

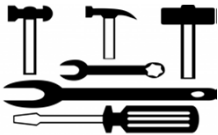
Temporary Orders in Domestic Cases

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Temporary Orders

- Very important tool
- Broad authority
- Purpose is to allow court to address immediate needs of families going through the litigation process



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Authorized in

- Custody
- Child support
- Alimony, in form of PSS
- Domestic Violence 50B
- Equitable Distribution
- All Civil Cases
 - Rule 65 TRO and Preliminary Injunction

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Generally speaking.....

- No limit on the number of temporary orders in a single case
- No need for changed circumstances to modify
 - Exception: PSS
- No immediate appeal
 - Exception: Denial of PSS

Findings/Conclusions.....

- **Generally** not required
 - Some exceptions.....
- **Never** binding in any subsequent court proceeding
 - So be careful with court time



But what if someone appeals?????

- Appeal divests trial court of jurisdiction over any issue affecting matter appealed
 - **Except** contempt for custody (GS 50-13.3), child support (50-13.3) and alimony (GS 50-16.7(j)).
- **But** – inappropriate interlocutory appeal does not take away jurisdiction
- **But** – if appeal allowed, trial court loses jurisdiction
- What should you do?



Dismissal of Claim

- A voluntary dismissal "carries down with it previous rulings and orders in the case."
 - *Doe v. Duke University*, 118 NC App 406 (1995)
 - *Collins v. Collins*, 18 NC App 45 (1973)(no civil contempt for violation of temporary order after voluntary dismissal)
 - *Barham v. Hawk*, 165 NC App 708 (2004)

Custody and Child Support

- **GS 50-13.5:**
-
- * (d) Service of Process: Interlocutory Orders. -
- (1) Service of process in civil actions for the custody of minor children shall be as in other civil actions. Motions for support of a minor child in a pending action may be made on 10 days notice to the other parties and compliance with G.S. 50-13.5(e). 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.
- (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.

Temporary Custody

- See Bench Book, Family Law, Chapter 4
 - Pages 4-14 through 4-22

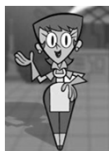


Temporary Custody

- Establish the rights of parties to custody pending resolution of the claim for permanent custody
 - *Regan v. Smith*, 131 NC App 851 (1998)
- Entered when the court deems it appropriate when an action for custody is pending
 - GS 50-13.5(d)(2)
- Can be heard on affidavits alone
 - *Story v. Story*, 57 NC App 509 (1982)

Temporary Custody

- Trial court has authority to order physical and psychological assessment of the parties and the child pursuant to Rule 35 of the Rule of Civil Procedure, before making a final custody determination
- The court of appeals has held that the court has no authority to order assessment or counseling as part of a 'final' custody order
 - *Jones v. Patience*, 121 NC App 434 (1996)(problems after entry of final order may be grounds for modification)
 - *But cf. Maxwell v. Maxwell*, 212 NC App 614 (2011)(trial court has broad authority to order mental health evaluation of parent before ordering visitation for a parent)



Consider.....

- Complaint filed by mom for custody of child
- Mom asks for temporary and permanent custody
- Also requests ex parte "status quo" order, telling you she has primary physical custody of child
- Do you grant her request?????????

Consider.....



- Complaint filed by dad for custody of child
- Dad asks for temporary and permanent custody
- Also requests ex parte "status quo" order, telling you he has primary physical custody of child
- Do you grant his request?????????

Custody and Child Support


- **GS 50-13.5:**
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Ex Parte Custody

- "(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."


Ex parte Custody

- “Temporary orders may be entered ex parte under appropriate circumstances.”
 - *Regan v. Smith*, 131 NC App 851 (1998)
 - *Brandon v. Brandon*, 10 NC App 457 (1971)(okay when mom shown “not suitable to exercise custody”)
 - *Story v. Story*, 57 NC App 509 (1982)



Consider.....

- Complaint filed by dad for modification of custody
- Requests temporary custody and ex parte relief
- Child primarily resides with mom but mom is leaving the state tomorrow to move to Alaska and is taking the child with her
- ????????



Modification

- Nothing in statutes or case law indicate temporary orders cannot be entered after motion to modify is filed
- But remember:
 - Trial court has no authority to modify a custody or support ‘final’ order unless a motion to modify **has been filed by a party**
 - *Jackson v. Jackson*, 192 NC App 455 (2008)(can’t modify custody in contempt hearing)
 - *Lee v. Lee*, 37 NC App 371 (1978)(same)
 - *Kennedy v. Kennedy*, 107 NC App (1992)(can’t modify custody when change child support)

Consider.....

- Grandmother files complaint seeking custody of two children alleging both parents are unfit and that child is in danger.
- Grandmother requests temporary custody and ex parte relief.
- Can you grant ex parte?????
- Do you grant ex parte????

