

## **Frequently Asked Family Law Questions**

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### **1. Did legislation authorizing the use of unsworn declarations for electronic filings supersede the requirements for a divorce complaint found in G.S. 50-8?**

Because there is no opinion yet from our appellate courts about the validity of the new verification, the determination of its validity is up to you as individual judges.

#### **50-8. Contents of complaint; verification; ... .**

In all actions for divorce the complaint shall be verified in accordance with the provisions of Rule 11 of the Rules of Civil Procedure and G.S. 1-148.

Rule 11 states:

“In any case in which verification of a pleading shall be required by these rules or by statute, it shall state in substance that the contents of the pleading verified are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he believes them to be true. Such verification shall be by affidavit of the party,…”

GS 1-148 provides:

“Any officer competent to take the acknowledgment of deeds, and any judge or clerk of the General Court of Justice, notary public, in or out of the State, or magistrate, is competent to take affidavits for the verification of pleadings, in any court or county in the State, and for general purposes.”

However, 7A-98 was enacted in 2021.

#### **7A-98. Unsworn declarations under penalty of perjury.**

(a) Any matter required or permitted to be supported, evidenced, established, or proved in writing under oath or affirmation may, if filed electronically pursuant to rules promulgated by the Supreme Court under G.S. 7A-49.5, with like force and effect be supported, evidenced, established, or proved by an unsworn declaration in writing, subscribed by the declarant and dated, that the statement is true under penalty of perjury.

(b) Declarations given pursuant to this section shall be deemed sufficient if given in substantially the following form:

"I declare (or certify, verify, or state) under penalty of perjury under the laws of North Carolina that the foregoing is true and correct. Executed on (date). (Signature)."

(c) Except as otherwise provided by law, this section does not apply to, and such unsworn declarations shall not be deemed sufficient for, any of the following:

- (1) Oral testimony.
- (2) Oaths of office.
- (3) Any statement under oath or affirmation required to be taken before a specified official other than a notary public.
- (4) Any will or codicil executed pursuant to G.S. 31-11.6.
- (5) Any real property deed, contract, or lease requiring an acknowledgment pursuant to G.S. 47-17. (2021-47, s. 17(a).)

The North Carolina Guide and File system creates a complaint for litigants who state they want to file electronically that uses the unsworn declaration and does not require an affidavit. The Office of General Counsel at the AOC has taken the position that the unsworn declaration is sufficient for a divorce complaint filed electronically.

In the case of *Gyger v. Clement*, 375 NC 80 (2020), the supreme court interpreted a similar issue relating to interstate child support proceedings pursuant to UIFSA (the Uniform Interstate Family Support Act) found in NC Chapter 52C. GS 52C-3-315(b) allows affidavits to be given under penalty of perjury (language similar to that authorized by GS 7A-98) rather than in front of a notary or other authorized person. The supreme court held that the legislature clearly intended to create an exception to the general rule that affidavits must be executed in front of an authorized person to support the interstate processes in UIFSA. A similar analysis could apply in this situation.

## **2. Can a judge sign a consent order/judgment that has not been signed by the parties and notarized?**

There is no legal requirement that consent orders be signed by the parties, so there is no statute or case law that requires notarization.

However, there is a requirement that the parties agree to the entry of the consent order at the time the judge signs the order. If there is no actual consent at the time of entry, the order will be void. *Rockingham Cnty. Dep't of Soc. Servs. ex rel. Walker v. Tate*, 202 N.C. App. 747, 689 S.E.2d 913 (2010); *Tevepaugh v. Tevepaugh*, 135 N.C. App. 489, 521 S.E.2d 117 (1999)); *Lalanne v. Lalanne*, 43 N.C. App. 528, 259 S.E.2d 402 (1979) (agreement reached between the parties four months before entry of the judgment could not support entry of judgment based on consent as there was no indication of the continuing consent of the parties).]

So, at the time of signing, a judge needs to be certain that parties agree to the entry of the consent order at that specific time. If the parties are in court, the judge can ask questions to be sure they understand the order. When they are not in court, many judges require the notarized signature of the parties on the consent order to indicate their agreement. I believe a judge can require whatever the judge needs to feel comfortable signing the order.

### **3. What do you do when you think a litigant is incompetent?**

A trial judge is obligated to hold a hearing to determine whether to appoint a Rule 17 Guardian Ad Litem for the incompetent litigant. The standard for incompetency is found in G.S. 35A-1101:

(7) Incompetent adult. - An adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

In *Rutledge v. Rutledge*, 10 NC App 427 (1971), the court stated:

“We are of the opinion, and so hold, that if in the course of the trial of a civil action or proceeding, circumstances are brought to the attention of the trial judge which raise a substantial question as to whether a party litigant, who is not already represented by a guardian, is Non compos mentis, it is the duty of the trial judge to see that proper determination of this question is made before proceeding further with the trial in any way which might prejudice the right of such party. Whether the circumstances which are brought to the attention of the trial judge are sufficient to raise a substantial question as to the party's competency is a matter to be initially determined in the sound discretion of the trial judge. In making this initial determination, normally a Voir dire examination should be conducted. Where practicable, it is preferable that the party whose competency is questioned be present in person before the court. If the evidence is conflicting, the trial judge should make findings of facts as the basis for his determination as to whether any substantial question of competency is raised. If the trial judge determines that a substantial question as to the party's competency is raised, notice and opportunity to be heard must then be given the party for whom appointment of a guardian is proposed.”

The holding in *Rutledge* was called into question by the holding in *Culton v. Culton*, 96 NC App 620 (1989), where the court held that Chapter 35A was the exclusive statutory

procedure for determining the competency of a party, and Chapter 35A gives exclusive jurisdiction to clerks of court.

However, following the opinion in *Culton*, the General Assembly amended Chapter 35A to clarify that trial judges can determine competency in accordance with Rule 17.

**35A-1102. Scope of law; exclusive procedure.**

This Article establishes the exclusive procedure for adjudicating a person to be an incompetent adult or an incompetent child. However, nothing in this Article shall interfere with the authority of a judge to appoint a guardian ad litem for a party to litigation under Rule 17(b) of the North Carolina Rules of Civil Procedure.

Any adult person can be appointed to act as GAL, but a person acting as a GAL cannot also act as the incompetent person's attorney. Fees for the GAL can be apportioned between the parties as court costs. *Van Every v. McQuire*, 125 NC App 578 (1997).

**4. If you grant a request for a divorce from bed and board, can you order the defendant to move out of the marital residence?**

A divorce from bed and board is nothing more than an authorized separation; a divorce from bed and board merely suspends the effect of the marriage as to cohabitation; it does not dissolve the marriage bond. *Schlagel v. Schlagel*, 253 N.C. 787, 117 S.E.2d 790 (1961). *See also Triplett v. Triplett*, 38 N.C. App. 364, 248 S.E.2d 69 (1978) (citing *Schlagel*).

