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"Interesting" Questions in 50B Cases

1) Must ex parte hearings be recorded?

> 50B *trials* must be recorded, *see* G.S 7A-198 (recording required unless court reporter is used); *Miller v. Miller*, 92 NC App 351 (1988)(GS 7A-198 requires that trials be recorded); *Holterman v. Holterman,* 127 NC App 109(1997)(acknowledging that GS 7A-198 requires that trials be recorded, but holding that party cannot raise failure to record as an issue on appeal unless party requested recording or court reporter during the trial), but neither that statute nor the clerk's Rules of Record Keeping require that proceedings other than trials be recorded. However, the AOC manual titled "Best Practices in Domestic Violence Cases" states that the best practice is to record ex parte hearings.

Discussion: In *Hensey vs. Hennessy*, 685 S.E.2d 541 (N.C. App., 2009), the court of appeals held there must be a 'hearing' before a judge can grant or deny a request for ex parte relief pursuant to Chapter 50B. According to the court of appeals, GS 50B does not allow a judge to decide a request for relief based only on the verified pleadings. Instead, the court must take testimony or other evidence. Based on that evidence, the trial court must make findings of fact – although the court of appeals recognized that, given the exigent circumstances, the detail in the findings will be less than generally required by the Rules of Civil Procedure.

The court of appeals also said that a party has the right to ask for appellate review of the trial court decision on the ex parte request, but only when the 'final' 50B order is entered. A recording of the ex parte hearing would significantly benefit the party who wants to raise issues regarding the ex parte on appeal, but the court of appeals did not say the recording is required.

2) Can I dismiss the 50B case after hearing the request for ex parte relief?

Probably not, especially if plaintiff used the AOC form complaint and checked the boxes. Only exception may be when complaint shows clearly that plaintiff does not have a personal relationship with defendant as required by GS 50B-1 because relationship probably is required for plaintiff to have standing to file the complaint.

Discussion: If a judge denies a request for an ex parte order, the plaintiff is still entitled to a trial on the issues raised in the complaint unless the judge actually dismisses the entire case. *See* G.S. 50B-2(b). A trial court can dismiss a complaint for failure to state a claim, pursuant to the authority granted in Rule 12(b). However, a failure to state a claim must be raised in the answer, or in a motion before trial, or at the trial. The defense is waived if not raised by defendant before trial concludes. *See* Rule 12(b) and *Dale v. Lattimore*, 12 N.C. App. 348 (1971). Because the failure to state a claim defense can be waived if not raised, it is not jurisdictional. Whether a plaintiff is successful in her claim depends on the evidence she is able to present at trial rather than what she states in her complaint.

While you certainly can consider a Rule 12 motion filed by a defendant alleging that the complaint is insufficient to state a claim for relief, I have not been able to find a case or statute allowing a judge to dismiss a complaint pursuant to Rule 12(b) on his or her own motion. And, the fact that the defense generally is waived if not raised by a defendant indicates it is not something a judge should do if defendant does not ask. Also, the AOC form complaint was drafted to allow the plaintiff to adequately state a claim by simply checking boxes. So, if plaintiff checked all required boxes, it would be difficult to conclude the complaint actually failed to state a claim.

One possible exception is when the face of the complaint shows clearly that plaintiff does not have a personal relationship with defendant. Arguably, the relationship is a matter of standing in GS 50B cases, although the court of appeals has not addressed the issue. Standing is necessary for subject matter jurisdiction. *See e.g. Ellison v. Ramos*, 130 N.C. App. 389 (1998) and *Mason v. Dwinnell*, 190 N.C. App. 209 (2008)(standing is a matter of subject matter jurisdiction and standing refers generally to the right of a particular person or particular class of persons to file a cause of action). A judge can dismiss a case for lack of subject matter jurisdiction at any time. *See e.g. Tilley v. Diamond, unpublished opinion,* 184 N.C. App. 758 (2007)(consent custody order declared void several years after entry because plaintiffs did not have relationship with child sufficient to grant standing at the time the consent order was entered).

3) If parties are siblings who last lived together 30 years ago, are they still "current or former household members"?

