Chapter 7
Domestic Violence

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I. Generally

A. Definition.

1. Domestic violence is the commission upon an aggrieved party, or upon a minor child residing with or in the custody of the aggrieved party, of one or more of the following acts:

a) Attempting to cause bodily injury, or intentionally causing bodily injury. [G.S. § 50B-1(a)(1)]

b) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury. [G.S. § 50B-1(a)(2)]

(1) The fact that plaintiff's neighbors were apprehensive based on private investigator's surveillance of plaintiff was irrelevant as "the aggrieved party or a member of the aggrieved party's family or household" are the only people the trial court may consider in issuing a DVPO pursuant to G.S. § 50B-1(a)(2). [*Kennedy v. Morgan*, __ N.C.App. __, 726 S.E.2d 193 (2012).]

(2) G.S. § 50B-1(a)(2) imposes a subjective test, rather than an objective reasonableness test. [*Brandon v. Brandon*, 132 N.C.App. 646, 513 S.E.2d 589 (1999).]

(a) The trial court must find that the plaintiff "actually feared" imminent serious bodily injury. [*Smith ex rel. Smith v. Smith*, 145 N.C.App. 434, 549 S.E.2d 912 (2001), *citing Brandon* (where defendant's actions made plaintiff feel "uncomfortable" and "'creepy" but she was not afraid that defendant would physically hurt her, no fear of imminent serious bodily injury).]

(b) Conclusion that defendant had committed an act of domestic violence was not supported by sufficient findings of fact where the trial court made no finding regarding plaintiff's subjective fear. [*Brandon v. Brandon*, 132 N.C.App. 646, 513 S.E.2d 589 (1999).]

(3) Imminent does not mean immediate, rather it means that there will be no significant delay. [*Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981) (considering "imminent" in the context of a civil assault and battery); *Brandon v. Brandon*, 132 N.C.App. 646, 654 n.7, 513 S.E.2d 589 (1999) (noting that "imminent" and "immediate" are not exact synonyms; use of "immediate" serious bodily injury in AOC form implied a higher showing than required by statute's use of "imminent" injury; evidence supported finding

that defendant threatened plaintiff' with immediate serious bodily injury but it did not follow from that finding that plaintiff was in fear of imminent seriously bodily injury, which is required to show that domestic violence occurred).]

c) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of continued harassment that inflicts substantial emotional distress. [G.S. § 50B-1(a)(2)]

(1) Harassment means knowing conduct, including written or printed communication or transmission, telephone or cellular or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions, directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose. [G.S. §§ 50B-1(a)(2); 14-277.3A(b)(2)]

(a) Because G.S. § 14-277.3A(b)(2) does not define the terms "torment," "terrorize," or "terrify," a court is to look to the meaning ordinarily accorded to those words. [*Judson v. Weiss,* __ N.C.App. __, 738 S.E.2d 454 (2013) (**unpublished**) (citation omitted) (using definition of "torment" from a dictionary and case law).]

(b) Although the record contained evidence that would support defendant's claim that she attempted to communicate with plaintiff for legitimate purposes, the aggressive manner in which defendant attempted to communicate, and the odd hours at which she did so, coupled with her repeated and persistent attempts to communicate with plaintiff after he requested that she not do so, amply supported the trial court's rejection of defendant's assertions that her conduct was for a "legitimate purpose." [*Judson v. Weiss,* __ N.C.App. __, 738 S.E.2d 454 (2013) (**unpublished**).]

(2) Defendant's hiring of a private investigator to conduct surveillance on plaintiff to determine whether she was cohabitating, was not, in and of itself, sufficient to support a finding of "substantial emotional distress." [*Kennedy v. Morgan,* __ N.C.App. __, 726 S.E.2d 193 (2012).]

(1) Defendant's installation of a hidden camera in daughters' bathroom not sufficient to support a finding of emotional distress of his daughters or their mother. Daughters did not testify, and no other witness testified, as to the impact on the daughters of the father's installation of the camera and while mother testified that she was "fearful" for her daughters' safety, she did not present any

evidence of her substantial emotional distress. [*Fairbrother v. Mann*, __ N.C.App __, 738 S.E.2d 454 (2013) (**unpublished**) (camera was discovered and removed before any filming of daughters took place).]

(2) The court of appeals addressed the meaning of the term "continued harassment" in *Wornstaff v. Wornstaff*, 179 N.C.App. 516, 634 S.E.2d 567 (2006). However, the North Carolina Supreme Court could not render a majority opinion in the appeal of that case. [*Wornstaff v. Wornstaff*, 361 N.C. 230, 641 S.E.2d 301 (2007) (per curiam).] Therefore, the case *Wornstaff v. Wornstaff* has **no precedential value.**

d) The commission of any act defined in G.S. §§ 14-27.2 through 14-27.7 (statutorily defined rape and other criminal sexual offenses). [G.S. § 50B-1(a)(3)]

2. Acts of self-defense do not constitute domestic violence. [G.S. § 50B-1(a)]

B. Personal relationship required.

1. The acts constituting domestic violence must be committed by a person with whom the aggrieved party has or has had a personal relationship. [G.S. § 50B-1(a)]

a) "Personal relationship" means the parties:

(1) Are current or former spouses [G.S. § 50B-1(b)(1)];

(2) Are persons of the opposite sex who live together or have lived together [G.S. § 50B-1(b)(2)];

(3) Are related as parents (including persons acting *in loco parentis*) and children, or grandparents and grandchildren, except a parent or grandparent may not obtain a protective order against a child or grandchild under 16 [G.S. § 50B-1(b)(3)];

(a) A child of any age may be the plaintiff but a child must be at least 16 years of age to be the defendant **under this section**. NOTE: This is the only personal relationship with an age limitation for the defendant. For example, a child under the age of 16 may be a defendant if the child is a current or former household member of plaintiff, someone with whom plaintiff lived or someone with whom plaintiff had a dating relationship.

(4) Have a child in common [G.S. § 50B-1(b)(4)];

(5) Are current or former household members [G.S. § 50B-1(b)(5)]; or

(a) This relationship appears to apply no matter how long the parties have lived apart.

(6) Are persons of the opposite sex who are in or have been in a dating relationship. [G.S. § 50B-1(b)(6)]

(a) A dating relationship is one in which the parties are romantically involved over time and on a continuous basis during the course of the relationship. [G.S. § 50B-1(b)(6)]

(b) A casual acquaintance or ordinary business or social fraternization does not constitute a dating relationship. [G.S. § 50B-1(b)(6)]

(c) This relationship appears to apply no matter how long it has been since the parties had a dating relationship.

2. A person that has been subjected to nonconsensual sexual conduct or stalking who does not have a "personal relationship" with the defendant may seek a civil no-contact order pursuant to Chapter 50C. *See* Bench Book, Vol. 2, *Civil No Contact Orders*, Chapter 5.

C. 50B remedies not exclusive and available in other proceedings.

1. The remedies in Chapter 50B are in addition to remedies provided under Chapter 50 and other statutes. [G.S. § 50B-7] This means an aggrieved party can request a either a 50B or a 50C order and also initiate criminal process.

2. The remedies in Chapter 50B are available to a party seeking divorce from bed and board on grounds of cruel or barbarous treatment that endangers the life of another. [G.S. § 50-7(3)]

II. Procedure

A. Parties under 18.

1. Except in situations involving G.S. § 50B-1(a)(3) (parents and grandparents may not obtain a protective order against a child or grandchild under the age of 16), there is no age restriction for parties in 50B proceedings; a person under the age of 18 can request relief as a plaintiff and also can be named as a defendant.

2. If the plaintiff seeking a domestic violence order is under 18, a Rule 17 guardian ad litem must be appointed to appear on his or her behalf. [G.S. § 1A-1, Rule 17(b)(1)]

3. However, if the plaintiff is an adult who has a personal relationship with the defendant, that adult aggrieved party plaintiff can seek a protective order based on acts committed by defendant upon a minor child residing with or in the custody of the aggrieved party plaintiff. [G.S. § 50B-1(a)] In that situation, the court can enter a protective order providing protection for the minor child even though the minor child is not made a plaintiff in the case. If the minor child is not a party plaintiff, no Rule 17 GAL needs to be appointed for the minor child. [*See* G.S. § 1A-1, Rule 17]

4. Given the nature of the remedies allowed under G.S. § 50B-3, especially the remedy of temporary custody, it is important that both the 50B complaint and

any protective order entered by the court clearly identify when a minor is actually a party and when an adult parent is the party seeking protection for a minor child. When the adult is the actual party plaintiff, to avoid confusion, the name of the child should not be included in the caption of the complaint or in the caption of the DVPO. Similarly, if the child actually is the plaintiff, the name of the Rule 17 GAL should not appear in the caption of the complaint or in the caption of the DVPO.

5. If the defendant in a domestic violence proceeding is under 18, a Rule 17 guardian ad litem must be appointed to defend the action on behalf of the defendant. [G.S. § 1A-1, Rule 17(b)(2)]

a) The appointment does not have to be made before the ex parte order is entered but must be made before the emergency hearing. [G.S. § 1A-1, Rule 17]

b) The emergency hearing may not be held until the judge or clerk has appointed a guardian ad litem for the minor defendant. [G.S. § 1A-1, Rule 17]

B. Venue.

1. Chapter 50B does not speak to venue. Any person residing in North Carolina may seek a DVPO. [G.S. § 50B-2(a)] Chapter 50B does not require that plaintiff reside in North Carolina for any specific length of time before filing, but the plaintiff must be a resident when the complaint is filed.

a) "Domicile denotes one's permanent, established home as distinguished from a temporary, although actual, place of residence.... It is the place where he intends to remain permanently, or for an indefinite length of time." [*Hall v. Wake County Bd. of Elections*, 280 N.C. 600, 187 S.E.2d 52 (1972); *Atassi v. Atassi*, 117 N.C.App. 506, 451 S.E.2d 371, *review denied*, 340 N.C. 109, 456 S.E.2d 310 (1995) (citation omitted) (whether husband's domicile was in Syria or North Carolina precluded summary judgment on certain domestic issues).]

b) "Residence" indicates a person's actual place of abode, whether permanent or temporary. [*Hall v. Wake County Bd. of Elections*, 280 N.C. 600, 187 S.E.2d 52 (1972).] A temporary presence may qualify as "residing" in a place. [*See Glover v. Farmer*, 127 N.C.App. 488, 490 S.E.2d 576 (1997), *review denied*, 347 N.C. 575, 502 S.E.2d 590 (1998) (adult daughter visiting her parents for a week was "residing" in their home and could properly accept service of process for her parents).]

2. In the absence of a provision in 50B, the general venue provision, G.S. § 1-82, is applicable. [*See Duff v Lineberger*, 172 N.C.App. 170, 616 S.E.2d 30 (2005) (**unpublished**) (applying G.S. § 1-82 to settle question of venue in a proceeding for a DVPO and overruling defendant's objection to venue because prior action was pending in another county for custody, child support, divorce, equitable distribution, and alimony).]

3. Neither Chapter 50B nor the general venue statute requires that the act of violence occur in North Carolina or in the county where the protective order is sought.

4. There appears to be no exception to the general rule that the court must have personal jurisdiction over the defendant before a protective order can be entered. Personal jurisdiction requires the court to find that:

a) A long-arm statute allows North Carolina to exercise personal jurisdiction over defendant; and

b) Defendant has "minimum contacts" with North Carolina sufficient to satisfy due process. [*See* discussion in section V.A at page 23.]

C. Overview of process.

1. Any person residing in this state may seek 50B relief by filing a civil action or by filing a motion in any existing Chapter 50 action. [G.S. § 50B-2(a)] In compliance with the federal Violence Against Women Act, no court costs or attorney fees may be assessed for the filing, issuance, registration, or service of a protective order or petition for a protective order or witness subpoena, except as provided in G.S. § 1A-1, Rule 11. [G.S. § 50B-2(a), *amended by* 2013 N.C. Sess. Law 390, § 1, effective October 1, 2013, and applicable to actions commenced on or after that date; G.S. §§ 7A-305, -311]

2. Any action for a domestic violence protective order requires that a summons be issued and served. The complaint, notice of hearing, any temporary or ex parte order that has been issued, and other papers through the appropriate law enforcement agency where the defendant is to be served, must be attached to the summons. [G.S. § 50B-2(a), *amended by* 2009 N.C. Sess. Law 342, § 2, effective for actions or motions filed on or after December 1, 2009.] Civil Summons Domestic Violence (AOC-CV-317) may be used.

3. An aggrieved party may proceed pro se [G.S. § 50B-2(a)], and the clerk of superior court must provide pro se complainants all forms necessary to enable them to proceed without a lawyer. [G.S. § 50B-2(d)] The clerk also is required to schedule hearings and issue notices of hearings for pro se litigants. [*See* G.S. § 50B-2(b) and (c)]

4. A complaint filed pursuant to Chapter 50B is a civil action, subject to the Rules of Civil Procedure, unless 50B specifies otherwise. [G.S. § 1A-1, Rule 1; *Hensey v. Hennessy*, 201 N.C.App. 56, 685 S.E.2d 541 (2009).] The summons issued with the complaint must require the defendant to answer within 10 days of the date of service. [G.S. § 50B-2(a), *amended by* 2009 N.C. Sess. Law 342, § 2, effective for actions or motions filed on or after December 1, 2009.] *Cf. Henderson v. Henderson*, __ N.C.App.__, 758 S.E.2d 681 (2014) (when an ex parte DVPO has been issued, the language in G.S. § 50B-2(a), giving a defendant 10 days after service of the summons to answer, is superseded by G.S. § 50B-2(c)(5), which requires that a hearing be held within 10 days from the issuance of an ex parte DVPO or within 7 days from the date of service of process on the

other party, whichever occurs later; under this interpretation of the statutes, 5 days to answer was found sufficient, *see* section 6 below).]

5. A plaintiff also may request temporary "emergency relief" pursuant to G.S. § 50B-2(b). If no ex parte order is entered, hearing on a motion for temporary emergency relief must be held after 5 days' notice of hearing to defendant or after 5 days following service of process, whichever occurs first. [*See* section IV.B at page 23 discussing emergency relief.]

6. A plaintiff may, at any time prior to hearing, request temporary ex parte relief. [G.S. § 50B-2(c); *see* section III at page 17 discussing ex parte hearings.] If an ex parte order is entered, a hearing must be held within 10 days from entry of the ex parte order or within 7 days from service of process on the party, whichever occurs later. [G.S. § 50B-2(c)(5); *see Henderson v. Henderson*, __ N.C.App. __, 758 S.E.2d 681 (6/3/2014) (when an ex parte DVPO was entered 2/8/13, defendant was served on 2/12/13 and hearing was held 2/18/13, that defendant had "at least five days" to answer was found to be sufficient, rejecting defendant's argument that G.S. § 50B-2(a) gave him 10 days from the date of service to answer).] If the ex parte is denied, a hearing on plaintiff's request for temporary emergency relief must be held within 5 days. [G.S. § 50B-2(b)]

7. The statute does not specify a time within which the trial on the merits must be held.

8. A "final" protection order may not exceed one year in duration. If an ex parte DVPO that has been continued in effect for more than a year has expired, a trial court lacks authority to enter a one year protective order based on the same complaint. **[***Rudder v. Rudder*, __ N.C.App. __, 759 S.E.2d 321 (2014).] [*See* section VII.B at page 48.]

9. Plaintiff may file a motion to renew a protective order before its expiration. [G.S. § 50B-3(b); *see* section VII.C at page 48.]

D. Relationship between an ex parte DVPO and a DVPO.

1. In *Hensey v. Hennessy*, 201 N.C.App. 56, 685 S.E.2d 541 (2009), the court made the following statements:

a) An ex parte DVPO and a DVPO are independent of one another.

b) An aggrieved party is not required to request an emergency or ex parte order prior to seeking entry of a DVPO.

c) A DVPO may be entered even though an ex parte order was denied or was never requested. This means a plaintiff has a right to have his or her claim tried on the merits even if a request for an ex parte order or emergency relief has been denied, unless the court dismisses plaintiff's complaint pursuant to G.S. § 1A-1, Rule 12(b)(6) (failure to state a claim) or pursuant to some other Rule of Civil Procedure. (It is not clear whether a trial court has authority to dismiss pursuant to Rule 12(b)(6) on the court's own motion.)

d) Ex parte DVPOs are normally in effect for a very brief time, until either entry or denial of entry of a DVPO. [*See also Rudder v. Rudder*, __ N.C. App.__, 759 S.E.2d 321 (2014) (statute shows clear legislative intent that continuances of hearings after entry of an ex parte DVPO should be limited in number).]

E. Relationship between a 50B proceeding and a related criminal domestic violence case.

1. Statutory.

a) A defendant placed on unsupervised probation in a criminal case must attend and complete an abuser treatment program if the court finds that the defendant is responsible for acts of domestic violence and there is a program approved by the Domestic Violence Commission that is reasonably available to the defendant, unless the court finds that such would not be in the best interests of justice. A defendant attending an abuser treatment program must abide by all program rules. [G.S. § 15A-1343(b)(12)]

(1) For a period between December 1, 2012, and December 1, 2013:

(a) The court was required to schedule a compliance review hearing within 60 days of judgment and every 60 days thereafter until the defendant completed the abuser treatment program; and

(b) If a defendant was discharged for noncompliance, the noncompliance had to be reported to the court. [G.S. § 15A-1343(b)(12), *added by* 2012 N.C. Sess. Law 39, § 1, effective December 1, 2012, and applicable to defendants placed on probation on or after that date; *deleted by* 2013 N.C. Sess. Law 123, § 1, effective December 1, 2013, and applicable to defendants placed on supervised or unsupervised probation on or after that date.]

b) When a defendant is found guilty of an offense involving assault, communicating a threat, or any of the acts as defined in G.S. § 50B-1(a), the presiding judge must determine whether the defendant and victim had a personal relationship. If the judge determines that there was a personal relationship, the judge must indicate on the form reflecting the judgment that the case involved domestic violence. [G.S. § 15A-1382.1(a), *amended by* 2012 N.C. Sess. Law 39, § 2, effective December 1, 2012, to add domestic violence acts, and applies to judgments entered on or after that date.]

c) When a defendant is found guilty of an offense involving child abuse or is found guilty of an offense involving assault or any of the acts of domestic violence as defined in G.S. § 50B-1(a) and the offense was committed against a minor, then the judge shall indicate on the form

reflecting the judgment that the case involved child abuse. [G.S. § 15A-1382.1(a1), *added by* 2013 N.C. Sess. Law 35, § 2, effective December 1, 2013, and applies to judgments entered on or after that date.]

d) When a person is found guilty of a felony offense, the presiding judge must determine whether the defendant used or displayed a firearm while committing the felony. If the judge determines that the defendant used or displayed a firearm while committing the felony, the sentencing court shall include that fact when entering the judgment that imposes the sentence for the felony conviction. [G.S. § 15A-1382.2, *added by* 2013 N.C. Sess. Law 369, § 27, effective October 1, 2013, and applies to any judgment entered for a felony conviction on or after that date.]

e) For crimes of domestic violence for purposes of bond and pretrial release purposes, *see* Domestic Violence Crimes Table at page 71.

