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Chapter 7
Domestic Violence

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Chapter 7: **Domestic Violence**

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I. Generally

A. Definition

1. Domestic violence is the commission upon an aggrieved party, or upon a minor child residing with or in the custody of the aggrieved party, of one or more of the following acts:
    a. Attempting to cause bodily injury or intentionally causing bodily injury. [G.S. 50B-1(a)(1).]
    b. Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury. [G.S. 50B-1(a)(2).]
        i. The fact that plaintiff's neighbors were apprehensive based on private investigator's surveillance of plaintiff was "irrelevant as 'the aggrieved party or a member of the aggrieved party's family or household' are the only people the trial court may consider in issuing a DVPO [domestic violence protective order] pursuant to G.S. 50B-1(a)(2)." [*Kennedy v. Morgan,* 221 N.C. App. 219, 224, 726 S.E.2d 193, 197 (2012).]
        ii. G.S. 50B-1(a)(2) imposes a subjective test, rather than an objective reasonableness test. [*Brandon v. Brandon*, 132 N.C. App. 646, 513 S.E.2d 589 (1999).]
            (a) The trial court must find that the plaintiff "actually feared" imminent serious bodily injury. [*Smith ex rel. Smith v. Smith*, 145 N.C. App. 434, 549 S.E.2d 912 (2001) (citing *Brandon v. Brandon*, 132 N.C. App. 646, 513 S.E.2d 589 (1999)) (where defendant's actions made plaintiff feel "uncomfortable" and "'creepy" but she was not afraid that defendant would physically hurt her, no fear of imminent serious bodily injury).]
            (b) Conclusion that defendant had committed an act of domestic violence was not supported by sufficient findings of fact where the trial court made no finding regarding plaintiff's subjective fear. [*Brandon v. Brandon*, 132 N.C. App. 646, 513 S.E.2d 589 (1999).]
        iii. Imminent does not mean immediate; rather, it means that there will be no significant delay. [*Dickens v. Puryear,* 302 N.C. 437, 276 S.E.2d 325 (1981) (considering "imminent" in the context of a civil assault and battery); *Brandon v. Brandon,* 132 N.C. App. 646, 654 n.7, 513 S.E.2d 589, 595 n.7 (1999) (noting that "imminent" and "immediate" are not exact synonyms; use of "immediate" serious bodily injury in AOC form implied a higher showing than required by statute's use of "imminent" injury; evidence supported finding that defendant threatened plaintiff with immediate serious bodily injury but it did not follow

from that finding that plaintiff was in fear of imminent serious bodily injury, which is required to show that domestic violence occurred).]

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

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

(a) Because G.S. 14-277.3A(b)(2) does not define the terms "torment," "terrorize," or "terrify," a court is to look to the meaning ordinarily accorded to those words. [*Judson v. Weiss,* 225 N.C. App. 654, 738 S.E.2d 454 (2013) (**unpublished**) (not paginated on Westlaw) (using definition of "torment" from dictionary and case law).]

(b) Although the record contained evidence that would support defendant's claim that she attempted to communicate with plaintiff for legitimate purposes, the aggressive manner in which defendant attempted to communicate and the odd hours at which she did so, coupled with her repeated and persistent attempts to communicate with plaintiff after he requested that she not do so, amply supported the trial court's rejection of defendant's assertions that her conduct was for a "legitimate purpose." [*Judson v. Weiss,* 225 N.C. App. 654, 738 S.E.2d 454 (2013) (**unpublished**) (not paginated on Westlaw).]

ii. Defendant's hiring of a private investigator to conduct surveillance on plaintiff to determine whether she was cohabitating was not, in and of itself, sufficient to support a finding of "substantial emotional distress." [*Kennedy v. Morgan,* 221 N.C. App. 219, 726 S.E.2d 193 (2012).]

iii. Father's installation of a hidden camera in daughters' bathroom was not sufficient to support a finding of substantial emotional distress of his daughters or their mother. Daughters did not testify, and no other witness testified, as to the impact on daughters of father's installation of the camera, and, while mother testified that she was "fearful" for her daughters' safety, she did not present any evidence of her substantial emotional distress. [*Fairbrother v. Mann*, 225 N.C. App. 654, 738 S.E.2d 454 (2013) (**unpublished**) (not paginated on Westlaw) (camera was discovered and removed before any filming of daughters took place).]

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

v. Evidence that defendant contacted plaintiff repeatedly over the space of a month after plaintiff told him not to contact her, that he continued to contact her after plaintiff filed for a domestic violence protective order, that he left her one "hostile" voicemail, that she was afraid of him, and that his actions caused her anxiety and sleeplessness and caused her to alter her normal daily activities due to her anxiety and inability to work was sufficient to support the conclusion that defendant placed plaintiff in fear of continued harassment and caused her substantial emotional distress. [*Thomas v. Williams*, 773 S.E.2d 900 (N.C. Ct. App. 2015) (court of appeals rejected defendant's argument that his actions would not cause a reasonable person to experience fear, holding that subjective fear is all that is required to prove an act of domestic violence).]

vi. Evidence that years before the request for a domestic violence protective order (DVPO) was filed defendant admitted to plaintiff that he tried to kill her, that one year before the request for the DVPO defendant sent a text to plaintiff threatening to kill himself, and that one month before the request for the DVPO defendant sent texts to plaintiff threatening that she would have to "[t]ake the wrath that comes" if she did not reconcile with him, along with plaintiff's statement that she was in fear of defendant, was sufficient to support the conclusion that defendant placed plaintiff in fear of continued harassment. [*Stancill v. Stancill*, 773 S.E.2d 890, 892–93 (N.C. Ct. App. 2015) (rejecting defendant's contention that these actions would not cause a reasonable person to fear, the court of appeals again stated that domestic violence is determined based on the subjective fear of the plaintiff rather than on the objective reasonableness of that fear).]

vii. Plaintiff's testimony that she was unable to engage in her profession of selling homes because she feared defendant would wait for her in an empty house to attack and kill her was sufficient to support the conclusion that plaintiff suffered substantial emotional distress as a result of defendant's conduct. [*Stancill v. Stancill*, 773 S.E.2d 890, 899 (N.C. Ct. App. 2015) (holding that "[a] level of fear so great that a person cannot perform the tasks required by her employment would likely cause 'substantial emotional distress'").]

d. The commission of any act defined in G.S. 14-27.21 through 14-27.33 (statutorily defined rape and other criminal sex offenses). [G.S. 50B-1(a)(3), *amended by* S.L. 2015-181, § 36, effective Dec. 1, 2015, and applicable to offenses committed on or after that date.]

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

B. Personal Relationship Required

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

a. "Personal relationship" means the parties:

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

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

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

(a) A child of any age may be the plaintiff, but a child must be at least 16 years of age to be the defendant under G.S. 50B-1(b)(3). **NOTE:** This is the only type of personal relationship with an age limitation for the defendant. For example, a child under the age of 16 may be a defendant if the child is a current or former household member of the plaintiff, someone with whom the plaintiff lived, or someone with whom the plaintiff had a dating relationship.

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

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

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

(b) The fact that plaintiff and defendant are siblings is not sufficient to establish that they are current or former household members. [*Tyll v. Willets*, 229 N.C. App. 155, 748 S.E.2d 329 (2013) (it is not appropriate to presume siblings lived together at some point in their lives without evidence to establish that fact).]

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

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

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

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

(d) The court of appeals has held that the term "dating relationship" should be interpreted broadly to cover a wide range of romantic relationships, with "only the least intimate of personal relationships" excluded. [*Thomas v. Williams*, 773 S.E.2d 900, 903 (N.C. Ct. App. 2015).]

(e) The mere fact that a relationship is short-term does not "categorically preclude" the relationship from meeting the definition of dating relationship. [*Thomas v. Williams*, 773 S.E.2d 900, 904 (N.C. Ct. App. 2015) (parties who dated for less than three weeks were in a "dating relationship").]

(f) The court of appeals in *Thomas v. Williams*, 773 S.E.2d 900, 904 (N.C. Ct. App. 2015) (citations omitted), provided the following six "non-exhaustive factors" that a trial court should consider when deciding if a dating relationship existed:

(1) "Was there a minimal social interpersonal bonding of the parties over and above [that of] mere casual [acquaintances or ordinary] fraternization?"

(2) "How long did the alleged dating activities continue prior to the acts of domestic violence alleged?"

(3) "What were the nature and frequency of the parties' interactions?"

(4) "What were the parties' ongoing expectations with respect to the relationship, either individually or jointly?"

(5) "Did the parties demonstrate an affirmation of their relationship before others by statement or conduct?"

(6) "Are there any other reasons unique to the case that support or detract from a finding that a 'dating relationship' exists?"

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

C. G.S. Chapter 50B Remedies Not Exclusive and Available in Other Proceedings

1. The remedies in G.S. Chapter 50B are in addition to remedies provided under Chapter 50 and other statutes. [G.S. 50B-7.] This means an aggrieved party can request either a Chapter 50B or 50C order and also initiate criminal process.
2. The remedies in Chapter 50B are available to a party seeking divorce from bed and board on grounds of "cruel or barbarous treatment [that] endangers the life of the other." [G.S. 50-7(3).]