There is no statute or published appellate opinion that authorizes a trial court to award possession of real property to a party who prevails on a claim for divorce from bed and board in the absence of an accompanying claim and order for alimony, child support, or domestic violence.

In *Slight v. Slight*, 200 N.C. App. 321, 683 S.E.2d 467 (2009) (**unpublished**), the trial court did not err in granting plaintiff possession of marital residence as part of divorce from bed and board, even though plaintiff did not request alimony or child support. The court of appeals in *Slight* cited *Triplett v. Triplett*, 38 N.C. App. 364, 248 S.E.2d 69 (1978), to support its statement that divorce from bed and board is "merely a judicial decision ordering a spouse out of the house."

In *Triplett v. Triplett*, 38 N.C. App. 364, 366, 248 S.E.2d 69, 70 (1978), the appellate court affirmed the award to plaintiff of alimony and sole possession of the home and furnishings, noting that plaintiff sought a divorce from bed and board and alimony and that "such an action may be the only method by which the injured spouse can obtain a

writ for exclusive possession of the home so as to keep the offending spouse from continuing to stay in the home.” The opinion in *Slight v. Slight*, 200 N.C. App. 321, 683 S.E.2d 467 (2009) (**unpublished**), does not address the fact that the plaintiff in *Triplett* sought and obtained an award of alimony, while the *Slight* plaintiff sought neither alimony nor child support

**5. There is an action for equitable distribution and alimony pending before you when you discover defendant husband has previously filed for divorce and property distribution in another state. Do you have jurisdiction to continue the North Carolina actions?**

Yes, but you can consider issuing a stay.

**Abatement, also known as the prior pending action doctrine, does not apply when the prior action is pending in another state**

If wife filed a complaint requesting child support, alimony, and property distribution in Watauga County and a few weeks later, while wife’s claims remained pending in Watauga County, husband filed a complaint requesting property distribution in Hyde County, the common law doctrine of abatement would allow wife to ask the court in Hyde County to dismiss husband’s complaint. Abatement, also called the prior pending action doctrine, provides that:

“[w]hen a prior action is pending between the same parties, affecting the same subject matter in a court within the State or the federal court having like jurisdiction, the subsequent action is wholly unnecessary and therefore, in the interest of judicial economy, should be subject to a plea of abatement.”

*State of N.C. Department of Health and Human Services v. Armstrong*, 203 NC App 116 (2010)(quoting *State ex rel. Onslow County v. Mercer*, 128 NC App 371, 375 (1998)). See also *Weaver v. Early*, 325 NC 535 (1989).

However, abatement applies only when both actions are filed in the same state. *Acorn v. Jones Knitting Corp.*, 12 NC App 266 (1971).

So, in the example above, if wife’s claims were pending in another state, such as Ohio, and husband’s claims were filed in North Carolina, the North Carolina court will have much more discretion to determine whether husband should be allowed to proceed with his claims even though he filed after wife filed in Ohio.

**G.S. 1-75.12: Stay of proceeding to permit trial in a foreign jurisdiction**

When the prior pending action is in another state, G.S. 1-75.12(a) grants the trial court the discretion to determine whether the action filed in North Carolina should be allowed to proceed. That statute provides:

“If, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State, the judge on

motion of any party may enter an order to stay further proceedings in the action in this State. A moving party under this subsection must stipulate his consent to suit in another jurisdiction found by the judge to provide a convenient, reasonable and fair place of trial.”

It is this statute, rather than the common law doctrine of abatement, that provides the analysis for determining whether the claims proceed simultaneously or whether the North Carolina claim is stayed pending the outcome of the action in the other state. *See American Motors Ins., Co. v. Avnet, Inc.*, 98 NC App 385 (1990), *Home Indemnity v. Hoechst-Celanese Corp.*, 99 NC App 322 (1990), and *Motor Inn Management, Inc. v. Irvin-Fuller Development Co., Inc.*, 46 NC App 707 (1980).

**Muter v. Muter, 203 NC App 129 (2010)**

Lynn and John Muter were married in Ohio in 1983 and had two children. The family moved to North Carolina in 1998, but wife (Lynn) and the children returned to Ohio later that same year. In October 2007, wife filed a complaint seeking divorce, spousal support, property distribution, child custody and child support in the State of Ohio. After the Ohio court entered a temporary order for spousal support, child support and child custody, husband moved to stay the Ohio action and to set aside the temporary support orders but both requests were denied by the Ohio court.

Husband also filed a complaint in North Carolina requesting absolute divorce and property distribution and asking that the North Carolina court determine spousal support. Wife filed a motion to dismiss for lack of personal and subject matter jurisdiction and she requested that the court stay the North Carolina proceeding until the resolution of the claims pending in Ohio. The North Carolina court denied wife’s motion for a stay. The North Carolina court then heard and granted husband’s request for absolute divorce. The Ohio court thereafter dismissed all of wife’s claims pending in that state on the basis that the absolute divorce had been granted in North Carolina.

Wife appealed the decision of the North Carolina court, arguing that the trial court erred in refusing her request to stay the North Carolina action. The court of appeals affirmed the trial court, holding that if a trial court considers the relevant factors, the appellate court will defer to the trial court’s determination of whether a stay should be granted.

**Factors to determine whether stay is required to avoid “substantial injustice”**

The court in *Muter* stated that pursuant to G.S. 1-75.12, “[t]he essential question for the trial court is whether allowing the matter to continue in North Carolina would work a substantial injustice on the moving party.” In making this determination, a trial court may consider the following factors:

(1) the nature of the case, (2) the convenience of the witnesses, (3) the availability of compulsory process to produce witnesses, (4) the relative ease of access to sources of proof, (5) the applicable law, (6) the burden of litigating matters not of local concern, (7) the desirability of litigating matters of local concern in local courts, (8) convenience and access to another forum, (9) choice of forum by plaintiff, and (10) all other practical considerations.

*Muter*, 203 NC App at 132.

The court of appeals held that the trial court considered each of the suggested factors and listed the following findings of fact in the trial court order as examples:

“31. Nature of the Case: This action involves the application for equitable distribution and spousal support, as pleaded by both parties.

32. Applicable Law: North Carolina law applies as to all aspects of this action.

33. Convenience of Witnesses: Those who may testify as to the date of separation and the assets which may be subject to equitable distribution will be predominantly from North Carolina.

34. Process to Compel Witness Attendance: North Carolina law is well suited [sic] to compel attendance of in-state witnesses, and to obtain the testimony of out-of-state witnesses.

35. Ease of Access to Sources of Proof: Because almost all of the assets, both personal and real property, which may be subject to equitable distribution are located in North Carolina, North Carolina offers the easiest access to sources of proof.”

*Muter*, 203 NC App at 133.