2. Case law.

a) A transcript of testimony from the criminal trial, if available, may be used as evidence at a DVPO hearing if the transcript is properly offered and admitted into evidence. [*Hensey v. Hennessy*, 201 N.C.App. 56, 68 n.5, 685 S.E.2d 541 (2009).]

b) A judge who presided over defendant's trial in criminal court cannot enter a DVPO based on the judge's own personal memory of the criminal proceeding as the judge's memory is not evidence. [*Hensey v. Hennessy*, 201 N.C.App. 56, 685 S.E.2d 541 (2009) (when plaintiff presented "absolutely no evidence" at the DVPO hearing, entry of DVPO on judge's memory of related criminal proceeding not appropriate, even though defendant had not answered the complaint, or appeared in person or by his attorney at the DVPO hearing).]

c) It is inappropriate for a judge at a DVPO hearing to take judicial notice of facts established by testimony presented at the related criminal proceeding when the allegations regarding the acts of domestic violence in the case at bar are in dispute. [*Hensey v. Hennessy*, 201 N.C.App. 56, 685 S.E.2d 541 (2009) (Rule of Evidence 8C-1, Rule 201, allows notice of adjudicative facts that are not subject to reasonable dispute; plaintiff did not contend at the DVPO hearing that allegations in the complaint regarding defendant's acts of domestic violence were "not subject to reasonable dispute" as required by the Rule but relied only on the fact that the trial judge had already heard the same facts, which had been disputed in the criminal proceeding; that defendant had not answered, or appeared in person or by his attorney at the DVPO hearing, did not require different result).] [For a civil DVPO case taking judicial notice of a fact established in a criminal case, *see Kenton v. Kenton*, 218 N.C.App. 603, 724 S.E.2d 79 (2012) (trial court considering request to renew consent DVPO, took judicial notice of defendant's Alford guilty plea entered in criminal proceeding, after DVPO originally entered, to "judicially establish" in

renewal proceeding that defendant committed an act of domestic violence).]

d) The trial court erred when, at the hearing for a DVPO, it took judicial notice of the official criminal file related to the incident because the appellate court was unable to identify any basis for admitting the result of the criminal proceeding at the DVPO hearing. [*Little v. Little*, __ N.C.App. __, 739 S.E.2d 876 (2013).]

(1) After announcing that he was taking judicial notice of the contents of the criminal file and orally granting the DVPO, the judge obtained and reviewed the file during a recess. The trial judge included as a finding in the DVPO that defendant had been found guilty of assault on a female.

(2) The appellate court noted that a trial court may take judicial notice of its own records in a prior or contemporaneous proceeding when relevant. (citations omitted)

(3) The only basis noted by the appellate court for the relevance of the criminal file to the DVPO proceeding was the doctrine of collateral estoppel. However, collateral estoppel was not available because, according to the appellate court, the actual disposition of the criminal matter was by PJC, which did not constitute a final judgment, a required element for application of collateral estoppel.

(4) Because the trial court specifically relied upon defendant's having been found guilty in the criminal action in entering the DVPO, the trial court's taking judicial notice of the criminal file was not harmless error.

F. Prior 50B proceeding as res judicata or collateral estoppel.

1. A previous 50B proceeding between the same parties dealing with the same incident may bar a subsequent 50B action. [*See Eagle v. Johnson*, 159 N.C.App. 701, 583 S.E.2d 346 (2003) (trial court erred by not allowing defendant to present evidence of the dismissal of plaintiff's prior proceeding in another county seeking a domestic violence protective order based on the same conduct to support his defense of res judicata).]

2. Collateral estoppel prevented a trial court from relitigating in a custody action the issue of domestic violence that had been litigated and resolved in an earlier 50B proceeding. [*See Doyle v. Doyle*, 176 N.C.App. 547, 626 S.E.2d 845 (2006) (trial judge in custody matter erred by making findings with respect to an incident of domestic violence that contradicted findings made by another judge in an earlier 50B proceeding regarding the same incident between the parties) and *Simms v. Simms*, 195 N.C.App. 780, 673 S.E.2d 753 (2009), *citing Doyle* (where judge in 50B case found insufficient evidence to support 50B order against defendant, trial judge in custody case erred by finding that defendant did commit an act of domestic violence).]

G. Voluntary dismissal by plaintiff.

1. Generally.

a) Under G.S. § 1A-1, Rule 41, a plaintiff has the right to take a voluntary dismissal of his or her civil action without order of court at any time up until the plaintiff rests his or her case. [G.S. § 1A-1, Rule 41(a)(1)]

b) If an ex parte order has been granted but the hearing for the final order has not yet been held, the plaintiff can take a voluntary dismissal as a matter of right and terminate the case, as long as no affirmative relief has been requested by the nondismissing party. If plaintiff dismisses the action before entry of a final judgment on the 50B claim, any ex parte order previously entered will be dismissed as well. [*See Doe v. Duke University*, 118 N.C.App. 406, 455 S.E.2d 470 (1995) (protective order entered during medical malpractice case was nullified by voluntary dismissal; court stated that a voluntary dismissal "carries down with it previous rulings and orders in the case"); *Barham v. Hawk*, 165 N.C.App. 708, 600 S.E.2d 1 (2004), *aff'd per curiam without precedential value*, 360 N.C. 358, 625 S.E.2d 778 (2006) (voluntary dismissal nullified discovery order entered in case); *Collins v. Collins*, 18 N.C.App. 45, 196 S.E.2d 282 (1973) (party cannot be held in contempt of temporary order following termination of action by a Rule 41 voluntary dismissal).]

c) If an emergency hearing has been requested or has been held, but the hearing for a final order has not yet been held, the plaintiff can take a voluntary dismissal as long as the defendant has not requested affirmative relief. [*See* G.S. § 1A-1, Rule 41] [*See* above (if 50B claim is dismissed before entry of final judgment, all temporary or interlocutory orders are dismissed as well).] Plaintiff cannot take a voluntary dismissal any time after a "final" order has been entered. [*See Massey v. Massey*, 121 N.C.App. 263, 465 S.E.2d 313 (1996).] Therefore, if a defendant waives the final hearing and the court enters a final order at the conclusion of an emergency hearing, the plaintiff cannot take a voluntary dismissal.

d) Once the plaintiff rests his or her case at the hearing for the final order, the plaintiff cannot terminate the case by taking a voluntary dismissal. At that point only a judge can dismiss the case. [*See* G.S. § 1A-1, Rule 41(a)(2)]

2. Effect of dismissal on other claims.

a) When the only claims filed were claims pursuant to Chapter 50B and the parties filed a consent judgment dismissing the Chapter 50B claims, the trial court had no authority to enter a consent judgment addressing other issues. [*See Bryant v. Williams*, 161 N.C.App. 444, 588 S.E.2d 506 (2003) (when complaints for domestic violence dismissed, trial court could not enter a consent order addressing property distribution between the parties or enter a restraining order prohibiting contact).]

H. Involuntary dismissal by court for failure to prosecute.

1. Generally.

a) G.S. § 1A-1, Rule 41(b), allows a defendant to move for dismissal of an action or claim for failure of the plaintiff to prosecute or to comply with the rules of civil procedure or any court order.

(1) Language allowing dismissal of a "claim" or "action" has been found to encompass motions filed in a domestic relations context. [*See Church v. Decker,* 214 N.C.App. 193, n.2, 714 S.E.2d 529 (2011) (**unpublished**) (motions for modification of child support, for retroactive and delinquent child support, and resolution of medical coverage issues, among others, were subject to dismissal under Rule 41(b), court of appeals noting that a number of the motions amounted to substantive claims that would ordinarily be asserted in a pleading outside the domestic relations context).]

(2) Whether a judge may dismiss a claim pursuant to Rule 41(b) depends on the facts and circumstances surrounding the particular case and may be appropriate, under certain circumstances, even without a motion by the defendant. [*See Blackwelder Furniture Co. v. Harris,* 75 N.C.App. 625, 331 S.E.2d 274 (1985) (disagreeing with the contention that a trial judge does not have authority to dismiss a claim pursuant to Rule 41(b) in the absence of a motion by defendant); *Perkins v. Perkins,* 88 N.C.App. 568, 364 S.E.2d 166 (1988), *citing Blackwelder* (dismissal without prejudice on court's own motion of plaintiff's claims for divorce from bed and board, alimony and ED, for failure to prosecute upheld based on the parties' failure to appear at a clean-up calendar call, the fact that no pleading had been filed in almost two years, and that the case had been placed on two prior clean-up calendars without any resulting activity or disposition).]

b) Unless the court otherwise specifies in its order, a Rule 41(b) dismissal is **with prejudice** and is an adjudication on the merits.

(1) If the court specifies that the dismissal of an action commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after the dismissal. [G.S. § 1A-1, Rule 41(b)]

(2) Unless the court in its order for dismissal otherwise specifies, a dismissal under Rule 41(b) and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits. [G.S. § 1A-1, Rule 41(b); *Foy v. Hunter,* 106 N.C.App. 614, 618 n.1, 418 S.E.2d

299 (1992) (although the trial court did not specify that the dismissal was with prejudice, the failure of the order to specify otherwise operated "as an adjudication on the merits").]

2. Procedure.

a) Before dismissing a claim with prejudice for failure to prosecute under Rule 41(b), a trial judge must address three factors:

(1) Whether the plaintiff acted in a manner that deliberately or unreasonably delayed the matter;

(2) The amount of prejudice, if any, to the defendant; and

(3) The reason, if one exists, that sanctions short of dismissal would not suffice. [*Wilder v. Wilder*, 146 N.C.App. 574, 553 S.E.2d 425 (2001) (a trial court must consider lesser sanctions when considering a Rule 41(b) motion to dismiss for failure to prosecute; reversing an order dismissing a complaint for failure to prosecute when the trial court did not fully address any of the three factors set out above); *Ray v. Greer*, 212 N.C.App. 358, 713 S.E.2d 93, *cert. denied*, 365 N.C. 362, 718 S.E.2d 634 (2011), *citing Foy v. Hunter*, 106 N.C.App. 614, 418 S.E.2d 299 (1992) (Rule 41(b) involuntary dismissal for failure to comply with court order) (trial court must consider lesser sanctions before imposing the "most severe sanction" available; after considering lesser sanctions, the trial court may determine the appropriate sanction in its discretion).]

(a) Less drastic sanctions include: (1) striking the offending portion of the pleading; (2) imposition of fines, costs (including attorney fees) or damages against the represented party or his counsel; (3) court ordered attorney disciplinary measures, including admonition, reprimand, censure, or suspension; (4) informing the North Carolina State Bar of the conduct of the attorney; and (5) dismissal without prejudice. [*Foy v. Hunter*, 106 N.C.App. 614, 418 S.E.2d 299 (1992) (citations omitted) (discussing lesser sanctions for failure to comply with rules of civil procedure); *McKoy v. McKoy*, 214 N.C.App. 551, 714 S.E.2d 832 (2011), *citing Daniels v. Montgomery Mutual Ins. Co.*, 320 N.C. 669, 360 S.E.2d 772 (1987) (failure to prosecute) (trial court has inherent power under the rule to impose lesser sanctions; adding as lesser sanction conditional dismissal and explicit warnings).]

b) Findings.

(1) A trial court must address each of the three factors before deciding whether to dismiss a claim with prejudice under Rule 41(b) for failure to prosecute. The order must clearly indicate that

the court considered lesser sanctions as dismissal is the most severe sanction available to the court in a civil action. [*Wilder v. Wilder*, 146 N.C.App. 574, 553 S.E.2d 425 (2001) (citation omitted); *Daniels v. Montgomery Mutual Ins. Co.*, 320 N.C. 669, 360 S.E.2d 772 (1987) (dismissal with prejudice is a harsh sanction); *McKoy v. McKoy*, 214 N.C.App. 551, 714 S.E.2d 832 (2011) (citation omitted) (trial court must, before dismissing with prejudice, make findings of fact and conclusions of law that indicate that it considered less drastic sanctions than dismissal).]

(2) Failure to demonstrate consideration of lesser sanctions requires reversal, even if findings on other factors are made. [*McKoy v. McKoy*, 214 N.C.App. 551, 714 S.E.2d 832 (2011) (dismissal based on party's failure to take any steps to pursue his claim for 26 months was remanded to trial court because judgment did not show trial court had considered lesser sanctions; trial court had made findings in support of its conclusion that party failed to prosecute her ED counterclaim, for example, that she had failed to schedule a status conference or a scheduling or discovery conference, had failed to calendar any dates for an initial pretrial or final pretrial conference, and had failed to produce any initial disclosures or an ED inventory affidavit).]

(3) Some cases have allowed a trial court to demonstrate that it sufficiently considered whether lesser sanctions were available by stating that in its order. For cases affirming dismissal with prejudice as a sanction for discovery violation and for failure to prosecute, *see In re Pedestrian Walkway Failure*, 173 N.C.App. 237, 618 S.E.2d 819 (2005), *review denied*, 360 N.C. 290, 628 S.E.2d 382 (2006) (dismissal pursuant to G.S. § 1A-1, Rules 37 and 41, both requiring consideration of lesser sanctions, following statement sufficient: "[t]he Court has carefully considered each of [Melton's] acts [of misconduct], as well as their cumulative effect, and has also considered the available sanctions for such misconduct. After thorough consideration, the Court has determined that sanctions less severe than dismissal would not be adequate given the seriousness of the misconduct"); *Cohen v. McLawhorn*, 208 N.C.App. 492, 704 S.E.2d 519 (2010), *citing Pedestrian Walkway* (that trial court sufficiently considered lesser sanctions shown by conclusion stating: "Sanctions short of this dismissal will not suffice in this case since the plaintiff has provided no information or facts as to why he or his representative did not appear when this case was called for trial to present evidence in the case and further the plaintiff has provided the Court with no information as to when it may be possible for this case to proceed, if it is not dismissed"); *Williard v. Williard*, __ N.C.App. __, 739 S.E.2d 627, *review denied*, 743 S.E.2d 222 (2013) (**unpublished**), *citing Pedestrian Walkway* (ED action filed

in 1995 and administratively closed in 2004 without prejudice properly dismissed in 2012 for failure to prosecute; following statement sufficient: the court "considered other sanctions less severe than dismissal with prejudice[, but was] unable to find anything short of a dismissal that would serve the purpose of Rule 41(b)").]

c) Appeal of an order for dismissal.

(1) The standard of review for an involuntary dismissal under Rule 41(b) is whether the findings of fact by the trial court are supported by competent evidence, and whether the findings of fact support the trial court's conclusions of law and its judgment. [*Ray v. Greer*, 212 N.C.App. 358, 713 S.E.2d 93, *cert. denied,* 365 N.C. 362, 718 S.E.2d 634 (2011) (citation omitted) (involuntary dismissal for failure to comply with court order but noting that while the "statutes giving rise to the particular dismissal vary, the procedure for the trial court and, thereafter, the Court of Appeals on review appears to be the same").]

(2) If the order includes findings that show that the trial court considered whether lesser sanctions were appropriate for a party's failure to prosecute, it will be reversed on appeal only for an abuse of discretion. [*Wilder v. Wilder*, 146 N.C.App. 574, 553 S.E.2d 425 (2001).]

III. Ex Parte Hearing

A. Procedure.

1. A plaintiff may request ex parte relief any time prior to hearing. [*See* G.S. § 50B-2(c)(1)] If a party proceeding pro se requests ex parte relief, the clerk must schedule a hearing within 72 hours or by the end of the next day on which the court is in session, whichever occurs first. [G.S. § 50B-2(c)(6)]

2. G.S. § 50B-2 requires that a "hearing" be held prior to issuance of an ex parte DVPO, meaning that the judge must take evidence to determine whether to issue the ex parte order. [*Hensey v. Hennessy*, 201 N.C.App. 56, 685 S.E.2d 541 (2009) (an ex parte DVPO cannot be issued based only upon a verified complaint, without having the aggrieved party appear for a hearing before a judge or magistrate).]

3. Continuance of an ex parte hearing.

a) A continuance of a hearing after the issuance of an ex parte DVPO shall be limited to one extension of no more than 10 days unless all parties consent or good cause is shown. The hearing on the return of the ex parte order shall have priority on the court calendar. [G.S. § 50B-2(c)(5), *added by* 2012 N.C. Sess. Law 20, § 1, effective October 1, 2012, and applicable to actions or motions filed on or after that date; *Rudder v. Rudder*, __ N.C.App. __, 759 S.E.2d 321 (2014) (considering amendment to be an

indication of the General Assembly's current intent to limit the length of time an ex parte DVPO may continue in effect).]

b) If a hearing is continued, ORDER CONTINUING DOMESTIC VIOLENCE HEARING AND EX PARTE ORDER (AOC-CV-316) allows the court to order that the ex parte order is continued until the date specified in the order for the new hearing.

4. If the district court is not in session in the county where ex parte relief is requested, a hearing can be scheduled in another county within the judicial district. [G.S. § 50B-2(c)(6)]

5. While the statute allows the court to grant relief before service of process on defendant, a court may inquire whether plaintiff knows if defendant is represented by counsel and if so, direct that counsel be notified.

6. If the judge denies the ex parte order, the plaintiff is still entitled to a hearing on the claim for a protective order unless the court dismisses the action pursuant to G.S. § 1A-1, Rule 12(b). (It is not clear whether a trial court has authority to dismiss pursuant to Rule 12(b)(6) on the court's own motion.)

7. Hearing by a magistrate.

a) The chief district court judge may authorize a magistrate to hear motions for emergency relief ex parte. [G.S. § 50B-2(c1)]

b) Before a magistrate may hear the motion, the magistrate must determine that the district court is not in session and that a district court judge is not available and will not be available for 4 or more hours. [G.S. § 50B-2(c1)]

B. Grounds for an ex parte order.

1. If it clearly appears to the court, from specific facts shown, that "there is a danger of acts of domestic violence against the aggrieved party or a minor child," the court may enter ex parte orders it deems necessary for protection. [G.S. § 50B-2(c)(1)]

2. The decision whether to grant an ex parte DVPO is "of necessity… predictive in nature, as the trial court must assess whether there is a substantial risk of future" harm. [*Hensey v. Hennessy,* 201 N.C.App. 56, 685 S.E.2d 541 (2009), *citing In re A.S.,* 190 N.C.App. 679, 661 S.E.2d 313 (2008).]

3. Because of the "potentially serious consequences" of an ex parte DVPO, which may require a defendant to leave his or her home, to stay away from his or her children, to give up possession of a motor vehicle, surrender his or her "firearms, ammunition, and gun permits" to the sheriff, and upon violation, may result in the defendant being charged with a class A1 misdemeanor or with various felonies for certain violations, a trial court should issue an ex parte DVPO only it "clearly appears" upon "specific facts" that the aggrieved party is in danger of acts of domestic violence. [*Hensey v. Hennessy,* 201 N.C.App. 56, 685 S.E.2d 541 (2009).]

C. Findings.

1. An ex parte DVPO must include specific findings that demonstrate "that there is a danger of acts of domestic violence against the aggrieved party." [G.S. § 50B-2(c)(1); *Hensey v. Hennessy,* 201 N.C.App. 56, 685 S.E.2d 541 (2009) (noting the lack of prior cases addressing the findings of fact required in an ex parte DVPO); *Rudder v. Rudder,* __ N.C.App. __, 759 S.E.2d 321 (2014), *quoting Hensey*.]

2. While findings are required, the findings do not have to fully comply with G.S. § 1A-1, Rule 52. [*Hensey v. Hennessy,* 201 N.C.App. 56, 685 S.E.2d 541 (2009) (to require Rule 52 findings "would be inconsistent with the fundamental nature and purpose of an ex parte DVPO, which is intended to be entered on relatively short notice" in situations needing quick action).]

3. While it is preferable for a trial court to state separately its factual findings, a form ex parte DVPO that explicitly incorporated the allegations of the complaint has been found sufficient for appellate review. [*Hensey v. Hennessy,* 201 N.C.App. 56, 685 S.E.2d 541 (2009).]

4. The following "specific facts" were sufficient, given their "recency and severity," for the trial court to conclude that plaintiff was in danger of acts of domestic violence: that two days before filing her complaint, defendant broke and hid plaintiff's cell phone, heckled plaintiff, put her in a headlock, dragged her and banged her into a wall, and then chased plaintiff as she sought help. Further the complaint stated that plaintiff was 29 weeks pregnant with defendant's child; plaintiff and defendant had other pending domestic violence proceedings; and plaintiff believed that she was in serious danger. [*Hensey v. Hennessy,* 201 N.C.App. 56, 685 S.E.2d 541 (2009); *Rudder v. Rudder,* __ N.C.App. __, 759 S.E.2d 321 (2014) (form ex parte DVPO that neither included specific facts nor referenced the allegations of the complaint was "minimally adequate" when finding 2 specified the date of the most recent conduct by defendant and four of the five subparts of finding 4 were checked and plaintiff's broken rib was identified as the serious injury inflicted by defendant; noting, however, that better practice would be to include more specific facts under finding 2 explaining the basis for the ultimate findings made by checking the boxes on the preprinted form).]

