

What the law says about *ex parte* custody orders

While there are no doubt numerous *ex parte* custody orders entered by North Carolina courts daily throughout the state, there is very little appellate guidance regarding the circumstances under which such orders are appropriate and regarding the procedure that should be followed after such an order has been entered. Because these orders are interlocutory and not subject to immediate appeal, we probably never will have much case law to direct us.

What we do know - an *ex parte* order is a temporary custody order

It may seem obvious, but it is important to recognize that *ex parte* custody orders simply are temporary custody orders entered as the result of an *ex parte* procedure. See *Campen v. Featherstone*, 150 NC App 692 (2002) (*ex parte* custody order is not a Rule 65 TRO; it is a temporary custody order authorized by [GS 50-13.5\(d\)](#)). Temporary custody orders are orders that establish a party's right to custody pending the resolution of a claim for permanent custody. *Regan v. Smith*, 131 NC App 851 (1998).

This means there is not an independent cause of action for emergency *ex parte* custody outside of the context of a custody action brought pursuant to GS 50. [The authority of a court to issue *ex parte* orders in juvenile or Chapter 50B domestic violence proceedings is beyond the scope of this post]. In other words, a court has no authority to consider a request for an *ex parte* custody order unless a party has filed a complaint for custody or a motion to modify an existing custody order.

An *ex parte* procedure is a procedure conducted with fewer than all the parties to the lawsuit having the opportunity to participate. See [Black's Law Dictionary](#). Because of principles of basic due process, *ex parte* procedures are not favored in the law. See generally *Peace v. Employment Sec. Comm'n*, 349 NC 315 (1998) ("The fundamental premise of procedural due process is notice and the opportunity to be heard."). The Code of Judicial Conduct prohibits judges from engaging in *ex parte* procedures unless expressly authorized by law. [Code of Judicial Conduct, Canon 3A\(4\)](#).

Statutory authorization for temporary orders

[G.S. 50-13.5](#), titled "Procedure in actions for custody or support of minor children," contains the only statutory authority for temporary custody orders in Chapter 50 custody cases. The statute states in part:

"(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 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."

The court of appeals has held that [section \(b\)\(2\) of GS 50-13.5](#) authorizes the court to enter temporary custody orders. *Regan v. Smith*, 131 NC App 851 (1998); *Story v. Story*, 57 NC App 509 (1982); *Brandon v. Brandon*, 10 NC App 457 (1971).

The court of appeals also has held that [GS 50-13.5\(b\)\(2\)](#) authorizes the court to enter temporary orders *ex parte* under certain circumstances. *Story v. Story*, 57 NC App 509 (1982) and *Brandon v. Brandon*, 10 NC App 457 (1971).

When can a court issue a temporary order?

[GS 50-13.5\(d\)\(2\)](#) allows the entry of a temporary custody order whenever the court has "gain[ed] jurisdiction of the minor child" and the court determines that "the circumstances of the case render it appropriate." The statute appears to be broad; granting the court authority to issue temporary orders any time a custody issue is pending before the court (so the court has gained jurisdiction over the child) and the court determines it appropriate to do so.

A court can enter a temporary custody order on affidavits alone. *Story v. Story*, 57 NC App 509 (1982). A court can alter or amend a temporary order whenever the court determines it is in the best interest of the child(ren) to do so, *Gary v. Bright*, 231 NC App 207 (2013) (the court is not required to find there has been a substantial change in circumstances before modifying a temporary order), and there is no limit on the number of temporary orders a court can enter in an individual custody case.

When can a court issue a temporary order *ex parte*?

The court of appeals stated in *Brandon v. Brandon*, 10 NC App 457 (1971), and again in *Story v. Story*, 57 NC App 509 (1982), that the general authority for temporary orders found in [GS 50-13.5\(d\)\(2\)](#) also authorizes the court to enter temporary orders *ex parte* in certain circumstances. *Story* does not offer any guidance on when it is appropriate for the court to act *ex parte*, but the court in *Brandon* held that an *ex parte* order entered in that case was appropriate where father alleged in his complaint for custody facts indicating mom was not suitable to exercise custody of the child.