Probably

Discussion. The statute does not put a time limit on the term "former" and there is no case law interpreting this provision. Plain reading of the statute seems to indicate that former household members are covered, regardless of the length of time since they resided together. Similarly, the statute places no time limitation on "former" spouses or persons of the opposite sex who have lived together. I understand there is an argument to be made that the statute implies a "reasonable" time limitation, but I do not see anything in the statute to support that limitation or, more importantly, which would help us define 'reasonable'. For example, there is nothing in GS 50B that would help us determine whether siblings who lived together 2 years ago would be covered, those who lived together 5 years ago, 7 years ago, 10, etc.

This issue can present significant problems for clerks of court when the judges in their district have different opinions about how this section of the statute should be interpreted. The clerks are required to provide forms to pro se litigants

in both 50B and 50C cases. The clerks need guidance from the judges to know whether the sibling who has not lived with the defendant in over 30 years, or whether litigants in similar situations, should be given 50B or 50C forms.

4) Can a plaintiff seek 50B relief based on acts which occurred in another state?

Probably, assuming it is possible to assert personal jurisdiction over the defendant.

Discussion. The 50B statute does not expressly limit relief to situations where the act occurred in NC, as does Chapter 50C (*see* GS 50C- 2(a)(1)). GS 50B-2 states "[a]ny person residing in this State may seek relief under this Chapter…". This section seems to indicate that residence of plaintiff is sufficient to give the court subject matter jurisdiction over the case, even if the act occurred somewhere other than North Carolina. However, if the defendant also resides outside of the state, personal jurisdiction requirements may limit the court's ability to enter a DVPO.

Unless the defendant makes an appearance or otherwise waives objection to personal jurisdiction, the trial court must have personal jurisdiction over defendant to enter an enforceable order. Personal jurisdiction generally requires appropriate service of process, as well as a long-arm statute authorizing the exercise of jurisdiction over a defendant who is not a resident of North Carolina, and a determination that a nonresident defendant has sufficient 'minimum contacts' with the state to comply with the Due Process Clause of the federal constitution. Because objection to personal jurisdiction can be waived, there generally is no reason to deny a request for ex parte relief based on a concern relating to due process.

However, the trial court should consider personal jurisdiction at the 'final' hearing on the DVPO. The appellate courts have held that if there is sufficient evidence to support a finding that defendant has adequate minimum contacts with the state to support jurisdiction, then the long-arm statute also will be

satisfied. *See Dillon v. Numismatic Funding Corp*., 291 N.C. 674 (1977). For an example of the analysis required for determining whether a nonresident defendant has sufficient contacts with the state in a domestic case, *see Bates v. Jarrett,* 135 N.C. App. 594 (1999)(nonresident husband's act of transferring a car title in violation of a DVPO provided sufficient minimum contacts for the exercise of jurisdiction in resident wife's equitable distribution action)[the benchbook chapter on Domestic Violence, page 7-11, also contains examples of cases from other states analyzing minimum contacts in domestic violence situations].

There seems to be a split of opinion in decisions from appellate courts in other states regarding whether minimum contacts are required for cases wherein a plaintiff seeks protection from domestic violence. North Carolina appellate courts have not addressed the issue. Some states have decided that normal due process rules apply and that no DVPO can be entered against a defendant who does not have sufficient minimum contacts with the state to satisfy due process. *See e.g. Becker v. Johnson,* 937 So.2d 1128 (Fla.App. 2006)(stating that the federal Violence Against Women Act affords adequate protection to fleeing victims by requiring the state where she flees to give full faith and credit to any DVPO she brings with her); *T.L. v. W.L.,* 820 A.2d 506 (Del.Fam.Ct. 2003)(no basis for exception to normal due process requirements). Others have held that DVPOs are more like child custody and divorce cases, meaning minimum contacts are not required. *See e.g. Caplan v. Donovan,* 879 N.E.2d 117 (Mass.), *cert. denied*, 553 U.S. 1018 (2008); *Bartsch v. Bartsch*, *636 N.W.2d 3* (Iowa 2001).

Several states have adopted a hybrid approach, concluding that a trial court unable to find a defendant has minimum contacts with the state can enter 'prohibitory' DVPOs but cannot enter any order that requires a defendant to undertake any affirmative action. See *Hemenway v. Hemenway,* 992 A.2d 575 (N.H., 2010); *Spencer v. Spencer,* 191 S.W.3rd 14 (Kentucky 2006); and *Shah v. Shah,* 875 A.2d 931 (N.J. 2005). These cases hold that orders that merely protect a plaintiff by prohibiting a defendant from assaulting a plaintiff do not implicate a defendant's due process rights. However, any order requiring a defendant to take affirmative action, such as surrender firearms, does require full due process protection. While it is a compelling argument that a state should be able to order

a nonresident to not commit a crime against a victim, the cases adopting this hybrid approach do not discuss the collateral consequences which result from the entry of any protection order.