II. Procedure

A. Parties under 18

1. Except in situations involving G.S. 50B-1(a)(3) (parents and grandparents may not obtain a protective order against a child or grandchild under the age of 16), there is no age restriction for parties in G.S. Chapter 50B proceedings; a person under the age of 18 can request relief as a plaintiff and also can be named as a defendant.
2. If the plaintiff seeking a domestic violence order (DVPO) is under 18, a Rule 17 guardian ad litem (GAL) must be appointed to appear on his behalf. [G.S. 1A-1, Rule 17(b)(1).]
3. However, if the plaintiff is an adult who has a personal relationship with the defendant, that adult aggrieved party plaintiff can seek a protective order based on acts committed by the defendant upon a minor child residing with or in the custody of the aggrieved party plaintiff. [G.S. 50B-1(a).] In that situation, the court can enter a protective order providing protection for the minor child even though the minor child is not made a plaintiff in the case. If the minor child is not a party plaintiff, no Rule 17 GAL needs to be appointed for the minor child. [*See* G.S. 1A-1, Rule 17.]

4. Given the nature of the remedies allowed under G.S. 50B-3, especially the remedy of temporary custody, it is important that both the G.S. Chapter 50B complaint and any protective order entered by the court clearly identify when a minor is actually a party and when an adult parent is the party seeking protection for a minor child. When the adult is the actual party plaintiff, to avoid confusion, the name of the child should not be included in the caption of the complaint or in the caption of the DVPO. Similarly, if the child actually is the plaintiff, the name of the Rule 17 GAL should not appear in the caption of the complaint or in the caption of the DVPO.
5. If the defendant in a domestic violence proceeding is under age 18, a Rule 17 GAL must be appointed to defend the action on behalf of the defendant. [G.S. 1A-1, Rule 17(b)(2).]
    a. The appointment does not have to be made before the ex parte order is entered, but it must be made before the emergency hearing. [G.S. 1A-1, Rule 17.]
    b. The emergency hearing may not be held until the judge or clerk has appointed a GAL for the minor defendant. [G.S. 1A-1, Rule 17.]

B. Venue

1. G.S. Chapter 50B does not speak to venue. Any person residing in North Carolina may seek a DVPO. [G.S. 50B-2(a).] Chapter 50B does not require that a plaintiff reside in North Carolina for any specific length of time before filing, but the plaintiff must be a resident when the complaint is filed.
    a. "Domicile denotes one's permanent, established home as distinguished from a temporary, although actual, place of residence. . . . [I]t is the place where he intends to remain permanently, or for an indefinite length of time." [*Hall v. Wake Cty. Bd. of Elections*, 280 N.C. 600, 605, 187 S.E.2d 52, 55 (1972); *Atassi v. Atassi,* 117 N.C. App. 506, 451 S.E.2d 371 (whether husband's domicile was in Syria or North Carolina precluded summary judgment on certain domestic issues), *review denied,* 340 N.C. 109, 456 S.E.2d 310 (1995).]
    b. "Residence . . . indicates a person's actual place of abode, whether permanent or temporary." [*Hall v. Wake Cty. Bd. of Elections*, 280 N.C. 600, 605, 187 S.E.2d 52, 55 (1972).] A temporary presence may qualify as "residing" in a place. [*See Glover v. Farmer,* 127 N.C. App. 488, 490 S.E.2d 576 (1997) (adult daughter visiting her parents for a week was "residing" in their home and could properly accept service of process for her parents), *review denied,* 347 N.C. 575, 502 S.E.2d 590 (1998).]
2. In the absence of a provision in G.S. Chapter 50B, the general venue provision, G.S. 1-82, is applicable. [*See Duff v Lineberger,* 172 N.C. App. 170, 616 S.E.2d 30 (2005) (**unpublished**) (applying G.S. 1-82 to settle question of venue in a proceeding for a DVPO and overruling defendant's objection to venue because prior action was pending in another county for custody, child support, divorce, equitable distribution, and alimony).]
3. Neither G.S. Chapter 50B nor the general venue statute requires that the act of violence occur in North Carolina or in the county where the protective order is sought.
4. The court must have personal jurisdiction over the defendant to enter a valid protective order. [*Mannise v. Harrell*, 791 S.E.2d 653 (N.C. Ct. App. 2016).] Personal jurisdiction requires the court to find that:

a. Defendant has consented to jurisdiction or waived any objection to jurisdiction or

b. A long-arm statute allows North Carolina to exercise personal jurisdiction over defendant and

c. Defendant has "minimum contacts" with North Carolina sufficient to satisfy due process. [See discussion in Section V.A, below.]

i. A trial court is not required to determine whether defendant has sufficient minimum contacts to satisfy due process unless defendant raises an objection to personal jurisdiction. [See discussion in Section V.A, below.]

C. Overview of Process

1. Any person residing in this state may seek G.S. Chapter 50B relief by filing a civil action or by filing a motion in any existing Chapter 50 action. [G.S. 50B-2(a).] In compliance with the federal Violence Against Women Act, no court costs or attorney fees may be assessed for the filing, issuance, registration, or service of a protective order or petition for a protective order or witness subpoena, except as provided in G.S. 1A-1, Rule 11. [G.S. 50B-2(a), *amended by* S.L. 2013-390, § 1, effective Oct. 1, 2013, and applicable to actions commenced on or after that date; G.S. 7A-305, -311.]
2. G.S. 7A-343.6, *added by* S.L. 2015-62, § 3.(a), effective June 5, 2015, authorizes the Administrative Office of the Courts to develop a program for electronic filing in G.S. Chapters 50B and 50C cases. Each judicial district with such a program is required to adopt local rules to implement the program to apply until statewide rules are promulgated.
3. G.S. 50B-2(e), *amended by* S.L. 2015-62, § 3.(b), effective Dec. 1, 2015, and applicable to documents filed and hearings held on or after that date, allows all documents filed, issued, registered, or served relating to an ex parte, emergency, or permanent domestic violence protective order pursuant to G.S. Chapter 50B to be filed electronically. In addition, this statute allows ex parte hearings to be conducted through video conference. A hearing for an emergency or a permanent protective order cannot be conducted through video conference.
4. Any action for a domestic violence protective order requires that a summons be issued and served. The complaint, notice of hearing, any temporary or ex parte order that has been issued, and other papers through the appropriate law enforcement agency where the defendant is to be served, must be attached to the summons. [G.S. 50B-2(a), *amended by* S.L. 2009-342, § 2, effective for actions or motions filed on or after Dec. 1, 2009.] Form AOC-CV-317, Civil Summons Domestic Violence, may be used.
5. An aggrieved party may proceed *pro se*, [G.S. 50B-2(a).] and the clerk of superior court must provide *pro se* complainants all forms necessary to enable them to proceed without a lawyer. [G.S. 50B-2(d).] The clerk also is required to schedule hearings and issue notices of hearings for *pro se* litigants. [*See* G.S. 50B-2(b) and (c).]
6. A complaint filed pursuant to G.S. Chapter 50B is a civil action, subject to the Rules of Civil Procedure, unless Chapter 50B specifies otherwise. [G.S. 1A-1, Rule 1; *Hensey v. Hennessy,* 201 N.C. App. 56, 685 S.E.2d 541 (2009).] The summons issued with the complaint must require the defendant to answer within ten days of the date of service. [G.S. 50B-2(a), *amended by* S.L. 2009-342, § 2, effective for actions or motions filed on or after Dec. 1, 2009. *Cf. Henderson v. Henderson*, 234 N.C. App. 129, 758 S.E.2d 681 (when

an ex parte domestic violence protective order (DVPO) has been issued, the language in G.S. 50B-2(a), giving a defendant ten days after service of the summons to answer, is superseded by G.S. 50B-2(c)(5), which requires that a hearing be held within ten days from the date of issuance of an ex parte DVPO or within seven days from the date of service of process on the other party, whichever occurs later; under this interpretation of the statutes, five days to answer was found sufficient), *review denied,* 763 S.E.2d 521 (N.C. 2014). See Section II.C.8, below.]

7. A plaintiff also may request temporary "emergency relief" pursuant to G.S. 50B-2(b). If no ex parte order is entered, a hearing on a motion for temporary emergency relief must be held after five days' notice of hearing to the defendant or after five days from the date of service of process, whichever occurs first. [G.S. 50B-2(b). See Section IV.B, below, discussing emergency relief.]
8. A plaintiff may, at any time prior to hearing, request temporary ex parte relief. [G.S. 50B-2(c). See Section III, below, discussing ex parte hearings.] If an ex parte domestic violence protective order (DVPO) is entered, a hearing must be held within ten days from the date of issuance of the ex parte DVPO or within seven days from the date of service of process on the other party, whichever occurs later. [G.S. 50B-2(c)(5). *See Henderson v. Henderson*, 234 N.C. App. 129, 758 S.E.2d 681 (when an ex parte DVPO was entered on Feb. 8, 2013, defendant was served on Feb. 12, 2013, and a hearing was held on Feb. 18, 2013, that defendant had "at least five days" to answer was found to be sufficient; court rejected defendant's argument that G.S. 50B-2(a) gave him ten days from the date of service to answer), *review denied*, 763 S.E.2d 521 (N.C. 2014).] If the request for ex parte relief is denied, a hearing on plaintiff's request for temporary emergency relief must be held within five days. [G.S. 50B-2(b).]
9. If an ex parte protective order is granted to a plaintiff acting *pro se*, the clerk of court must effect service of the summons, complaint, notice of hearing, and ex parte order through the appropriate law enforcement agency where the defendant is to be served. [G.S. 50B-2(c)(7).]
10. The statute does not specify a time within which the trial on the merits must be held.
11. A "final" protection order may not exceed one year in duration. If an ex parte DVPO that has been continued in effect for more than a year has expired, a trial court lacks authority to enter a one-year protective order based on the same complaint. [*Rudder v. Rudder,* 234 N.C. App. 173, 759 S.E.2d 321 (2014). See Section VII.C, below.]
12. Plaintiff may file a motion to renew a protective order before its expiration. [G.S. 50B-3(b). See Section VII.D, below.]
13. A copy of any order entered pursuant to G.S. Chapter 50B must be issued to each party. In addition, a copy of the order must be provided to and maintained by the appropriate police department or sheriff's office. If the order directs defendant to stay away from a child's school, the sheriff must deliver the order to the principal of the school named in the order. [G.S. 50B-3(c).]
14. G.S. 50B-3(c), *amended by* S.L. 2015-176, § 1, effective Aug. 5, 2015, requires law enforcement agencies to accept receipt of protective orders entered pursuant to G.S. Chapter 50B issued by the clerk of court by electronic or facsimile transmission for service on the defendant.

