

Custody Cases

Procedure and Temporary Orders

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Custody and Child Support

- **GS 50-13.5:**
-
- "(d) Service of Process; Notice; Interlocutory Orders. -
- (1) Service of process in civil actions for the custody of minor children shall be as in other civil actions. Motions for support of a minor child in a pending action may be made on 10 days notice to the other parties and compliance with G.S. 50-13.5(e). Motions for custody of a minor child in a pending action may be made on 10 days notice to the other parties and after compliance with G.S. 50A-205.
- (2) If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending the service of process or notice as herein provided.
- (3) A temporary order for custody which changes the living arrangements of a child or changes custody shall not be entered ex parte and prior to service of process or notice, unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse or that there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts."

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Notice of Hearing

- **GS 50-13.5:**
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Temporary Custody

- **GS 50-13.5:**
-
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Temporary Custody

- Establish the rights of parties to custody pending resolution of the claim for permanent custody
 - *Regan v. Smith*, 131 NC App 851 (1998)
- Entered when the court deems it appropriate when an action for custody is pending
 - GS 50-13.5(d)(2)
- Can be heard on affidavits alone
 - *Story v. Story*, 57 NC App 509 (1982)

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Temporary Custody

- Trial court has authority to order physical and psychological assessment of the parties and the child pursuant to Rule 35 of the Rule of Civil Procedure, before making a final custody determination
- The court of appeals has held that the court has no authority to order assessment or counseling as part of a 'final' custody order
 - *Jones v. Patience*, 121 NC App 434 (1996)(problems after entry of final order may be grounds for modification)
 - *But cf. Maxwell v. Maxwell*, 212 NC App 614 (2011)(trial court has broad authority to order mental health evaluation of parent before ordering visitation for a parent when there is evidence of domestic violence)

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Consider.....

- Complaint filed by mom for custody of child
- Mom asks for temporary and permanent custody
- Also requests ex parte "status quo" order, telling you she has primary physical custody of child
- Do you grant her request?????????

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Ex Parte Custody

- “(3) A temporary order for custody which changes the living arrangements of a child or changes custody shall not be entered ex parte and prior to service of process or notice, unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse or that there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts.”

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Ex parte Custody

- “Temporary orders may be entered ex parte under appropriate circumstances.”
 - *Regan v. Smith*, 131 NC App 851 (1998)
 - *Brandon v. Brandon*, 10 NC App 457 (1971) (okay when mom shown “not suitable to exercise custody”)
 - *Story v. Story*, 57 NC App 509 (1982)



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Hearing after *ex parte*???

- Yes, definitely
 - Due Process
- No time set in statute or case law
- Ex parte custody is **not** a Rule 65 TRO – it does **not** expire after 10 days unless it explicitly states that it does
 - *Campan v. Featherstone*, 150 NC App 692 (2002)
- What do you do at the hearing?
 - *Ex parte* order is a temporary order pursuant to authority in GS 50-13.5(d)
 - Court to enter temporary order "as circumstances render appropriate"
 - Order entered after hearing is not *ex parte*

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S.L. 2017-22 (S 53) - Orders on or after Oct. 1, 2017

- "**§ 50-13.5.** Procedure in actions for custody or support of minor children.
 - (d) Service of Process; Notice; Interlocutory Orders. –
 - (3) ... A temporary custody order that requires a law enforcement officer to take physical custody of a minor child shall be accompanied by a warrant to take physical custody of a minor child as set forth in G.S. 50A-311.

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Duration/Number of Orders

- “It is the public policy of this State that in all cases where it is practicable, child custody orders should entered as permanent or final to avoid the turmoil and insecurity that children face from constant litigation of their custody status”
 - *Simmons v. Arriola*, 160 NC App 671, 675 (2003)

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Consider.....

- Order states that ‘permanent’ primary physical custody is with mom
- No future hearing scheduled or contemplated
- Dad ordered to have psychological evaluation
- No visitation schedule to be set until after evaluation
- After evaluation, dad files motion to modify primary physical custody
- ??????????????
-

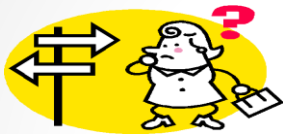
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Temporary or Final?

- Temporary orders can be modified for any reason
 - 'Final' order modified only upon substantial change in circumstances
- Temporary orders cannot be appealed
 - Permanent order can be appealed immediately
- Temporary orders go away if case is dismissed
 - 'Final' orders cannot be dismissed by parties
- UCCJEA jurisdiction
 - If last order was 'final', need modification jurisdiction

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Is it temporary or final?



- It doesn't matter what it says it is.....
- If it resolves all issues and has no "reconvening date," it is not temporary
- Temporary if:
 - Entered "without prejudice" to either party
 - States reconvening time in the relatively near future, or
 - Does not resolve all issues

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Temporary may not remain temporary.....

- Temporary custody “is not designed to remain in effect for extensive periods of time or indefinitely.”
 - *LaValley v. LaValley*, 151 NC App 290 (2002)
- Temporary order will ‘convert’ to a final order if neither party seeks a final determination within a reasonable time after entry of the temporary order
 - ‘reasonable’ time determined on a case-by-case basis
 - Cases listed on Bench Book, Family Law, p. 4-20 through 4-21

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Deployed Parents Custody and Visitation Act

- GS 50A-350, et. seq.
- Effective October 1, 2013
- Allows temporary custody during deployment
 - By agreement of the parties
 - If it modifies existing court order, agreement must be filed
 - By court order
 - Both terminate upon end of deployment



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Help in Custody Cases

- Custody mediation
 - Whenever it appears to the court there is an issue regarding custody
 - GS 50-13.1
 - Results in "Parenting Agreement"
- Physical and psychological examinations
 - Rule 35 of Rules of Civil Procedure
- Rule 17 GAL for the child
 - Must give instructions to the GAL
- Appointment of experts
 - Custody evaluations
 - Rule of Evidence 706
- Parenting Coordinators
 - GS 50-91

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Hearing from the kids....

- In chambers interview
 - Only if both parents agree
 - Court can make findings based on conversation
 - Dreyer v. Goodson, 163 NC App 155
- In court
 - Can consider child's preference for custody if child is of suitable age
 - Should give preference of child 'considerable weight', but.....
 - Court has discretion to refuse to hear from child

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Appeals

- Interlocutory appeal
 - Inappropriate interlocutory appeal does not take away jurisdiction
 - But appropriate interlocutory appeal does
 - See *Smith v. Barbour*, 154 NC App 402 (2004)
- Can enforce custody order during an appeal
 - GS 50-13.3(a)

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Other issues.....

- Attorney fees
 - GS 50-13.6
 - Reasonable fee allowed to party acting in good faith who has insufficient means to defray the expense of the suit
 - Blog post: <https://civil.sog.unc.edu/attorney-fees-in-custody-actions/>
- Enforcement
 - GS 50-13.3
 - Custody order is enforced by civil contempt; violation of order is punished by criminal contempt
 - Blog post: <https://civil.sog.unc.edu/enforcing-custody-orders-civil-contempt-is-not-always-the-appropriate-remedy/>

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