**But note: The North Carolina Court of Appeals has held that a trial court considering a temporary custody order as part of a DVPO must comply with the jurisdictional requirements of GS Chapter 50A, the UCCJEA. *See Danna v. Danna,* 88 NC App 680 (1988).

5) Can a 50B claim be brought *against* someone under the age of 18?

Yes, with one limitation.

Discussion. The general rule is that a minor can sue or be sued, as long as the court appoints a Rule 17 GAL. No GAL is required for a child who already has a general or testamentary guardian. (note that a parent is not a general guardian. General guardians are appointed by the clerk of court). *See* Rule 17 of the Rules of Civil Procedure. There is no express limitation on this general rule in Chapter 50B, *except* when the relationship supporting the action is that set out in GS 50B-1(b)(3)(related as parents and children, or as grandparents and grandchildren). In that situation, the statute requires that the defendant be at least 16 years old.

The Rule 17 GAL is not required to be a lawyer and does not act as court-appointed counsel. The GAL is not a party to the action and should not be named in the caption. The cost of a Rule 17 GAL is apportioned as costs between the parties. *See Van Every v. McGuire,* 125 N.C. App. 578 (1997). While GS 50B-2(a) states that "no court costs shall be assessed for the filing, issuance, registration, or service of a protective order or petition for a protective order or witness subpoena," this provision does not appear to prohibit the award of costs as authorized for a Rule 17 GAL by GS 1-305(d)(7).

6) Can a 50B claim be brought *by* someone under the age of 18?

Yes, as long as the minor plaintiff is an 'aggrieved party' under Chapter 50B, the minor child is an alleged victim of the act of domestic violence (or has a minor victim of the act residing with her or in her custody), and a Rule 17 GAL

is appointed for the minor plaintiff. It is important to note, however, that in many cases (although clearly not in every case), protection can be granted to and for a minor victim without that minor being an actual plaintiff in the case. When the minor is not a party, no GAL is required.

**I think the best thing a judge can do in these cases is make certain the DVPO clearly identifies all of the actual parties, and make certain a GAL is formally appointed for any party who is below the age of 18. Remember, a minor who is not a party does not need a Rule 17 GAL. When a minor is a party and a GAL is appointed, that GAL is NOT a party. The name of the GAL does not need to appear anywhere on the complaint and should not appear in the caption of the DVPO. The AOC form appointing the GAL should be in the file and the DVPO should state that a GAL was appointed for any minor party.

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Discussion. There is extreme confusion around the state regarding when a child must be named as a plaintiff in a 50B case and when the child does not need to be an actual plaintiff to be covered by the protection granted in the DVPO. I think the wording on the complaint form adds to the confusion. The distinction is important for many reasons but primarily because if a minor is an actual party, a Rule 17 GAL must be formally appointed for the child. And, enforcement remedies generally are available only against people who are parties to the action.

The following is my interpretation of the way the statute works regarding alleged victims who are minors, although there is no case law saying whether my interpretation is correct:

a) As with a minor defendant, a Rule 17 GAL is required whenever a plaintiff is a minor. This requirement comes from Rule 17 of the Rules of Civil Procedure. The only exception is when the child already has a general or testamentary guardian (note that a parent is not a general guardian).

b) I believe any party plaintiff in a 50B case must be an "aggrieved party" (50B-2 states that "an aggrieved party entitled to relief under this Chapter may file a civil action...") and I think an "aggrieved party" is someone with whom the defendant has a personal relationship (because 50B-1(a) says that a defendant must be someone with whom the "aggrieved party has or has had a personal relationship.")

c) So I think Chapter 50B allows a minor to be a plaintiff when the minor has a personal relationship with the defendant and when the minor child is an alleged victim of an act of domestic violence. When a plaintiff is a minor, the clerk of court must appoint the Rule 17 GAL at the time the case is filed, and the AOC has a form for the clerks to use. The Rule 17 GAL can be any adult person, and usually is the parent of the child. However, a parent as a GAL creates much confusion when the parent also is a plaintiff. See further discussion below. The GAL is not a court-appointed lawyer and the GAL is not a party.