D. Relationship between an Ex Parte Domestic Violence Protective Order (DVPO) and a DVPO

1. In *Hensey v. Hennessy,* 201 N.C. App. 56, 685 S.E.2d 541 (2009), the court of appeals made the following statements:
    a. An ex parte DVPO and a DVPO are independent of one another.
    b. An aggrieved party is not required to request an emergency or ex parte order prior to seeking entry of a DVPO.
    c. A DVPO may be entered even though an ex parte order was denied or was never requested. This means a plaintiff has a right to have her claim tried on the merits even if a request for an ex parte order or emergency relief has been denied, unless the court dismisses the plaintiff's complaint pursuant to G.S. 1A-1, Rule 12(b)(6) (failure to state a claim) or pursuant to some other Rule of Civil Procedure. (It is not clear whether a trial court has authority to dismiss pursuant to Rule 12(b)(6) on its own motion.)
    d. Ex parte DVPOs are normally in effect for a very brief time, until either entry or denial of entry of a DVPO. [*See Rudder v. Rudder*, 234 N.C. App. 173, 759 S.E.2d 321 (2014) (statute shows clear legislative intent that continuances of hearings after entry of an ex parte DVPO should be limited in number).]

E. Relationship between a G.S. Chapter 50B Proceeding and a Related Criminal Domestic Violence Case

1. Statutory.
    a. A defendant placed on unsupervised probation in a criminal case must attend and complete an abuser treatment program if the court finds that the defendant is responsible for acts of domestic violence and there is a program approved by the Domestic Violence Commission that is reasonably available to the defendant, unless the court finds that such would not be in the best interests of justice. A defendant attending an abuser treatment program must abide by all program rules. [G.S. 15A-1343(b)(12).]
        i. For a period between Dec. 1, 2012, and Dec. 1, 2013:
            (a) The court was required to schedule a compliance review hearing within sixty days of judgment and every sixty days thereafter until the defendant completed the abuser treatment program and
            (b) If a defendant was discharged for noncompliance, the noncompliance had to be reported to the court. [G.S. 15A-1343(b)(12), *added by* S.L. 2012-39, § 1, effective Dec. 1, 2012, and applicable to defendants placed on probation on or after that date; *deleted by* S.L. 2013-123, § 1, effective Dec. 1, 2013, and applicable to defendants placed on supervised or unsupervised probation on or after that date.]
    b. When a defendant is found guilty of an offense involving assault, communicating a threat, or any of the acts as defined in G.S. 50B-1(a), the presiding judge must determine whether the defendant and victim had a personal relationship. If the judge determines that there was a personal relationship, the judge must indicate on the form reflecting the judgment that the case involved domestic violence.

[G.S. 15A-1382.1(a), *amended by* S.L. 2012-39, § 2, effective Dec. 1, 2012, to add domestic violence acts, and applicable to defendants placed on probation on or after that date.]

c. When a defendant is found guilty of an offense involving child abuse or is found guilty of an offense involving assault or any of the acts of domestic violence as defined in G.S. 50B-1(a) and the offense was committed against a minor, then the judge shall indicate on the form reflecting the judgment that the case involved child abuse. [G.S. 15A-1382.1(a1), *added by* S.L. 2013-35, § 2, effective Dec. 1, 2013, and applicable to judgments entered on or after that date.]

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

e. For crimes of domestic violence for purposes of bond and pretrial release, see Appendix A, Domestic Violence 48-Hour Rule Offense Chart, below.

2. Case law.

a. A transcript of testimony from the criminal trial, if available, may be used as evidence at a domestic violence protective order (DVPO) hearing if the transcript is "properly offered and admitted into evidence." [*Hensey v. Hennessy,* 201 N.C. App. 56, 68 n.5, 685 S.E.2d 541, 549 n.5 (2009).]

b. A judge who presided over a defendant's trial in criminal court cannot enter a DVPO based on the judge's own personal memory of the criminal proceeding, as the judge's memory is not evidence. [*Hensey v. Hennessy,* 201 N.C. App. 56, 67, 685 S.E.2d 541, 549 (2009) (emphasis in original) (when plaintiff presented "absolutely *no* evidence" at the DVPO hearing, entry of DVPO on judge's memory of related criminal proceeding was not appropriate, even though defendant had not answered the complaint or appeared in person or by his attorney at the DVPO hearing).]

c. It is inappropriate for a judge at a DVPO hearing to take judicial notice of facts established by testimony presented at the related criminal proceeding when the allegations regarding the acts of domestic violence in the case at bar are in dispute. [*Hensey v. Hennessy,* 201 N.C. App. 56, 69, 685 S.E.2d 541, 550 (2009) (N.C. R. Evid. 201 allows notice of adjudicative facts that are not subject to reasonable dispute; plaintiff did not contend at the DVPO hearing that allegations in the complaint regarding defendant's acts of domestic violence were "not subject to reasonable dispute" as required by the Rule but relied only on the fact that the trial judge had already heard the same facts, which had been disputed in the criminal proceeding; that defendant had not answered, or appeared in person or by his attorney at the DVPO hearing, did not require different result). For a civil DVPO case taking judicial notice of a fact established in a criminal case, see *Kenton v. Kenton*, 218 N.C. App. 603, 724 S.E.2d 79 (2012) (trial court considering request to renew consent DVPO took judicial notice

of defendant's *Alford* guilty plea entered in criminal proceeding, after DVPO was originally entered, to "judicially establish" in renewal proceeding that defendant committed an act of domestic violence).]

d. In *Little v. Little,* 226 N.C. App. 499, 739 S.E.2d 876 (2013), the trial court erred when, at the hearing for a DVPO, it took judicial notice of the official criminal file related to defendant's prosecution for assault because the appellate court was unable to identify any basis for admitting the result of the criminal proceeding at the DVPO hearing.

i. After the trial judge in *Little v. Little,* 226 N.C. App. 499, 739 S.E.2d 876 (2013), announced that he was taking judicial notice of the contents of the criminal file and orally granting the DVPO, the judge obtained and reviewed the file during a recess. The trial judge included as a finding in the DVPO that defendant had been found guilty of assault on a female.

ii. The appellate court noted that a trial court may take judicial notice of its own records in a prior or contemporaneous proceeding when relevant.

iii. The only basis noted by the appellate court for the relevance in *Little v. Little,* 226 N.C. App. 499, 739 S.E.2d 876 (2013), of the criminal file to the DVPO proceeding was the doctrine of collateral estoppel. However, collateral estoppel was not available because, according to the appellate court, the actual disposition of the criminal matter was by prayer for judgment continued, which did not constitute a final judgment, a required element for application of collateral estoppel.

iv. Because the trial court in *Little v. Little,* 226 N.C. App. 499, 739 S.E.2d 876 (2013), specifically relied upon defendant's having been found guilty in the criminal action in entering the DVPO, the trial court's taking judicial notice of the criminal file was not harmless error.

F. Prior G.S. Chapter 50B Proceeding as Res Judicata or Collateral Estoppel

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

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

G. Voluntary Dismissal by Plaintiff

1. Generally.

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

   b. If an ex parte order has been granted but the hearing for the final order has not yet been held, plaintiff can take a voluntary dismissal as a matter of right and terminate the case, as long as no affirmative relief has been requested by the nondismissing party. If plaintiff dismisses the action before entry of a final judgment on the G.S. Chapter 50B claim, any ex parte order previously entered will be dismissed as well. [*See Doe v. Duke Univ.*, 118 N.C. App. 406, 408, 455 S.E.2d 470, 471 (1995) (quoting *Gibbs v. Light Co.,* 265 N.C. 459, 464, 144 S.E.2d 393, 398 (1965)) (protective order entered during medical malpractice case was nullified by voluntary dismissal; court stated that a voluntary dismissal "carries down with it previous rulings and orders in the case"); *Barham v. Hawk*, 165 N.C. App. 708, 600 S.E.2d 1 (2004) (voluntary dismissal nullified discovery order entered in case), *aff'd per curiam without precedential value*, 360 N.C. 358, 625 S.E.2d 778 (2006); *Collins v. Collins*, 18 N.C. App. 45, 196 S.E.2d 282 (1973) (party cannot be held in contempt of temporary order following termination of action by a G.S. 1A-1, Rule 41 voluntary dismissal).]

   c. If an emergency hearing has been requested or has been held but the hearing for the final order has not yet been held, plaintiff can take a voluntary dismissal as a matter of right and terminate the case, as long as no affirmative relief has been requested by defendant. [*See* G.S. 1A-1, Rule 41; see Section II.G.1.b, immediately above (if G.S. Chapter 50B claim is dismissed before entry of final judgment, all temporary or interlocutory orders are dismissed as well).] Plaintiff cannot take a voluntary dismissal any time after a "final" order has been entered. [*See Massey v. Massey,* 121 N.C. App. 263, 465 S.E.2d 313 (1996) (reconciling spouses could not under Rule 41(a) voluntarily dismiss a final custody and support order).] Therefore, if a defendant waives the final hearing and the court enters a final order at the conclusion of an emergency hearing, plaintiff cannot take a voluntary dismissal.