### **The burden is on the party requesting the stay**

The court in *Muter* pointed out that the burden is on the party requesting the stay to prove that proceeding in North Carolina would work a substantial injustice. The court held that it is not the job of the trial court to determine “the most convenient or ideal venue for resolving the matter but only to determine whether [the moving party] proved that proceeding in North Carolina would work a substantial injustice on her.” *Muter*, 203 NC App at 134.

- 6. Grandmother filed a custody action against the mother of the child, but she did not include the father as a defendant. Neither grandmother nor mother know the location of father. Can you proceed with the custody case without the father?**

Yes, I think so.

### **Is a parent always a ‘necessary party’ to a custody action?**

Consider a custody action brought by a grandparent against the mother of a child. Grandmother is seeking primary custody, arguing that mother is unfit and has waived her constitutional right to exclusive care, custody, and control of her child. Grandmother does not name the father of the child as a defendant and makes no attempt to serve him with process. The complaint states that neither the grandmother nor the mother know the location of the father, and the father has never been involved in the life of the child. Can the court move forward on grandmother’s claim without the father named as a party?

**Parents are entitled to notice.**

GS 50A-205(a) states:

“Before a child-custody determination is made under this Article, notice and an opportunity to be heard in accordance with the standards of G.S. 50A-108 must be given to ... any parent whose parental rights have not been previously terminated ...”.

However, section (b) provides:

“This Article does not govern the enforceability of a child-custody determination made without notice or an opportunity to be heard.”

This means that the impact of the failure to provide notice to a parent is determined by other state laws. See Official Comment, GS 50A-205.

It seems obvious that a custody order entered without notice to a parent and without the parent being named as a party in the action will not be binding on that parent and will not affect the parental rights of that parent in any way. See GS 50A-308(d)(1)(lack of notice is defense to enforcement of custody order). See also *Ludwig v. Hart*, 40 NC App 188 (1979)(portion of judgment divesting trustee of property was invalid where trustee was not joined as a party); *Barber v. Dixon*, 62 NC App 455 (1983)(portion of judgment enjoining action by non-parties was invalid as to the non-parties); *Buncomb County Bd. Of Health v Brown*, 271 NC 401 (1967)(court has no authority to affect the rights of a person who is not a party to the proceeding).

Even if his custodial or parental rights are not affected by the custody order, does the court have jurisdiction to resolve the custody dispute between grandmother and mother without the father in the case?

### **When is father a ‘necessary party’?**

“The term ‘necessary party’ embraces all persons who have a claim or material interest in the subject matter of the controversy, which interest will be directly affected by the outcome of the litigation.” *Smith v. Barbour*, 154 NC App 402 (2002), quoting *Lambroia v. Peek*, 107 NC App 745, 750 (1992). “A person is a necessary party to an action when he is so vitally interested in the controversy involved in an action that a valid judgment cannot be rendered without his presence as a party. ... His interest must be such that no decree can be rendered which will not affect him. ... Necessary parties are those persons who have rights that must be ascertained and settled before the rights of the parties to the suit can be determined.” *Wall v. Sneed*, 13 NC App 719, 724 (1972).

GS 1A, Rule 19(a) requires that persons who are “united in interest” be joined as parties in a case. A ‘necessary party’ is a person who is “united in interest” with the other parties to the suit and must be joined for a valid judgment to be entered affecting the rights of that necessary party. See *Ludwig v. Hart*, 40 NC App 188 (1979)(portion of judgment divesting trustee of property was invalid where trustee was not joined as a party).

In *Smith v. Barbour*, 154 NC App 402 (2002), the court of appeals held that the trial court had no subject matter jurisdiction to enter a temporary custody order in a case between a mother and the putative father of the child because the mother’s husband was not a party to the case. According to the appellate court, because the husband was the legal father of the child born during the marriage and there had been no adjudication that he was not the father of the child, the husband was a necessary party in the custody case, and his absence deprived the court of subject matter jurisdiction to enter a custody order.



**Does this mean the court can never decide custody unless both parents are parties to the case?**

GS 50-13.1 was intended by the legislature to be a broad statute to provide a comprehensive process for resolving custody disputes. *Oxendine v. Catawba County Dept. of Social Services*, 303 NC 699 (1981). A custody order entered pursuant to Chapter 50 does nothing more than resolve the custody dispute between the parties. See *Kannellos v. Kanellos*, 251 NC App 149 (2016)(despite the broad discretion granted to the court, the scope of the court's authority in custody cases is limited to determining the custodial rights of the parties). It does not impact the rights of other people who may have an interest in the future in the custody of the child. For example, a custody order can resolve a dispute between two parents, but that order will have no impact on the rights of a grandparent who may want to assert a claim for custody in the future.

In our hypothetical case, the custody dispute is between grandmother and mother. Father is not involved in the life of the child. The court can resolve the dispute between grandmother and mother without affecting the rights of the father, assuming he ever wants to assert those rights.

There have been several appellate opinions involving custody disputes between a non-parent and only one parent, and the appellate courts have not questioned the jurisdiction of the trial court to resolve those disputes. See e.g., *Price v. Howard*, 346 NC 68 (1997)(unknown father); *Ellison v. Ramos*, 130 NC App 389 (1998)(incapacitated mother not a party); *Weideman v. Shelton*, 247 NC App 875 (2016)(unknown father).

What about *Smith v. Barbour*? The opinion is written in broad language, but in that case, the court could not resolve the custody dispute between the mother and the putative father without resolving the issue of the paternity of the child. The court would need to determine whether to treat the case as a parent vs. parent case, or a non-parent vs. parent case. The non-party husband clearly would be affected by a determination of the child's paternity because he was the legal father of the child and would remain the legal father only until a court determined someone else was the child's father. Because his parental rights would be directly affected by the custody case between mother and the putative father, the court could not proceed without him.

In custody cases that do not require a determination of paternity, I do not believe that a parent is a necessary party in the technical sense of the word. See Reynold's on North Carolina Family Law, 2021 edition, section 8.27(a)(“The only necessary parties to an action or proceeding for the custody of a child are the two parties who are disputing the custody of the child.”).

I am not implying that efforts should not be made to contact and provide notice to both parents whenever a child's custody is at issue. However, I do not think the law prohibits a court from resolving a custody dispute whenever one parent is not a party in the case.

- 7. There is an existing custody order between the parents of a child. Grandmother files a motion to intervene, asking for visitation with the child.**

**a. Can you grant the motion to intervene?**

If the motion to intervene includes a complaint for custody that properly alleges a claim for custody, you can grant the motion to intervene. See Rule 24 of the Rules of Civil Procedure.