d) Of course in many cases, both the child and the parent with whom the child resides have a personal relationship with the defendant. When the parent who has “custody” of the child or with whom the child resides has a personal relationship with the defendant, the 50B statute allows that parent to be a plaintiff whether the parent was an alleged victim of violence or not. That is because the statute allows an aggrieved party to seek relief for an act against himself or for an act against a minor child in the custody of or residing with that aggrieved party. The statute is written this way - I think - so that, for example, a mom can obtain relief for her minor child even when the minor child has no relationship with the defendant who allegedly commits an act against that child (as when mom's non-live-in but dating boyfriend or

her ex-husband who is not the child's father commits act against the mom's child).

e) When both the parent and the minor child can be plaintiffs, it is much easier and less confusing if only the parent is named as a plaintiff. This is because the parent can obtain relief for herself and for the minor child and there is no need for a GAL because the minor child is not a plaintiff. But I believe the statute allows, and it often happens, that both the parent and the minor child are named as plaintiffs. If that is the case, then Rule 17 requires that a GAL be appointed for the minor plaintiff. In these situations when both are plaintiffs, GALs often are not properly appointed and the complaints frequently only make a confusing reference to mom "obo" minor child. When the complaint is less than clear about who is a plaintiff and who is a GAL, the resulting orders can be a real mess to interpret.

f) The minor *must* be a plaintiff to obtain relief if the parent with whom the child resides or who has “custody” of the child does not have a personal relationship with the defendant. The most common example is the teenagers in a dating relationship. Mom of teenager cannot be plaintiff because she is not an aggrieved party. However, mom could be appointed the Rule 17 GAL for the teenager. In that situation, mom is NOT a party. There is no need for the name of the GAL to appear on the complaint at all. The AOC form appointing the GAL should be in the file.

g) What if the allegation is that the parent with primary physical custody of the child has committed an act of domestic violence against the child, and the allegation is made by the other parent who is a ‘visitation-only’ parent?

The child can be the plaintiff because the child clearly has a personal relationship with the defendant and the allegation is that the act of domestic violence was committed against the child. A Rule 17 GAL must be appointed. The question is whether the child is the *only* appropriate plaintiff in this situation. It is unclear, as discussed in detail below, whether the ‘visitation only’ parent can be a plaintiff. If he cannot, the obvious problem with having the child as the only

plaintiff is that the trial court does not have the ability to award custody of the child to the child. The court may be able to use other forms of relief to protect the child. For example, the court could order the custodial parent to stay away from the child. However, this type of relief will not be superseded by a subsequent Chapter 50 custody order between the parents. *See* GS 50B-3(b). Arguably, a Chapter 50 custody order is the most appropriate way to resolve this problem on a more comprehensive and permanent basis.

So could the other parent with secondary physical custody (visitation) be a party plaintiff in this scenario and request custody as relief? While the 'visitation only' parent has a personal relationship with the defendant, GS 50B-1 only allows relief to be granted to an aggrieved party who is the victim of the acts alleged, or who "resides with" or "has custody of", a minor child who is the victim of the alleged acts. In our scenario, no acts were committed against the 'visitation only' parent. So, does the child "reside with" him, or does he have "custody of" that minor child?

Of course, there is no statutory or case law definition of either of those terms in this context. Residence generally is a person's regular place of abode. If the noncustodial parent only has the more traditional visitation schedule of every other weekend, I don't think that would be sufficient to make that parent's home a place where the child 'resides.' However, "in the custody of" can be interpreted more broadly than 'resides with' because it is well established that visitation is a form of custody. So – maybe a child can be found to be 'in the custody of' a parent who has only visitation rights. I also think there is a strong argument to be made that the statutory intent was to allow any parent or caretaker of a minor child to seek relief for actions against the child.

h) Caution. When a plaintiff is a minor, be careful not to award custody of the child to the child.

i) Caution. GS 50B-3(b) provides that any subsequent Chapter 50 custody order supersedes a temporary custody order entered pursuant to Chapter 50B. However, that statute does not say that a Chapter 50 custody order will supersede 50B protection granted

directly to a minor plaintiff, because that protection is not part of a temporary custody order. Also, the statute does not say that a subsequent Chapter 50 order will supersede 50B provisions other than the temporary custody in a DVPO that might impact the custodial arrangement.