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

2. Effect of dismissal on other claims.

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

H. Involuntary Dismissal by Court for Failure to Prosecute

1. Generally.

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

      i. Language allowing dismissal of a "claim" or "action" has been found to encompass motions filed in a domestic relations context. [*See Church v. Decker,* 214 N.C. App. 193, n.2, 714 S.E.2d 529 n.2 (2011) (**unpublished**) (not paginated on Westlaw) (motions for modification of child support, retroactive and delinquent child support, and resolution of medical coverage issues, among others, were subject to dismissal under G.S. 1A-1, Rule 41(b); court of appeals noted that a number of the motions amounted to substantive claims that would ordinarily be asserted in a pleading outside the domestic relations context).]

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

   b. Unless the court otherwise specifies in its order, a G.S. 1A-1, Rule 41(b) dismissal is with prejudice and is an adjudication on the merits.

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

      ii. Unless the court in its order for dismissal otherwise specifies, a dismissal under Rule 41(b) and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits. [G.S. 1A-1, Rule 41(b); *Foy v. Hunter,* 106 N.C. App. 614, 617 n.1, 418 S.E.2d 299, 302 n.1 (1992) (although the trial court did not specify that the dismissal was with prejudice, "the failure of the order to specify otherwise operated as an adjudication on the merits").]

2. Procedure.
    a. Before dismissing a claim with prejudice for failure to prosecute under G.S. 1A-1, Rule 41(b), a trial judge must address three factors:
        i. Whether the plaintiff acted in a manner that deliberately or unreasonably delayed the matter;
        ii. The amount of prejudice, if any, to the defendant; and
        iii. The reason, if one exists, that sanctions short of dismissal would not suffice. [*Wilder v. Wilder,* 146 N.C. App. 574, 553 S.E.2d 425 (2001) (a trial court must consider lesser sanctions when considering a Rule 41(b) motion to dismiss for failure to prosecute; reversing an order dismissing a complaint for failure to prosecute when the trial court did not fully address any of the three factors set out above); *Ray v. Greer,* 212 N.C. App. 358, 363, 713 S.E.2d 93, 97 (citing *Foy v. Hunter,* 106 N.C. App. 614, 418 S.E.2d 299 (1992)) (Rule 41(b) involuntary dismissal for failure to comply with court order) (trial court must consider lesser sanctions before imposing the "most severe sanction" available; after considering lesser sanctions, the trial court may determine the appropriate sanction in its discretion), *cert. denied,* 365 N.C. 362, 718 S.E.2d 634 (2011).]
            (a) Less drastic sanctions include: (1) striking the offending portion of the pleading; (2) imposing fines, costs (including attorney fees), or damages against the represented party or his counsel; (3) court-ordered attorney disciplinary measures, including admonition, reprimand, censure, or suspension; (4) informing the North Carolina State Bar of the conduct of the attorney; and (5) dismissal without prejudice. [*Foy v. Hunter,* 106 N.C. App. 614, 418 S.E.2d 299 (1992) (discussing lesser sanctions for failure to comply with rules of civil procedure); *McKoy v. McKoy,* 214 N.C. App. 551, 714 S.E.2d 832 (2011) (citing *Daniels v. Montgomery Mut. Ins. Co.,* 320 N.C. 669, 360 S.E.2d 772 (1987)) (failure to prosecute) (trial court has inherent power under the rule to impose lesser sanctions; adding as lesser sanction conditional dismissal and explicit warnings).]
    b. Findings.
        i. A trial court must address each of the three factors before deciding whether to dismiss a claim with prejudice under G.S. 1A-1, Rule 41(b) for failure to prosecute. The court's order must clearly indicate that the court considered lesser sanctions, as dismissal is the most severe sanction available in a civil action. [*Wilder v. Wilder,* 146 N.C. App. 574, 553 S.E.2d 425 (2001); *Daniels v. Montgomery Mut. Ins. Co.,* 320 N.C. 669, 360 S.E.2d 772 (1987) (dismissal with prejudice is a harsh sanction); *McKoy v. McKoy,* 214 N.C. App. 551, 714 S.E.2d 832 (2011) (trial court must, before dismissing with prejudice, make findings of fact and conclusions of law that indicate that it considered less drastic sanctions than dismissal).]
        ii. Failure to demonstrate consideration of lesser sanctions requires reversal, even if findings on other factors are made. [*McKoy v. McKoy,* 214 N.C. App. 551, 714 S.E.2d 832 (2011) (dismissal based on party's failure to take any steps to pursue her counterclaim for twenty-six months was remanded to trial court because

judgment did not show trial court had considered lesser sanctions; trial court had made findings in support of its conclusion that party failed to prosecute her equitable distribution (ED) counterclaim, for example, that she had failed to schedule a status conference or a scheduling or discovery conference, had failed to calendar any dates for an initial pretrial or final pretrial conference, and had failed to produce any initial disclosures or an ED inventory affidavit).]

iii. The following quoted statements in trial court orders were found to sufficiently show that the trial court considered lesser sanctions. For cases affirming dismissal with prejudice as a sanction for discovery violation and for failure to prosecute, see *In re Pedestrian Walkway Failure,* 173 N.C. App. 237, 251, 618 S.E.2d 819, 829 (2005) (dismissal pursuant to G.S. 1A-1, Rules 37 and 41, both requiring consideration of lesser sanctions; "[t]he Court has carefully considered each of [Melton's] acts [of misconduct], as well as their cumulative effect, and has also considered the available sanctions for such misconduct. After thorough consideration, the Court has determined that sanctions less severe than dismissal would not be adequate given the seriousness of the misconduct"), *review denied*, 360 N.C. 290, 628 S.E.2d 382 (2006). *Cohen v. McLawhorn,* 208 N.C. App. 492, 505, 704 S.E.2d 519, 528 (2010) (citing *Pedestrian Walkway*) ("Sanctions short of this dismissal will not suffice in this case since the plaintiff has provided no information or facts as to why he or his representative did not appear when this case was called for trial to present evidence in the case and further the plaintiff has provided the Court with no information as to when it may be possible for this case to proceed, if it is not dismissed"); *Williard v. Williard,* 226 N.C. App. 202, 739 S.E.2d 627 (**unpublished**) (not paginated on Westlaw) (citing *Pedestrian Walkway*) (ED action filed in 1995 and administratively closed in 2004 without prejudice was properly dismissed in 2012 for failure to prosecute; the court "considered other sanctions less severe than dismissal with prejudice[, but was] unable to find anything short of a dismissal that would serve the purpose of Rule 41(b)"), *review denied*, 366 N.C. 598, 743 S.E.2d 222 (2013).]

c. Appeal of an order for involuntary dismissal.

i. The standard of review for an involuntary dismissal under G.S. 1A-1, Rule 41(b) is whether the findings of fact by the trial court are supported by competent evidence and whether the findings of fact support the trial court's conclusions of law and its judgment. [*Ray v. Greer,* 212 N.C. App. 358, 363, 713 S.E.2d 93, 97 (involuntary dismissal for failure to comply with court order; court noted that while the "statutes giving rise to the particular dismissal vary, the procedure for the trial court and, thereafter, the Court of Appeals on review appears to be the same"), *cert. denied,* 365 N.C. 362, 718 S.E.2d 634 (2011).]

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

III. Ex Parte Hearing

A. Procedure

1. G.S. 50B-2(e), *amended by* S.L. 2015-62, § 3.(b), effective Dec. 1, 2015, and applicable to documents filed and hearings held on or after that date, allows ex parte hearings to be conducted through video conference. The statute specifies that a hearing for an emergency or a permanent protective order cannot be conducted through video conference.
2. A plaintiff may request ex parte relief any time prior to hearing. [G.S. 50B-2(c)(1).] If a party proceeding *pro se* requests ex parte relief, the clerk must schedule a hearing within seventy-two hours of filing for relief or by the end of the next day on which the court is in session, whichever first occurs. [G.S. 50B-2(c)(6).]
3. G.S. 50B-2 requires that a "hearing" be held prior to issuance of an ex parte domestic violence protective order (DVPO), meaning that the judge must take evidence to determine whether to issue the ex parte order. [*Hensey v. Hennessy,* 201 N.C. App. 56, 685 S.E.2d 541 (2009) (an ex parte DVPO cannot be issued based only upon a verified complaint, without having the aggrieved party appear for a hearing before a judge or magistrate).]
4. The court of appeals held that because an ex parte hearing pursuant to G.S. Chapter 50B is a civil trial, G.S. 7A-198 requires that all ex parte hearings be recorded. [*Stancill v. Stancill*, 773 S.E.2d 890 (N.C. Ct. App. 2015).] However, for hearings conducted on or after July 31, 2015, G.S. 7A-198 was amended to specify that no recording is required for "ex parte or emergency hearings before a judge pursuant to Chapter 50B or 50C of the General Statutes." [G.S. 7A-198(e), *amended by* S.L. 2015-173, § 5, effective July 31, 2015.]
5. Continuance of an ex parte hearing.
    a. A continuance of a hearing after the issuance of an ex parte DVPO shall be limited to one extension of no more than ten days unless all parties consent or good cause is shown. The hearing on the return of the ex parte order shall have priority on the court calendar. [G.S. 50B-2(c)(5), *added by* S.L. 2012-20, § 1, effective Oct. 1, 2012, and applicable to actions or motions filed on or after that date; *Rudder v. Rudder*, 234 N.C. App. 173, 182 n.4, 759 S.E.2d 321, 328 n.4 (2014) (in dicta, considering amendment to be an indication of the General Assembly's current intent to limit the length of time an ex parte DVPO may continue in effect).]
    b. If a hearing is continued, Form AOC-CV-316, Order Continuing Domestic Violence Hearing and Ex Parte Order, allows the court to order that the ex parte order is continued until the date specified in the order for the new hearing.
6. If the district court is not in session in the county where ex parte relief is requested, a hearing can be scheduled in another county within the judicial district. [G.S. 50B-2(c)(6).]
7. While the statute allows the court to grant relief before service of process on a defendant, a court may inquire whether a plaintiff knows if the defendant is represented by counsel and, if so, may direct that counsel be notified.
8. If the judge denies the ex parte order, the plaintiff is still entitled to a hearing on the claim for a protective order unless the court dismisses the action pursuant to G.S. 1A-1, Rule 12(b). (It is not clear whether a trial court has authority to dismiss pursuant to Rule 12(b)(6) on the court's own motion.)