A grandparent always has standing to ask for custody (visitation is a form of custody). *Rodriguez v. Rodriguez*, 211 N.C. App. 267 (2011). But to state claim for visitation, the grandparent in this case will need to allege facts sufficient that, if proven, would support a conclusion that the parents have waived their constitutional right to custody. *Id.*

Unlike claims brought pursuant to the grandparent visitation statutes, an ongoing custody dispute is not required when a grandparent seeks custody or visitation pursuant to G.S. 50-13.1(a). *Eakett v. Eakett*, 157 N.C. App. 550, 579 S.E.2d 486 (2003); *Wellons v. White*, 229 N.C. App. 164, 748 S.E.2d 709 (2013) (citing *Eakett*); *Grindstaff v. Byers*, 152 N.C. App. 288, 567 S.E.2d 429 (2002) (grandparents alleging unfitness can bring initial suit for custody pursuant to G.S. 50-13.1 even if there is no ongoing custody proceeding). A grandparent can seek custody or visitation pursuant to G.S. 50-13.1(a) only if the grandparent can show that the parent has waived the parent's constitutional right to custody.

The grandparent will not be able to seek visitation pursuant to the grandparent visitation statutes in this situation because there is no on-going litigation between the parents.

For a full discussion of all possible grandparent claims, see *McIntyre v. McIntyre*, 341 N.C. 629, 461 S.E.2d 745 (1995); *Eakett v. Eakett*, 157 N.C. App. 550, 579 S.E.2d 486 (2003).

**b. If grandmother properly alleges the parents have lost their constitutional right to exclusive custody of the child and asks for an ex parte custody order, can you enter an ex parte custody order?**

Yes, if the facts alleged establish grounds for an ex parte custody order, temporary custody can be granted ex parte to a non-parent third party. At the return hearing, both parties should be allowed to be heard on the motion to intervene.

There is nothing in case law or statutes indicating a different standard for temporary orders in cases initiated by nonparent third parties against parents when

the constitutional rights of the parent are at issue. *See Smith v. Barbour*, 154 N.C. App. 402, 571 S.E.2d 872 (2002) (where trial court made findings to show plaintiff third party had standing to bring action against parent, trial court had authority to enter a temporary custody order granting temporary visitation to third party), cert. denied, 599 S.E.2d 408 (2004).

In addition, numerous third-party cases reviewed by both the North Carolina Supreme Court and the Court of Appeals included temporary orders by the trial court, and the appellate courts have not indicated such orders are inappropriate. *See Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997) (trial court awarded temporary custody to plaintiff after blood tests revealed plaintiff was not the father of the child); *Owenby v. Young*, 357 N.C. 142, 579 S.E.2d 264 (2003) (ex parte and temporary orders removed child from parent and granted temporary custody to third party); *Speagle v. Seitz*, 354 N.C. 525, 557 S.E.2d 83 (2001) (ex parte order granted custody to grandparents following arrest of mother for murder of father), cert. denied, 536 U.S. 923, 122 S. Ct. 2589 (2002); *Mason v. Dwinnell*, 190 N.C. App. 209, 660 S.E.2d 58 (2008) (temporary order gave nonparent significant temporary visitation following denial of parent's motion to dismiss complaint for failure to state a claim); *Brewer v. Brewer*, 139 N.C. App. 222, 533 S.E.2d 541 (2000) (ex parte order granted temporary custody to nonparents and temporary order granted custody to parent, all based on "best interest").

#### **8. After your colleague granted an ex parte custody order, you are conducting the return hearing. What is the issue for you to decide at this hearing?**

The issue is whether the entry of a temporary custody order is appropriate under the circumstances. There is no legal requirement that you determine whether the ex parte order was appropriately granted before reaching the issue of the issuance of a temporary custody order.

#### **What the law says about ex parte custody orders**

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

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

It may seem obvious, but it is important to recognize that *ex parte* custody orders simply are temporary custody orders entered as the result of an *ex parte* procedure. *See Campen v. Featherstone*, 150 NC App 692 (2002)(*ex parte* custody order is not a Rule 65 TRO; it

is a temporary custody order authorized by GS 50-13.5(d)). Temporary custody orders are orders that establish a party's right to custody pending the resolution of a claim for permanent custody. *Regan v. Smith*, 131 NC App 851 (1998).

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

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

### **Statutory authorization for temporary orders**

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

“(d) Service of Process; Notice; Interlocutory Orders. –

(1) Service of process in civil actions for the custody of minor children shall be as in other civil actions. ... Motions for custody of a minor child in a pending action may be made on 10 days notice to the other parties and after compliance with G.S. 50A-205.

**(2) If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending the service of process or notice as herein provided.”**

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

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

### **When can a court issue a temporary order?**

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

before the court (so the court has gained jurisdiction over the child) and the court determines it appropriate to do so.

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

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

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

Neither of these cases nor any other appellate opinions offer guidance on whether the law authorizes “status quo” *ex parte* custody orders common in some judicial districts in North Carolina. A “status quo” *ex parte* custody order is one where the court grants temporary custody *ex parte* to the party filing an initial complaint for custody when that party asks the court for a temporary order to maintain the existing custody arrangement of the parties while the custody claim is litigated. These requests generally do not include allegations of exigent circumstances requiring immediate action other than the requesting party’s desire to maintain what the party contends is the ‘status quo’ custody arrangement.

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

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

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

(3) A temporary order for custody which changes the living arrangements of a child or changes custody shall not be entered *ex parte* and prior to service of process or notice, unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse or that there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts. A temporary custody order that requires a law enforcement officer to take physical custody of a minor child shall be accompanied by a warrant to take physical

custody of a minor child as set forth in G.S. 50A-311.” [the last sentence relating to law enforcement was added by S.L. 2017-22, s.2].

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

### **How long do *ex parte* orders last?**

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

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

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

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

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

9. **Parents have been litigating custody for years in North Carolina. The last permanent order was entered two years ago, but father filed a motion to modify and obtained a temporary custody order that was entered 6 months ago. Mother files a motion asking that you “transfer the case to Florida” because she lives there now with the children, and since filing the motion to modify, father has moved to Georgia.**

**a. Can you proceed with the motion to modify?**

Yes, subject matter jurisdiction is set at the time the motion to modify is filed. That means you have jurisdiction to continue the action until you enter the final judgment on the motion to modify, even if all parties leave the state while the action is pending.

Subject matter jurisdiction is determined at the time of filing. *In re T.N.G.*, 244 N.C. App. 398, 781 S.E.2d 93 (2015) (citing *Gerhauser v. Van Bougondien*, 238 N.C. App. 275, 767 S.E.2d 378 (2014)). Once jurisdiction attaches, “it exists for all time until the cause is fully and completely determined.” *Waly v. Alkamary*, 279 N.C. App. 73, 84, 864 S.E.2d 763, 771 (2021) (quoting *In re Baby Boy Searce*, 81 N.C. App. 531, 538–39, 345 S.E.2d 404, 409 (1986)) (rejecting argument by parent that North Carolina lost custody jurisdiction when all parties left the state after the commencement of the custody case), review denied, 881 S.E.2d 297 (N.C. 2022). *See also In re C.M.B.*, 266 N.C. App. 448, 836 S.E.2d 746 (2019) (juvenile court retains jurisdiction until juvenile court explicitly terminates jurisdiction even if all parties leave the state).