Neither of these cases nor any other appellate opinions offer guidance on whether the law authorizes "status quo" *ex parte* custody orders common in some judicial districts in North Carolina.

A "status quo" *ex parte* custody order is one where the court grants temporary custody *ex parte* to the party filing an initial complaint for custody when that party asks the court for a temporary order to maintain the existing custody arrangement of the parties while the custody claim is litigated.

These requests generally do not include allegations of exigent circumstances requiring immediate action other than the requesting party's desire to maintain what the party contends is the 'status quo' custody arrangement.

[GS 50-13.5\(d\)\(2\)](#) clearly gives the court broad authority to enter temporary orders whenever the court determines "the circumstances of the case render it appropriate." However, the general rule that *ex parte* procedures are not favored in the law absent exigent circumstances suggests such 'status quo' *ex parte* orders are not appropriate absent some allegation of circumstances related to the welfare of the child(ren) that justify the entry of an order before offering all parties the opportunity to be heard on the request for temporary custody.

Explicit limitation on *ex parte* orders that change the child's living arrangement

In S.L. 1987 sec. 893, effective October 1, 1988, the General Assembly added the following section to [GS 50-13.5\(d\)](#):

(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. 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." [the last sentence relating to law enforcement was added by [S.L. 2017-22, s.2](#)].

While there are no appellate opinions interpreting this provision in the statute, the intent of the amendment clearly was to restrict the court's ability to enter temporary orders *ex parte* that change a child's living arrangement or change custody of a child to allow for such orders only under the circumstances set forth in the statute.

How long do *ex parte* orders last?

The court of appeals has rejected an argument that an *ex parte* custody order expires automatically after 10 days. In *Campan v. Featherstone*, 150 NC App 692 (2002), father argued that a court's authority to enter an *ex parte* custody order is based on [Rule 65 of the Rules of Civil Procedure](#) which authorizes *ex parte* temporary restraining orders. Because [Rule 65](#) specifies that *ex parte* TROs expire after 10 days, father argued that *ex parte* custody orders also expire. The court of appeals rejected his argument, holding that *ex parte* custody orders are not [Rule 65](#) TROS but are temporary custody orders entered pursuant to [GS 50-13.5\(d\)](#). As that statute contains no explicit expiration date for these orders, there is no automatic expiration. Presumably this means the order entered *ex parte* will remain in effect until the trial court terminates it or modifies it with a new temporary custody order entered after all parties have been given an opportunity to be heard.

What is the issue before the court at the hearing held after the entry of an *ex parte* order?

While an *ex parte* custody order does not automatically expire, due process requires that the court provide all parties with notice and an opportunity to be heard on the issue of temporary custody as soon as possible after an *ex parte* is entered. See *Peace v. Employment Sec. Comm'n*, 349 NC 315 (1998) (“The fundamental premise of procedural due process is notice and the opportunity to be heard.”). Many districts in North Carolina schedule “return” hearings within 10 days after an *ex parte* order has been issued.

The only issue before the court at this hearing is the moving party’s request for a temporary custody order. There simply is no reason related to the custody matter to return to the issue of whether circumstances justified the issuance of the *ex parte* order as the court already addressed that issue when the court issued the *ex parte* order. [Of course, the court may examine the circumstances under which the *ex parte* order was entered for other reasons. See for example *Lamm v. Lamm*, 210 NC App 181 (2011)(Rule 11 sanctions upheld where mother obtained an *ex parte* custody order based on allegations found to have no basis in fact).]

Instead, once all parties to the custody case have been afforded notice of the request for temporary custody and the opportunity to be heard on the request, the court can proceed to determine whether the entry of a temporary order is appropriate under the circumstances pursuant to [GS 50-13.5\(d\)\(2\)](#).