9. Hearing by a magistrate.
    a. The chief district court judge may authorize a magistrate to hear motions for emergency relief ex parte. [G.S. 50B-2(c1).]
    b. Before a magistrate may hear the motion, the magistrate must determine that the district court is not in session and that a district court judge is not available and will not be available for four or more hours. [G.S. 50B-2(c1).]

B. Grounds for an Ex Parte Order

1. If it clearly appears to the court, from specific facts shown, that "there is a danger of acts of domestic violence against the aggrieved party or a minor child," the court may enter ex parte orders it deems necessary for protection. [G.S. 50B-2(c)(1).]
2. The decision whether to grant an ex parte DVPO is "of necessity . . . predictive in nature, as the trial court must assess whether there is a substantial risk of future" harm. [*Hensey v. Hennessy,* 201 N.C. App. 56, 65, 685 S.E.2d 541, 548 (2009) (quoting *In re A.S.,* 190 N.C. App. 679, 690, 661 S.E.2d 313, 320 (2008)).]
3. Because of the "potentially serious consequences" of an ex parte DVPO, which may require a defendant to leave her home, to stay away from her children, to give up possession of a motor vehicle, and to surrender her "firearms, ammunition, and gun permits" to the sheriff, and which may, upon violation, result in the defendant being charged with a class A1 misdemeanor or with various felonies for certain violations, a trial court should issue an ex parte DVPO only it "clearly appears" upon "specific facts" that the aggrieved party is in danger of acts of domestic violence. [*Hensey v. Hennessy,* 201 N.C. App. 56, 61, 685 S.E.2d 541, 545–46 (2009).]

C. Findings

1. An ex parte DVPO must include specific findings that demonstrate "that there is a danger of acts of domestic violence against the aggrieved party or a minor child." [G.S. 50B-2(c)(1); *Hensey v. Hennessy,* 201 N.C. App. 56, 685 S.E.2d 541 (2009) (noting the lack of prior cases addressing the findings of fact required in an ex parte DVPO); *Rudder v. Rudder*, 234 N.C. App. 173, 759 S.E.2d 321 (2014) (citing *Hensey*).]
2. While findings are required, the findings do not have to fully comply with G.S. 1A-1, Rule 52. [*Hensey v. Hennessy,* 201 N.C. App. 56, 63, 685 S.E.2d 541, 547 (2009) (to require Rule 52 findings "would be inconsistent with the fundamental nature and purpose of an ex parte DVPO, which is intended to be entered on relatively short notice" in situations needing quick action).]
3. While it is preferable for a trial court to state separately its factual findings, a form ex parte DVPO that explicitly incorporated the allegations of the complaint has been found sufficient for appellate review. [*Hensey v. Hennessy,* 201 N.C. App. 56, 685 S.E.2d 541 (2009), and *Stancill v. Stancill*, 773 S.E.2d 890 (N.C. Ct. App. 2015).]
4. The following "specific facts" were sufficient, given their "recency and severity," for the trial court to conclude that plaintiff was in danger of acts of domestic violence: that two days before filing her complaint, defendant broke and hid plaintiff's cell phone, heckled plaintiff, put her in a headlock, dragged her and banged her into a wall, and then chased

plaintiff as she sought help. Further, the complaint stated that plaintiff was twenty-nine weeks pregnant with defendant's child; plaintiff and defendant had other pending domestic violence proceedings, and plaintiff believed that she was in serious danger. [*Hensey v. Hennessy,* 201 N.C. App. 56, 65–66, 685 S.E.2d 541, 548 (2009); *Rudder v. Rudder*, 234 N.C. App. 173, 759 S.E.2d 321 (2014) (form ex parte DVPO that neither included specific facts nor referenced the allegations of the complaint was "minimally adequate" when finding 2 specified the date of the most recent conduct by defendant and four of the five subparts of finding 4 were checked and plaintiff's broken rib was identified as the serious injury inflicted by defendant; court noted, however, that better practice would be to include more specific facts under finding 2 explaining the basis for the ultimate findings made by checking the boxes on the preprinted form).]

D. Relief Authorized

1. The relief authorized in G.S. 50B-3(a) applies to ex parte requests as well as to requests for relief made after service of process and notice of hearing. Those provisions are set out in Section V.E, below.
2. The court may order temporary child custody. The temporary custody provided for in an ex parte order is different from temporary custody awarded after notice and a hearing.
   a. A temporary order for custody ex parte and prior to service shall not be entered unless the court finds that the child is exposed to "a substantial risk of physical or emotional injury or sexual abuse." [G.S. 50B-2(c)(2).]
   b. The statute does not require actual injury or sexual abuse but a substantial risk of one of those.
   c. Upon finding that the child is exposed to "a substantial risk of physical or emotional injury or sexual abuse," upon request of the aggrieved party, the court shall consider and may order the other party to:
      i. Stay away from a minor child or
      ii. Return a minor child to, or not remove the child from, the physical care of the parent or person in loco parentis. [G.S. 50B-2(c)(3).]
   d. The court can enter the custody provisions listed in Section III.D.2.c, immediately above, upon finding that those provisions are:
      i. In the best interest of the child and
      ii. Necessary for the child's safety. [G.S. 50B-2(c)(3).]
   e. If the court awards temporary custody to the aggrieved party, upon finding that it is in the best interest of the child to have contact with the other party, the court must specify the terms of contact in an order designed to protect the safety and well-being of the child and aggrieved party. [G.S. 50B-2(c)(4).] The order may include:
      i. A specific schedule setting out the time and location for the exchange of the child,
      ii. Provisions for supervision by a third party or a supervised visitation center, and
      iii. Any other provisions that ensure the well-being of the minor child and the aggrieved party. [G.S. 50B-2(c)(4).]

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

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

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

a. The court must ask the plaintiff, at an ex parte or emergency hearing, about (1) the defendant's ownership of or access to firearms, ammunition, or permits to purchase firearms or to carry concealed firearms and (2) identifying information for those items. [G.S. 50B-3.1(b).]

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

i. Used or threatened to use a deadly weapon, or has a pattern of prior conduct involving the use or threatened use of a firearm against a person; or

ii. Has made threats to seriously injure or kill the aggrieved party or minor child; or

iii. Has made threats to commit suicide; or

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

c. It is error for the court to enter an order requiring surrender of firearms without making one of the findings required by G.S. 50B-3.1(a). [*Stancill v. Stancill*, 773 S.E.2d 890 (N.C. Ct. App. 2015).]

d. Finding that defendant threatened suicide was sufficient to support order of surrender of firearms as part of an ex parte protective order. [*Stancill v. Stancill*, 773 S.E.2d 890 (N.C. Ct. App. 2015).]

e. G.S. Chapter 50B does not give the trial court authority to order that law enforcement search the defendant's person, vehicle, and residence and seize any weapons found. [*State v. Elder,* 368 N.C. 70, 773 S.E.2d 51 (2015), *aff'g as modified* 232 N.C. App. 80, 753 S.E.2d 504 (2014).]

f. An ex parte order is a "protective order" for purposes of G.S. 14-269.8 and 50B-3.1. [*State v. Poole,* 228 N.C. App. 248, 745 S.E.2d 26, *writ and review denied, appeal dismissed,* 367 N.C. 255, 749 S.E.2d 885 (2013).]

g. For a discussion of a defendant's right to have surrendered firearms returned and the procedure therefore, see Section VI.A, below.

E. Expiration of an Ex Parte Order

1. Ex parte orders entered by a district court judge.
   a. G.S. 50B-2(c) does not specify a date or time for expiration of an ex parte order issued by a district court judge.
   b. G.S. 50B-2(c)(5) provides that a hearing must be held within ten days of the issuance of an ex parte order or within seven days from the date of service of process on the other party, whichever occurs later.
   c. An ex parte order will not expire unless the order includes a specific expiration date. [*See, e.g., Campen v. Featherstone,* 150 N.C. App. 692, 564 S.E.2d 616 (because the statute authorizing an ex parte order does not specify that the order expires on a certain date, nor does case law establish a definite period of viability for temporary custody orders, the ex parte order does not expire), *appeal dismissed, review denied,* 356 N.C. 297, 570 S.E.2d 504 (2002).]
   d. Form AOC-CV-304, Ex Parte Domestic Violence Order of Protection, provides a space for the court to enter a date after which the ex parte order ceases to be effective.
2. Ex parte orders entered by a magistrate.
   a. An ex parte order entered by a magistrate expires by the end of the next day that the district court is in session in the county in which the action was filed. The magistrate must schedule an ex parte hearing before a district court judge before the order expires. [G.S. 50B-2(c1).] The defendant is not entitled to notice of this second ex parte hearing.
   b. Following the entry of an ex parte order by a magistrate, the district court judge proceeds with an ex parte hearing in accordance with G.S. 50B-2(c). [G.S. 50B-2(c1).]