**b. Can you transfer the case to Florida?**

No. There is no mechanism authorizing a judge in one state to transfer a case to another state. However, GS 50A-207 allows a judge in North Carolina to stay a custody proceeding in North Carolina to allow a party to go to another state and initiate a custody proceeding when the North Carolina court determines that North Carolina is an inconvenient forum for the litigation of custody and that the other state is the more convenient forum.

**Child Custody: We Can’t “Change Venue” to Another State; Determining NC is an inconvenient forum**

I received a call once from a clerk of court asking what she should do with a voluminous court file received in the mail from a court in another state. It was a large box containing all of the pleadings, motions, reports and other filings for a custody case that had been litigated in another state for several years, accompanied by a court order signed by a judge in that other state “transferring venue” of the case to North Carolina, citing as authority that state’s version of the Uniform Child Custody and Jurisdiction Act (the “UCCJEA”).

Does the UCCJEA allow a judge to transfer a custody case to another state? When that clerk received the file and the order from the other state, is the North Carolina court required to act in the custody proceeding?

The answer to both of those questions is no. Nothing in the UCCJEA or any other law allows a judge in one state to transfer a custody case to another state. However, we all tend to use the words ‘change venue’ when we are talking about GS 50A-207. That is the provision in North Carolina’s version of the UCCJEA that allows a court to decline to exercise jurisdiction when it determines that North Carolina is an ‘inconvenient forum’ in which to litigate a pending custody issue and that another state is a more appropriate forum. A determination by a court with jurisdiction that it is an inconvenient forum has the effect of granting a basis for exercising jurisdiction to another state that would not otherwise have jurisdiction to act. *See for example, GS 50A-201(a)(3)* (North Carolina has jurisdiction to make an initial custody determination, even when it is not home state, if a court with jurisdiction determines NC is the more appropriate forum).

Similarly, GS 50A-208 also allows a court to decline to exercise jurisdiction when the court has jurisdiction due to the “unjustifiable conduct” of one party. That section will be the subject of a future blog post.

As my call from the clerk indicates, our lack of care in accurately describing the authority granted in GS 50A-207 can result in confusion and annoyance, especially to court personnel who receive the physical court files. But significant legal errors also can occur. For example, I received another call regarding a situation where a court believed that because it was transferring venue of the custody matter, it also was required to transfer all of the other issues pending in the case to the other state. This resulted in the court attempting to send claims for equitable distribution, child support and alimony to another state along with the custody matter because all of the claims had been filed in the same action.

### **What does GS 50A-207 actually authorize a court to do?**

A court with jurisdiction to make a child custody determination “may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances, and that a court of another state is a more appropriate forum.” GS 50A-207. A court may consider declining jurisdiction pursuant to GS 50A-207 when requested by a party or on the court’s own motion, or when requested by the court of another State. GS 50A-207(a).

If the court declines to exercise jurisdiction, GS 50A-207(c) states that the court “*shall stay the proceeding* upon the condition that a child-custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.” (italics added).

The Official Comment to GS 50A-207 explains:

“[T]he court may not simply dismiss the action. To do so would leave the case in limbo. Rather the court shall stay the case and direct the parties to file in the State that has been found to be the more convenient forum. The court is also authorized to impose any other conditions it considers appropriate. This might include the issuance of temporary custody



orders during the time necessary to commence a proceeding in the designated State, dismissing the case if the custody proceeding is not commenced in the other State or resuming jurisdiction if a court of the other State refuses to take the case.”

*See also In the Matter of M.M.*, 230 NC App 225 (2013) (the “shall” in GS 50A-207 means the stay is the mandatory procedure when the court determines NC is an inconvenient forum; dismissal of the case is inappropriate).

### **When is North Carolina an inconvenient forum?**

North Carolina is an inconvenient forum when the court rules that North Carolina is an inconvenient forum and determines that another State is a more appropriate forum. GS 50A-207(b) sets forth the factors the court is required to consider to make these determinations. That statute requires that the court consider “all relevant factors”, specifically including the following:

- (1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
- (2) The length of time the child has resided outside this State;
- (3) The distance between the court in this State and the court in the state that would assume jurisdiction;
- (4) The relative financial circumstances of the parties;
- (5) Any agreement of the parties as to which state should assume jurisdiction;
- (6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
- (7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
- (8) The familiarity of the court of each state with the facts and issues in the pending litigation.

In order to support a determination that North Carolina is an inconvenient forum, the court must make sufficient findings of fact regarding these statutory factors. *In the Matter of M.M.*, 230 NC App 225 (2013). *See also Halili v. Ramnishta*, 848 S.E.2d 542 (September 1, 2020)(these statutory factors do not include the requirement that the trial court conclude litigation in another state would be in the best interest of the child).

While the court must have evidence upon which to base these findings of fact, the North Carolina Court of Appeals has held that the trial court can rely on evidence presented in the form of affidavits or verified motions to support the required findings of fact. *Harter v. Eggeston*, 847 S.E.2d 444 (Aug. 4, 2020).

The Official Comment to GS 50A-207 reminds us that when making this decision, the court “may communicate, in accordance with [GS 50A-110], with a court in another State and exchange information pertinent to the assumption of jurisdiction by either court.”

**Can a court determine NC is an inconvenient forum when there is no custody claim pending?**

What if, after a custody trial is conducted in North Carolina and the court enters a custody order, one party files a motion asking that the court determine North Carolina is an inconvenient forum for any future custody issue that may arise, such as a motion to modify? Can a court determine North Carolina is an inconvenient forum outside of the context of a pending custody issue?

Our appellate courts have not answered this specific question, and GS 50A-207(a) states that the court may decline to exercise jurisdiction “at any time” it determines North Carolina is an inconvenient forum. *See also Halili v. Ramnishta*, 848 S.E.2d 542 (September 1, 2020)(the trial court can consider post-filing occurrences to determine that another state is a more convenient forum because the court can make this determination at any time during a pending custody action).

However, GS 50A-207 indicates that a decision about the most appropriate forum should be made only in the context of a pending request for a custody determination. The Official Comment to the statute states that the purpose of the statute is to authorize the court “to decide that another state is in a better position to make *the* custody determination, taking into consideration the relative circumstances of the parties.” It seems obvious the drafters mean the circumstances of the parties at the time the custody determination is to be made. Similarly, several of the factors the court must consider specifically reference a pending issue; for example, (6) “the nature and location of evidence needed to resolve *the pending issue*,” (7) the ability of the court of each state to *decide the issue* expeditiously,” and “the familiarity if the court of each state with the facts and issues in the *pending litigation*.”

Anyone familiar with custody litigation knows that it is impossible to anticipate what the circumstances of the parties will be by the time they need to return to court. The decision about the appropriate forum for litigation needs to be made based upon consideration of the facts at the time the court is being asked to act.