7) Is a consent order entered in a 50B case void if it was entered without findings of fact?

If the consent order is a "mutual order", then GS 50B-3(b) clearly requires that the consent order contain specific findings. If the consent order is not mutual, then the answer is unclear.

It definitely is best to include some findings if possible. The ultimate findings made by checking one of the boxes on the form order should be sufficient, even if the parties do not want to include the specific facts. (such as, for example, checking the box "defendant placed plaintiff in fear of imminent bodily injury…"). *See e.g. Crocker v. Crocker,* 190 N.C. App. 165 (2008)(while trial court must find ultimate facts necessary to support all conclusions of law, findings of specific evidentiary facts are not required).

Also, while the *Bryant* case discussed below refers to it as a 'finding of fact', I think "defendant has committed an act of domestic violence" actually is a conclusion of law. *See Brandon v. Brandon*, 132 N.C. App. 646 (1999)(referring to this throughout opinion as a conclusion of law). Arguably, simply checking the conclusion box indicating that the parties stipulate "defendant committed an act of domestic violence" should be sufficient to support the subject matter jurisdiction of the court.

Discussion. It is clear that when you try a Chapter 50B case and enter an order *not* based on the consent of the parties, you must make findings sufficient to support a conclusion that an act of domestic violence occurred. *See Price v. Price,* 133 N.C. App. 440 (1999); *Brandon v. Brandon,* 132 N.C. App. 646 (1999). Note however, both of those cases base their holdings, in part, on the conclusion that GS 50B only authorizes the entry of a DVPO when the DVPO is "necessary to bring about the cessation of domestic violence." That conclusion was based on language that is no longer in the statute. *See* N.C.S.L. 2005-423.

It is not clear whether the conclusion that defendant committed an act of domestic violence is necessary to supply the subject matter jurisdiction to support a consent order that does not contain mutual restraining orders. And, if it is necessary to include such a conclusion, it is not clear whether the consent order also must contain findings of fact to support that conclusion.

The 50B statute

GS 50B-1(c) states: "the term 'protective order' includes any order entered pursuant to this Chapter upon hearing by the court or consent of the parties." Therefore, the statute expressly authorizes the entry of consent orders in 50B cases.

50B-3 states that the listed relief can be granted "if the court finds that an act of domestic violence has occurred." Compare that language to the language of the statute at issue in the case of *Allred v. Tucci* discussed below. The statute at issue in *Tucci*, GS 50-10, states "no judgment shall be entered unless judge or jury finds facts". The *Tucci* court cited that language to hold that consent judgments are not valid unless they contain the required findings.

GS 50B-2(a) states that "any aggrieved party entitled to relief under this Chapter may file a civil action." This could be interpreted to mean that a plaintiff has no standing unless there is an ultimate conclusion that the plaintiff is entitled to relief because defendant has committed an act of domestic violence. This seems like a stretch to me but it is very close to what the court decided in *Tilley v. Diamond, unpublished,* 184 N.C. App. 758 (2007). In that case, the court held that plaintiffs did not have standing to file a complaint for custody so the consent order they entered with the parents was void. The court held that standing is required, even though generally no findings of fact or conclusions of law of any sort are required for consent custody orders. *See* *Buckingham v. Buckingham* discussed below.

Some case law that seems relevant

Regarding required conclusions and findings, I think the following three cases are important to consider. I have not found anything else obviously instructive:

> *Bryant v. Williams,* 161 N.C.App. 444, 588 S.E.2d 506 (2003). In this opinion, the court of appeals made the broad statement that "the court's authority to approve a consent agreement under Chapter 50B depends upon finding that an act of domestic violence occurred…". While that statement seems definitive, it arguably is dicta because the case did not involve an issue concerning whether the consent order was invalid due to a lack of findings. However, the court clearly found it critical to the resolution of the case. It should be noted that this opinion also relies in part on a statutory provision, and case law interpreting that provision, that has been removed from the statute. (language from GS 50B-3 allowing relief "when necessary to bring about the cessation of domestic violence" was deleted from the statute by S.L. 2005-423).
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> *Allred v. Tucci,* 85 N.C.App. 138, 354 S.E.2d 291, *review denied,* 320 N.C. 166, 358 S.E.2d 47 (1987). In this case, the court held that a consent judgment resolving a claim for divorce from bed and board was void because the consent order did not contain the statutory findings necessary for the granting of a divorce from bed and board. However, the court did rely in part on G.S. 50-10 which states that "no *divorce* shall be entered unless the facts supporting the divorce are found by a judge or jury."
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> *Buckingham v. Buckingham,* 134 N.C.App. 82, 516 S.E.2d 869, *review denied,* 351 N.C. 100, 540 S.E.2d 353 (1999). In this case, the court held without much explanation that a trial court had no duty to make findings of fact or conclusions of law when a child custody judgment is entered by consent. However, this decision is based in large part on the premise that some consent orders are not "judicial determinations" but rather are only "recitals of the parties' agreement." This premise still applies to consent judgments entered in non-family law cases. However, the supreme court held in *Walters v. Walters*, 307 NC 381 (1983) that consent judgments "in the area of domestic relations law" should be treated as court orders for all purposes and are no longer treated as

"mere recitals of the parties" following the date of that decision. It is unclear whether 50B cases fall within the scope of *Walters*.

Also Note: The court of appeals has held that a court cannot enter a consent order addressing other issues (for example, property settlement) when the only complaint filed was a complaint seeking Chapter 50B protection and the consent order dismissed all claims alleged pursuant to 50B. *Bryant v. Williams,* 161 N.C.App. 444, 588 S.E.2d 506 (2003)(court lost jurisdiction to enter any order when only claim supporting jurisdiction was dismissed).

8) Can a party file a complaint asking for Rule 65 injunctive relief rather than filing a 50B action?

Yes, but a Rule 65 TRO or Preliminary Injunction is not a cause of action nor is it a permanent remedy. A person also can file a different civil action seeking relief for acts that would support a DVPO, such as a tort or a divorce from bed and board, and request a Rule 65 injunction as a form of temporary relief in that civil action.

Discussion. G.S. 50B-7 provides that the "remedies provided by this Chapter are not exclusive." Therefore, theoretically, a plaintiff can request Rule 65 relief within the Chapter 50B action. The trial court hearing the 50B could grant a TRO or an injunction by following the procedure in set out in Rule 65 as a form of temporary relief in the 50B case. The supreme court has said that the purpose of a Rule 65 TRO or preliminary injunction is "to preserve the status quo pending a trial on the merits" of the underlying claim. *A.E.P. Indus. Inc. v. McClure,* 308 N.C. 393 (1983). However, because the list of relief available in GS 50B-3 is very broad, and the cases are generally resolved very quickly, I am not sure why anyone would want to use Rule 65 in this way. The fact that the court orders alternative relief as authorized by GS 50B-7 would not mean that the resulting order is anything

other than a DVPO entered pursuant to Chapter 50B. The cause of action remains the same even if alternative remedies are adopted.

I also think the provision stating that remedies are not exclusive means a victim of an act which amounts to domestic violence is free to seek relief pursuant to law other than Chapter 50B. But an injunction is a form of relief and not a cause of action. Examples of alternative claims that might support a granting of injunctive relief would be a civil assault claim, which is an intentional tort, or a divorce from bed and board. The plaintiff filing those civil claims would be able to request Rule 65 preliminary remedies. *See State v. Byrd*, 363 NC 214 (2009)(TRO granted pursuant to Rule 65 in a proceeding where plaintiff sought divorce from bed and board but did not request relief pursuant to GS 50B was a method for plaintiff to seek protection from acts which probably would support a finding of domestic violence, but the TRO was not a protective order within the meaning of Chapter 50B). Injunctions can be a form of permanent relief in the resolution of a civil matter. However, permanent injunctions are not governed by Rule 65. *See e.g. Roberts v. Madison County Realtors Ass'n, Inc.,* 344 N.C. 394 (1996)(distinguishing 'interlocutory' injunctions from permanent injunctions.

9) When I grant a request for a 50B protective order, can I order the defendant to refrain from posting comments on social networking sites, such as Facebook?

Probably, especially if the act of domestic violence involved comments posted on a website. We have no case on point. However, in criminal law, it is well established that a court can impose restrictions on a defendant which restrict the defendant's constitutional rights (such as the right of free speech), as long as those restrictions are reasonably related to the goals of sentencing and probation. *See e.g. State v. Strickland,* 169 N.C. pp. 193 (2005).