IV. Emergency Hearing

A. Procedure

1. An emergency hearing is held if requested by a party whether or not an ex parte hearing was held or an ex parte order was entered. [G.S. 50B-2(b).]
2. G.S. 50B-2(e), *amended by* S.L. 2015-62, § 3.(b), effective Dec. 1, 2015, and applicable to documents filed and hearings held on or after that date, allows ex parte hearings to be conducted through video conference. The statute specifies that a hearing for an emergency or a permanent protective order cannot be conducted through video conference.
3. An emergency hearing is different from the ex parte hearing and is held after notice to defendant. **NOTE:** Form AOC-CV-303, Complaint and Motion for Domestic Violence Protective Order, contains a request for emergency relief as part of the standard language.
4. If service of process on defendant is not complete, no hearing is required. [G.S. 50B-2(b).]

5. Ex parte order entered.
   a. If an ex parte order was entered, the hearing shall be held within ten days of the issuance of the ex parte order or within seven days from the date of service of process on the defendant, whichever occurs later. [G.S. 50B-2(c)(5); *Henderson v. Henderson,* 234 N.C. App. 129, 758 S.E.2d 681, *review denied*, 763 S.E.2d 521 (N.C. 2014).]
   b. If the ex parte order was issued in a *pro se* proceeding, the clerk sets a date for the emergency hearing, issues a notice of hearing, and causes service to be had on the defendant. [G.S. 50B-2(c)(7).]
6. No ex parte order entered.
   a. If no ex parte order was entered, the hearing shall be held five days after notice of hearing or after five days from the date of service of process, whichever occurs first. [G.S. 50B-2(b).]
   b. If the plaintiff is proceeding *pro se*, requests emergency relief, and does not request an ex parte hearing, the clerk sets a date for the emergency hearing within the time periods set out in Section IV.A.6.a, immediately above, issues a notice of hearing, and causes service to be had on the defendant. [G.S. 50B-2(b).]

B. Grounds for Emergency Relief

1. G.S. 50B-2(b) allows a party to move for emergency relief if he or she believes there is a danger of serious and immediate injury to himself or herself or a minor child.
2. The statute does not provide a standard for entry of an emergency order. However, G.S. 50B-3 seems to provide that if the court finds that an act of domestic violence has occurred, the court must grant an emergency order that, at a minimum, restrains the defendant from further acts of domestic violence.

C. Relief Authorized

1. The relief authorized in G.S. 50B-3(a) applies to requests for relief made at an emergency hearing. Those provisions are set out in Section V.E, below.
2. The judge is required to make the same firearm inquiries at the emergency hearing as she is required to make at the ex parte hearing. See Section III.D.3.a, above.
3. Upon issuance of an emergency order, the court must order the defendant to surrender all firearms, machine guns, ammunition, and permits to purchase and carry concealed firearms that are in defendant's care, custody, possession, ownership, or control upon finding any of the factors in G.S. 50B-3.1(a), which are set out in Section III.D.3.b, above.
4. For a discussion of a defendant's right to have surrendered firearms returned and the procedure therefore, see Section VI.A, below.

V. Protective Orders

A. Jurisdiction

1. The district court has original jurisdiction over actions instituted under G.S. Chapter 50B. [G.S. 50B-2(a).]
2. In addition to proper service, the long-arm statute, G.S. 1-75.4, must authorize the exercise of jurisdiction, and the exercise of jurisdiction must comport with due process of law. [*Mannise v. Harrell*, 791 S.E.2d 653 (N.C. Ct. App. 2016) ("minimum contacts" are required for G.S. Chapter 50B proceedings). *See also Bates v. Jarrett,* 135 N.C. App. 594, 521 S.E.2d 735 (1999) (nonresident husband's act of transferring car title to a third party in violation of a North Carolina domestic violence protective order granting wife possession provided sufficient minimum contacts for the exercise of personal jurisdiction in wife's equitable distribution (ED) action).]
3. Courts in other jurisdictions have found the use of interstate mail or telephone facilities sufficient minimum contacts for the assertion of personal jurisdiction over a nonresident defendant under a long-arm statute. [*See McNair v. McNair,* 151 N.H. 343, 350, 856 A.2d 5, 13 (2004) (exercise of long-arm jurisdiction based on "multiple harassing phone calls" made by defendant in Texas to plaintiff in New Hampshire was fair and reasonable); *Beckers v. Seck,* 14 S.W.3d 139 (Mo. Ct. App. 2000) (nonresident uncle's harassing calls and mailings purposefully directed at his niece in Missouri provided sufficient minimum contacts for Missouri court to exercise jurisdiction); *A.R. v. M.R.*, 351 N.J. Super. 512, 799 A.2d 27 (App. Div. 2002) (nonresident husband's threats to exact revenge, and telephone calls to wife who had fled to New Jersey, were tantamount to physical pursuit of the victim in New Jersey and served as the requisite minimum contacts with New Jersey, even though the acts of domestic violence were committed in another state and husband did not physically enter New Jersey); *cf. Caplan v. Donovan,* 450 Mass. 463, 879 N.E.2d 117 (five or six daily calls by nonresident partner to cell phone of partner who had fled to Massachusetts did not amount to tortious injury for purposes of personal jurisdiction under Massachusetts long-arm statute when there was no evidence as to the content of the calls, that resident partner was in fear because of the calls, or that the calls were threatening), *cert. denied,* 553 U.S. 1018, 128 S. Ct. 2088 (2008).]
4. A plaintiff is not required to allege or prove facts sufficient to support the conclusion that defendant has minimum contacts with North Carolina until defendant raises an objection to personal jurisdiction. When the issue is raised, plaintiff must present evidence sufficient to show that minimum contacts can be established at trial. [*Mannise v. Harrell*, 791 S.E.2d 653 (N.C. Ct. App. 2016) (after defendant raised objection to personal jurisdiction, plaintiff failed to meet her burden of presenting evidence sufficient to show she would be able to prove minimum contacts; argument from her lawyer forecasting evidence that would be produced was insufficient).]
5. When a party seeks a determination of custody or visitation rights in an action under G.S. Chapter 50B, subject matter jurisdiction over the action is determined by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), just as it is in any other custody dispute. Chapter 50B does not provide alternative grounds for jurisdiction over custody disputes. [*See Danna v. Danna,* 88 N.C. App. 680, 364 S.E.2d 694 (holding that

North Carolina trial judge, having properly declined to exercise jurisdiction under the UCCJA, the statute in effect until adoption of the UCCJEA, in favor of a Florida court that was exercising jurisdiction over the parties' custody dispute, did not err by failing to address mother's Chapter 50B claims filed in the same proceeding), *review denied,* 322 N.C. 479, 370 S.E.2d 221 (1988).] For more on jurisdiction under the UCCJEA, see *Child Custody*, Bench Book, Vol. 1, Chapter 4.

B. Mutual Claims for Domestic Violence Protective Orders

1. Protective orders, including consent orders, shall not be mutual in nature except when both parties file a claim and the court makes detailed findings indicating that:
   a. Both parties acted as aggressors,
   b. Neither party acted primarily in self-defense, and
   c. The right of each party to due process is preserved. [G.S. 50B-3(b).]
2. In addition to the findings above, for relief to be ordered against the plaintiff, the defendant must serve a pleading (counterclaim) on the plaintiff. [G.S. 50B-3(b) (requiring both parties to file a claim). *See also Bryant v. Williams,* 161 N.C. App. 444, 446 n.2, 588 S.E.2d 506, 508 n.2 (2003) (the court recognizing, in dicta, that mutual claims require an additional complaint and detailed findings by the court).]
3. When both parties file a claim for relief, it is error for the court to dismiss a second action filed without a hearing after entering judgment in the first action filed. [*Holder v. Kunath*, 781 S.E.2d 806 (N.C. Ct. App. 2016) (court erred in dismissing second filed claim without a hearing on the basis that the second claim was simply a "dueling 50B" request).]

C. Hearing

1. G.S 7A-198 requires that all civil trials held in district court be recorded, and a hearing for a protective order pursuant to G.S. Chapter 50B is a civil trial. [*See Stancill v. Stancill*, 773 S.E.2d 890 (N.C. Ct. App. 2015) (holding that ex parte hearing pursuant to Chapter 50B must be recorded).] However, for hearings conducted on or after July 31, 2015, G.S. 7A-198 was amended to specify that ex parte and emergency hearings pursuant to G.S. Chapter 50B and 50C do not need to be recorded. [G.S. 7A-198(e), *amended by* S.L. 2015-173, § 5, effective July 31, 2015.]
2. G.S. 50B-2(e), *added by* S.L. 2015-62, § 3.b, effective Dec. 1, 2015, and applicable to documents filed and hearings held on or after that date, allows ex parte hearings to be conducted through video conference. The statute specifies that a hearing for an emergency or a permanent protective order cannot be conducted through video conference.
3. Purpose of the domestic violence protective order (DVPO) hearing.
   a. When an ex parte order has been issued:
      i. The purpose of the DVPO hearing is to determine whether the protective order should be continued beyond the temporary time frame of the ex parte DVPO. [*Henderson v. Henderson*, 234 N.C. App. 129, 758 S.E.2d 681, *review denied*, 763 S.E.2d 521 (N.C. 2014).]

ii. The purpose of the DVPO hearing is not to determine whether to continue the ex parte DVPO, as the process of issuing an ex parte DVPO is complete once the trial court determines that the complainant alone has alleged sufficient facts to show a danger of acts of domestic violence. [*Henderson v. Henderson*, 234 N.C. App. 129, 758 S.E.2d 681, *review denied*, 763 S.E.2d 521 (N.C. 2014).]