D. Relief authorized.

1. The relief authorized in G.S. § 50B-3(a) applies to ex parte requests as well as to requests for relief made after service of process and notice of hearing. Those provisions are set out in section V.E at page 29.

2. The court may order temporary child custody. The temporary custody provided for in an ex parte order is different from temporary custody awarded after notice and a hearing.

   a) A temporary order for custody ex parte and prior to service shall not be entered unless the court finds that the child is exposed to "a

substantial risk of physical or emotional injury or sexual abuse." [G.S. § 50B-2(c)(2)]

b) The statute does not require actual injury or sexual abuse but a substantial risk of one of those.

c) Upon finding that the child is exposed to "a substantial risk of physical or emotional injury or sexual abuse," upon request of the aggrieved party, the court shall consider and may order the other party to:

(1) Stay away from a minor child; or

(2) Return a minor child to, or not remove the child from, the physical care of the parent or person in loco parentis. [G.S. § 50B-2(c)(3)]

d) The court can enter the custody provisions in paragraph c upon finding that those provisions are:

(1) In the best interest of the child; and

(2) Necessary for the child's safety. [G.S. § 50B-2(c)(3)]

e) If the court awards temporary custody to the aggrieved party, upon finding that it is in the best interest of the child to have contact with the other party, the court must specify the terms of contact in an order designed to protect the safety and well-being of the child and aggrieved party. [G.S. § 50B-2(c)(4)] The order may include:

(1) A specific schedule setting out the time and location for the exchange of the child;

(2) Provisions for supervision by a third party or a supervised visitation center; and

(3) Any other provisions that ensure the well-being of the minor child and the aggrieved party. [G.S. § 50B-2(c)(4)]

f) Subject to the same limitations and requirements listed above for orders entered by district court judges, G.S. § 50B-2(c1) allows a magistrate, if authorized by a chief district court judge, to enter a temporary order for custody ex parte if the magistrate finds that the child is exposed to a substantial risk of physical or emotional injury or sexual abuse. The authority granted to authorized magistrates to award temporary custody pursuant to G.S. § 50B-2(c1) and G.S. § 50B-3(a)(4) is granted subject to custody rules to be established by the supervising chief district judge of each judicial district. [G.S. § 50B-2(c2)]

g) **NOTE:** If the defendant is ordered to stay away from the child's school, the sheriff is to deliver a copy of the protective order to the principal of each school named in the order. [G.S. § 50B-3(c)]

3. Under certain circumstances, the court must order the defendant to surrender firearms, ammunition and permits. [G.S. § 50B-3.1]

a) The court must ask the plaintiff, at an ex parte or emergency hearing, about the defendant's ownership of or access to firearms, ammunition, or permits to purchase firearms or to carry concealed firearms, and identifying information for those items. [G.S. § 50B-3.1(b)]

b) Upon issuance of an ex parte order, the court must order the defendant to surrender all firearms, machine guns, ammunition, and permits to purchase and carry firearms, in defendant's care, custody, possession, ownership, or control if the court finds that the defendant:

(1) Used or threatened to use a deadly weapon or has a pattern of prior conduct involving the use or threatened use of a firearm against a person; or

(2) Has made threats to seriously injure or kill the aggrieved party or minor child; or

(3) Has made threats to commit suicide; or

(4) Has inflicted serious injuries upon the aggrieved party or minor child. [G.S. § 50B-3.1(a)]

c) An ex parte DVPO cannot serve as a valid search warrant in a criminal proceeding based in part on the lack of determination regarding probable cause for the search. [*State v. Elder,* __ N.C.App. __, 753 S.E.2d 504, *stay allowed,* __ N.C. __, 753 S.E.2d 681, *writ allowed,* __ N.C. _, 755 S.E.2d 607, *review dismissed,* __ N.C. _, 758 S.E.2d 863 (2014).]

d) Because G.S. § 50B-3.1 specifies the trial court's authority regarding weapons, the court cannot use the 'catch-all' provision of G.S. § 50B-3(a)(13) to order law enforcement to search for and seize weapons. [*State v. Elder,* __ N.C.App. __, 753 S.E.2d 504, *stay allowed,* __ N.C. __, 753 S.E.2d 681, *writ allowed,* __ N.C. _, 755 S.E.2d 607, *review dismissed,* __ N.C. _, 758 S.E.2d 863 (2014).]

e) An ex parte order is a "protective order" for purposes of G.S. §§ 14–269.8 and 50B–3.1. [*State v. Poole,* __ N.C.App. __, 745 S.E.2d 26, *writ and review denied, appeal dismissed,* __ N.C. __, 749 S.E.2d 885 (2013).]

f) For a discussion of a defendant's right to have surrendered firearms returned, and the procedure therefore, *see* section VI.A at page 36.

E. Expiration of an ex parte order.

1. Ex parte orders entered by a district court judge.

a) G.S. § 50B-2(c) does not specify a date or time for expiration of an ex parte order issued by a district court judge.

b) G.S. § 50B-2(c)(5) provides that a hearing must be held within 10 days of the issuance of an ex parte order or within 7 days of service of process on the other party, whichever occurs later.

c) An ex parte order will not expire unless the order includes a specific expiration date. [*See, e.g., Campen v. Featherstone,* 150 N.C.App. 692, 564 S.E.2d 616, *appeal dismissed, review denied,* 356 N.C. 297, 570 S.E.2d 504 (2002) (because the statute authorizing an ex parte order does not specify that the order expires on a certain date, nor does case law establish a definite period of viability for temporary custody orders, the ex parte order does not expire).]

d) EX PARTE DOMESTIC VIOLENCE ORDER OF PROTECTION (AOC-CV-304) provides a space for the court to enter a date after which the ex parte order ceases to be effective.

2. Ex parte orders entered by a magistrate.

a) An ex parte order entered by a magistrate expires by the end of the next day that the district court is in session in the county in which the action was filed. The magistrate must schedule an ex parte hearing before a district court judge before the order expires. [G.S. § 50B-2(c1)] The defendant is not entitled to notice of this second ex parte hearing.

b) Following the entry of an ex parte order by a magistrate, the district court judge proceeds with an ex parte hearing in accordance with G.S. § 50B-2(c). [G.S. § 50B-2(c1)]

IV. Emergency Hearing

A. Procedure.

1. An emergency hearing is held if requested by a party whether or not an ex parte hearing was held or an ex parte order was entered. [G.S. § 50B-2(b)]

2. This hearing is different from the ex parte hearing and is held after notice to the defendant. NOTE: AOC Form CV-303 contains a request for emergency relief as part of the standard language.

3. If service of process on defendant is not complete, no hearing is required. [G.S. § 50B-2(b)]

4. Ex parte order entered.

a) If an ex parte order was entered, the hearing **shall** be held within 10 days of the issuance of the ex parte order or within 7 days of service on the defendant, whichever occurs later. [G.S. § 50B-2(c)(5); *Henderson v. Henderson,* __ N.C.App. __, 758 S.E.2d 681 (2014).]

b) If the ex parte order was issued in a pro se proceeding, the clerk sets a date for the emergency hearing, issues a notice of hearing, and causes service to be had on the defendant. [G.S. § 50B-2(c)(7)]

5. No ex parte order entered.

a) If no ex parte order was entered, the hearing shall be held 5 days after notice of hearing or after 5 days from the date of service of process, whichever occurs first. [G.S. § 50B-2(b)]

b) If the plaintiff is proceeding pro se, requests emergency relief and does not request an ex parte hearing, the clerk sets a date for the emergency hearing within the time periods set out in (a) above, issues a notice of hearing, and causes service to be had on the defendant. [G.S. § 50B-2(b)]

B. Grounds for emergency relief.

1. G.S. § 50B-2(b) allows a party to move for emergency relief if he or she believes there is a danger of serious and immediate injury to himself or herself or a minor child.

2. The statute does not provide a standard for entry of an emergency order. However, G.S. § 50B-3 seems to provide that if the court finds that an act of domestic violence has occurred, the court must grant an emergency order that, at a minimum, restrains the defendant from further acts of domestic violence.

C. Relief authorized.

1. The relief authorized in G.S. § 50B-3(a) applies to requests for relief made at an emergency hearing. Those provisions are set out in section V.E at page 29.

2. The judge is required to make the same firearm inquiries at the emergency hearing as he or she is required to make at the ex parte hearing. *See* section III.D.3 at page 20.

3. Upon issuance of an emergency order, the court must order the defendant to surrender firearms, machine guns, ammunition, and permits to purchase and carry firearms, in defendant's care, custody, possession, ownership, or control upon finding any of the factors in G.S. § 50B-3.1(a), which are set out in section III.D.3 at page 20.

4. For a discussion of the defendant's right to have surrendered firearms returned, and the procedure therefore, *see* section VI.A at page 36.

V. Protective Orders

A. Jurisdiction.

1. The district court has original jurisdiction over actions instituted under Chapter 50B. [G.S. § 50B-2(a)]

2. In addition to proper service, the long-arm statute, G.S. § 1-75.4, must authorize the exercise of jurisdiction, and the exercise of jurisdiction must comport with due process of law. [*See Bates v. Jarrett,* 135 N.C.App. 594, 521 S.E.2d 735 (1999) (nonresident husband's act of transferring car title to a third party in violation of a North Carolina domestic violence protective order granting wife possession provided sufficient minimum contacts for the exercise of personal jurisdiction in wife's ED action).]

3. Courts in other jurisdictions have found the use of interstate mail or telephone facilities sufficient minimum contacts for the assertion of personal jurisdiction over a nonresident defendant under a long-arm statute. [*See McNair v. McNair,* 151 N.H. 343, 856 A.2d 5 (2004) (exercise of long-arm jurisdiction

based on "multiple harassing phone calls" made by the defendant in Texas to the plaintiff in New Hampshire was fair and reasonable); *Beckers v. Seck*, 14 S.W.3d 139 (Mo. App. 2000) (nonresident uncle's harassing calls and mailings purposefully directed at his niece in Missouri sufficient minimum contacts for Missouri court to exercise jurisdiction); *A.R. v. M.R.*, 351 N.J.Super. 512, 799 A.2d 27 (2002) (nonresident husband's threats to exact revenge and telephone calls to wife who had fled to New Jersey were tantamount to physical pursuit of the victim in New Jersey, and served as the requisite minimum contacts with New Jersey, even though the acts of domestic violence were committed in another state and defendant did not physically enter New Jersey); *cf. Caplan v. Donovan*, 450 Mass. 463, 879 N.E.2d 117, *cert. denied*, 553 U.S. 1018 (2008) (five or six daily calls by nonresident partner to cell phone of partner who had fled to Mass. did not amount to tortious injury for purposes of personal jurisdiction under Mass. long-arm statute when there was no evidence as to the content of the calls, that resident partner was in fear because of the calls, or that the calls were threatening; abuse prevention order entered without personal jurisdiction based on status exception as set out immediately below).]

4. Some courts in other jurisdictions have determined that due process concerns are not always implicated in these cases because a petition seeking only an order of protection is a request for a status determination only. In such cases, these courts have ruled that a nonresident defendant is not required to have minimum contacts with a state before the court can enter an order protecting the in-state victim, who generally has fled the abuser and recently come to the state. These states did not require affirmative action from a defendant, such as the surrender of firearms. [*See Hemenway v. Hemenway*, 159 N.H. 680, 992 A.2d 575 (2010) (*citing Caplan* and *Bartsch* (New Hampshire Supreme Court affirming final protective order entered without personal jurisdiction over nonresident defendant based on status exception to requirement of personal jurisdiction but reversing portion of the order that required affirmative action from defendant); *Caplan v. Donovan*, 450 Mass. 463, 879 N.E.2d 117, *cert. denied*, 553 U.S. 1018 (2008) (when defendant given notice and opportunity to be heard, abuse prevention order that prohibited defendant from abusing, contacting, or approaching the plaintiff or their child affirmed without personal jurisdiction over defendant; portion of the order that required defendant to surrender his firearms imposed an affirmative duty and was invalid for lack of personal jurisdiction); *Bartsch v. Bartsch*, 636 N.W.2d 3 (Iowa 2001) (Supreme Court of Iowa holding that personal jurisdiction was not required to enter an order, after notice to defendant and an opportunity to be heard, that directed defendant to stay away from wife, and to refrain from assaulting or communicating with her; order preserved the protected status afforded an Iowa resident by Iowa law); *Spencer v. Spencer*, 191 S.W.3d 14 (Ky. App. 2006) (under Kentucky's safe haven statute, court without personal jurisdiction over nonresident defendant could enter a protective order without violating due process); for a discussion of these cases and consideration of status determination generally, *see We Are Never Ever Getting Back Together: Domestic Violence Victims, Defendants, and Due Process*, 35 CARDOZO L. REV. 141 (2013).] For cases and commentary taking the opposite

view, *see Becker v. Johnson*, 937 So.2d 1128 (Fl. App. Dist. Ct. 2006) (per curiam) (protective order entered in Florida shortly after wife fled there vacated when husband did not have minimum contacts with Florida; no discussion of status determination as a basis for jurisdiction); *T.L. v. W.L.*, 820 A.2d 506 (Del. Fam. Ct. 2003), *distinguishing Bartsch* (affirming dismissal of petition for an order of protection based on nonresident husband's lack of minimum contacts with Delaware; wife brought petition after being in Delaware only two days and thus was not considered a bona fide resident and could have sought a remedy in Ohio where all allegations of abuse occurred and where all significant facts and witnesses would be located); Comment, *'Til Death Do Us Part: Why Personal Jurisdiction Is Required To Issue Victim Protection Orders Against Nonresident Abusers*, 63 OKLA. L. REV. 821 (2011).

5. When a party seeks a determination of custody or visitation rights in an action under Chapter 50B, subject matter jurisdiction over the action is determined by the Uniform Child Custody Jurisdiction and Enforcement Act (the "UCCJEA"), just as it is in any other custody dispute. Chapter 50B does not provide alternative grounds for jurisdiction over custody disputes. [*See Danna v. Danna*, 88 N.C.App. 680, 364 S.E.2d 694, *review denied*, 322 N.C. 479, 370 S.E.2d 221 (1988) (holding that North Carolina trial judge, having properly declined to exercise jurisdiction under the UCCJA in favor of a Florida court which was exercising jurisdiction over the parties' custody dispute, did not err by failing to address mother's Chapter 50B claims filed in the same proceeding).] For more on jurisdiction under the UCCJEA, *see* Bench Book, Vol. 1, *Child Custody*, Chapter 4.

B. Mutual claims for domestic violence protective orders.

1. Protective orders, including consent orders, shall not be mutual in nature except when both parties file a claim and the court makes detailed findings indicating that:

   a) Both parties acted as aggressors;

   b) Neither party acted primarily in self-defense; and

   c) The right of each party to due process is preserved. [G.S. § 50B-3(b)]

2. In addition to the findings above, for relief to be ordered against the plaintiff, the defendant must serve a pleading (counterclaim) on the plaintiff. [G.S. § 50B-3(b) (requiring both parties to file a claim); *see also Bryant v. Williams*, 161 N.C.App. 444, 446 n.2, 588 S.E.2d 506 (2003) (the court recognizing, in dicta, that mutual claims require an additional complaint and detailed findings by the court).]

C. Hearing.

1. Purpose of the DVPO hearing.

   a) When an ex parte order has been issued:

(1) The purpose of the DVPO hearing is to determine whether the protective order should be continued beyond the temporary time frame of the ex parte DVPO. [*Henderson v. Henderson,* __ N.C.App. __, 758 S.E.2d 681 (2014).]

(2) The purpose of the DVPO hearing is not to determine whether to continue the ex parte DVPO as the process of issuing an ex parte DVPO is complete once the trial court determines that the complainant, alone, has alleged sufficient facts to show a danger of acts of domestic violence. [*Henderson v. Henderson,* __ N.C.App. __, 758 S.E.2d 681 (2014).]

2. Evidence.

a) While the results of a DSS investigation into allegations of sexual abuse of minor children may be relevant to the issue of domestic violence, the fact that there is or has been an investigation is not evidence that can be used to support a finding that there has been domestic violence. [*Burress v. Burress,* 195 N.C.App. 447, 672 S.E.2d 732 (2009).] However, testimony about defendant's conduct, that repeated statements made in an ongoing DSS investigation, has been found relevant to the issue of domestic violence in a DVPO hearing. [*Henderson v. Henderson,* __ N.C.App.__, 758 S.E.2d 681 (2014), *distinguishing Burress* (mother's testimony, that included statements made by her children about their treatment while with defendant father, was not rendered irrelevant and incompetent because those statements also had been made to DSS).]

b) Hearsay.

(1) Testimony by plaintiff mother that her son told her of inappropriate conduct by defendant father was hearsay, which had been admitted by the court, for the limited purpose of explaining why plaintiff left the residence she shared with defendant, so it was not evidence that could be used to support a finding that defendant actually committed acts of domestic violence against the children. [*Burress v. Burress,* 195 N.C.App. 447, 672 S.E.2d 732 (2009); *cf. Henderson v. Henderson,* __ N.C.App.__, 758 S.E.2d 681 (2014), *citing State v. Wood,* 311 N.C. 739, 319 S.E.2d 247 (1984) (when defendant failed to assert a hearsay objection, plaintiff mother's testimony about incidents that occurred when children were with defendant father, which children had described to her, was admissible despite mother's inability to provide specific dates of the incidents; a child's uncertainty as to time or date goes to the weight rather than the admissibility of the evidence).] For more on evidence issues arising in the context of a child victim or witness, *see* Jessica Smith, "Evidence Issues In Criminal Cases Involving Child Victims and Child Witnesses," *Administration of Justice Bulletin No. 2008/07* (School of Government, December 2008),

available at
http://shopping.netsuite.com/s.nl/c.433425/it.I/id.369/.f.]

(2) Plaintiff's testimony that she had been diagnosed with neck strain after defendant's assault was inadmissible hearsay. When her testimony was the only evidence of that diagnosis and the trial court made a specific finding that plaintiff suffered neck strain, the trial court relied on the inadmissible testimony, making the error prejudicial and not harmless. [*Little v. Little,* __ N.C.App. __, 739 S.E.2d 876 (2013).]

c) Privileges.

(1) Against self-incrimination. A parent's decision to invoke his Fifth Amendment right to remain silent when asked during custody trial about his alleged involvement in drug trafficking allowed judge to assume allegations were true when deciding issues of custody and visitation. [*Qurneh v. Colie,* 122 N.C.App. 553, 471 S.E.2d 433, *appeal withdrawn,* 343 N.C. 752, 477 S.E.2d 34 (1996).] For application of the privilege in a contempt proceeding, *see* section VIII.C at page 50.

(2) Agents of domestic violence programs or rape crisis centers. [G.S. § 8-53.12]

D. Grounds for, and findings and conclusions to support, a protective order.

1. To enter a domestic violence protective order, the court must find that an act of domestic violence has occurred. [G.S. § 50B-3(a)]

a) Commission of a criminal act is not required to determine that an act of domestic violence has occurred. [*Metts v. Metts,* __N.C.App. __, __ S.E.2d __ (10/16/2012) (**unpublished**).]

b) Previous statutory language requiring the court to grant an order "to bring about a cessation of acts of domestic violence" was omitted in a 2005 legislative change. [2005 N.C. Sess. Law 423, § 1] Although the appellate courts continue to cite to earlier cases citing that language as the standard for issuance of an order, it is no longer the statutory standard.

c) While the court of appeals "appreciates the usefulness" of form orders in domestic violence cases, it has emphasized that a trial court should not neglect its responsibility to make necessary findings and conclusions. [*Price v. Price,* 133 N.C.App. 440, 441 n.2, 514 S.E.2d 553 (1999) (DVPO reversed when it did not contain any findings or conclusions; trial judge did not check any boxes under the "Findings' and "Conclusions" section of the AOC form used).]

2. Even though G.S. § 50B-3(a) requires that the trial court "find" that an act of domestic violence has occurred, this is a conclusion of law. [*Kennedy v. Morgan,* __ N.C.App. __, 726 S.E.2d 193, 197 n.2 (2012) (noting that

DOMESTIC VIOLENCE ORDER OF PROTECTION (AOC-CV-306) correctly identifies the language as a conclusion of law).]