**10. A child support order was entered 8 years ago. Five years ago, father filed a motion to modify based on the fact he lost his job. For various reasons, that motion was not scheduled for hearing until now. You determine there has been a substantial change in circumstances since the original order was entered in that, by the time of the modification hearing, the income of both parents has increased.**

**a. What income do you use to set the modified prospective child support?**

The income of the parties at the time of the modification hearing.

**b. What is the effective date of the modified prospective child support award?**

The date the motion to modify was filed. If any other date is used, or if support is calculated in different ways for the 5-year time period that the motion was pending, it is a deviation from the Guidelines that requires all

findings necessary to support deviation. Findings must show that amounts ordered were sufficient to meet the needs of the children in light of the financial circumstances of the parties and their standard of living at the time.

See the blog post below and more recent cases: *Nzewunwah v. Nzewunwah*, 926 S.E.2d 633 (N.C. App., Dec. 17, 2026); *Flores v. Gutierrez*, 927 S.E.2d 50 (N.C. App., Feb. 4, 2026).

### **Prospective Child Support: What is it and how is the amount determined?**

In the post “[Retroactive Support: What is it and how is the amount determined](#)”, I wrote that the law defines retroactive support as support due for the time before a complaint or motion seeking support is filed, *Briggs v. Greer*, 136 NC App 294 (2000), and that the amount of retroactive support owed by an obligor can be determined based either on the Child Support Guidelines or on the parent’s share of actual expense incurred on behalf of the child during a period of time in the past. NC Child Support Guidelines, March 1, 2020, p. 2.

On the other hand, prospective support is defined as support due from the time a complaint or motion seeking support is filed forward in time. *Ex. rel. Miller v. Hinton*, 147 NC App 700 (2001)(there is an implied presumption that prospective support begins at the time of filing). This means that *prospective* support generally includes amounts due for the period of time *before* the support order is entered, but only that time period between the date of the filing of the complaint or motion and the time of the entry of the child support order. *Mason v. Erwin*, 157 NC App 284 (2003)(it is clear that new amount of child support resulting from a modification is due from the time of filing of the motion); *Cole v. Cole*, 149 NC App 427 (2002)(prospective support begins at the time of filing).

### **How is the amount of prospective support determined?**

Prospective support is determined by application of the guidelines, unless the court deviates from the guidelines upon finding that application of the guidelines is unjust or inappropriate. G.S 50-13.4(c) provides that:

“The court shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to subsection (c1) of this section. However, upon request of any party, the Court shall hear evidence, and from the evidence, find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support. If, after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may vary from the guidelines. If the court orders an amount other than the amount determined

by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered.”

Further, prospective support is set based on the circumstances, including the income of the parties, at the time of the child support hearing. *Simms v. Boger*, 264 N.C. App. 442, 453 (2019).

**Does this mean that prospective support must be ordered from the time of filing and in the same amount as the award going forward from the hearing?**

As stated in the *Ex. rel. Miller v. Hinson* case cited above, there is an implied presumption that prospective support will be ordered from the time of filing forward in time and, as the court reiterated in the *Simms* case cited above, prospective support generally is set based on the income of the parties at the time of the hearing. This means that there is a presumption that the amount of support set by the court based on the income of the parties at the time of the hearing is payable from the time the complaint or motion seeking support was filed forward in time.

However, the court of appeals also has stated on occasion that judges have discretion to order that prospective support payments begin at a different date or that the amount of support due from the date of filing until the date of the hearing may be different than the award going forward in time without also addressing when it is appropriate to do so or addressing how to set the amount of support for the time from filing if not in the amount set from the hearing date forward. *See e.g. Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 596 S.E.2d 285 (2004) (affirming court order that made permanent support payable as of two weeks before trial started, but not back to the date complaint was filed).

However, in *State ex rel. Fisher v. Lukinoff*, 131 NC App 642 (1998), the court addressed the issue directly and stated:

“This Court has held for purposes of computing child support, the portion of the award “representing that period from the time a complaint seeking child support is filed to the date of trial,” is “in the nature of prospective child support.” [citations omitted] Since prospective child support is to be awarded for the time period between the filing of a complaint for child support and the hearing date, Section 50–13.4(c) applies and requires application of the Guidelines with respect to that period. ... [citations omitted] **Thus, the court must make adequate findings to justify deviating from the Guidelines for the time period between the filing of plaintiff’s complaint and the hearing date, as it was required to make findings to “justify varying from the guidelines” [if it orders support to begin at a time other than the date of filing]. See G.S. § 50–13.4(c).**”

*See also State ex rel. Miller v. Hinton*, 147 NC App 700 (2001)(guidelines are required from time of filing unless court deviates after determining amount is unjust or otherwise inappropriate)

These cases hold that, just as prospective support going forward from the date the court enters the award, prospective support owed for the time between filing and the entry of the order must be based on the guidelines unless the court makes findings to support deviation. If the court concludes deviation is appropriate, the alternative amount ordered must be supported with findings to show the alternative is appropriate given the financial

circumstances of the parties and the needs of the children during the time covered. The court in *Fisher* explained:

“As we hold that the trial court did not determine [the child’s] reasonable needs including his education, maintenance, or accustomed standard of living in deviating from the Guidelines in its award of child support commencing [on the day following the hearing on permanent support], the court’s failure to provide child support for the time period between plaintiff’s filing of her complaint and the trial date is also not adequately justified to support deviation from the Guidelines. We therefore remand to the trial court for findings concerning the “reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.” G.S. § 50–13.4(c1).”

The court cited the *Fisher* opinion in *State ex. Rel. Miller v. Hinton*, 147 NC App 700 (2001), to support this statement:

“After careful examination of the record, we conclude that the trial court in the present case made the same error as the trial court in *Fisher*, in that the trial court provided no rationale as to why the child support award did not begin at the filing of the complaint. Unless the trial court finds that beginning the prospective child support payments on the date the complaint was filed would be “unjust or inappropriate” and there is evidence in the record to support this finding, it is error to order prospective support to begin at any other time.”

Most recently, in *Simms v. Boger*, 264 N.C. App. 442 (2019), the court of appeals reversed and remanded where the trial court determined that because the income of the payor had changed over the time the motion to modify was pending, support for that time period should be set based on an application of the guidelines to the income of the parties for each separate year before the hearing. The court of appeals did not discuss deviation specifically but held the trial court erred by not setting support based on the income of the parties at the time of the modification hearing without much more explanation as to why the amount ordered for the time before the modification hearing was appropriate under the circumstances.

### **What if a temporary order had been entered while the matter was pending?**

Prospective child support payments begin at the time of the filing of the complaint even when a temporary support order has been in effect while the case was awaiting trial on the permanent order. In *Cole v. Cole*, 149 N.C. App. 427, 562 S.E.2d 11 (2002), the court of appeals rejected defendant’s argument that a temporary consent order entered shortly after the action was filed established his support obligation while action was pending. *See also Miller v. Miller*, 153 NC App 40 (2002)(no error for trial court to order permanent prospective support payable for time temporary order was in place; trial court gave payor appropriate credit for amounts paid pursuant to the temporary order).