4. Evidence.

a. While the results of a department of social services (DSS) investigation into allegations of sexual abuse of minor children may be relevant to the issue of domestic violence, the fact that there is or has been a DSS investigation is not evidence that can be used to support a finding that there has been domestic violence. [*Burress v. Burress,* 195 N.C. App. 447, 672 S.E.2d 732 (2009).] However, testimony about a defendant's conduct that repeated statements made in an ongoing DSS investigation has been found relevant to the issue of domestic violence in a DVPO hearing. [*Henderson v. Henderson*, 234 N.C. App. 129, 758 S.E.2d 681 (distinguishing *Burress*) (mother's testimony, that included statements made by her children about their treatment while with defendant father, was not rendered irrelevant and incompetent because those statements also had been made to DSS), *review denied*, 763 S.E.2d 521 (N.C. 2014).]

b. Hearsay.

i. Testimony by plaintiff mother that her son told her of inappropriate conduct by defendant father was hearsay, which had been admitted by the court for the limited purpose of explaining why plaintiff left the residence she shared with defendant, so it was not competent to support a finding that defendant committed an act of domestic violence against son. [*Burress v. Burress,* 195 N.C. App. 447, 672 S.E.2d 732 (2009). *Cf. Henderson v. Henderson,* 234 N.C. App. 129, 758 S.E.2d 681 (citing *State v. Wood,* 311 N.C. 739, 319 S.E.2d 247 (1984)) (when defendant father failed to assert a hearsay objection, plaintiff mother's testimony about incidents that occurred when children were with defendant and which children had described to her, was admissible despite mother's inability to provide specific dates of the incidents; a child's uncertainty as to time or date goes to the weight rather than the admissibility of the evidence), *review denied*, 763 S.E.2d 521 (N.C. 2014).] For more on evidence issues arising in the context of a child victim or witness, see Jessica Smith, *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*, Admin. of Just. Bull. No. 2008/07 (UNC School of Government, Dec. 2008), http://sogpubs.unc.edu/electronicversions/pdfs/aojb0807.pdf.

ii. Plaintiff's testimony that she had been diagnosed with neck strain after being assaulted by defendant was inadmissible hearsay. When her testimony was the only evidence of that diagnosis and the trial court made a specific finding that plaintiff suffered neck strain, the trial court relied on the inadmissible testimony, making the error prejudicial and not harmless. [*Little v. Little,* 226 N.C. App. 499, 739 S.E.2d 876 (2013).]

c. Privileges.

i. Against self-incrimination. A parent's decision to invoke his Fifth Amendment right to remain silent when asked during custody trial about his alleged

involvement in drug trafficking prevented court from determining parent's fitness to have custody; father's complaint for custody properly dismissed. [*Qurneh v. Colie,* 122 N.C. App. 553, 471 S.E.2d 433, *appeal withdrawn,* 343 N.C. 752, 477 S.E.2d 34 (1996).] A witness does not waive his privilege against self-incrimination by voluntarily taking the stand to testify, except with regard to matters covered by the direct examination of the witness. [*Herndon v. Herndon*, 368 N.C. 826, 785 S.E.2d 922 (2016), *rev'g* 777 S.E.2d 141 (N.C. Ct. App 2015) (trial judge did not violate witness's privilege by questioning her about matters covered by her direct examination).] For application of the privilege in a criminal contempt proceeding, see Section VIII.C.3.g, below.

ii. Agents of domestic violence programs or rape crisis centers. [G.S. 8-53.12.]

D. Grounds for, and Findings and Conclusions to Support, a Protective Order

1. To enter a domestic violence protective (DVPO) order, the court must find that an act of domestic violence has occurred. [G.S. 50B-3(a).]
   a. A defendant does not have to commit a criminal act for a trial court to determine that an act of domestic violence has occurred. [*Metts v. Metts,* 223 N.C. App. 210 (2012) (**unpublished**) (rejecting defendant's argument that his acquittal of assault charges on plaintiff's sister precluded entry of a DVPO; other findings supported entry of the DVPO).]
   b. Previous statutory language requiring the court to grant an order "to bring about a cessation of acts of domestic violence" was omitted in a 2005 legislative change. [S.L. 2005-423, § 1.] Although appellate courts continue to cite to earlier cases citing that language as the standard for issuance of an order, it is no longer the statutory standard.
   c. While the court of appeals "appreciate[s] the usefulness" of form orders in domestic violence cases, it has emphasized that a trial court should not neglect its responsibility to make necessary findings and conclusions. [*Price v. Price,* 133 N.C. App. 440, 441 n.2, 514 S.E.2d 553, 554 n.2 (1999) (DVPO was reversed when it did not contain any findings or conclusions; trial judge did not check any boxes under the "Findings" and "Conclusions" sections of the AOC form used).]
2. Even though G.S. 50B-3(a) requires that the trial court "find" that an act of domestic violence has occurred, this is a conclusion of law. [*Kennedy v. Morgan,* 221 N.C. App. 219, 223 n.2, 726 S.E.2d 193, 196 n.2 (2012) (noting that Form AOC-CV-306, Domestic Violence Order of Protection, correctly identifies the language as a conclusion of law).]
3. The trial court must make findings of fact based upon the definition of domestic violence in G.S. 50B-1(a) to support the conclusion that an act of domestic violence has occurred. [*Kennedy v. Morgan,* 221 N.C. App. 219, 223 n.2, 726 S.E.2d 193, 196 n.2 (2012); *Brandon v. Brandon*, 132 N.C. App. 646, 513 S.E.2d 589 (1999) (where a protective order does not contain a conclusion of law supported by adequate findings of fact that domestic violence has occurred, the conclusion of law cannot provide grounds for issuance of the DVPO).]
4. Each finding of fact, conclusion of law, and mandate of the DVPO must be supported by competent evidence or the order will be reversed. [*Wilson v. Wilson,* 134 N.C. App. 642, 518 S.E.2d 255 (1999) (citing *Price v. Price,* 133 N.C. App. 440, 514 S.E.2d 553 (1999));

Price (DVPO was reversed, instead of remanded for required findings, where there was no evidence to support a conclusion of domestic violence; remand would have been futile).]

5. Findings/evidence not sufficient.
    a. Harassment/emotional distress.
        i. The following sole finding, made to support a conclusion that defendant committed an act of domestic violence based on continued harassment sufficient to cause substantial emotional distress, was not sufficient: that "[a]fter a long history of abuse plaintiff separated from the defendant and finished counseling through family circumstances, she remains afraid of the defendant who tries to intimidate her—surveillance on her house at late hours, making the plaintiff and her neighbors apprehensive." [*Kennedy v. Morgan*, 221 N.C. App. 219, 220, 223, 726 S.E.2d 193, 194, 196 (2012) (vague finding of a general "history of abuse" is not a finding of an "act of domestic violence" as that term is defined in G.S. 50B-3(a)).]
        ii. When daughters did not testify, and no other witnesses testified, as to the impact on daughters of father's installation of a hidden camera in daughters' bathroom, evidence was insufficient to support finding that father's conduct harassed mother to such an extent as to inflict substantial emotional distress on mother or daughters. [*Fairbrother v. Mann*, 225 N.C. App. 654, 738 S.E.2d 454 (2013) (**unpublished**) (while mother testified that she was "fearful" for her daughters' safety, she did not present any evidence of her substantial emotional distress; camera was discovered and removed before any filming of daughters took place).]
    b. Act of domestic violence occurred.
        i. That plaintiff may have been "afraid" or "apprehensive" because of defendant's actions in hiring a private investigator (PI) to conduct surveillance of plaintiff did not support a determination of domestic violence. Evidence showed that the PI service was professional, had not broken any laws, and that its investigators had not been on plaintiff's property or approached the individuals residing in plaintiff's home. [*Kennedy v. Morgan,* 221 N.C. App. 219, 726 S.E.2d 193 (2012).]
        ii. At hearing on plaintiff mother's complaint seeking DVPO against defendant father, hearsay testimony by plaintiff that son told her of inappropriate sexual conduct by defendant, admitted by the trial court for the limited purpose of explaining why plaintiff left the residence she shared with defendant, was not competent to support a finding that defendant committed an act of domestic violence against son. Further, evidence that at the time of the hearing DSS was investigating allegations that defendant sexually abused the parties' children was not relevant, without results of the investigation, to the issue of whether defendant committed domestic violence against the children. [*Burress v. Burress*, 195 N.C. App. 447, 672 S.E.2d 732 (2009).]
6. Findings/evidence sufficient
    a. The following evidence supported the determination that defendant tormented, terrorized, or terrified plaintiff, causing plaintiff to avoid staying at his residence and to take steps to obscure when he arrived at his office: defendant waited in the middle

of the night at plaintiff's apartment and began yelling and blowing the horn upon his return, would look in the windows of plaintiff's residence, called and sent text messages on both plaintiff's work and cell phones after being asked to cease communication, chased plaintiff into his work place and threatened to contact his human resources manager, and circled plaintiff's office parking lot looking for his car. [*Judson v. Weiss,* 225 N.C. App. 654, 738 S.E.2d 454 (2013) (**unpublished**).]