3. The trial court must make findings of fact based upon the definition of domestic violence in G.S. § 50B-1(a) to support the conclusion that an act of domestic violence has occurred. [*Kennedy v. Morgan,* __ N.C.App. __, 726 S.E.2d 193, 197 n.2 (2012); *Brandon v. Brandon,* 132 N.C.App. 646, 513 S.E.2d 589 (1999) (where a protective order does not contain a conclusion of law supported by adequate findings of fact that domestic violence occurred, the conclusion of law cannot provide grounds for issuance of the DVPO).]

4. Each finding of fact, conclusion of law, and mandate of the domestic violence protective order, must be supported by competent evidence or the order will be reversed. [*Wilson v. Wilson,* 134 N.C.App. 642, 518 S.E.2d 255 (1999), *citing Price*; *Price v. Price,* 133 N.C.App. 440, 441 n.2, 514 S.E.2d 553 (1999) (DVPO reversed, instead of remanded for required findings, where there was no evidence to support a conclusion of domestic violence; remand would have been futile).]

5. Findings/evidence not sufficient.

a) Harassment/emotional distress.

(1) Sole finding made to support a conclusion that defendant committed an act of domestic violence based on continued harassment sufficient to cause substantial emotional distress was not sufficient: that '[a]fter a long history of abuse plaintiff separated from the defendant and finished counseling through family circumstances, she remains afraid of the defendant who tries to intimidate her —surveillance on her house at late hours, making the plaintiff and her neighbors apprehensive.' [*Kennedy v. Morgan,* __ N.C.App. __, 726 S.E.2d 193 (2012) (vague finding of a general "history of abuse" is not a finding of an "act of domestic violence" as that term is defined in G.S. § 50B-3(a)).]

(2) When daughters did not testify, and no other witness testified, as to the impact on the daughters of the father's installation of a hidden camera in daughters' bathroom, evidence was insufficient to support finding that father's conduct harassed mother to such an extent as to inflict substantial emotional distress on mother or the daughters. [*Fairbrother v. Mann,*__ N.C.App __, 738 S.E.2d 454 (2013) (**unpublished**) (while mother testified that she was "fearful" for her daughters' safety, she did not present any evidence of her substantial emotional distress; camera was discovered and removed before any filming of daughters took place).]

b) Act of domestic violence occurred.

(1) That plaintiff may have been "afraid" or "apprehensive" because of defendant's actions in hiring a private investigator to

conduct surveillance of plaintiff did not support a determination of domestic violence. Evidence showed that the PI service was professional, had not broken any laws, and that its investigators had not been on plaintiff's property or approached the individuals residing in plaintiff's home. [*Kennedy v. Morgan,* __ N.C.App. __, 726 S.E.2d 193 (2012).]

(2) Conclusion that defendant committed acts of domestic violence against plaintiff's minor children was not supported by evidence that, at the time of the hearing, DSS was investigating allegations that defendant sexually abused the children, without evidence of the investigation's results; nor was conclusion supported by hearsay testimony of mother that son told her of inappropriate conduct by father. [*Burress v. Burress,* 195 N.C.App. 447, 672 S.E.2d 732 (2009).]

6. Findings/evidence sufficient.

a) Harassment/emotional distress.

(1) The following evidence supported the determination that defendant tormented, terrorized or terrified plaintiff, causing plaintiff to avoid staying at his residence and to take steps to obscure when he arrived at his office: defendant waited in the middle of the night at plaintiff's apartment and began yelling and blowing the horn upon his return, would look in the windows of plaintiff's residence, called and sent text messages on both plaintiff's work and cell phones after being asked to cease communication, chased plaintiff into his work place and threatened to contact his HR manager, and circled plaintiff's office parking lot looking for his car. [*Judson v. Weiss,* __ N.C.App. __, 738 S.E.2d 454 (2013) (**unpublished**).]

b) Act of domestic violence occurred.

(1) The following testimony at hearing supported trial's court findings of assault and attempted bodily injury, which findings supported conclusion that defendant committed an act of domestic violence: plaintiff's testimony that defendant grabbed her after she said that she would call 911 if he didn't leave, responding deputy's testimony that plaintiff told him the same thing and that he saw a small mark "about an inch long" under plaintiff's ear, and testimony of plaintiff's daughter that her mother "had a scratch on her face and on the side of her neck." [*Baker v. Baker,* 218 N.C.App. 454, 721 S.E.2d 763 (2012) (**unpublished**).]

E. Relief authorized.

1. Upon finding that an act of domestic violence has occurred, the court must grant a protective order restraining the defendant from further acts of domestic violence. [G.S. § 50B-3(a)]

2. In addition, the court has discretion to enter a protective order or approve a consent agreement that:

a) Grants a party possession of the residence or household of the parties and excludes the other party from the residence or household.

b) Requires a party to provide a spouse and his or her children suitable alternate housing.

c) Awards temporary custody and establishes temporary visitation rights for minor children. [*See* section 3 below.]

d) Orders the eviction of a party from the residence and assistance to the victim in returning to it.

e) Orders a party to support minor children as required by law.

(1) The 2011 Child Support Guidelines clarify that the guidelines must be used when temporary child support is ordered as a form of relief in a domestic violence protective order entered pursuant to G.S. Chapter 50B.

(2) *See* Bench Book, Vol. 1, *Child Support*, Chapter 3.

f) Orders a party to support a spouse as required by law. [*See* Bench Book, Vol. 1, *Postseparation Support and Alimony*, Chapter 2.]

g) Provides for possession of the personal property of the parties, including the care, custody, and control of any animal owned, possessed, kept, or held as a pet by either party or minor child residing in the household.

h) Orders a party to refrain from doing any or all of the following:

(1) Threatening, abusing, or following the other party.

(2) Harassing the other party, including by telephone, visiting the home or workplace, or other means.

(3) Cruelly treating or abusing an animal owned, possessed, kept, or held as a pet by either party or minor child residing in the household.

(4) Otherwise interfering with the other party.

i) Awards attorney fees to either party.

j) Prohibits a party from purchasing a firearm for a time certain. [*See* section V.E.4 at page 33 regarding when the court is required to order surrender of all firearms, ammunition and permits.]

k) Orders a party to attend and complete an abuser treatment program approved by the Domestic Violence Commission. [A list of approved abuser treatment programs may be found at http://www.councilforwomen.nc.gov/displayprograms-ab.aspx.]

l) Includes any additional prohibitions or requirements the court deems necessary to protect any party or minor child. [G.S. § 50B-3(a)(1)-(13), *amended by* 2009 N.C. Sess. Law 425, § 1, effective July 28, 2009, to provide for protection of pets.]

(1) A district court exceeded its statutory authority when it ordered in an ex parte DVPO a general search of defendant's person, vehicle and residence for unspecified weapons pursuant to G.S. § 50B-3(a)(13). [*State v. Elder*, __ N.C.App. __, 753 S.E.2d 504, *stay allowed*, __ N.C. __, 753 S.E.2d 681, *writ allowed*, __ N.C. _, 755 S.E.2d 607, *review dismissed*, __ N.C. __, 758 S.E.2d 863 (2014).]

m) **NOTE:** If the defendant is ordered to stay away from the child's school, the sheriff is to deliver a copy of the protective order to the principal of each school named in the order. [G.S. § 50B-3(c)]

3. Upon request of either party, the court shall consider and may award temporary child custody and establish temporary visitation rights. [G.S. § 50B-3(a1)]

a) When a party seeks a determination of custody or visitation rights in an action under Chapter 50B, subject matter jurisdiction over the action is determined by the Uniform Child Custody Jurisdiction and Enforcement Act (the "UCCJEA"), just as it is in any other custody dispute. Chapter 50B does not provide alternative grounds for jurisdiction over custody disputes. [*See Danna v. Danna*, 88 N.C.App. 680, 364 S.E.2d 694, *review denied*, 322 N.C. 479, 370 S.E.2d 221 (1988) (holding that North Carolina trial judge, having properly declined to exercise jurisdiction under the UCCJA in favor of a Florida court which was exercising jurisdiction over the parties' custody dispute, did not err by failing to address mother's Chapter 50B claims filed in the same proceeding).] For more on jurisdiction under the UCCJEA, *see* Bench Book, Vol. 1, *Child Custody*, Chapter 4.

b) A court's decision on temporary custody and temporary visitation must be based on the best interest of the minor child with particular consideration given to the safety of the minor child. [G.S. § 50B-3(a1)]

c) The court must consider the following factors when determining temporary custody and visitation:

(1) Whether the minor child was exposed to a substantial risk of physical or emotional injury or sexual abuse.

(2) Whether the minor child was present during acts of domestic violence.

(3) Whether a weapon was used or threatened to be used during any acts of domestic violence.

(4) Whether a party caused or attempted to cause serious bodily injury to the aggrieved party or minor child.

(5) Whether a party placed an aggrieved party or minor child in reasonable fear of imminent serious bodily injury.

(6) Whether a party caused an aggrieved party to engage involuntarily in sexual relations by force, threat, or duress.

(7) Whether there is a pattern of abuse against the aggrieved party or minor child.

(8) Whether a party has abused or endangered the minor child during visitation.

(9) Whether a party has used visitation as an opportunity to abuse or harass the aggrieved party.

(10) Whether a party has improperly concealed or detained the minor child.

(11) Whether a party has otherwise acted in a manner that is not in the best interest of the minor child. [G.S. § 50B-3(a1)(2)]

d) If the court awards temporary custody, the court must consider whether visitation is in the best interest of the minor child. [G.S. § 50B-3(a1)(3)]

e) If the court orders visitation, the court must provide for the safety and well-being of the child and the aggrieved party. The order must specify dates and times for the visitation to take place or other specific parameters or conditions that are appropriate. [G.S. § 50B-3(a1)(3)] The court may consider including in the visitation order any of the following provisions:

(1) Ordering an exchange of the minor child in a protected setting or in the presence of an appropriate third party.

(2) Ordering visitation supervised by an appropriate third party, or at a supervised visitation center or other approved agency.

(a) A person, supervised visitation center, or other agency may be approved to supervise visitation after appearing in court or filing an affidavit accepting that responsibility and acknowledging accountability to the court. [G.S. § 50B-3(a1)(3)]

(3) Ordering the noncustodial parent to attend and complete, to the satisfaction of the court, an abuser treatment program as a condition of visitation.

(4) Ordering either or both parents to abstain from possession or consumption of alcohol or controlled substances during the

visitation or for 24 hours preceding an exchange of the minor child.

(5) Ordering the noncustodial parent to pay the costs of supervised visitation.

(6) Prohibiting overnight visitation.

(7) Requiring a bond from the noncustodial parent for the return and safety of the minor child.

(8) Ordering an investigation or appointment of a guardian ad litem or attorney for the minor child.

(9) Imposing any other condition that is deemed necessary to provide for the safety and well-being of the minor child and the safety of the aggrieved party. [G.S. § 50B-3(a1)(3)]

f) A temporary custody order pursuant to Chapter 50B is without prejudice and must be for a fixed period of time not to exceed one year. [G.S. § 50B-3(a1)(4)] Any subsequent custody order entered under Chapter 50 supersedes a temporary order issued pursuant to Chapter 50B. [G.S. § 50B-3(a1)(4)]

g) A temporary custody order entered as part of a protective order cannot exceed one year in total duration. [G.S. § 50B-3(b)] Therefore, if a protective order including temporary custody is entered for one year, any subsequent renewal of the protective order cannot include a custody provision. TEMPORARY CHILD CUSTODY ADDENDUM TO DOMESTIC VIOLENCE PROTECTIVE ORDER (AOC-CV-306A) provides a space for the court to enter a date after which the temporary custody order ceases to be effective.

h) If the defendant is ordered to stay away from the child's school, the sheriff is to deliver a copy of the protective order to the principal of each school named in the order. [G.S. § 50B-3(c)]

i) For more on temporary custody orders, *see* Bench Book, Vol. 1, *Child Custody,* Chapter 4.

4. Under certain circumstances, the court must order the defendant to surrender firearms, machine guns, ammunition and permits. [G.S. § 50B-3.1]

a) Surrender of firearms, machine guns, ammunition and permits.

(1) The court must ask the plaintiff about the defendant's ownership of or access to firearms, ammunition, or permits to purchase firearms or to carry concealed firearms, and identifying information for those items. [G.S. § 50B-3.1(b)]

(2) The court must ask the defendant about the presence of, ownership of or access to firearms, ammunition, or permits to purchase firearms or to carry concealed firearms, and identifying information for those items. [G.S. § 50B-3.1(c)]

(3) Upon issuance of an emergency or ex parte protective order, the court must order the defendant to surrender all firearms, machine guns, ammunition, and permits to purchase firearms or to carry concealed firearms, in defendant's care, custody, possession, ownership, or control if the court finds that the defendant:

(a) Used or threatened to use a deadly weapon or has a pattern of prior conduct involving the use or threatened use of a firearm against a person; or

(b) Has made threats to seriously injure or kill the aggrieved party or minor child; or

(c) Has made threats to commit suicide; or

(d) Has inflicted serious injuries upon the aggrieved party or minor child. [G.S. § 50B-3.1(a)]

(4) An ex parte order is a "protective order" for purposes of G.S. §§ 14–269.8 and 50B–3.1. [*State v. Poole*, __ N.C.App. __, 745 S.E.2d 26, *writ and review denied, appeal dismissed,* __ N.C. __, 749 S.E.2d 885 (2013).]

(5) A court must make findings on the factors listed in G.S. § 50B-3.1(a) before ordering a defendant to surrender a firearm, even if using an AOC form order. [*Howe v. Howe*, 214 N.C.App. 193, 714 S.E.2d 529, *appeal dismissed, review denied*, 365 N.C. 355, 718 S.E.2d 151, *review denied*, 732 S.E.2d 345 (2011) (**unpublished**) (when trial judge failed to check any boxes representing the required statutory findings, error to order defendant to surrender his firearms; that portion of the order reversed, instead of remanded for findings, when there was no evidence to support a finding that defendant engaged in any act that would warrant surrender).]

b) Order for surrender of firearms.

(1) G.S. § 50B-3.1(d) allows the trial court to order a defendant to immediately surrender to the sheriff all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms that are in the care, custody, possession, ownership, or control of the defendant. [*See State v. Elder*, __ N.C.App. __, 753 S.E.2d 504, *stay allowed*, __ N.C. __, 753 S.E.2d 681, *writ allowed,* __ N.C. _, 755 S.E.2d 607, *review dismissed*, __ N.C. __, 758 S.E.2d 863 (2014) (applying the dictionary definition of "surrender" to find that G.S. § 50B-3.1 requires a defendant, upon service of an emergency or ex parte order, to "immediately yield" to a law enforcement officer the weapons and permits set out above).]

(2) However, G.S. § 50B-3.1(d) does not give the trial court authority to order law enforcement to search defendant's person,

vehicle or residence for weapons and to seize the weapons. [*State v. Elder*, __ N.C.App. __, 753 S.E.2d 504, *stay allowed*, __ N.C. __, 753 S.E.2d 681, *writ allowed*, __ N.C. _, 755 S.E.2d 607, *review dismissed*, __ N.C. _, 758 S.E.2d 863 (2014).]

(3) If the court orders surrender of firearms, the order must provide that the defendant is prohibited from possessing, purchasing, or receiving a firearm, as long as the protective order or any successive protective order is in effect. [G.S. § 50B-3.1(d)(1)] Defendant is also prohibited from attempting any of these acts. [G.S. § 50B-3.1(d)(1)]

(a) This provision was effective December 1, 2011, and is applicable to offenses committed on or after that date. [2011 N.C. Sess. Law 268, § 23]

(b) Prosecutions for offenses committed before December 1, 2011, are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions. [2011 N.C. Sess. Law 268, § 26]

(4) Prior to December 1, 2011, G.S. § 50B-3.1(d)(1) prohibited "ownership" of a firearm.

(a) If the court orders surrender of firearms, the order must provide that the defendant is prohibited from owning, possessing, purchasing, or receiving a firearm, as long as the protective order or any successive protective order is in effect. [G.S. § 50B-3.1(d)(1)] Defendant is also prohibited from attempting any of these acts. [G.S. § 50B-3.1(d)(1)]

F. Consent judgments.

1. A 50B protective order includes orders entered by a court after a hearing or with consent of the parties. [G.S. § 50B-1(c)]

a) A protective order under Chapter 50B entered by the court with the consent of the parties is treated in all respects like any other protective order. [G.S. § 50B-1(c)]

b) The hearing held on an application for an ex parte DVPO is "exactly" the type of hearing contemplated by G.S. § 50B-1(c). [*State v. Poole*, _ N.C.App. __, 745 S.E.2d 26, *writ and review denied, appeal dismissed*, __ N.C. __, 749 S.E.2d 885 (2013), *citing State v. Byrd*, 363 N.C. 214, 675 S.E.2d 323 (2009) (that an ex parte hearing is not an adversarial hearing at which both parties are present does not mean that it is not a "hearing" for purposes of G.S. § 50B-1(c)).]

c) Mutual protective orders are prohibited, except in limited circumstances, even if the mutual orders are entered by consent. [G.S. § 50B-3(b)] *See* section V.B at page 25.

2. Findings of fact in consent judgments.

a) Consent orders entered **on or after** October 1, 2013.

(1) A consent order may be entered pursuant to Chapter 50B without findings of facts and conclusions of law if the parties agree in writing that no findings and conclusions will be included. The consent protective order will be valid and enforceable and shall have the same force and effect as a protective order entered without findings of act and conclusions of law. [G.S. § 50B-3(b1), *added by* 2013 N.C. Sess. Law 237, § 1, effective October 1, 2013, and applicable to orders entered on or after that date.]

(2) DOMESTIC VIOLENCE ORDER OF PROTECTION (CONSENT ORDER) (AOC-CV-306) (Rev. 10/13) has a section for the parties to sign, acknowledging entry of a consent judgment without findings of fact.

b) Consent orders entered **before** October 1, 2013.

(1) All consent orders entered pursuant to Chapter 50B that do not contain a finding or conclusion that defendant committed an act of domestic violence are void *ab initio*. [*Kenton v. Kenton,* 218 N.C.App. 603, 724 S.E.2d 79 (2012), *citing Bryant v. Williams,* 161 N.C.App. 444, 588 S.E.2d 506 (2003) (consent judgment which "lacked any finding that defendant committed an act of domestic violence is void *ab initio*").]

c) Mutual DVPO.

(1) G.S. § 50B-3(b) requires that the court make detailed findings of fact when entering a **mutual** DVPO indicating that both parties have filed claims pursuant to Chapter 50B, both parties acted as aggressors, that neither party acted primarily in self-defense, and that the right of each party to due process is preserved. The statute specifies that this requirement applies to consent orders involving mutual claims for a DVPO as well as to those orders entered after a contested hearing.

VI. Return of Firearms

A. Return of surrendered firearms.

1. No protective order entered at the expiration of an ex parte or emergency order. [G.S. § 50B-3.1(e)]

a) If no protective order is entered at the expiration of an ex parte or emergency order, the defendant may retrieve a surrendered weapon unless the court finds that defendant is precluded from owning or possessing a firearm by:

(1) State or federal law [*see* section VI.B on page 38]; or

(2) Final disposition of criminal charges arising from acts against the domestic violence victim. [G.S. § 50B-3.1(e)]

b) A sheriff may not return surrendered firearms to a defendant unless the court orders the return of firearms after concluding defendant is not precluded from owning or possessing a firearm. [G.S. § 50B-3.1(d)(2)]

2. Motion for return at expiration of a protective order or final disposition of criminal charges. [G.S. § 50B-3.1(f)]

a) The defendant must timely file a motion.

(1) A defendant must file a motion for return of the firearm or other covered item no later than 90 days after expiration of a protective order or final disposition of any pending criminal charges for acts against the domestic violence victim. [G.S. § 50B-3.1(f)]

b) Hearing required.

(1) Upon receipt of a motion for return, the court must schedule a hearing and provide written notice to the domestic violence victim, who has the right to appear and be heard, and to the sheriff who has control of the items. [G.S. § 50B-3.1(f)]

c) At the hearing, the court must:

(1) Determine whether the defendant is subject to any state or federal law or court order that precludes the defendant from owning or possessing a firearm [G.S. § 50B-3.1(f); *see* section B below for a partial list of federal and state statutes that ban firearms];

(2) Inquire whether:

(a) The protective order has been renewed.