Non-parent Custody

- See *Smith v. Barbour*, 154 NC App 402 (2002)
- See also *Price v. Howard*, 346 NC 68 (1997)
- See also *Speagle v. Seitz*, 354 NC 525 (2001)
- Bench Book, page 4-15 through 4-16.



Hearing after *ex parte*???

- Yes, definitely
 - Due Process
- No time set in statute or case law
- Ex parte custody is not a Rule 65 TRO – it does not expire after 10 days unless it explicitly states that it does
 - *Campen v. Featherstone*, 150 NC App 692 (2002)
- What do you do at the hearing?
 - *Ex parte* order is a temporary order pursuant to authority in GS 50-13.5(d)
 - Court to enter temporary order "as circumstances render appropriate"
 - Order entered after hearing is not *ex parte*

Unfounded allegations

- Rule 11 sanctions found appropriate when party makes allegations with no basis in request for *ex parte* custody

- *Lamm v. Lamm*, 210 NC App 181 (2011)



Duration/Number of Orders

- "It is the public policy of this State that in all cases where it is practicable, child custody orders should be entered as permanent or final to avoid the turmoil and insecurity that children face from constant litigation of their custody status"

- *Simmons v. Arriola*, 160 NC App 671, 675 (2003)

Consider.....

- Order states that 'permanent' primary physical custody is with mom
- No future hearing scheduled or contemplated
- Dad ordered to have psychological evaluation
- No visitation schedule to be set until after evaluation
- After evaluation, dad files motion to modify primary physical custody
- ????????????

Is it temporary or final?



- It doesn't matter what it says it is.....
- If it resolves all issues and has no "reconvening date," it is not temporary
- Temporary if:
 - Entered "without prejudice" to either party
 - States reconvening time in the relatively near future, or
 - Does not resolve all issues

Smith v. Barbour, 195 NC App 244 (2009)

- Order cannot be final if visitation is not resolved
 - *But see Maxwell v. Maxwell*, 212 NC App 614 (2011)(order a final one for purpose of appeal even though it denied father visitation until he submitted to mental health evaluation; stated court would schedule hearing on visitation after evaluation completed. Held to be final order because "no specific reconvening date was set.")
- Orders are completely final or completely temporary – cannot be a little of both

Temporary may not remain temporary.....

- Temporary custody "is not designed to remain in effect for extensive periods of time or indefinitely."
 - *LaValley v. LaValley*, 151 NC App 290 (2002)
- Temporary order will 'convert' to a final order if neither party seeks a final determination within a reasonable time after entry of the temporary order
 - 'reasonable' time determined on a case-by-case basis
 - Cases listed on Bench Book, Family Law, p. 4-19 through 4-20

Deployed Parents Custody and Visitation Act

- GS 50A-350, et. seq.
- Effective October 1, 2013
- Allows temporary custody during deployment
 - By agreement of the parties
 - If it modifies existing court order, agreement must be filed
 - By court order
 - Both terminate upon end of deployment



Custody and Child Support

- **GS 50-13.5:**
-
- * (d) Service of Process: Interlocutory Orders. -
- (1) Service of process in civil actions for the custody of minor children shall be as in other civil actions. Motions for support of a minor child in a pending action may be made on 10 days notice to the other parties and compliance with G.S. 50-13.5(e). 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.
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Temporary Child Support

- See Bench Book, Family Law, Chapter 3
 - Pages 3-153 through 3-157



Temporary Support

- Set by Guidelines unless court deviates
- Not binding at time of final order
 - Final order can be more or less
 - Final order is effective as of date of filing unless court decides otherwise, even if temporary order has been in effect
 - Amounts due under temporary order do not 'vest'

Is it temporary?

- The Rules used to determine whether a custody order is temporary or permanent "logically apply to child support as well."
 - *Sarno v. Sarno*, 762 SE2d (2014)
- *But cf. Gray v. Peele*, 761 SE2d 739 (2014)(intent of court controls)

Is it still temporary?

- Support Order probably converts to final order when neither party requests final determination within a reasonable time
 - *LaValley v. LaValley*, 151 NC App 290 (2002) (temporary orders will convert if allowed to stay in effect too long)
 - But - no case yet holding support order converted



Deployed Parents Custody and Visitation Act



- GS 50A-350, et. seq.
- Effective October 1, 2013
- Allows temporary custody during deployment
 - By agreement of the parties
 - Cannot modify existing order for support
 - By court order
 - Court can enter temporary support order
 - Both terminate upon end of deployment

Postseparation Support

- See Bench Book, Family Law, Chapter 2
 - Pages 2-9 through 2-21



PSS

- PSS "is designed to function as a means of securing temporary support for a dependent spouse in an expedited manner."
 - *Wells v. Wells*, 132 NC App 401 (1999)
- Dependent spouse is entitled to PSS if, after consideration of all factors set out in the statute, the court determines that the resources of the dependent spouse are not adequate to meet her/his reasonable needs and the supporting spouse has the ability to pay.
 - GS 50-16.2A(c)

