Default and Summary Judgment in 'Divorce' Cases

In a recent opinion, the court of appeals held that a trial court has no authority to annul a marriage by summary judgment. Hill v. Durette, (N.C. App, March 19, 2019). This case reminds us that while the Rules of Civil Procedure apply to domestic relations cases generally, there are significant limitations on the use of rules that relieve the court of the obligation to make findings of fact based on evidence presented to the court before entering certain types of domestic orders.

Hill v. Durette and Annulment

The trial court in Hill granted plaintiff's request for an annulment. Both parties agreed that a person ordained by the Universal Life Church performed the ceremony and the trial court ruled that the marriage was *void ab initio* because the Universal Life Church is not an actual religious denomination.

After concluding the trial court entered the annulment by summary judgment, the court of appeals vacated the order, citing GS 50-10(a). That statute states:

"(a) Except as provided for in subsection (e) of this section, the material facts in every complaint asking for a divorce or for an annulment shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a judge or jury."

The court in Hill references *Hawkins ex. rel Thompson v. Hawkins*, 192 NC App 248 (2008), wherein the court of appeals held that GS 50-10(a) also prohibits annulment by default judgment. The court in *Hawkins* explained:

"A marriage may not be annulled by a default judgment. …[S]*ee* N.C. Gen.Stat. § 50–10(a) (2005); … . Although most of the cases which have arisen under this statute have dealt with an absolute divorce instead of annulment, the plain language of the statute says that its prohibition against default applies to *every complaint* asking for a divorce or *for an annulment.*"

Absolute Divorce

The *Hawkins* case cites *Adair v. Adair*, 62 N.C. App. 493 (1983), wherein the court, citing GS 50-10(a), stated:

"In North Carolina a plaintiff cannot obtain judgment by default in a divorce proceeding. A divorce will be granted only after the facts establishing a statutory ground for divorce have been pleaded and actually proved."

As with annulment, in addition to prohibiting divorce by default, this statute also prohibits a trial court judge from granting an absolute divorce by summary judgment because the statute requires that facts be "found by a judge or jury". However, GS 50-10(d) provides:

"(d) The provisions of G.S. 1A-1, Rule 56, shall be applicable to actions for absolute divorce pursuant to G.S. 50-6, for the purpose of determining whether any genuine issue of material fact remains for trial by jury, but in the event the court determines that no genuine issue of material fact remains for trial by jury, the court must find the facts as provided herein. The court may enter a judgment of absolute divorce pursuant to the procedures set forth in G.S. 1A-1, Rule 56, finding all requisite facts from nontestimonial evidence presented by affidavit, verified motion or other verified pleading."

This procedure closely resembles a summary judgment in that the parties do not need to testify in open court on the record, but a trial judge still must find facts supporting the entry of the divorce judgment based on 'nontestimonial' evidence.

In addition, GS 50-10(e) allows entry of absolute divorce by the clerk of court in limited circumstances. This part of the statute is much less clear about whether the clerk must find facts based on some type of evidence and to date there have been no appellate opinions on point. It provides:

"(e) The clerk of superior court, upon request of the plaintiff, may enter judgment in cases in which the plaintiff's only claim against the defendant is for absolute divorce, or absolute divorce and the resumption of a former name, and the defendant has been defaulted for failure to appear, the defendant has answered admitting the allegations of the complaint, or the defendant has filed a waiver of the right to answer, and the defendant is not an infant or incompetent person."

Divorce from Bed and Board

In *Allred v. Tucci*, 85 NC App 138 (1987), the court of appeals held that GS 50-10(a) prohibits the entry of a divorce from bed and board by consent of the parties because the court must make findings of fact based on evidence to support the divorce from bed and board. The court in that case ruled that a consent order stating that one party had committed indignities and granting a divorce from bed and board was void *ab initio* because the trial court did not make the findings of fact required for entry of the order. *See also Schlagel v. Schlagel*, 253 NC 787 (1971)(statute prohibiting default and consent orders in divorce cases applies to divorce from bed and board).

The court of appeals also has held that GS 50-10(a) prohibits the court from finding facts upon which to support a divorce from bed and board by default pursuant to Rule 8 of the Rules of Civil Procedure. That Rule provides that "[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." In *Skamarak v. Skamarak*, 81 NC App 125 (1986), husband argued that wife

admitted she committed indignities by default when she failed to respond to his counterclaim alleging indignities and seeking a divorce from bed and board. The court of appeals disagreed, citing GS 50-10(a) and holding that all facts *"in every complaint for divorce"* are deemed denied whether a responsive pleading is filed or not.

Alimony

The court of appeals has interpreted this *"all material facts* in every complaint asking for divorce*"* language broadly, holding that all facts in every complaint asking for a divorce are deemed denied, even if those facts relate to an alimony claim rather than the divorce request.

In *Phillips v. Phillips*, 185 NC App 238 (2007), plaintiff wife filed a complaint seeking divorce, PSS and alimony. Whether additional claims were included is not clear from the opinion. After entry of a divorce judgment and a PSS consent order, the trial court ordered husband to pay alimony. On appeal, husband argued that the wife has stipulated to marital misconduct by failing to file a reply to his counterclaim wherein he alleged she committed marital misconduct.

The court of appeals acknowledged Rule 8 and acknowledged that allegations in a counterclaim generally are deemed admitted when no rely is filed, but stated:

"[D]efendant overlooks N.C.G.S. § 50–10(a), which states "the material facts in every complaint asking for a *divorce* ... shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not."

Because every material fact in every complaint for divorce is deemed denied, wife did not admit the allegations relating to marital misconduct by failing to file the required responsive pleading. *See also Schlagel v. Schlagel*, 253 NC 787 (1961)(no alimony without divorce by default judgment because alimony claim was dependent upon wife's claim for divorce from bed and board and GS 50-10 required that all material facts be found by a judge or jury).

What about custody?

Although not based on GS 50-10, the court of appeals also has held that a trial court cannot enter a custody order by default. In *Bohannan v. McManaway*, 208 NC App 572 (2011), the trial judge signed a custody order submitted by plaintiff's attorney when defendant failed to appear for the custody trial. The court of appeals vacated the order, holding that "[a] court cannot enter a permanent custody order without hearing testimony" even when a defendant fails to answer or appear for trial. *See also Story v. Story*, 57 NC App 509 (1982)(trial court cannot enter permanent custody order without hearing evidence and making finding of fact to support conclusion that the order is in the best interest of the child). *But cf. Buckingham v. Buckingham*, 134 NC App 82 (1999)(a consent order for custody does not need findings of fact or conclusions of law but "the court should review a consent judgment to ensure that it does not contradict statutory, judicial, or

public policy”).