**11. The parties to an equitable distribution proceeding list an LLC as a marital asset in their inventory affidavits. Is the LLC a necessary party to the equitable distribution action?**

No, not unless a spouse claims that property titled in the name of the LLC is marital property that should be distributed by the court in the equitable distribution judgment. In addition to the blog post below, see *Roesel v. Roesel*, 927 S.E.2d 739 (N.C. App., Feb. 18, 2026)(trial court did not err when it denied a motion to intervene filed by an LLC that was formed during the marriage of the parties. The trial court had the ability to classify, value and distribute the interests of the parties in the LLC without ordering the LLC to do anything or to refrain from doing anything).

**Equitable Distribution: When does the marital LLC have to be joined as a party?**

The equitable distribution statutes only give trial courts the authority to distribute marital property. This means equitable distribution is all about – and only about – identifying property owned by either or both spouses on the date of separation and determining how it should be distributed between those two people.

Marital property may include ownership interests in businesses and corporations. Just as parties can own stock in a traditional C corporation, parties also can own an LLC or an interest in an LLC. And just as a court would not be required to join, for example, Exxon Corporation or Google before distributing stock owned by the parties, a court is not required to join an LLC in an ED case if the court simply distributes the marital ownership interest in the LLC between the parties.

But just as a C corporation is a legal entity, an LLC also is a person in the eyes of the law. So just as a court cannot enter orders affecting the property or personal rights of an individual without first acquiring jurisdiction over that individual and affording that person due process, a trial court cannot enter orders affecting the ‘person’ or the property of the LLC without first acquiring jurisdiction over the LLC by making it a party to the ED action.

Two opinions from the court of appeals illustrate this distinction.

**Montague v. Montague, 767 SE2d 71 (NC App 2014)**

This opinion is an example of the most common ED scenario involving an LLC. Joinder of the LLC was not even discussed by the appellate court because there clearly was no need to make the LLC a party. The former spouses were the sole owners of the LLC and the only issue before the trial court was how to classify, value and distribute the marital and divisible property interest in that LLC and in the funds paid from the LLC to the husband following the date of separation. Neither party claimed that property titled in the name of the LLC should be classified as marital property or distributed by the court, and neither party asked the court to order the LLC, or to order the parties in their capacity as managers of the LLC, to do anything.

While there certainly must have been need for a significant amount of evidence about the finances, daily operations and management of the LLC in order for the court to classify,

value and distribute the LLC and the funds distributed by the LLC following separation, the trial court had no need to enter any order directly affecting property owned by the LLC or directly affecting the corporate structure of the LLC. Instead, evidence in the possession of the LLC could be gathered through the use of subpoenas, just as evidence is gathered from non-parties in other types of civil cases. There certainly is no need to join the recipient of a subpoena as a party to a civil case. See Rules of Civil Procedure, G.S. 1A-1, Rule 45.

**Campbell v. Campbell, 773 SE2d 93 (NC App 2015)**

The situation was more complicated in this case. The trial court was requested to enter an injunction to protect the value and business integrity of the LLC while the ED case was pending. While the ultimate goal in the ED case was to distribute the marital ownership interest in the LLC, the trial court attempted to protect the marital interest by entering orders that required action by the LLC, ordered the transfer of funds belonging to the LLC, and otherwise affected the ‘person’ of the LLC by altering the management structure pending the final outcome of the ED case.

The court of appeals explained:

...[T]he trial court ordered Defendant to transfer \$350,000.00 of TSG assets without first adding TSG as a party. The trial court also effectively ordered TSG to act by ordering the parties, as the only members of TSG, to appoint Dr. Tharp as an interim controlling manager of TSG, and it specifically ordered TSG to act by ordering TSG to indemnify and pay Dr. Tharp and to post an unsecured bond during the pendency of the preliminary injunction. Finally, the trial court affected the management structure of TSG by finding that Defendant was not a manager of TSG, even though TSG’s filings consistently listed Defendant as a manager of TSG and TSG’s attorney repeatedly testified that Defendant was a manager, albeit not one “necessary to the function of the company.”

In holding that the LLC must be joined before such orders will be valid, the Campbell opinion states:

The courts are not free, for the sake of convenience, to completely ignore the existence of a legal entity, such as [an] LLC.” ...”A corporation, even one closely held, is recognized as a separate legal entity ... [even when its members are] engaged in litigation which is personal in nature[.]” ...”When the separate legal entity has not been made a party to an action, the trial court does not have the authority to order that entity to act. ... Moreover, even where a named party to an action is a member-manager of an LLC, the assets of which are contested in a pending equitable distribution action, “[t]he trial court exceed [s] its authority when it order[s] [that named party] to transfer the assets of the LLC” without first adding the LLC as a party to the action.

**12. Did the recent legislative change to GS 50-20 impact the classification in an equitable distribution proceeding of real property titled as tenants by the entirety?**

I believe it does not, but there are family law specialists who believe otherwise.

S.L. 2025-25, Part VI, titled “Conveyances Between Spouses” was effective October 1, 2025, and made several statutory changes, including amendments to one of the equitable distribution statutes, G.S. 50-20(b). The entire Part VI of the Session Law is set out below, but the substantive amendments to G.S. 50-20(b) are as follows:

“(1b) ... It is presumed that all property acquired after the date of marriage and before the date of separation is marital property except property ~~which~~ that is separate property under ~~subdivision (2)~~ of this subsection. It is presumed that all real property creating a tenancy by the entirety acquired after the date of marriage and before the date of separation is marital property. Either presumption may be rebutted by the greater weight of the evidence.

(2) ~~“Separate property” means all~~ Separate property. – All real and personal property acquired by a spouse before marriage or acquired by a spouse by devise, descent, or gift during the course of the marriage. However, ~~property~~ property, other than real property, acquired by gift from the other spouse during the course of the marriage shall be is considered separate property only if such an intention is this intent is expressly stated in the conveyance, in writing. Real property acquired by gift from the other spouse during the course of the marriage is considered separate property only if this intent is expressly stated in a written agreement separate from the conveyance in accordance with subsection (d) of this section. The act of conveying property from one spouse to the other does not in itself state this intent. Property acquired in exchange for separate property shall remain remains separate property regardless of whether the title is in the name of the husband or wife or both one or both spouses and shall is not be considered to be marital property unless a contrary intention the intent for the property to become marital property is expressly stated in the conveyance, in writing. The act of acquiring the property does not in itself state this intent. The increase in value of separate property and the income derived from separate property shall be is considered separate property. All professional licenses and business licenses which that would terminate on transfer shall be are considered separate property.” Since amendment in 2013, S.L. 2013-103, § 1, effective Oct. 1, 2013, G.S. 50-20(b) has stated that in addition to the presumption that all property acquired during the marriage and before the date of separation is marital property, there is a presumption that all real property creating a tenancy by the entirety is marital property. The statute also was amended at that time to state that either presumption is rebutted by the greater weight of the evidence. The statute specifies that the marital property presumption is rebutted by evidence that the property meets the definition of separate property contained in G.S. 50-20(b)(2). The statute does not specify how the presumption that tenancy by the entirety is marital property is rebutted, but because property held as tenants by the entirety must be acquired during the marriage, it is covered by the marital property presumption, which means it can be classified as separate property if shown to fall within one of the categories of separate property in G.S. 50-20(b)(2).