(b) The defendant is subject to any other protective orders.

(c) The defendant is disqualified from owning or possessing a firearm pursuant to 18 U.S.C. § 922 or any state law.

(d) The defendant has any pending criminal charges, in either state or federal court, committed against the domestic violence victim. [G.S. § 50B-3.1(f)]

(3) Make findings.

(a) The statute requires the trial court to conduct an inquiry before returning a defendant's firearms and to find facts as to the only substantive issue raised by the motion: whether the defendant is subject to any state or federal law or court order precluding defendant from owning or

possessing a fireman. [*Gainey v. Gainey*, 194 N.C.App. 186, 669 S.E.2d 22 (2008) (when the trial court did not address this issue and instead directed return of the weapons after finding that the Sheriff had illegally seized defendant's firearms, the legality of which was not raised by defendant's motion and on which no relevant evidence was presented, matter reversed and remanded for court to conduct the proper inquiry).]

(4) Deny the motion for return of a firearm or other covered item if the court finds that:

(a) The defendant is prohibited from owning or possessing a firearm pursuant to state or federal law; or

(b) There are current criminal proceedings, state or federal, pending against the defendant for acts against the domestic violence victim. [G.S. § 50B-3.1(f)]

B. A partial list of federal and state statutes that ban firearms, and a partial list of the statutes addressing removal of a firearms ban, include:

1. Person mentally defective, adjudicated incompetent or committed to a mental institution.

a) Federal disability and restoration.

(1) 18 U.S.C. § 922(g)(4), which makes it unlawful for a person who has been adjudicated a "mental defective" or who has been committed to a mental institution to possess any firearm or ammunition. [*See Gainey v. Gainey*, 194 N.C.App. 186, 669 S.E.2d 22 (2008) (order directing return of surrendered weapons reversed and matter remanded for court to consider whether defendant was precluded by this law from owning or possessing a firearm; appellate court noted the "highly persuasive" evidence that defendant had been committed to a mental institution two years prior to entry of the ex parte DVPO).] MOTION FOR RETURN OF WEAPONS SURRENDERED UNDER DOMESTIC VIOLENCE PROTECTIVE ORDER AND NOTICE OF HEARING (AOC-CV-319), page 4, sets out 18 U.S.C. § 922(g) in its entirety.

(2) 18 U.S.C. § 925(c) sets out a procedure for a person prohibited from possessing or receiving firearms or ammunition to apply to the U.S. Attorney General for relief from federal firearms disabilities, which may be granted if the applicant establishes to the satisfaction of the Attorney General that he or she will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. However, the Bureau of Alcohol, Tobacco, Firearms and Explosives, the agency to whom an application for restoration of

firearm privileges is to be made, states on its website that it is no longer making the restoration form available due to Congressional appropriation restrictions and recommends that persons seeking relief from a federal firearm disability seek a presidential pardon. [*See* http://www.atf.gov/forms/download/atf-f-3210-1-notice.html; North Carolina Civil Commitment Manual (2d ed. 2011), Chapter 12 and Appendix D, available at http://www.sog.unc.edu/node/2221.]

b) State disability and restoration.

(1) G.S. § 14-404(c)(4), which prohibits issuance of a permit for the purchase or receipt of a pistol (handgun permit) to a person who has been adjudicated mentally incompetent or has been committed to any mental institution.

(a) An applicant shall not be ineligible to receive a handgun permit under G.S. § 14-404(c)(4) because of involuntary commitment to mental health services if the individual's rights have been restored under G.S. § 122C-54.1. [G.S. § 14-404(g), *added by* 2008 N.C. Sess. Law 210, § 3.(a), effective December 1, 2008.]

(b) However, 2013 N.C. Sess. Law 369, § 9, effective October 1, 2013, removed G.S. § 14-404 from the list of statutes eligible for removal of disability by petition under G.S. § 122C-54.1(a). G.S. § 14-404(g) was not amended and still references restoration under G.S. § 122C-54.1. It is not clear whether G.S. § 122C-54.1 is available to a person seeking to remove a firearm ban imposed pursuant to G.S. § 14-404(c)(4) after October 1, 2013.

(c) For a case determining that a trial court erred when it upheld a sheriff's denial of an application for a handgun permit based on G.S. § 14-404(c)(4), *see Waldron v. Batten*, 191 N.C.App. 237, 662 S.E.2d 568 (2008) (while plaintiff's mother had petitioned for plaintiff's involuntary commitment some 10 years earlier, the statutory requirements for plaintiff's involuntary commitment were never met and nothing in the record showed that plaintiff had voluntarily committed himself to a mental institution).

(2) G.S. § 14-415.12(b)(6), which prohibits issuance of a permit to carry a concealed handgun (concealed handgun permit) to a person who is currently, or has been previously adjudicated by a court or administratively determined by a governmental agency whose decisions are subject to judicial review to be, lacking mental capacity or mentally ill. Receipt of previous consultative services or outpatient treatment alone shall not disqualify an applicant.

(a) An applicant shall not be ineligible to receive a concealed carry permit under G.S. § 14-415.12(b)(6) because of an adjudication of mental incapacity or illness or an involuntary commitment to mental health services if the individual's rights have been restored under G.S. § 122C-54.1. [G.S. § 14-415.12(c), *amended by* 2013 N.C. Sess. Law 369, § 11, effective October 1, 2013.]

(b) An applicant shall not be ineligible to receive a concealed carry permit under G.S. § 14-415.12(b)(6) because of an involuntary commitment to mental health services if the individual's rights have been restored under G.S. § 122C-54.1. [G.S. § 14-415.12(c), *added by* 2008 N.C. Sess. Law 210, § 3.(b), effective December 1, 2008.]

(3) G.S. § 122C-54.1 provides a procedure for an individual over the age of 18 to petition for the removal of the mental commitment bar.

(a) An individual may petition for the removal of the disabilities pursuant to 18 U.S.C. § 922(g)(4) [set out in (1)(a) above], and G.S. § 14-415.12 [set out in (1)(b) above] arising out of a determination or finding required to be transmitted to the National Instant Criminal Background Check System by G.S. § 122C-54(d1)(1) through (6). The petitioner must establish that he or she will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. [G.S. § 122C-54.1(a), (c), *amended by* 2013 N.C. Sess. Law 369, § 9, effective October 1, 2013.] PETITION AND ORDER FOR REMOVAL OF DISABILITY PROHIBITING THE PURCHASE, POSSESSION OR TRANSFER OF A FIREARM (AOC-SP-211, Rev. 10/13) may be used.

(b) An individual may petition for the removal of the mental commitment bar to purchase, possess, or transfer a firearm when the individual no longer suffers from the condition that resulted in the individual's involuntary commitment for either inpatient or outpatient mental health treatment and no longer poses a danger to self or other for purposes of the purchase, possession, or transfer of firearms pursuant to 18 U.S.C. § 922, G.S. § 14-404, and G.S. § 14-415.12. [G.S. § 122C-54.1, *added by* 2008 N.C. Sess. Law 210, § 2, effective December 1, 2008.] PETITION AND ORDER FOR REMOVAL OF A MENTAL COMMITMENT BAR TO PURCHASE, POSSESS OR TRANSFER A FIREARM (AOC-SP-211, Rev. 7/11) may be used.

(4) For a discussion of the collateral consequences of commitment or admission to a mental health treatment facility on the right to own or possess firearms, and on overview of involuntary commitment and the Federal Gun Control Act, *see* North Carolina Civil Commitment Manual (2d ed. 2011), Chapter 12 and Appendix D, available at http://www.sog.unc.edu/node/2221.

2. Person subject to a civil protection order.

a) Federal disability.

(1) 18 U.S.C. § 922(g)(8), which makes it unlawful for a person subject to most civil protection orders to possess any firearm or ammunition as long as that protective order remains in effect. [This statute applies to protective orders restraining conduct toward an "intimate partner" as defined by 18 U.S.C. § 921(a)(32), and requires an active protective order.]

(a) The Fourth Circuit has held that application of the statute did not violate a defendant's Second Amendment right to bear arms for self-defense. [*U.S. v. Chapman*, 666 F.3d 220 (4th Cir. 2012) (applying an intermediate scrutiny standard, defendant's as-applied Second Amendment challenge rejected).]

(b) This provision correctly applied when the order at issue resulted from defendant's conviction in state court of assault and battery of a family or household member, with a 30 day sentence suspended for 2 years upon the judge's hand-written condition "no violent, threatening or abusive contact with victim." [*U.S. v. Larson*, 843 F.Supp.2d 641 (W.D.Va. 2012), *aff'd per curiam*, 502 Fed.Appx. 336 (4th Cir. 2013) (**unpublished**) (rejecting defendant's argument that above court order was not the type of order contemplated by the statute, holding that a formal DVPO issued after a hearing pursuant to state law is not required, only a "court order" that satisfies the elements of 18 § U.S.C. 922(g)(8)).]

b) State disability.

(1) G.S. § 14-404(c)(8), which prohibits issuance of a permit for the purchase or receipt of a pistol (handgun permits) to a person who is subject to a court order issued after notice and a hearing, at which the person had an opportunity to participate, that restrains the person from harassing, stalking, or threatening an intimate partner or child of the intimate partner, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or to the partner's child, if the order

includes a finding that the person represents a credible threat as set out therein.

(2) G.S. § 14-269.8, which makes it a Class H felony for any person to possess, purchase or receive, or attempt to possess, purchase or receive, a firearm, machine gun, ammunition, or permits to purchase and carry concealed firearms, if that person is subject to a domestic violence protective order or any successive protective order. [G.S. § 14-269.8(a), *amended by* 2011 N.C. Sess. Law 268, § 7, effective December 1, 2011, and applicable to offenses committed on or after that date.] Prosecutions for offenses committed before December 1, 2011, are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions. [2011 N.C. Sess. Law 268, § 26.]

(a) Prior to December 1, 2011, G.S. § 14-269.8 made it a Class H felony for any person to own, possess, purchase or receive, or attempt to possess, purchase or receive, a firearm, machine gun, ammunition, or permits to purchase and carry concealed firearms, if that person is subject to a domestic violence protective order or any successive protective order. [*See* 2011 N.C. Sess. Law 268, § 7, eliminating the prohibition against "ownership" in G.S. § 14-269.8(a)]

(b) An emergency or ex parte order is a "protective order" for purposes of G.S. §§ 14–269.8 and 50B–3.1. [*State v. Poole*, __ N.C.App. __, 745 S.E.2d 26, *writ and review denied, appeal dismissed*, __ N.C. __, 749 S.E.2d 885 (2013).]

(c) Criminal prosecution for violation of an ex parte order requiring the surrender of a defendant's firearms does not violate a defendant's due process rights under the U.S. or North Carolina Constitutions. [*State v. Poole*, __ N.C.App. __, 745 S.E.2d 26, *writ and review denied, appeal dismissed*, __ N.C. __, 749 S.E.2d 885 (2013) (basis for a possible due process violation is entry of an ex parte order prior to notice and an opportunity to be heard but exigencies of the domestic violence context justify a post-deprivation hearing; moreover, deprivation of the right to bear arms is for a short period of time and statutory requirements for issuance of an ex parte order limit the risk of an erroneous deprivation).]

(3) G.S. § 50B-3.1(j), which , in accordance with G.S. § 14-269.8, makes it a Class H felony to possess, purchase, or receive, or attempt to do so, a firearm, machine gun, ammunition, or a

permit to purchase or carry a firearm, in violation of a domestic violence protective order. [G.S. § 50B-3.1(j), *amended by* 2011 N.C. Sess. Law 268, § 24, effective December 1, 2011, and applicable to offenses committed on or after that date.] Prosecutions for offenses committed before December 1, 2011, are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions. [2011 N.C. Sess. Law 268, § 26.]

(a) Prior to December 1, 2011, G.S. § 50B-3.1(j) made it a Class H felony for any person to own, possess, purchase or receive, or attempt to possess, purchase or receive, a firearm, machine gun, ammunition, or permits to purchase and carry concealed firearms, if that person is subject to a domestic violence protective order or any successive protective order. [*See* 2011 N.C. Sess. Law 268, § 24, eliminating the prohibition against "ownership" in G.S. § 50B-3.1(j).]

3. Person convicted of the misdemeanor crime of domestic violence.

a) 18 U.S.C. § 922(g)(9), which makes it unlawful for a person convicted in any court of a misdemeanor crime of domestic violence to ever possess or receive any firearm or ammunition. [A misdemeanor crime of domestic violence is defined by 18 U.S.C. § 921(a)(33)(A) in part as having as an element the use of physical force.] For a short piece discussing the convictions that can serve as a predicate to the federal conviction under 18 U.S.C. § 922(g)(9), *see* Jeff Welty, *Ban on Gun Possession by Defendants Convicted of a "Domestic Violence Misdemeanor"*, Jan. 13, 2011, http://nccriminallaw.sog.unc.edu/?p=1874. For a recent case on this issue, *see U.S. v. Castleman*, __ U.S. __, 134 S.Ct. 1405 (2014), *reversing* 695 F.3d 582 (6th Cir. 2012) (defendant's guilty plea to "intentionally or knowingly caus[ing] bodily injury to" the mother of his child, a misdemeanor domestic assault under the relevant Tenn. statute, qualified as a misdemeanor conviction of domestic violence under 18 U.S.C. § 922(g)(9); the requirement of physical force in 922(g)(9) was satisfied by the degree of force that supports a common-law battery conviction; defendant's argument that the Tenn. statute did not have a use of physical force element was rejected when the indictment made clear that use of physical force was an element of his state conviction).]

(1) The Fourth Circuit has held that application of the statute did not violate a defendant's Second Amendment right to bear arms for self-defense. [*U.S. v. Staten*, 666 F.3d 154 (4th Cir. 2011), *cert. denied*, 132 S.Ct. 1937 (2012) (applying an intermediate scrutiny standard, defendant's as-applied Second Amendment challenge rejected); *see also U.S. v. Chester*, 847 F.Supp.2d 902

(S.D.W.Va. 2012), *aff'd per curiam*, 514 Fed.Appx. 393 (4th Cir. 2013).]

b) A person is not considered to have been convicted of the misdemeanor crime of domestic violence for the purposes of Chapter 44 of the U.S.Code (Firearms) if the conviction has been expunged or set aside, or if the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms. [18 U.S.C. § 921(a)(33)(B)(ii)]

c) Because North Carolina's restoration statute, G.S. § 14-415.4, is not applicable to misdemeanor convictions, an expunction or pardon is necessary to lift the federal firearm disability under 18 U.S.C. § 922(g)(9). [*See* Relief from a Criminal Conviction, section titled Firearm Rights after Felony Conviction (October 2012), available at http://www.sog.unc.edu/node/2673 (hereafter "Firearm Rights after Felony Conviction").]

d) For more on 18 U.S.C. § 922(g)(9), *see* James Lockhart, Annotation, *Validity, Construction, and Application of 18 § U.S.C. 922(g)(9), Prohibiting Possession of Firearm by Persons Convicted of Misdemeanor Crime of Domestic Violence*, 50 A.L.R. Fed.2d 31 (2010).

4. Person convicted of a felony.

a) Disability under federal law.

(1) 18 U.S.C. § 922(g)(1), which makes it unlawful for a person convicted of a crime punishable by imprisonment for a term exceeding one year, to ship, transport, possess or receive any firearm or ammunition.

(2) The term "crime punishable by imprisonment for a term exceeding one year" does not include any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less. [18 U.S.C. § 921(a)(20)(B)] This describes almost all misdemeanors in North Carolina. [Firearm Rights after Felony Conviction, n.3.]

b) Federal law restoration.

(1) Federal law lifts the ban imposed by 18 U.S.C. § 922(g)(1) if the conviction has been expunged or set aside, or if the person has been pardoned or has had civil rights restored unless the pardon, expungement or restoration expressly provides that the person may not ship, transport, possess, or receive firearms. [18 U.S.C. § 921(a)(20); Firearm Rights after Felony Conviction]

(2) North Carolina's statutes restoring rights of citizenship, G.S. §§ 13-1 to -4, do not address firearm restrictions.

CERTIFICATE OF RESTORATION OF CITIZENSHIP (OUT-OF-STATE OR FEDERAL CONVICTION) (AOC-CR-919) (Rev. 5/13) was recently amended to specifically provide that it does not restore the right to possess a firearm.

(3) If a person convicted of a felony completes his or her sentence, automatically regaining his or her civil rights, and later obtains an order restoring his or her firearm rights under G.S. § 14-415.4, regaining the firearm rights not covered by the automatic restoration of civil rights, the person would appear to have satisfied the requirements of federal law and would no longer be subject to the federal firearms ban imposed by 18 U.S.C. § 922(g)(1). [Firearm Rights after Felony Conviction]

c) Disability under state law.

(1) G.S. § 14-404(c)(1), which prohibits issuance of a permit for the purchase or receipt of a pistol (handgun permit) to a person who is under indictment for, or has been convicted in any state or federal court, of a felony, unless the person is later pardoned or the person's firearm rights have been restored pursuant to G.S. § 14-415.4, if the purchase or receipt of a handgun does not violate a condition of the pardon or restoration of firearms rights. (exception for felonies pertaining to antitrust violations, unfair trade practices, or restraints of trade). [G.S. § 14-404(c)(1), *amended by* 2010 N.C. Sess. Law 108, § 4, effective February 1, 2011 to add restoration under G.S. § 14-415.4, and 2011 N.C. Sess. Law 2, § 1 (clarifying effective date).]

(2) G.S. § 14-415.12(b)(3), which prohibits issuance of a permit to carry a concealed handgun (concealed handgun permit) to a person who has been adjudicated guilty in any court of a felony unless the person's firearms rights have been restored pursuant to G.S. § 14-415.4 (exception for felonies pertaining to antitrust violations, unfair trade practices, or restraints of trade). [G.S. § 14-415.12(b)(3)]

(3) G.S. § 14-415.1(a), which makes it unlawful for any person who has been convicted of a felony to purchase, own, possess, or have custody, care or control of any firearm.

(a) G.S. § 14-415.1 does not apply to a person who, pursuant to the law of the jurisdiction in which the conviction occurred, has been pardoned or has had his or her firearms rights restored if such restoration of rights could also be granted under North Carolina law (exception for felonies pertaining to antitrust violations, unfair trade practices, or restraints of trade). [G.S. § 14-415.1(d), *amended by* 2011 N.C. Sess. Law 268, § 13, effective December 1, 2011, and applicable to offenses committed

on or after that date; prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions).] *See Booth v. State*, __ N.C.App. __, 742 S.E.2d 637, *writ and review denied, appeal dismissed, review dismissed as moot*, 747 S.E.2d 525 (2013) (affirming trial court determination that G.S. § 14-415.1(d) did not apply to a plaintiff who had been granted a Pardon of Forgiveness in 2001 arising from a guilty plea in 1981 to one felony count of non-aggravated kidnapping; only requirement of statute, that both plaintiff's conviction and pardon occur in North Carolina, met).]

(b) G.S. § 14-415.1 does not apply to a person whose firearms rights have been restored under G.S. § 14-415.4, unless the person is convicted of a subsequent felony after the petition to restore the person's firearms rights is granted (exception for felonies pertaining to antitrust violations, unfair trade practices, or restraints of trade). [G.S. § 14-415.1(d), *added by* 2010 N.C. Sess. Law 108, § 3, effective February 1, 2011; prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions; *amended by* 2011 N.C. Sess. Law 2, § 1 (clarifying effective date).]

d) State law restoration.

(1) G.S. § 14-415.4 sets out a procedure for a North Carolina resident, convicted of a single nonviolent felony and whose citizenship rights have been restored for at least 20 years, to petition the district court in the district where the person resides to restore the person's firearms rights. [G.S. § 14-415.4, *added by* 2010 N.C. Sess. Law 108, § 1, effective February 1, 2011; *amended by* 2011 N.C. Sess. Law 2, § 1 (clarifying effective date).] Prosecutions for offenses committed before February 1, 2011, are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions. [2010 N.C. Sess. Law 108, § 7, effective February 1, 2011; *amended by* 2011 N.C. Sess. Law 2, § 1 (clarifying effective date).]

