award.

(e) Assume that the wife diligently completes law school, but has difficulty finding a position as an attorney—a not-uncommon result in the present market. This is a very fact-sensitive situation. The court must determine whether the wife has made a good-faith effort to seek employment, what legal jobs are likely to be available to her in the future, and when and to what extent she should be seeking nonlegal employment. There are a thousand shades of grey in this situation, and the result probably depends greatly upon the trial court's discretion.

b. To convert a defined-duration award into a permanent award, the moving spouse must present evidence of a change in circumstances that invalidates the original reason for awarding defined-duration support.

(1) Many of these cases involve fact patterns on the borderline between permanent and defined-duration alimony.

(2) In particular, it is difficult to predict the future earning capacity of long-term homemakers with little recent job experience. If they return to school, their future income depends upon their grades, which are not reliably predictable in advance. If they seek employment directly, there is often an element of randomness in the job market.

(3) If the court awards defined-duration alimony in this sort of situation, and the recipient is not able, through no fault of her own, to find permanent employment at the level of income expected, AND the facts show no reasonable chance that she will do so, the award can be converted to permanent support.

(4) Again, modification cases in this situation are much easier for both parties to litigate if the original award sets forth exactly why the award is time-limited and what future increases in income the court expects will occur.

(5) Keep in mind that the court can modify both duration and amount. If the recipient makes a good-faith effort to increase her earnings, but achieves a smaller increase than the court originally expected, and no further increase is possible, the equitable result may be to convert the award to permanent alimony, but to reduce the amount.

VII. Contempt

A. Court Orders

1. Contempt is obviously a proper remedy for violation of a court order. *E.g., Cox v. Cox*, 92 N.C. App. 702, 376 S.E.2d 13 (1989); *Shumaker v. Shumaker*, 137 N.C. App. 72, 527 S.E.2d 55 (2000) (alimony pendente lite); *Martin v. Martin*, 202 N.C. App. 372, 690 S.E.2d 767 (2010) (consent order).

2. The court may fix the amount of unpaid alimony under a court order, and order a party to pay that amount, even before it makes a formal finding of contempt. *Swain v. Swain*, 179 N.C. App. 795, 801, 635 S.E.2d 504, 508 (2006).

B. Merged Agreements

1. An agreement which is presented to the court merges into the divorce decree. *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983).

2. Therefore, a merged agreement is enforceable by contempt. "[S]eparation agreements approved by the court and incorporated into a judgment are treated as court orders and are "enforceable by the contempt powers of the court." *Oakley v. Oakley*, 165 N.C. App. 859, 864, 599 S.E.2d 925, 928 (2004), *quoting Walters*, 307 N.C. at 386, 298 S.E.2d at 342. "A court approved separation agreement is enforceable by the contempt power of the court." *Cavenaugh v. Cavenaugh*, 317 N.C. 652, 659, 347 S.E.2d 19, 24 (1986).

C. Unmerged Agreements

1. An agreement which is not presented to the court does not merge into the divorce decree. *Walters.*

2. Therefore, an unmerged agreement is not a court order, and it cannot be enforced by contempt. "The court's power to enforce an agreement through contempt proceedings extends only to those provisions submitted to the court for approval." *Young v. Young*, 224 N.C. App. 388, 395, 736 S.E.2d 538, 545 (2012). "A separation agreement which is merely approved by the court does not assume the status of a judicial decree. It exists only as a contract between the parties, and is therefore not enforceable by contempt proceedings." *Cobb v. Cobb*, 54 N.C. App. 230, 232, 282 S.E.2d 591, 592 (1981).

3. An unmerged agreement can be enforced by:

a. Specific performance, *e.g. Condellone v. Condellone*, 129 N.C. App. 675, 501 S.E.2d 690 (1998), or

b. An action for damages for breach of contract. *E.g.*, *Reeder v. Carter*, 740 S.E.2d 913, 918 (N.C. Ct. App. 2013); *Reis v. Hoots*, 131 N.C. App. 721, 731, 509 S.E.2d 198, 205 (1998).

VIII. Conclusion

North Carolina law on modification of alimony is well-settled and generally works well. The courts are given flexibility to reach equitable results, within the confines of a structure that requires findings of fact and ensures that the proper statutory factors are fairly considered.

The most unusual point from a nationwide perspective is the mandatory merger rule of *Walters*. In most other states, the parties can elect to have their agreement merged or not merged into the divorce decree. But even under *Walters*, the parties can effectively choose no merger by not presenting the agreement to the court, although that choice carries a cost in making the agreement not subject to direct enforcement by contempt. *Walters* remains unpopular among commentators, *see* Sally B. Sharp, *Semantics As Jurisprudence: The Elevation of Form Over Substance in the Treatment of Separation Agreements in North Carolina*, 69 N.C. L. Rev. 319, 328, 335 (1991); Brett R. Turner & Laura W. Morgan, *Attacking and Defending Marital Agreements* § 5.014 (2d ed. 2012), but with proper planning, its practical effects are limited.

If there is a problem with North Carolina law on modification of alimony, it is that many fact situations have not yet arisen in the reported cases. There is little case law on the effect of retirement on spousal support. The courts have only begun to delve into the difficult issues involving modification of defined-duration alimony, including especially the circumstances under which the duration can be modified. Mostly, however, these are issues on which the law of other states has reached a general consensus. Factual differences are likely to prevent uniformity in the results of the cases, but there is reason to believe that the law on these issues will quickly become settled as soon as the courts have the chance to address the issues.