Family Law Frequently Asked Questions

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Question 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?

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.”

7A-98. Unsworn declarations under penalty of perjury (2021)

“(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).)”

Question 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 **<u>at the time the judge signs the order</u>**. If there is no actual consent at the time of entry, the order will be void.

Question 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.

Rutledge v. Rutledge, 10 NC App 427 (1971)

- “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 to 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.”

Question 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?

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.

Question 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

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

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

“[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.

Question 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?

Probably .....

- Parents are entitled to notice
  - GS 50A-205(a)

- But there is no indication in statutes or case law that a parent is a “necessary party” affecting subject matter jurisdiction

Question 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?**

McIntyre v. McIntyre 341 N.C. 629 (2003)

- **GS 50-13.1**
  - Any person with standing
    - Grandparents always have standing
    - *Rodriguez*, 211 N.C. App. 267 (2011)
  - Who properly alleges parents have lost their constitutional right to exclusive custody and control
  - Can seek custody/visitation

- Three "grandparent visitation" statutes – require on-going dispute between the parents
  - **GS 50-13.2(b1)** – as part of original custody order
  - **GS 50-13.5(j)** – as part of modification order
  - **GS 50-13.2A** – where there has been a step-parent or relative adoption

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. 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).

Question 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?

G.S. 50-13.5

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

(1) Service of process in civil actions for the custody of minor children shall be as in other civil actions. … Motions for 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.”

G.S. 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."

Question 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.

- **Can you proceed with the motion to modify?**

- **Yes - 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)(rejecting argument by parent that North Carolina lost custody jurisdiction when all parties left the state after the commencement of the custody case). *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.

Requires a hearing and findings of fact:

(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.

Question 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.

- What income do you use to set the modified prospective child support?

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

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

<u>The date the motion to modify was filed.</u>

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**.

Question 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, 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

Question 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?

Amendments to GS 50-20

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).

(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."

GS 50-20(b)(1b)

- Marital property. - All real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property in accordance with this subsection. …
- It is presumed that all property acquired after the date of marriage and before the date of separation is marital property except property that is separate property under 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**.

GS 50-20 (b)(2)

- 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, other than 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 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 remains separate property regardless of whether the title is in the name of one or both spouses and is not considered marital property unless the intent for the property to become marital property is expressly stated in writing. The act of acquiring the property does not in itself state this intent.

McLean, 323 NC 543 (1988), quoting Sally Sharp

- We must attempt to construe the interspousal gift and exchange provisions so as to avoid ambiguity and effectuate the legislative intent. **Were we to construe the exchange provision to include interspousal gifts traceable to separate funds, the exchange provision would swallow the gift provision**.

- A literal application of this rule would require that property exchanged for separate property be classified separate even if title to it were taken in the name of the nonowner spouse or by both spouses jointly. Such an interpretation would have the effect of eliminating from marital property any gift between the spouses if the gift property could be traced, through exchanges, to separate property. No jurisdiction has been willing to hold that its legislature could have intended such an extraordinary result. .. **We, too, do not believe our legislature intended such a result.**

McLean

"An individual transfer must be considered as either a gift or an exchange."

"Common law principles instruct us in determining whether a transfer constitutes a gift."

A gift is a voluntary transfer of property without consideration

Considering the nature of the marital relationship and of the entireties estate, we conclude that the marital gift presumption established in McLeod is appropriate as an aid in construing N.C.G.S. § 50-20(b)(2). **Donative intent is properly presumed when a spouse uses separate funds to furnish consideration for property titled as an entireties estate.**

McLean

The gift presumption is rebutted by evidence that **no gift was intended.**

"It is the intention at the time of the transfer that is germane."

It is not rebutted by showing the motivation for the gift

- I believe it does not.
- The amendment made no change to the “gift provision” in the definition of separate property; the classification of tenancy by the entirety is governed by the gift provision.
- *McLean v. McLean*, 323 N.C. 543, 374 S.E.2d 376 (1988)