The 2025 amendments to G.S. 50-20(b) make changes to the definitions of separate property, and the effect of these amendments is the subject of debate.



The statute clearly still provides that a gift between spouses is marital property, unless a contrary intention is stated by one or both spouses. If the gift is of personal property, the statement that the gifted property is to be separate property must be in writing. If the gift is of real property, the intention that the real property be separate property must be stated in an agreement separate from the conveyance and that agreement must be executed with the formality of a duly executed and acknowledged property settlement agreement. This section of the statute now also states that “the act of acquiring the property does not itself state [the] intent” that the property be separate property.

The amended statute also clearly continues to provide that property acquired in exchange for separate property remains separate property regardless of whether title is in the name of one or both spouses. The property acquired in exchange for separate property will not be marital property unless the intent that the property be marital is expressly stated in writing. This section of the statute also now states that the act of acquiring the property does not “itself state [the] intent” that the property be marital property.

What is less clear is the effect these amendments have on the classification of real property held by the spouses as tenants by the entirety when the tenancy by the entirety was created as the result of an exchange of separate real property or was purchased in whole or in part using separate funds. Does the gift provision continue to control the classification or does the exchange provision now control?

### **The common law marital gift presumption**

When property is titled as tenants by the entirety, case law has long held that there is a presumption that any separate property or separate funds used to acquire the property was a gift to the marriage and the entirety property is marital. *Walter v. Walter*, 149 N.C. App. 723, 561 S.E.2d 571 (2002) (titling of marital residence acquired during the marriage as tenants by the entirety raised a presumption of donative intent); *Davis v. Sineath* (Davis), 129 N.C. App. 353, 498 S.E.2d 629 (1998).

The property is presumed marital even if one spouse subsequently dissolves the tenancy by the entirety before the date of separation by quitclaiming her interest in the property to the other spouse. *Beroth v. Beroth*, 87 N.C. App. 93, 359 S.E.2d 512, review denied, 321 N.C. 296, 362 S.E.2d 778 (1987), disapproved of on other grounds by *Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988). Similarly, if property is held as tenants by the entirety on the date of separation, the property is presumed marital even if one party quitclaimed his interest to the other party after the date of separation. *Davis v. Davis*, 360 N.C. 518, 631 S.E.2d 114 (2006).

A presumption of a gift of separate property to the marital estate arises when “a spouse uses separate funds to furnish consideration for property conveyed to the marital estate, as demonstrated by titling property as a tenancy by the entirety.” *Stone v. Stone*, 181 N.C. App. 688, 692, 640 S.E.2d 826, 829 (2007) (quoting *McLean v. McLean*, 323 N.C. 543, 546, 374 S.E.2d 376, 378 (1988)).

The first application of the marital gift presumption was in *McLeod v. McLeod*, 74 N.C. App. 144, 327 S.E.2d 910, cert. denied, 314 N.C. 331, 333 S.E.2d 488 (1985), overruled in part on other grounds by *Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986). In *McLeod*, both husband and wife contributed separate property toward the purchase of a house titled as entirety property. Rather than having each party retain as separate property the amount he or she contributed plus any passive appreciation, the court adopted the marital gift presumption and classified the entirety property as marital property. The rationale for the presumption is that the titling of the property as tenants by the entirety supplies the specific intent necessary to find a gift to the marital estate. *McLeod v. McLeod*, 74 N.C. App. 144, 156, 327 S.E.2d 910, 918. The North Carolina Supreme Court upheld the use of the marital gift presumption for entirety property in *McLean v. McLean*, 323 N.C. 543, 374 S.E.2d 376 (1988).

Case law provides that the presumption of a gift to the marriage may be rebutted by evidence that the separate property was not gifted to the marriage, *McLean v. McLean*, 323 N.C. 543 (1988)(presence of donative intent at the time of transfer determines whether gift was made; motivation for making gift is not determinative); **or** by showing that while there was a gift, the intention that the property remain separate was expressly stated in the conveyance creating the tenancy by the entirety. *Romulus v. Romulus*, 215 N.C. App. 495 (2011). Until the amendment in 2013, case law required that the gift presumption be rebutted by clear, cogent and convincing evidence. Effective Oct. 1, 2013, the marital gift presumption probably is rebutted “by the greater weight of the evidence.” G.S. 50-20(b)(1), amended by S.L. 2013-103, § 1, effective Oct. 1, 2013.

To date, there has not been an appellate opinion upholding a trial court’s determination that the marital gift presumption has been rebutted. In *Lawrence v. Lawrence*, 100 N.C. App. 1, 394 S.E.2d 267 (1990), the court of appeals held that the following facts were not relevant to the issue of whether husband intended to make a gift to the marital estate:

That separate funds were used to acquire the entirety property (but this may be considered as a distributional factor);

That the property was “ancestral” property of the donor spouse;

That the donee spouse did not know the location of the property;

or

That the donee spouse did not testify that the donor spouse intended to make a gift to the marital estate.

I do not believe the amendments made significant substantive changes to the classification of real property held as tenants by the entirety. I believe the statutes now provide:

That tenancy by the entirety property is presumed marital. That presumption can be rebutted by the greater weight of the evidence that the property meets the definition of separate property.

That property acquired in exchange for separate property during the marriage is separate property, unless the intent that the property become marital property is stated in writing.

However, a gift of real property between spouses is marital property unless a contrary intention that the property be separate property is stated in a properly executed agreement separate from the conveyance. Case law provides that a gift between spouses is presumed when separate property is exchanged for real property held as tenants by the entirety. I do not believe the recent amendments change that case law.

The important change resulting from the legislation is that the intent that a gift of real property between spouses not be marital property in a future equitable distribution proceeding must be made in a writing that is executed in the same manner as other property settlement agreements. It cannot be done by simply including a statement in the deed creating the tenancy by the entirety.

If the gift presumption could be rebutted by showing the property was acquired in exchange for separate property, the gift provision would have no effect or meaning, as most gifts between spouses can be traced to separate property.

The amendments probably apply to conveyances made on or after Oct. 1, 2025. That would be consistent with how the Court of Appeals has applied the last two amendments to the divisible property statutes. *Warren v. Warren*, 75 NC App 509 (2006)(change made effective October 1, 2002, applied to payments made on or after that date), and *Lund v. Lund*, 244 NC App 279 (2015)(change made effective Oct 1, 2013, applies to payments made on or after that date).