(a) For the definition of "nonviolent felony" *see* G.S. § 14-415.4(a)(2). For the criteria that must be satisfied before a court can grant a petition to restore firearm rights pursuant to G.S. § 14-415.4, *see* G.S. § 14-415.4(d)(1) to (6). For matters that require a court to deny a petition to

restore firearm rights pursuant to G.S. § 14-415.4, *see* G.S. § 14-415.4(e)(1) to (10).

(2) The procedure in G.S. § 14-415.4 is available to restore firearm rights prohibited by the three statutes set out above, G.S. § 14-404(c)(1), G.S. § 14-415.12(b)(3) and G.S. § 14-415.1(a). [*See* language in each of the statutes referencing G.S. § 14-415.4; Firearm Rights after Felony Conviction]

(3) Restoration under G.S. § 14-415.4 does not constitute an expunction or pardon. [G.S. § 14-415.4(i)]

(4) The Felony Firearms Act, G.S. § 14-415.1 et seq., has been challenged on constitutional grounds.

(a) North Carolina's Felony Firearms Act has been found constitutional when challenged on procedural due process grounds. [*Johnston v. State*, __ N.C.App. __, 735 S.E.2d 859 (2012), *temporary stay allowed,* 366 N.C. 422, 366 N.C. 562, 736 S.E.2d 180, *writ allowed, review on add'l issues denied,* 366 N.C. 562, 738 S.E.2d 360, *appeal dismissed*, 366 N.C. 562, 738 S.E.2d 361, *aff'd per curiam*, __ N.C. __, 749 S.E.2d 278 (2013) (the Act did not violate plaintiff's procedural due process rights under the North Carolina or U.S. Constitution; portion of the trial court's order that found federal and state substantive due process violations when act applied to plaintiff reversed and remanded for additional findings as to plaintiff's felony convictions and post-conviction history).]

(b) In another case, plaintiff's as-applied due process challenge under the North Carolina Constitution was sustained. However, the case has no **precedential value. [***Baysden v. State*, 217 N.C.App. 20, 718 S.E.2d 699, *temporary stay and writ allowed*, 365 N.C. 373, 719 S.E.2d 29 (2011), *appeal dismissed, review allowed,* __ N.C. __, 720 S.E.2d 390, *review allowed, appeal dismissed,* 365 N.C. 549, 742 S.E.2d 182 (2012), *aff'd per curiam without precedential value,* 366 N.C. 370, 736 S.E.2d 173 (2013) (plaintiff gun owner had two felony convictions that were decades old, his firearms-related rights had been restored under Va. and federal law and he had used his weapons in a safe and lawful manner for 17 years; after amendment to North Carolina Felony Firearms Act, he was precluded from possessing firearms and did not qualify for restoration under G.S. § 14-415.4).]

C. Disposal of surrendered firearms if items not returned to defendant.

1. The sheriff must apply to the court for an order to dispose of the surrendered items if:

a) The defendant does not file a timely motion for return of surrendered items; or

b) The court determines that the defendant is not entitled to have the surrendered items returned; or

c) If the defendant or third-party owner does not timely pay all fees owed for storage. [G.S. § 50B-3.1(h)]

2. For return of a surrendered firearm or other surrendered item pursuant to a motion of a third-party owner, *see* G.S. § 50B-3.1(g).

D. Copies of orders regarding firearms to be provided to parties and certain others.

1. Copies of any orders entered pursuant to Chapter 50B must be furnished to each party and to the law enforcement agency (city or county) responsible for the area in which the victim resides. [G.S. § 50B-3(c)] If the defendant is ordered to stay away from the child's school, the sheriff is to deliver a copy of the protective order to the principal of each school named in the order. [G.S. § 50B-3(c)]

VII. Modification, Expiration and Renewal of a Protective Order

A. Modification of a protective order.

1. Under general law, a final judgment cannot be modified without a specific statute authorizing modification. There is no statute authorizing the amendment of a final domestic violence protective order.

2. A party may move under G.S. § 1A-1, Rule 60(b) to set aside a DVPO and also may seek to have a new order issued. The form is MOTION TO RENEW OR SET ASIDE DOMESTIC VIOLENCE PROTECTIVE ORDER/NOTICE OF HEARING (AOC-CV-313).

B. Expiration of a protective order.

1. Protective orders shall be for a fixed period not to exceed one year. [G.S. § 50B-3(b)]

2. A person who knowingly makes a false statement to a law enforcement agency or officer that a protective order entered pursuant to Chapter 50B, or by the court of another state or Indian tribe, remains in effect shall be guilty of a Class 2 misdemeanor. [G.S. § 50B-4.2]

C. Renewal of a protective order.

1. Before expiration of the current order, the court may renew a protective order for good cause for a fixed period of time not to exceed two years, including an order that previously has been renewed. [G.S. § 50B-3(b), *amended by* 2005 N.C. Sess. Law 423, effective October 1, 2005, and applicable to orders entered on or after that date; limit was one year before that amendment.] While the

motion must be filed before expiration of the current order, the hearing may be held after the current order expires.

a) "Good cause" for the first renewal of a DVPO was that defendant had violated the DVPO since it was entered and that plaintiff remained in fear of defendant for her and her family. "Good cause" for a later renewal of the DVPO was that defendant admitted in court that he had been to the plaintiff's home and that plaintiff remained in fear of defendant. [*Metts v. Metts,* __N.C.App. __, __ S.E.2d __ (10/16/2012) (**unpublished**).]

2. Note, however, that temporary custody provisions cannot exceed one year total duration. [G.S. § 50B-3(a1)(4)] So, if the DVPO being renewed has provided for temporary custody for a year, the custody provision cannot be renewed.

3. A new act of domestic violence is not required for a renewal. [G.S. § 50B-3(b); *Metts v. Metts,* __N.C.App. __, __ S.E.2d __ (10/16/2012) (**unpublished**) (no criminal act required for renewal for a DVPO).]

4. G.S. § 50B-3(b) contains no limit on the number of times a protective order may be renewed.

5. An order renewing a domestic violence protective order must be based on sufficient findings of fact and conclusions of law. [*Basden v. Basden,* 154 N.C.App. 520, 572 S.E.2d 442 (2002) (**unpublished**) (AOC form renewal order contained only one preprinted finding of fact but renewal order upheld because it incorporated by reference the original protective order, which was attached and contained sufficient findings of fact).]

VIII. Enforcement of a Civil Domestic Violence Protective Order

A. Generally.

1. A valid protective order entered pursuant to Chapter 50B must be enforced by all North Carolina law enforcement agencies without further order of the court. [G.S. § 50B-4(c)]

2. A valid protective order entered in another state must be given full faith and credit and must be enforced in North Carolina as if it were an order issued by a North Carolina court, whether or not the order has been registered in North Carolina. [G.S. § 50B-4(d); *see* section VIII.E. on page 59 for more on enforcement of an out-of-state DVPO.]

3. The term "valid protective order" as used in G.S. §§ 50B-4(c) and (d) includes an emergency or ex parte order entered under Chapter 50B. [G.S. § 50B-4(f), *added by* 2009 N.C. Sess. Law 342, § 4, effective July 24, 2009.]

B. Two ways to enforce a domestic violence protective order.

1. A motion for contempt as set out in G.S. § 50B-4(a); and

2. Criminal prosecution for the crime of violating a protective order as set out in G.S. § 50B-4.1(b).

C. Contempt. [G.S. § 50B-4] For an ONLINE MODULE on both civil and criminal contempt, see https://unc.ncgovconnect.com/p30019876/.

1. Order to show cause.

a) A party may file a motion for contempt for violation of any order entered pursuant to Chapter 50B. [G.S. § 50B-4(a)]

b) The party may proceed pro se, using forms provided by the clerk or an authorized magistrate. [G.S. § 50B-4(a)]

(1) For a pro se motion, the clerk shall schedule and issue notice of a show cause hearing in district court. [G.S. § 50B-4(a)] The clerk must schedule the hearing at the earliest possible date pursuant to G.S. § 5A-23.

(2) If the pro se motion is made when the clerk is not available, an authorized magistrate must schedule and issue notice of a show cause hearing, if the facts show clearly a danger of acts of domestic violence against the aggrieved party or a minor child. [G.S. § 50B-4(a)]

(3) The clerk or authorized magistrate effects service of the motion, notice and other papers through the appropriate law enforcement agency where the defendant is to be served. [G.S. § 50B-4(a)]

c) For more on civil and criminal contempt generally and for a checklist for use when finding a party in either civil or criminal contempt, *see Contempt of Court*, Bench Book, Vol. 2, Chapter 4.

2. Contempt hearing.

a) Venue.

(1) In a proceeding for criminal contempt, venue lies throughout the judicial district where the order was issued. [G.S. § 5A-15(b)]

(2) In a proceeding for civil contempt, venue lies in the county where the order was issued. [G.S. § 5A-23(b)]

(3) Thus, depending on the type of contempt sought, the motion to show cause must be filed and heard in the judicial district or the county where the DVPO was entered, even if the conduct alleged to be contemptuous did not occur in that district or county.

b) Right to court-appointed counsel.

(1) An alleged contemnor is entitled to court-appointed counsel in a criminal contempt proceeding if (a) he or she is indigent, **and** (b) there is a significant likelihood that he or she will actually be incarcerated as a result of the hearing. [G.S. § 7A-451(a) (an

indigent person is entitled to court-appointed counsel in any case in which imprisonment, or a fine of $500, or more, is likely to be adjudged); *State v. Wall,* 49 N.C.App. 678, 272 S.E.2d 152 (1980) (failure to advise defendant charged with criminal contempt of his right to counsel if he was indigent not prejudicial error when no evidence that defendant was indigent and he voluntarily waived right to counsel); *Hammock v. Bencini*, 98 N.C.App. 510, 391 S.E.2d 210 (1990) (noting that G.S. § 7A-451(a)(1) requires appointment of counsel in any case in which imprisonment likely to be adjudged and includes citations for criminal contempt for failure to comply with civil child support orders).]

(2) The North Carolina Supreme Court has held that an alleged contemnor is entitled to **court-appointed** counsel in a civil contempt proceeding arising out of the nonpayment of child support if (a) he or she is indigent, **and** (b) there is a significant likelihood that he or she will actually be incarcerated as a result of the hearing. [*See McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993) (right based on Fourteenth Amendment due process clause); *King v. King*, 144 N.C.App. 391, 547 S.E.2d 846 (2001) (for appointment of counsel, a defendant must show that he is indigent and that his liberty interest is at stake); *cf. Turner v. Rogers,* __ U.S. __, 131 S.Ct. 2507 (2011) (the Fourteenth Amendment due process clause does not automatically require the State to appoint counsel at civil contempt proceedings for an indigent individual who is subject to a child support order if the State provides "alternative or substitute procedural safeguards").] It is not clear whether the holding in *McBride* is broad enough to require the appointment of counsel for civil contempt proceedings arising in contexts other than child support enforcement.

(3) For more on this issue, *see Contempt of Court*, Bench Book, Vol. 2, Chapter 4. For more on civil contempt, including the burden of proof, *see* John Saxon, "Using Contempt to Enforce Child Support Orders," Special Series No. 17, School of Government, February 2004.]

c) Award of attorney fees.

(1) A protective order may include a provision awarding attorney fees to either party. [G.S. § 50B-3(a)(10)]

(2) Trial court's order requiring defendant in civil contempt of a marital dissolution agreement to pay attorney fees for his violation of the agreement upheld. [*Marshall v. Marshall,* __ N.C.App. __, 757 S.E.2d 319 (2014) (defendant violated Tennessee marital dissolution agreement, registered and confirmed in North Carolina, that prohibited defendant from harassing his

wife and two named individuals, and authorized attorney fees upon a party's noncompliance).]

3. Criminal contempt.

a) In most cases, the proceeding will be for criminal contempt rather than civil contempt because the purpose will be to punish a violation rather than to coerce compliance. [*See Hodges v. Hodges*, 156 N.C.App. 404, 577 S.E.2d 121 (2003) (when defendant was being punished for violation of a domestic violence protective order, contempt was criminal).] NOTE: The relevant AOC forms may be used for either civil or criminal contempt. [MOTION FOR ORDER TO SHOW CAUSE DOMESTIC VIOLENCE PROTECTIVE ORDER (AOC-CV-307); ORDER TO APPEAR AND SHOW CAUSE FOR FAILURE TO COMPLY WITH DOMESTIC VIOLENCE PROTECTIVE ORDER (AOC-CV-308) and CONTEMPT ORDER DOMESTIC VIOLENCE PROTECTIVE ORDER (AOC-CV-309).]

b) The burden of proof in a criminal contempt proceeding is on the State or the moving party and cannot be shifted to the defendant. [*State v. Coleman*, 188 N.C.App. 144, 655 S.E.2d 450 (2008) (plenary proceeding) (a show cause order in a criminal contempt proceeding is akin to an indictment and the burden of proof beyond a reasonable doubt that the alleged contemptuous acts occurred must be borne by the State; burden does not shift to the defendant as in a proceeding for civil contempt under G.S. § 5A-23(a)).]

c) Findings required for criminal contempt. The order should:

(1) Include a finding of guilty or not guilty. [G.S. § 5A-15(f)]

(2) Indicate it is criminal contempt. [*See Watkins v. Watkins*, 136 N.C.App. 844, 526 S.E.2d 485 (2000) (urging trial courts to identify whether contempt proceedings are in the nature of criminal or civil contempt).]

(3) If imprisonment ordered, the judge should specify the beginning and end dates of the sentence. [Note that a sentence of imprisonment for criminal contempt is served day for day with no credit for good time, gain time or earned time. *See* State of North Carolina Department of Corrections Division of Prisons Policy and Procedure, Chapter B, sections .0111(d)(2) (good time); .0112(c)(2)(gain time); .0113(f)(1) (earned time).]

(4) Indicate that the court applied the reasonable doubt standard. [G.S. § 5A-15(f); *State v. Ford*, 164 N.C.App. 566, 596 S.E.2d 846 (2004), *citing State v. Verbal*, 41 N.C.App. 306, 254 S.E.2d 794 (1979) (superior court order of contempt, entered in a de novo plenary proceeding on appeal from a summary finding of contempt in district court, must indicate that the reasonable doubt standard of proof was applied); *State v. Phillips*, __ N.C.App. __,

750 S.E.2d 43 , *temporary stay allowed,* __ N.C. __, 751 S.E.2d 212 (2013), *review allowed,* __ N.C. __, 755 S.E.2d 629 (2014), citing *Ford* and *Verbal* (order for indirect criminal contempt reversed for failure to indicate application of "beyond a reasonable doubt" standard).]

(5) Make findings of fact and enter judgment. [G.S. § 5A-15(f)]

d) Sanctions allowed for criminal contempt.

(1) The sanctions allowed for criminal contempt depend on the type of contempt and are set out in G.S. § 5A-12(a).

(2) A person who commits criminal contempt, whether direct or indirect, is subject to censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three, except:

(a) A person who willfully refuses to testify or produce other information pursuant to a judge's order under Article 61, Chapter 15A (Granting of Immunity to Witnesses) is subject to censure, imprisonment up to 6 months, a fine not to exceed $500, or any combination of the three; and

(b) A person who has not been arrested who fails to comply with a nontestimonial identification order, issued pursuant to Article 14, Chapter 15A (Nontestimonial Identification) is subject to censure, imprisonment up to 90 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)]

(3) Except for contempt under G.S. § 5A-11(a)(5) (willful publication of report of court proceedings) or G.S. § 5A-11(a)(9) (willful communication with a juror), a fine or imprisonment may not be imposed for criminal contempt unless the conduct was willfully contemptuous or was preceded by a clear warning by the court that the conduct is improper. [G.S. § 5A-12(b)]

(4) For a chart outlining the sanctions allowed for each type of contempt set out in G.S. § 5A-11(a), *see Contempt of Court*, Bench Book, Vol. 2, Chapter 4.

e) Bail procedure upon appeal if confinement ordered.

(1) Upon appeal in a case imposing confinement for criminal contempt, a bail hearing must be held within a reasonable time after imposition of confinement. A superior court judge is to hold the bail hearing when confinement is imposed by a district court judge. If confinement is imposed by a clerk or magistrate, a district court judge holds the hearing. [G.S. § 5A-17(b), *added by* 2013 N.C. Sess. Law 303, § 1, effective December 1, 2013, and applicable to confinement imposed on or after that date.]

(2) A person found in criminal contempt who has given notice of appeal may be retained in custody not more than 24 hours from the imposition of confinement without a bail determination being made by a judicial official as set out in G.S. § 5A-17(b), set out above. If the designated judicial official has not acted within 24 hours of the imposition of confinement, any judicial official shall act under G.S. § 5A-17(b) and hold the bail hearing. [G.S. § 5A-17(c), *added by* 2013 N.C. Sess. Law 303, § 1, effective December 1, 2013, and applicable to confinement imposed on or after that date.]

f) Double jeopardy may prohibit a subsequent criminal action against a defendant held in criminal contempt. [*See* discussion in section XI.C on page 66.]

g) Under G.S. § 5A-15(e), a person charged with criminal contempt may not be called to be a witness against himself at the show cause hearing. In civil contempt proceedings, an alleged contemnor may assert the right against self-incrimination and refuse to testify but the court may draw an adverse inference of fact from the failure to testify. [*McKillop v. Onslow County,* 139 N.C.App. 53, 532 S.E.2d 594 (2000).] For more on this issue, *see Contempt of Court*, Bench Book, Vol. 2, Chapter 4.

4. Civil contempt.

a) Civil contempt may be appropriate for a defendant's refusal to abide with provisions requiring the payment of money or the conveyance or exchange of property, or provisions regarding custody of children.

b) Civil contempt also may be used when a defendant violates provisions in a DVPO or other court order prohibiting contact or harassment of the complainant or others protected thereby.

(1) In *Marshall v. Marshall*, __ N.C.App. __, 757 S.E.2d 319 (2014), defendant was found in civil contempt for violating provisions in a DVPO prohibiting him from harassing and having contact with his former wife, even though defendant did not contact his former wife but contacted her friends and family members; hateful and vulgar voicemail and email messages to wife's elderly parents, other family members and friends resulted in "incredible torment" of wife and were intended to, and did, abuse and harass wife in violation of the DVPO; moreover, messages directing the recipients to "tell" wife certain things were indirect contacts with wife specifically barred by the DVPO.

(2) The defendant in *Marshall* also was found in civil contempt of a Tennessee marital dissolution agreement, registered and confirmed in North Carolina, that specifically prohibited defendant from harassing two named individuals, the Moores, even though the Moores were not parties to the agreement or to related court

orders entered in Tennessee and North Carolina, based on the trial court's finding that the Moores were third party beneficiaries of the agreement. [*Marshall v. Marshall,* __ N.C.App. __, 757 S.E.2d 319 (2014) (agreement of defendant's wife in the dissolution agreement to accept an unequal division of divisible property in exchange for defendant's agreement to stop harassing her and the Moores gave the Moores third party beneficiary status).]

D. Criminal prosecution for the crime of violating a DVPO. [G.S. § 50B-4.1(b)]

1. For purposes of G.S. § 50B-4.1, the term "valid protective order" includes an emergency or ex parte order entered under Chapter 50B. [G.S. § 50B-4.1(h), *added by* 2009 N.C. Sess. Law 342, § 5, effective July 24, 2009.] G.S. § 50B-4.1(h) was added to clarify that a "valid protective order" is an order valid under whichever statute it falls, whether an ex parte order pursuant to G.S. § 50B–2 (c), an emergency order pursuant to G.S. § 50B–2(b), or an order effective for one year pursuant to G.S. § 50B–3. [*State v. Poole*, _ N.C.App. __, 745 S.E.2d 26, *writ and review denied, appeal dismissed,* __ N.C. __, 749 S.E.2d 885 (2013).]

a) Under the revised statute, violation of an ex parte 50B order is a crime.

b) A temporary restraining order entered pursuant to G.S. § 1A-1, Rule 65, in an action for divorce from bed and board, is not a valid domestic violence protective order as defined by Chapter 50B. [*State v. Byrd*, 363 N.C. 214, 675 S.E.2d 323 (2009).]