Discussion. When the act of domestic violence involved comments posted on a social networking site, GS 50B-3(a)(1) allows the judge to "direct a party to refrain

from such acts." Further, even if the domestic violence involved other conduct, G.S. 50B-3 requires the court to order the defendant "to refrain from further acts of domestic violence." That provision would allow the court to order defendant not to post comments that would place plaintiff in fear of injury or continued harassment. Remember that any restriction must be clear enough for defendant to be able to comply. See e.g. *Cox v. Cox,* 133 NC App 221 (1999)(condition in contempt order was too vague to enforce); *Scott v. Scott,* 157 N.C. App. 382(2003)(same).

A related issue is whether comments posted on social networking sites can be acts of domestic violence within the meaning of GS 50B-1. Case law has recognized that statements made by a defendant can be an act of domestic violence if the statements cause a plaintiff to actually "fear imminent serious bodily injury." *See Brandon v. Brandon*, 132 NC App 646 (1999). In addition, the definition of harassment applicable to 50B includes "written or printed communication or transmission… or other computerized or electronic transmission," as long as that communication or transmission was "directed at a specific person" and it "torments, terrorizes, or terrifies that person." *See also State v. Leigh,* 278 N.C. 243 (1971)(constitutional free speech rights do not extend immunity to conduct which has been declared unlawful).

The requirement that a communication or transmittal be "directed at" a specific person does not necessarily mean the comment must have been stated or sent directly to the victim. *See State v. Wooten*, 696 S.E.2d 570 (N.C. App. 2010)(faxed messages were directed at the victim even though they were not addressed to him where the text of the fax "focused" on the victim). *See also Holcomb v. Com*., 709 S.E.2d 711 (Va. App. 2010)(postings on defendant's social media page were communicated to the victim even though the website was open to the public and he did not direct the victim to look at the page. Evidence showed he knew she had visited the site in the past, and the substance of the comments contained many references to their past relationship, making it easy for the victim to identify herself as the subject of the comments).

10) When I am considering a request for an emergency ex part custody order in a case filed pursuant to Chapter 50 and I find out a 50B ex parte was entered one week before which granted temporary custody to the other parent, what can I do?

Any custody order entered in a Chapter 50 proceeding will supersede a temporary custody order entered as relief in a 50B case. G.S. 50B-3(a1)(4). Because the claims for relief are different, I think you can proceed with the Chapter 50 case even if the 50B case is pending. *See State ex rel Onslow County v. Mercer,* 128 N.C. App. 371 91998)(same parties can proceed on different claims at same time; second action does not abate when claims are different).

However, it is important to try to make sure both law enforcement and the other judge is informed about any order you enter that conflicts with the DVPO.

Discussion. The law provides that a Chapter 50 ex parte custody order will trump the 50B order, but conflicting orders will cause problems for the parties and for law enforcement. It is an easier issue to address when you find out about the previous order before you enter a Chapter 50 ex parte. If that is the case, you have the authority to request that the other side be given an opportunity to be present when you consider the request for a Chapter 50 order. It always is better to make a temporary custody decision after hearing even very briefly from both sides as opposed to hearing from one only. If you enter an order that conflicts with the 50B, you or one of the parties should make sure law enforcement is made aware of the modification and you also may consider ordering the parties to inform the 50B judge about the Chapter 50 order. You can arrange to speak to the other judge if necessary, but I do not know of any authority for you to do that ex parte.

When you are considering a custody request pursuant to Chapter 50, you are bound by any previous findings concerning domestic violence made in a 'final' DVPO entered between the same parties. *See Doyle v. Doyle,* 176 N.C. App. 547 (2006)(custody judge bound by conclusion of 50B judge that act of domestic

violence had occurred) and *Simms v. Simms,* 195 N.C. App. 780(2009)(custody judge bound by conclusion of 50B judge that evidence was not sufficient to establish domestic violence). This means that if a 50B judge concluded domestic violence has occurred, you must abide by all the requirements of GS 50-13.2(a)(findings and considerations required in a Chapter 50 case when domestic violence has occurred).

However, the general rule is that findings made in ex parte or other 'temporary' orders are not binding in subsequent court proceedings. *See e.g., Wells v. Wells,* 132 N.C. App. 401 (1999)(findings by court in PSS hearing were not binding on court in alimony trial).