PSS

- May be ordered in action for divorce, divorce from bed and board, annulment or alimony
 - GS 50-16.1A(4)
- Either party can "move" for PSS in "an action brought pursuant to Chapter 50"
 - GS 50-16.2A(a)
- Factual basis for relief must be set forth in verified pleading or motion, or in an affidavit
- Court can decide on verified pleading, motion or affidavit – or take evidence
 - Statute seems to require a hearing – see *e.g.* GS 50-16.2A(d)



PSS

- Probably need 5 days notice before hearing
- PSS order must state:
 - Conclusion that party seeking support is or is not dependent; other is or is not supporting
 - Reasons for allowing or denying request
 - If grant PSS, reasons for amount and duration
- But – findings and conclusions in PSS order are not binding at hearing on alimony
 - *Wells v. Wells*, 132 NC App 401 (1999)

Consider.....

- Wife is seeking PSS
- Husband's Answer denied wife is dependent but made no other statement regarding the PSS
- Wife's verified pleading states husband committed many acts of domestic violence against her and the children of the parties
- Can you consider husband's alleged misconduct?

§ 50-16.2A. Postseparation support

.....
(d) At a hearing on postseparation support, the judge **shall consider marital misconduct by the dependent spouse** occurring prior to or on the date of separation in deciding whether to award postseparation support and in deciding the amount of postseparation support. **When the judge considers these acts by the dependent spouse**, the judge shall also consider any marital misconduct by the supporting spouse in deciding whether to award postseparation support and in deciding the amount of postseparation support.

Consider...



- Plaintiff's complaint requests PSS and ED
- Defendant later files for divorce and divorce is granted
- Plaintiff schedules hearing on PSS
- Can you consider granting PSS?



PSS

- Court can order PSS payments to begin at time of hearing or at some other time
- Court can order support from the time of separation if court deems it appropriate
 - See *Gardner v. Gardner*, 40 NC App 334 (1979)

Termination of PSS

- PSS is paid until the earlier of any of the following:
 - The date set in the order
 - The entry of order allowing or denying alimony
 - The dismissal of the alimony claim
 - The entry of divorce if no alimony claim is pending
 - Death of either party
 - Remarriage or cohabitation of dependent spouse
- "If PSS is ordered at the time of entry of absolute divorce, a claim for alimony must be pending at the time of the entry of the judgment of divorce."
 - GS 50-16.1A(4)

Consider

- Wife requests PSS
- She clearly is dependent; husband clearly supporting
- Evidence showed that for a 3 month period of time after separation, she cohabitated
- PSS comes on for hearing 6 months after date of separation
 - Wife no longer cohabitating
- ????????

Cohabitation

- GS 50-16.9(b)
 - "If a dependent spouse who is receiving PSS or alimony from a supporting spouse under a judgment or order of a court of this State remarries or engages in cohabitation, the PSS or alimony will terminate."
- *Williamson v. Williamson*, 142 NC App 702 (2001)
 - Cohabitation **before** award of alimony is a bar to alimony



PSS

- No modification without motion by a party and changed circumstances
 - GS 50-16.9
- Denial of PSS affects a substantial right and can be immediately appeals
 - Probably takes away jurisdiction to proceed with alimony

Domestic Violence

- See Bench Book, Family Law, Chapter 7
 - Pages 7-17 through 7-23




Domestic Violence

- GS Chapter 50B authorizes two temporary orders
 - **Ex parte orders – GS 50B-2(c):**
 - "Prior to hearing, if it clearly appears from specific facts shown, there is a danger of domestic violence, the court may enter orders as it deems necessary to protect the aggrieved party or minor children from those acts."
 - **Emergency orders – GS 50B-2(b):**
 - "A party may move for emergency relief if he or she believes there is a danger of serious and immediate injury to himself or herself or a minor child. A hearing on a motion for emergency relief, where no ex parte is granted, shall be held after 5 days notice of the hearing to the other party or five days from service of process on the other party, whichever occurs first...."

Equitable Distribution


- See Bench Book, Family Law, Chapter 6
 - Pages 6-58 through 6-61



The image shows the cover of a PDF document titled "Bench Book" for North Carolina Trial Judges. The cover features the text "NORTH CAROLINA TRIAL JUDGES Bench Book" and "PDF" at the bottom. There is a small seal on the right side of the cover.

Equitable Distribution

- Temporary orders:
 - GS 50-20(j):
 - Injunction pursuant to Rule 65
 - Order Bond
 - Both are tools to help preserve and protect assets
 - GS 50-20(i1):
 - Interim distribution
 - To allocate marital assets and debts; return separate property
 - If requested, must be entered unless good cause shown that it should not be entered



The image is a simple icon of a pair of scales of justice, with a central pillar and two pans hanging from a horizontal beam. Above the beam are five small stars.