2. A person who knowingly violates a valid 50B protective order or a valid protective order of another state or the courts of an Indian tribe is guilty of a Class A1 misdemeanor. [G.S. § 50B-4.1(a)]

a) As stated in *Underwood v. State Bd. of Alcoholic Control*, 278 N.C. 623, 181 S.E.2d 1 (1971):

(1) "Knowledge may be implied from the circumstances. Knowledge means 'an impression of the mind, the state of being aware; and this may be acquired in numerous ways and from many sources. It is usually obtained from a variety of facts and circumstances. Generally speaking, when it is said a person has knowledge of a given condition, it is meant that his relation to it, his association with it, his control over it and his direction of it are such as to give him actual information concerning it." (citations omitted)

(2) In considering whether a licensee knowingly permitted the consumption of alcoholic liquors, *Underwood* further states that a licensee "who is aware of violations on his premises but who arranges never to see them cannot be said to be ignorant of their existence. He must take steps to avoid violations or suffer the penalties prescribed."

(3) *See also State v. Bogle*, 324 N.C. 190, 376 S.E.2d 745 (1989) (North Carolina law allows knowledge to be inferred from circumstances); *State v. Williams*, 207 N.C.App. 136, 698 S.E.2d 542 (2010) (objective knowledge – meaning defendant reasonably should have known – is sufficient to support a criminal conviction); and *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985) (defendant must know or "have reasonable grounds to believe" person assaulted was a police officer).

b) The crime applies to any violation of the order, which may include failure to pay child support as ordered or failure to give the plaintiff possession of the car as ordered.

3. Unless covered under some other provision of law providing greater punishment, a person who commits a felony at a time when the person knows the behavior is prohibited by a valid protective order as provided in G.S. § 50B-4.1(a) shall be guilty of a felony one class higher than the principal felony charged. [G.S. § 50B-4.1(d) (certain exceptions set out in the statute).]

a) A temporary restraining order entered pursuant to G.S. § 1A-1, Rule 65, in an action for divorce from bed and board, is not a valid domestic violence protective order as defined by Chapter 50B and cannot be basis for a sentence enhancement pursuant to G.S. § 50B-4.1(d). [*State v. Byrd*, 363 N.C. 214, 675 S.E.2d 323 (2009) (only a valid protective order entered under Chapter 50B can be used to enhance a defendant's sentence under G.S. § 50B-4.1(d)).]

b) An emergency or ex parte 50B order is a valid protective order that can be the basis for a sentence enhancement pursuant to G.S. § 50B-4.1(d). [*See* G.S. § 50B-4.1(h), *added by* 2009 N.C. Sess. Law 342, § 5, effective July 24, 2009.]

4. A person who knowingly violates a valid 50B protective order, after having been previously convicted of two misdemeanor offenses under Chapter 50B, shall be guilty of a Class H felony. [G.S. § 50B-4.1(f), *amended by* 2008 N.C. Sess. Law 93, § 1, effective December 1, 2008, and applies to offenses committed on or after that date, but offenses committed before that date count in determining the total prior offenses.]

a) To properly charge a defendant with felony violation of a domestic violence protective order, the State must comply with G.S. § 15A-928 and charge the prior two misdemeanor convictions in either a special indictment or in a separate count in the principal indictment. Failure to do so is jurisdictional and deprives the trial court of jurisdiction over the felony charge. [*State v. Friend*, __ N.C.App. __, 729 S.E.2d 129, *writ denied, review denied*, 366 N.C. 392, 732 N.C. 349 (2012) (**unpublished**) (citations omitted) (when the State did not use a special indictment to charge defendant's prior misdemeanor convictions and did not incorporate the misdemeanor convictions in a separate count for each principal indictment, the principal indictments only charged defendant with

misdemeanor violations of a domestic violence protective order; trial court lacked jurisdiction to enter judgment on the felony convictions).]

5. Unless covered under some other provision of law providing greater punishment, any person who is subject to a valid protective order, as provided in G.S. § 50B-4.1, who enters property operated as a safe house or haven for victims of domestic violence, where a person protected under the order is residing, shall be guilty of a Class H felony. A person violates this subsection regardless of whether the person protected under the order is present. [G.S. § 50B-4.1(g1), *added by* 2010 N.C. Sess. Law 5, § 1, effective December 1, 2010, and applicable to offenses committed on or after that date.]

6. Unless covered under some other provision of law providing greater punishment, any person who, while in the possession of a deadly weapon or on about his or her person or within close proximity to his or person, knowingly violates a valid 50B protective order by failing to stay away from a place, or a person, as directed by the order, shall be guilty of a Class H felony. [G.S. § 50B-4.1(g), *amended by* 2007 N.C. Sess. Law 190, § 1, effective December 1, 2007, and applicable to offenses committed on or after that date.] When a person is found guilty of a felony offense, the presiding judge must determine whether the defendant used or displayed a firearm while committing the felony. If the judge determines that the defendant used or displayed a firearm while committing the felony, the sentencing court shall include that fact when entering the judgment that imposes the sentence for the felony conviction. [G.S. § 15A-1382.2, *added by* 2013 N.C. Sess. Law 369, § 27, effective October 1, 2013, and applies to any judgment entered for a felony conviction on or after that date.]

7. Consent by victim as a defense to a charge of violating a Chapter 50B order.

a) No North Carolina court has decided whether consent is a defense to a charge of violating a protective order.

b) Language in AOC-CV-306 addresses the issue. [*See* DOMESTIC VIOLENCE ORDER OF PROTECTION (CONSENT ORDER) (AOC-CV-306) and EX PARTE DOMESTIC VIOLENCE ORDER OF PROTECTION (AOC-CV-304), both stating "[o]nly the Court can change this order," "plaintiff cannot give you [defendant] permission to violate this order," and the "court or judge is the only one that can make changes to this order."]

c) State courts in other jurisdictions have held that consent is not a defense. [*State v. Branson*, 38 Kan.App.2d 484, 167 P.3d 370 (2007) (consent not a defense to the crime of violating a protective order); *State v. Dejarlais*, 136 Wash.2d 939, 969 P.2d 90 (1998), *superseded by statute on other grounds as stated in State v. Wofford*, 148 Wash.App. 870, 201 P.3d 389 (2009) (consent of the person protected by the order not a defense to the charge of violating the order); *People v. Van Guidler*, 815 N.Y.S.2d 337 (N.Y.A.D. 2006) (express invitation to resume cohabitation, in violation of protective orders, did not provide a defense to criminal

contempt convictions for violation thereof); *cf. Mohamed v. Mohamed,* 232 N.J. Super. 474, 557 A.2d 696 (N.J.App.Div. 1989) (under the New Jersey Prevention of Domestic Violence Act of 1981, reconciliation of the parties destroys the viability of the protective order; protective order providing for temporary custody ceased to be effective upon reconciliation).]

8. Arrest with or without a warrant is mandatory if requirements in G.S. § 50B-4.1(b) are met.

a) A law enforcement officer must arrest a person and take a person into custody, with or without a warrant or other process, if the officer has probable cause to believe that the person knowingly has violated a DVPO that:

(1) Excludes the person from the victim's residence or household; or

(2) Enjoins the person from threatening, abusing or following the victim, harassing the victim, or otherwise interfering with the victim. [G.S. § 50B-4.1(b), *amended by* 2009 N.C. Sess. Law 389, § 2, effective July 23, 2009, and applicable to orders entered on or after that date.]

(a) "Notwithstanding the holding in *Cockerham-Ellerbee v. Town of Jonesville,* 176 N.C.App. 372, 626 S.E.2d 685 (2006), G.S. § 50B-4.1(b) creates a mandatory provision requiring law enforcement to arrest and take a person into custody without a warrant or other process if the requirements set forth in the subsection are met." [G.S. § 50B-4.1(b), *amended by* 2009 N.C. Sess. Law 389, § 1, effective July 23, 2009, and applicable to orders entered on or after that date (quoted language appears in § 1 of the session law).]

(b) In *Cockerham-Ellerbee v. Town of Jonesville,* 176 N.C.App. 372, 626 S.E.2d 685 (2006), the court of appeals held that although the use of the word "shall" in G.S. §§ 50B-4.1(b) and 50B-4(c) "implied" that law enforcement had a mandatory duty to arrest those in violation of a protective order, law enforcement had "some level of discretionary authority" in carrying out the enforcement of the protective order at issue in the case.

(c) The public duty doctrine shields the state and its political subdivisions from tort liability arising out of discretionary governmental actions that by their nature are not ordinarily performed by private persons. [*Cockerham-Ellerbee v. Town of Jonesville,* 176 N.C.App. 372, 626 S.E.2d 685 (2006), *citing Stone v. Dep't of Labor,* 347 N.C.

473, 495 S.E.2d 711 (1998).] The amendment making clear that arrest is mandatory upon a knowing violation of a DVPO should make the public duty doctrine unavailable as a defense to a claim similar to that in *Ellerbee.*

b) A warrantless arrest is authorized for:

(1) Domestic criminal trespass (occurs when a person who is forbidden to enter or remain on premises by the lawful occupant; applies to persons who lived together and are presently separated, including by virtue of a DVPO). [G.S. § 14-134.3; G.S. § 15A-401(b)(2)c]

(2) Misdemeanors under G.S. § 14-33(a) (simple assault), G.S. § 14-33(c)(1) (assault inflicting serious injury or using a deadly weapon), G.S. § 14-33(c)(2) (assault on a female), and G.S. § 14-34 (assault by pointing gun), when the offense is committed by a person with whom the alleged victim has a personal relationship as defined in G.S. § 50B-1. [G.S. § 15A-401(b)(2)d]

(3) A misdemeanor violation of violating a domestic violence protective order under G.S. § 50B-4.1(a). [G.S. § 15A-401(b)(2)e]

(4) Violation of a pretrial release order entered under G.S. § 15A-534.1(a)(2). [G.S. § 15A-401(b)(2)f]

9. Pretrial release/bail.

a) A person arrested is entitled to bail under G.S. §§ 15A-534 and 534.1.

b) For special conditions of pretrial release pursuant to G.S. § 15A-534.1, *see* the table at page 71.

10. The Justice Reinvestment Act of 2011 [2011 N.C. Sess. Law 192, effective June 16, 2011, except as otherwise provided in the Act, and as amended by 2011 N.C. Sess. Law 412; (he "JRA").

a) The JRA may apply to the crime of knowingly violating a valid DVPO or to the domestic violence crimes set out in the table on page 71.

b) For a resource on the Act, *see* The Justice Reinvestment Act Resource Page, available at http://www.sog.unc.edu/node/2044.

E. Enforcement of an out-of-state domestic violence protective order.

1. A valid protective order entered in another state must be given full faith and credit and must be enforced in North Carolina as if it were an order issued by a North Carolina court, whether or not the order has been registered in North Carolina. [G.S. § 50B-4(d)]

2. The federal Violence Against Women Act requires that a protection order issued by a state court or Indian tribe be accorded full faith and credit by the court

of another state, Indian tribe or territory and enforced by the court and law enforcement personnel as if it were the order of the enforcing state or tribe if:

a) The court of the issuing state, tribe or territory had jurisdiction over the parties and matter under the law of the issuing state or Indian tribe; and

b) Reasonable notice and opportunity to be heard was given to the person against whom the order was sought sufficient to protect that person's right to due process. [18 U.S.C. § 2265(a) and (b)]

(1) In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by state, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights. [18 U.S.C. § 2265(b)(2)]

3. An out-of-state order is enforced in the same manner as any protective order issued in North Carolina.

a) The party protected by the out-of-state order may seek an order to show cause for contempt pursuant to G.S. § 50B-4(a), discussed in section VIII.C at page 50; or

b) The person violating the out-of-state order may be arrested and charged with the crime of violating a domestic violence protective order pursuant to G.S. § 50B-4.1, discussed in section VIII.D at page 55.

IX. Appeal

A. Standard of review.

1. When the trial court sits without a jury regarding a DVPO, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. [*Hensey v. Hennessy,* 201 N.C.App. 56, 685 S.E.2d 541 (2009), *citing Burress v. Burress,* 195 N.C.App. 447, 672 S.E.2d 732 (2009); *Kennedy v. Morgan,* __ N.C.App. __, 726 S.E.2d 193 (2012), *citing Hensey*.]

2. When a party appeals both an ex parte DVPO and a DVPO, the appellate court must consider each appeal independently of the other. [*Hensey v. Hennessy,* 201 N.C.App. 56, 685 S.E.2d 541 (2009) (because the two orders appealed from were independent of one another, the appellate court had to consider defendant's arguments as to the DVPO independent of the issues regarding the ex parte DVPO).]

B. Appeal of an ex parte domestic violence order. Appeals from the following actions are interlocutory and not immediately appealable:

1. Entry of an ex parte domestic violence protective order. [*Doyle v. Doyle,* 176 N.C.App. 547, 626 S.E.2d 845 (2006), *citing Smart v. Smart,* 59 N.C.App. 533, 297 S.E.2d 135 (1982).] Appeal may be taken from an ex parte domestic violence protective order when the party files a notice of appeal after entry of the

DVPO and notice of appeal is given as to both the ex parte DVPO and the DVPO. [*Hensey v. Hennessy,* 201 N.C.App. 56, 685 S.E.2d 541 (2009).]

2. The dismissal or vacation of an ex parte domestic violence protective order. [*Hayes v. Hayes,* 139 N.C.App. 831, 534 S.E.2d 639 (2000).]

C. Appeal of a domestic violence protective order.

1. A domestic violence protective order entered after an evidentiary hearing is a final order of the trial court from which a party may appeal. [*Doyle v. Doyle,* 176 N.C.App. 547, 626 S.E.2d 845 (2006).]

2. When appeal of a domestic violence matter is moot.

a) Generally, an appeal should be dismissed as moot when events occur during the appeal that cause the underlying controversy to cease to exist. [*Smith ex rel. Smith v. Smith,* 145 N.C.App. 434, 549 S.E.2d 912 (2001), *citing In re Hatley,* 291 N.C. 693, 231 S.E.2d 633 (1977); *see also Wilson v. Wilson,* 134 N.C.App. 642, 518 S.E.2d 255 (1999) (husband's appeal from a DVPO prohibiting him from possessing a firearm for one year was moot because the order had expired and defendant was no longer attempting to avoid dismissal from his position as a corrections officer).]

b) But if collateral legal consequences of an adverse nature can reasonably be expected to result from an expired order, an appeal is not moot. [*Smith ex rel. Smith v. Smith,* 145 N.C.App. 434, 549 S.E.2d 912 (2001), *citing Hatley* (possible collateral legal consequence was consideration of the DVPO in a later custody action involving defendant; also " numerous non-legal collateral consequences to entry of a DVPO that render expired orders appealable"; appeal not moot); *Rudder v. Rudder,* __ N.C.App. __, 759 S.E.2d 321 (2014), *citing Smith* (the numerous nonlegal consequences arising from entry of a DVPO render expired protective orders appealable; appeal of an expired ex parte order and a DVPO that would expire 5 days after case heard by the appellate court not moot); *Eagle v. Johnson,* 159 N.C.App. 701, 583 S.E.2d 346 (2003), *citing Smith* (recognizing that a protective order can have collateral legal and nonlegal consequences, including the stigma of a judicial determination of domestic violence; appeal of an expired DVPO not moot).] For a resource setting out collateral consequences imposed under North Carolina law for a criminal conviction, *see* Collateral Consequences Assessment Tool, or C-CAT, available at http://ccat.sog.unc.edu.

X. Miscellaneous Civil Domestic Violence Issues

A. Impact of North Carolina's marriage amendment on domestic violence proceedings.

1. Effective May 23, 2012, Article 14, sec. 6 of the North Carolina Constitution provides:

Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State. This section does not prohibit a private party from entering into contracts with another private party; nor does this section prohibit courts from adjudicating the rights of private parties pursuant to such contracts.

2. No court has addressed the constitutionality of North Carolina's marriage amendment or its impact, if any, on domestic violence proceedings between unmarried couples of the same or opposite sex or on same sex couples legally married in another state.

3. In *State v. Carswell*, 114 Ohio St.3d 210, 871 N.E.2d 547, *reconsideration denied*, 115 Ohio St.3d 1414, 873 N.E.2d 1317 (2007) (**unpublished**), the Ohio Supreme Court held that a provision in Ohio's domestic violence statute applicable to unmarried persons was not rendered unconstitutional by Ohio's marriage amendment.

a) By 2004 amendment, the Ohio Constitution provides: Only a union between one man and one woman may be a marriage valid in or recognized by this state. This state and its political subdivisions shall not create or recognize a legal status for unmarried persons that intends to approximate the design, qualities, significance or effect of marriage. [OHIO CONST. art. XV, § 11]

b) An unmarried defendant, charged under Ohio's domestic violence statute with knowingly causing or attempting to cause physical harm to a "person living as a spouse," argued that the "living as a spouse" language was in conflict with the second sentence of the marriage amendment set out above.

c) HELD: A "person living as a spouse" is simply a classification with significance only to domestic-violence statutes and does not create a quasi-marital relationship in violation of the portion of Ohio's marriage amendment set out above. The provision in Ohio's domestic violence statute applicable to a person "living as a spouse" was not unconstitutional.

B. Emergency assistance from law enforcement.

1. A local law enforcement agency must respond as soon as practicable to a request for assistance by a person who alleges that he or she or a minor child has been the victim of domestic violence. [G.S. § 50B-5(a)]

2. The local law enforcement agency may take whatever steps are reasonably necessary to protect the complainant from harm and may advise of sources for shelter, medical care, counseling and other services. [G.S. § 50B-5(a)]

3. Upon request and where feasible, a law enforcement officer may transport the complainant to appropriate facilities and accompany the complainant to his or her residence to remove food, clothing, medication and other personal property that is reasonably necessary to allow the complainant and any minor children to reside elsewhere pending further proceedings. [G.S. § 50B-5(a)]

4. In providing assistance, an officer may not be held criminally or civilly liable for reasonable measures taken pursuant to G.S. § 50B-5(a). [G.S. § 50B-5(b); *see also Braswell v. Braswell,* 98 N.C.App. 231, 390 S.E.2d 752 (1990), *aff'd in part, rev'd in part,* 330 N.C. 363, 410 S.E.2d 897 (1991), *reh'g denied,* 330 N.C. 854, 413 S.E.2d 550 (1992) (this statute, and others in Chapter 50B, do not impose an affirmative duty on officers to assist anyone threatened with domestic violence).]

C. Effect of domestic violence allegations on Chapter 50 custody cases.

1. An allegation of domestic violence between the parents of a child may be considered good cause for waiver of the mandatory setting of a contested custody or visitation matter for child custody mediation. [G.S. § 50-13.1(c)]

2. If the court in a Chapter 50 custody/visitation action finds that domestic violence has occurred, the court must enter orders designed to protect the child and any other party that was a victim of the domestic violence, in accordance with the provisions of G.S. § 50B-3(a1)(1), (2), and (3). [G.S. § 50-13.2(b)]

3. If a party to a Chapter 50 custody/visitation case is absent or relocates with or without children due to an act of domestic violence, the absence or relocation shall not be a factor that weighs against the party in determining custody or visitation. [G.S. § 50-13.2(b)]

4. A subsequent Chapter 50 custody order supersedes a Chapter 50B temporary custody order. [G.S. § 50B-3(a1)(4)]

D. Effect of domestic violence or violation of a protective order on immigration status.

1. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 makes the following acts, among others, ground for deportation:

a) Conviction of a crime of domestic violence or violation of a court's protective order. [8 U.S.C. § 1227(a)(2)(E)]

E. Domestic violence victim's right to apply for a handgun permit.

1. A domestic violence victim may apply for a temporary (up to 90 days) concealed handgun permit upon showing proof of a 50B protective order. [G.S. § 14-415.15(b)]

a) When a 50B protective order is filed with the clerk's office, the clerk is to provide the plaintiff in the action an information sheet that explains the plaintiff's right to apply for a permit under G.S. § 14-415.15. The information sheet also must include information about domestic violence agencies and services, sexual assault agencies and services, victim compensation services, legal aid services, and address confidentiality services. [G.S. § 50B-3(c1)]

b) The plaintiff may present a 50B protective order as evidence of an emergency situation that allows the Sheriff to issue a temporary permit to carry a concealed weapon to the plaintiff. [G.S. § 14-415.15(b)]

F. Malicious prosecution claims following dismissal of 50B complaint.

1. If an ex parte domestic violence protective order is issued but the judge at the emergency hearing finds that the complainant failed to prove an act of domestic violence and dismisses the complaint, the defendant in the domestic violence proceeding may have the basis for a malicious prosecution suit if he or she can show that:

a) The complainant in the domestic violence case initiated the proceeding maliciously and without probable cause;

b) The domestic violence proceeding was terminated in favor of the defendant in the domestic violence proceeding; and

c) The defendant in the domestic violence proceeding suffered special damage from that action. [*Alexander v. Alexander*, 152 N.C.App. 169, 567 S.E.2d 211 (2002) (provisions in an ex parte DVPO that restricted the husband's free movement and communication with his spouse, and that threatened arrest for violation of the order, constituted special damage; jury verdict in husband's favor upheld).]

XI. Miscellaneous Criminal Domestic Violence Issues

A. Domestic violence protective order or proceeding as an aggravating circumstance for criminal sentencing.

1. The trial court did not err in a capital sentencing proceeding by submitting to the jury either of the following as an aggravating circumstance:

a) That the murder of a domestic violence victim was committed to disrupt or hinder a governmental function; defendant murdered his wife, in part, to stop the proceeding to renew a DVPO. [*State v. Anthony*, 354 N.C. 372, 555 S.E.2d 557 (2001), *cert. denied*, 536 U.S. 930 (2002) (victim was scheduled to return to court the day after her murder to obtain an extension of a DVPO).]

b) That the murder of a domestic violence victim was committed because of the victim's exercise of her official duty as a witness; defendant murdered his wife, in part, because she exercised her official duty as a witness when she obtained a protective order against the defendant. [*State v. Anthony*, 354 N.C. 372, 555 S.E.2d 557 (2001), *cert. denied*, 536 U.S. 930 (2002).]

B. Testimonial statements of an unavailable witness.

1. In a criminal prosecution, if the declarant is unavailable at trial and the defendant has not had a prior opportunity to cross-examine the declarant, the Sixth Amendment right to confrontation bars admission of an out-of-court statement by the declarant that is testimonial in nature. [*Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004).] [For the most recent analysis of the *Crawford* decision, *see* Jessica Smith, "A Guide to *Crawford* and the Confrontation Clause" (School of Government, September 2012) available at http://benchbook.sog.unc.edu/evidence/guide-crawford-confrontation-clause. For

earlier articles analyzing the *Crawford* decision, *see* Jessica Smith, "*Crawford v. Washington*: Confrontation One Year Later" (School of Government, April 2005); Jessica Smith, "Emerging Issues in Confrontation Litigation: A Supplement to *Crawford v. Washington:* Confrontation One Year Later" (School of Government, March 2007); and Jessica Smith, "Understanding the New Confrontation Clause Analysis: *Crawford, Davis and Melendez-Diaz*" (School of Government, April 2010).] The *Crawford* articles are available from the School of Government Publications website at http://shopping.netsuite.com/s.nl?c=433425&sc=7&category=-107&search=jessica%20smith.

2. If a statement is nontestimonial in nature, the Confrontation Clause is not implicated and the statement's admissibility is merely a matter of applying evidentiary rules regarding hearsay and various hearsay exceptions. [*Crawford v. Washington,* 541 U.S. 36, 68 (2004); *Davis v. Washington,* 547 U.S. 813, 821 (2006); *State v. Blackstock*, 165 N.C.App. 50, 598 S.E.2d 412 (2004), *review denied, appeal dismissed*, 359 N.C. 283, 610 S.E.2d 208 (2005) (*Crawford* does not require that victim's nontestimonial statements to family members be excluded from trial; statements' admissibility decided pursuant to exceptions to the general rule against hearsay).]

3. In *Davis v. Washington,* 547 U.S. 813, 126 S.Ct. 2266 (2006), the U.S. Supreme Court further examined the meaning of "testimonial" and held that statements made in response to police interrogation are:

a) Nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.

b) Testimonial when the circumstances objectively indicate that there is no such ongoing emergency and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. [*Davis,* 126 S.Ct. at 2273.]

4. *Crawford* is not applicable to a civil domestic violence protective order proceeding. [*See In re B.D.*, 174 N.C.App. 234, 620 S.E.2d 913 (2005), *review denied*, 360 N.C. 289, 628 S.E.2d 245 (2006), *citing In re D.R.*, 172 N.C.App. 300, 616 S.E.2d 300 (2005) (*Crawford* not applicable to a civil termination of parental rights proceeding); *In re T.M.*, 180 N.C.App. 539, 638 S.E.2d 236 (2006), *citing B.D.* and *D.R.* (protections of the confrontation clause do not apply in a civil neglect proceeding).]

5. However, because victims in domestic violence cases are frequently unwilling to testify, *Crawford* often will be implicated in criminal domestic violence prosecutions and related criminal prosecutions. [*See Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266 (2006) (noting that a victim in a domestic violence case is "notoriously susceptible to intimidation or coercion" to ensure that she does not testify at trial); *see also* Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 768 (2005) (stating that "*Crawford's* impact has been particularly great on prosecutions of domestic

violence, because these cases are more likely than others to rely on hearsay statements by accusers who may recant or refuse to cooperate with the prosecution at the time of trial"); and Jessica Smith, "Understanding the New Confrontation Clause Analysis: *Crawford, Davis and Melendez-Diaz*" (School of Government, April 2010) (*Crawford* applies when the state seeks to admit out-of-court statements of a nontestifying domestic violence victim to first-responding officers or to a 911 operator).] For a resource briefly discussing *Crawford* in the domestic violence context, *see* Alyson Grine, "Domestic Violence Offenses: What New Defenders Need to Know (September 2010), available online at http://www.ncids.org/Defender%20Training/2010NewMisdDefender/DomesticViolenceOffenses.pdf.]

6. Testimonial evidence excluded under the Confrontation Clause may be admitted under the doctrine of forfeiture.

a) Under the doctrine of forfeiture, an accused who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation. [*Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004); *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266 (2006); *Giles v. California*, 554 U.S. 353, 128 S.Ct. 2678 (2008) (in a case considering a victim's statements to a police officer responding to a domestic violence call three weeks before she was murdered by boyfriend, holding that forfeiture requires a showing that the defendant intended to prevent a witness from testifying).]

b) For more on the doctrine of forfeiture, *see*:

(1) "A Guide to *Crawford* and the Confrontation Clause" (School of Government, September 2012) available at http://benchbook.sog.unc.edu/evidence/guide-crawford-confrontation-clause.

(2) Jessica Smith, "Understanding the New Confrontation Clause Analysis: *Crawford, Davis and Melendez-Diaz*" (School of Government, April 2010), available at http://sogpubs.unc.edu/electronicversions/pdfs/aojb1002.pdf.

(3) Deborah Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C.L. REV. 1 (2006) (predicting in the introduction to the article that "forfeiture is the next frontier of domestic violence prosecution").

C. Criminal contempt for violating a civil DVPO may bar a subsequent criminal prosecution.

1. The double jeopardy clause constitutes a bar to a subsequent criminal prosecution if the elements of the offense at issue in the contempt proceeding match the elements of the subsequently charged criminal offense. [*See State v. Freeland*, 316 N.C. 13, 340 S.E.2d 35 (1986) (defendant could not be punished for both first-degree kidnapping and the underlying sexual assault, which is an element of first-degree kidnapping).]

2. When wife in criminal contempt for violating provision in civil consent order that prevented her from "coming to" the residence of her ex-husband, double jeopardy precluded subsequent prosecution for domestic criminal trespass as elements of the offenses in both proceedings the same. [*State v. Dye*, 139 N.C.App. 148, 532 S.E.2d 574 (2000).]

3. Double jeopardy precluded conviction for assault on a female in light of defendant's prior adjudication of criminal contempt based upon violation of a DVPO that prohibited defendant from assaulting his wife. [*State v. Gilley*, 135 N.C.App. 519, 522 S.E.2d 111 (1999), *cert. denied*, 549 S.E.2d 860 (2001).]

D. Special pretrial release rules for domestic violence crimes.

1. Only a judge can determine the conditions of pretrial release for the first 48 hours after the defendant's arrest for domestic violence crimes (the "48 Hour Rule"). For the domestic violence crimes to which the 48 Hour Rule applies, *see* the table at page 71.

a) A judge must determine the conditions of pretrial release for a defendant charged with crimes of domestic violence or with violating a domestic violence protective order. [G.S. § 15A-534.1(a)] "Judge" means either a district or superior court judge.

b) The judge must direct a law enforcement officer or a district attorney to provide a criminal history report for the defendant and must consider the criminal history when setting conditions of release. [G.S. § 15A-534.1(a), *amended by* 2010 N.C. Sess. Law 135, § 1, effective October 1, 2010.]

(1) After setting conditions of release, the judge shall return the report to the providing agency or department. The report is not to be placed in the case file. [G.S. § 15A-534.1(a), *amended by* 2010 N.C. Sess. Law 135, § 1, effective October 1, 2010.]

(2) No judge shall unreasonably delay the determination of conditions of pretrial release for the purpose of reviewing the defendant's criminal history report. [G.S. § 15A-534.1(a), *amended by* 2010 N.C. Sess. Law 135, § 1, effective October 1, 2010.]

c) For the conditions that a judge may impose on a defendant charged with crimes of domestic violence, *see* G.S. § 15A-534.1(a)(2), one of which is that a defendant abstain from alcohol consumption, as verified by the use of a continuous alcohol monitoring system. [G.S. § 15A-534.1(a)(2)e, *added by* 2012 N.C. Sess. Laws 146, § 2, effective December 1, 2012, and applicable to offenses committed on or after that date.]

d) If a judge has not set conditions of pretrial release within 48 hours of arrest, a magistrate is to set conditions of pretrial release. [G.S. § 15A-534.1(b)] A magistrate does not have authority to set conditions of pretrial release for the first 48 hours after arrest. [2002 Att'y Gen. 526]

e) CONDITIONS OF RELEASE FOR PERSON CHARGED WITH A CRIME OF DOMESTIC VIOLENCE (AOC-CR-630) may be used in conjunction with CONDITIONS OF RELEASE AND RELEASE ORDER (AOC-CR-200).

2. No specific period of detention required by G.S. § 15A-534.1.

a) G.S. § 15A-534.1(b) does not *require* pretrial detention or prescribe any minimum period of detention. [*State v. Thompson*, 349 N.C. 483, 508 S.E.2d 277 (1998) (emphasis in original) (further noting that "[i]ndividuals charged with domestic violence might not be detained at all under the statute; they might be brought before a judge for a pretrial-release hearing immediately following arrest").]

b) G.S. § 15A-534.1 "is not and has never been a provision authorizing a domestic violence defendant to be held without bond for 48 hours." [Joan G. Brannon, "Domestic Violence Special Pretrial Release and Other Issues," *Administration of Justice Bulletin No. 2001/06* (Institute of Government, December 2001).]

(1) A magistrate's order that automatically detained a defendant without a hearing for 48 hours when judges were available to conduct a hearing violated defendant's procedural due process rights. [*State v. Thompson*, 349 N.C. 483, 508 S.E.2d 277 (1998) (failure to provide defendant with a bond hearing before a judge at the first opportunity on Monday morning, and his continued detention well into the afternoon pursuant to a magistrate's order specifying a 48-hour delay, violated defendant's procedural due process rights to a timely pretrial-release hearing; improper detention required dismissal of the charges).]

(2) Defendant's due process rights violated when defendant was held approximately 39 hours despite the availability of judges pursuant to a release order that specified that he was to be held 48 hours. [*State v. Clegg*, 142 N.C.App. 35, 542 S.E.2d 269, *appeal dismissed, review denied*, 353 N.C. 453, 548 S.E.2d 529 (2001), *citing Thompson* (new trial not required when defendant failed to show that he was prejudiced in the prosecution of the superseding charges based on his detention related to the original charge).]

c) A defendant must receive a timely pretrial-release hearing under G.S. § 15A-534.1(a). Whether the hearing was timely is decided on a case-by-case basis.

(1) Magistrate's order providing that defendant be brought before a judge on the day after his arrest did not unreasonably delay defendant's post-detention hearing. [*State v. Malette*, 350 N.C. 52, 509 S.E.2d 776 (1999) (court noting that the magistrate had not arbitrarily set a 48 hour limit as in *Thompson*).]

(2) Although a defendant was detained for approximately 7 hours, from 6:15am until his bond hearing at 1:30pm, the bond hearing occurred in a reasonably feasible time, even though the district court had convened at 9:30am. [*State v. Jenkins,* 137 N.C.App. 367, 527 S.E.2d 672, *appeal dismissed, review denied,* 352 N.C. 153, 544 S.E.2d 234 (2000) (State presented evidence that bond hearings set for 1:30pm for purpose of scheduling and need to file paperwork).]

3. Domestic violence offenses covered by pretrial release rules of G.S. § 15A-534.1.

a) For a list of the most common offenses to which the special pretrial release rule applies, *see* the table at page 71.

b) **Note** that for the special pretrial release rule to apply, the defendant and the complainant must be either current or former spouses or must be living together or have lived together as if married. [G.S. § 14-134.3 (domestic criminal trespass); G.S. § 15A-534.1(a) (for other offenses).]

(1) A complainant and defendant may have a relationship to which the special pretrial release rule does not apply, for example, they may have a child in common but are not current or former spouses or have never lived together as if married.

(2) For a list of offenses to which the special pretrial release rule does not apply because the relationship between the complainant and defendant is other than that specified in the statutes set out above, see the table at page 71.

4. Detention beyond the initial 48 hours authorized by G.S. § 15A-534.1(b).

a) A judge conducting a pretrial release hearing may retain the defendant in custody "for a reasonable period of time" beyond the initial 48 hours authorized by G.S. § 15A-534.1(b) if the judge determines that:

(1) The immediate release of the defendant will a pose a danger of injury to the alleged victim or to any other person or is likely to result in intimidation of the alleged victim; and

(2) The execution of an appearance bond will not reasonably assure that injury or intimidation will not occur. [G.S. § 15A-534.1(a)(1); *see State v. Thompson,* 349 N.C. 483, 508 S.E.2d 277 (1998).]

b) A judge can use G.S. § 15A-534.1(a)(1) to determine conditions of pretrial release even if the defendant has been held for some time before bond is set. [*See State v. Thompson,* 349 N.C. 483, 508 S.E.2d 277 (1998); for more discussion on the point, *see* Joan G. Brannon, "Domestic Violence Special Pretrial Release and Other Issues," *Administration of Justice Bulletin No. 2001/06* (Institute of Government, December 2001)

and Alyson Grine, “Domestic Violence Offenses: What New Defenders Need to Know (September 2010), available online at http://www.ncids.org/Defender%20Training/2010NewMisdDefender/DomesticViolenceOffenses.pdf.]

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DOMESTIC VIOLENCE CRIMES[1]

Crime Charged	Relationship Between Defendant and Victim	Only Judge May Set Bond for First 48 Hours After Arrest	Crime Victims' Rights Act (VRA) Applies
Simple assault [G.S 14-33(a)]	• Current or former spouses. •Persons who live or have lived together as if married. • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members.	Yes No	Yes [Magistrate must indicate VRA Case on the criminal process]
Assault on a female [G.S. 14-33(c)(2)]	• Current or former spouses. • Persons who live or have lived together as if married. • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members.	Yes No	Yes [Magistrate must indicate VRA Case on the criminal process]
Assault with a deadly weapon [G.S. 14-33(c)(1)]	• Current or former spouses. •Persons who live or have lived together as if married. • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members.	Yes No	Yes [Magistrate must indicate VRA Case on the criminal process]

[1] This chart lists the most common offenses to which the special 48-hour pretrial release rule applies, but it does not list every felony to which it applies. The rule covers any felony in Articles 7A (Rape and Sexual Offenses), 8 (Assaults), 10 (Kidnapping and Abduction), or 15 (Arson and Other Burnings) of the General Statutes if the relationship between the defendant and the victim is current or former spouse or persons who are living together or have lived together as if married.

Crime Charged	**Relationship Between Defendant and Victim**	**Only Judge May Set Bond for First 48 Hours After Arrest**	**Crime Victims' Rights Act (VRA) Applies**
Assault inflicting serious injury [G.S.14-33(c)(1)]	• Current or former spouses. •Persons who live or have lived together as if married. _____ • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members.	Yes _____ No	Yes [Magistrate must indicate VRA Case on the criminal process]
Assault by pointing a gun [G.S. 14-34]	• Current or former spouses. •Persons who live or have lived together as if married. _____ • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members.	Yes _____ No	Yes [Magistrate must indicate VRA Case on the criminal process]
Assault with a deadly weapon with intent to kill [G.S. 14-32(c)]	• Current or former spouses. •Persons who live or have lived together as if married. _____ • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members.	Yes _____ No	Yes; because VRA felony no matter what relationship.
Assault with a deadly weapon inflicting serious injury [G.S. 14-32(b)]	• Current or former spouses. •Persons who live or have lived together as if married. _____ • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members.	Yes _____ No	Yes; because VRA felony no matter what relationship.

Crime Charged	**Relationship Between Defendant and Victim**	**Only Judge May Set Bond for First 48 Hours After Arrest**	**Crime Victims' Rights Act (VRA) Applies**
Assault with a deadly weapon with intent to kill inflicting serious injury [GS 14-32(a)]	• Current or former spouses. •Persons who live or have lived together as if married. • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members..	Yes No	Yes; because VRA felony no matter what relationship.
Assault inflicting serious bodily injury [G.S. 14-32.4(a)]	• Current or former spouses. •Persons who live or have lived together as if married. • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members.	Yes No	Yes; because VRA felony no matter what relationship.
Assault by strangulation [G.S. 14-32.4(b)]	• Current or former spouses. •Persons who live or have lived together as if married. • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members.	Yes No	No
Habitual misdemeanor assault [G.S. 14-33.2]	• Current or former spouses. •Persons who live or have lived together as if married. • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members.	Yes No	Yes; because VRA felony no matter what relationship.
Communicating a threat [G.S. 14-277.1]	• Current or former spouses. •Persons who live or have lived together as if married. • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members.	Yes No	No

Crime Charged	**Relationship Between Defendant and Victim**	**Only Judge May Set Bond for First 48 Hours After Arrest**	**Crime Victims' Rights Act (VRA) Applies**
Domestic criminal trespass [G.S. 14-134.3]	• Current or former spouses. • Persons who live or have lived together as if married. (having one of these relationships is an element of this offense)	Yes	Yes [Magistrate must indicate VRA Case on the criminal process]
Violating a protective order [G.S. 50B-4.1]	• Current or former spouses. •Persons who live or have lived together as if married. • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members.	Yes	Yes [Magistrate must indicate VRA Case on the criminal process]
Stalking [G.S. 14-277.3A]	• Current or former spouses. •Persons who live or have lived together as if married. • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members.	Yes No	Yes [Magistrate must indicate VRA Case on the criminal process]
Rape or sexual offense [G.S. 14-27.2 to –27.8]	• Current or former spouses. •Persons who live or have lived together as if married. • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members.	Yes No	Yes; because VRA felony no matter what relationship.

Crime Charged	**Relationship Between Defendant and Victim**	**Only Judge May Set Bond for First 48 Hours After Arrest**	**Crime Victims' Rights Act (VRA) Applies**
Kidnapping [GS. 14-39]	• Current or former spouses. •Persons who live or have lived together as if married. _____ • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members.	Yes _____ No	Yes because VRA felony no matter what relationship.
Harassing telephone calls [G.S. 14-196]	• Current or former spouses. •Persons who live or have lived together as if married. _____ • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members.	No	No
Arson	• Current or former spouses. • Persons who live or have lived together as if married. _____ • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members.	Yes _____ No	Yes because VRA felony no matter what relationship.

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