b. Evidence that defendant contacted plaintiff repeatedly over the space of a month after plaintiff told him not to contact her, that he continued to contact her after plaintiff filed for a domestic violence protective order, that he left her one "hostile" voicemail, that she was afraid of him, and that his actions caused her anxiety and sleeplessness and caused her to alter her normal daily activities due to her anxiety and inability to work was sufficient to support the conclusion that defendant placed plaintiff in fear of continued harassment and caused her substantial emotional distress. [*Thomas v. Williams*, 773 S.E.2d 900 (N.C. Ct. App. 2015) (court of appeals rejected defendant's argument that his actions would not cause a reasonable person to experience fear, holding that subjective fear is all that is required to prove an act of domestic violence).]

c. Evidence that years before a request for a domestic violence protective order (DVPO) was filed defendant admitted to plaintiff that he tried to kill her, that one year before the request for the DVPO defendant sent a text to plaintiff threatening to kill himself, that one month before the request for the DVPO defendant sent texts to plaintiff threatening that she would have to "[t]ake the wrath that comes" if she did not reconcile with him, along with plaintiff's statement that she was in fear of defendant, was sufficient to support the conclusion that defendant placed plaintiff in fear of continued harassment. [*Stancill v. Stancill*, 773 S.E.2d 890, 892–93 (N.C. App. 2015) (rejecting defendant's contention that these actions would not cause a reasonable person to feel fear, the court of appeals again stated that domestic violence is determined based on the subjective fear of the plaintiff rather than on the objective reasonableness of that fear).]

d. Plaintiff's testimony that she was unable to engage in her profession of selling homes because she feared defendant would wait for her in an empty house to attack and kill her was sufficient to support the conclusion that plaintiff suffered substantial emotional distress as a result of defendant's conduct. [*Stancill v. Stancill*, 773 S.E.2d 890, 899 (N.C. Ct. App. 2015) (holding that "[a] level of fear so great that a person cannot perform the tasks required by her employment would likely cause 'substantial emotional distress' ").]

e. The following testimony at hearing supported trial's court findings of assault and attempted bodily injury, and those findings supported conclusion that defendant committed an act of domestic violence: (1) plaintiff's testimony that defendant grabbed her after she said that she would call 911 if he didn't leave, (2) responding deputy's testimony that plaintiff told him the same thing and that he saw a small mark "about an inch long" under plaintiff's ear, and (3) testimony of plaintiff's daughter that her mother "had a scratch on her face and on the side of her neck." [*Baker v. Baker,* 218 N.C. App. 454, 721 S.E.2d 763 (2012) (**unpublished**) (not paginated on Westlaw).]

E. Relief Authorized

1. Upon finding that an act of domestic violence has occurred, the court **must** grant a protective order restraining the defendant from further acts of domestic violence. [G.S. 50B-3(a).]
2. The court **has discretion** to enter a protective order or approve a consent agreement that:
   a. Grants a party possession of the residence or household of the parties and excludes the other party from the residence or household; [G.S. 50B-3(a)(2).]
   b. Requires a party to provide a spouse and his children suitable alternate housing; [G.S. 50B-3(a)(3).]
   c. Awards temporary custody and establishes temporary visitation rights for minor children; [G.S. 50B-3(a)(4). See Section V.E.3, below.]
   d. Orders the eviction of a party from the residence and assistance to the victim in returning to it; [G.S. 50B-3(a)(5).]
   e. Orders a party to support minor children as required by law; [G.S. 50B-3(a)(6).]
      i. The 2015 Child Support Guidelines clarify that the guidelines must be used when temporary child support is ordered as a form of relief in a domestic violence protective order entered pursuant to G.S. Chapter 50B.
      ii. See *Child Support*, Bench Book, Vol. 1, Chapter 3.
   f. Orders a party to support a spouse as required by law; [G.S. 50B-3(a)(7). See *Postseparation Support and Alimony*, Bench Book, Vol. 1, Chapter 2.]
   g. Provides for possession of the personal property of the parties, including the care, custody, and control of any animal owned, possessed, kept, or held as a pet by either party or minor child residing in the household; [G.S. 50B-3(a)(8), *amended by* S.L. 2009-425, § 1, effective Aug. 5, 2009, to provide for protection of pets.]
   h. Orders a party to refrain from doing any or all of the following:
      i. Threatening, abusing, or following the other party;
      ii. Harassing the other party, including by telephone, by visiting the home or workplace, or other means;
      iii. Cruelly treating or abusing an animal owned, possessed, kept, or held as a pet by either party or minor child residing in the household;
      iv. Otherwise interfering with the other party; [G.S. 50B-3(a)(9), *amended by* S.L. 2009-425, § 1, effective Aug. 5, 2009, to provide for protection of pets.]
   i. Awards attorney fees to either party; [G.S. 50B-3(a)(10).]
   j. Prohibits a party from purchasing a firearm for a time certain; [G.S. 50B-3(a)(11). See Section V.E.4, below, regarding when the court is required to order surrender of all firearms, ammunition, and permits.]
   k. Orders a party to attend and complete an abuser treatment program approved by the Domestic Violence Commission; [G.S. 50B-3(a)(12).] A list of approved abuser treatment programs may be found at www.councilforwomen.nc.gov/displayprograms-ab.aspx;

l. Includes any additional prohibitions or requirements the court deems necessary to protect any party or minor child. [G.S. 50B-3(a)(13).]

i. While often referred to as the catch-all relief provision because it authorizes the court to order, in addition to all other relief specifically authorized, any additional relief the court deems necessary to protect any party or minor child, this provision only gives the court the authority to impose prohibitions or requirements on the parties to the action. [*State v. Elder*, 773 S.E.2d 51 (N.C. 2015), *aff'g as modified* 232 N.C. App. 80, 753 S.E.2d 504 (2014) (trial court had no authority to order law enforcement to search defendant's person, vehicle and residence and seize any weapons found).]

ii. A district court exceeded its statutory authority when it ordered in an ex parte DVPO a general search of defendant's person, vehicle, and residence for unspecified weapons pursuant to G.S. 50B-3(a)(13). [*State v. Elder*, 773 S.E.2d 51 (N.C. 2015), *aff'g as modified* 232 N.C. App. 80, 753 S.E.2d 504 (2014).]

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

3. Upon request of either party at a hearing after notice or service of process, the court shall consider and may award temporary child custody and establish temporary visitation rights. [G.S. 50B-3(a1).]

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

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

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

i. Whether the minor child was exposed to a substantial risk of physical or emotional injury or sexual abuse;

ii. Whether the minor child was present during acts of domestic violence;

iii. Whether a weapon was used or threatened to be used during any acts of domestic violence;

iv. Whether a party caused or attempted to cause serious bodily injury to the aggrieved party or minor child;

v. Whether a party placed an aggrieved party or minor child in reasonable fear of imminent serious bodily injury;

vi. Whether a party caused an aggrieved party to engage involuntarily in sexual relations by force, threat, or duress;

vii. Whether there is a pattern of abuse against the aggrieved party or minor child;

viii. Whether a party has abused or endangered the minor child during visitation;

ix. Whether a party has used visitation as an opportunity to abuse or harass the aggrieved party;

x. Whether a party has improperly concealed or detained the minor child;

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

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

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

i. Ordering an exchange of the minor child in a protected setting or in the presence of an appropriate third party;

ii. Ordering visitation supervised by an appropriate third party or at a supervised visitation center or other approved agency;

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

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

iv. Ordering either or both parents to abstain from possession or consumption of alcohol or controlled substances during the visitation or for twenty-four hours preceding an exchange of the minor child;

v. Ordering the noncustodial parent to pay the costs of supervised visitation;

vi. Prohibiting overnight visitation;

vii. Requiring a bond from the noncustodial parent for the return and safety of the minor child;

viii. Ordering an investigation or appointment of a guardian ad litem or attorney for the minor child;

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

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

g. A temporary custody order entered as part of a protective order cannot exceed one year in total duration. [G.S. 50B-3(b).] Therefore, if a protective order including temporary custody is entered for one year, any subsequent renewal of the protective order cannot include a custody provision. Form AOC-CV-306A, Temporary Child Custody Addendum to Domestic Violence Protective Order, provides a space for the court to enter a date after which the temporary custody order ceases to be effective.

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

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

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

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

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

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

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

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

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

(c) Has made threats to commit suicide; or

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

iv. An ex parte order is a "protective order" for purposes of G.S. 14-269.8 and 50B-3.1. [*State v. Poole,* 228 N.C. App. 248, 745 S.E.2d 26, *writ and review denied, appeal dismissed,* 367 N.C. 255, 749 S.E.2d 885 (2013).]

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

b. Order for surrender of firearms.

i. G.S. 50B-3.1(d) allows the trial court to order a defendant to immediately surrender to the sheriff all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms that are in the care, custody, possession, ownership, or control of the defendant. [*See State v. Elder,* 232 N.C. App. 80, 753 S.E.2d 504 (2014) (applying the dictionary definition of "surrender" to find that G.S. 50B-3.1 requires a defendant, upon service of an emergency or ex parte order, to "immediately yield" to a law enforcement officer the weapons and permits set out in Section V.E.4.a, above), *aff'd as modified*, 368 N.C. 70, 773 S.E.2d 51 (2015).]

ii. It is error for the trial court to order surrender of weapons and permits without making one of the findings of fact required by G.S. 50B-3.1(a). [*Stancill v. Stancill*, 773 S.E.2d 890 (N.C. Ct. App. 2015).]

iii. G.S. 50B-3.1(d) does **not** give the trial court authority to order law enforcement to search defendant's person, vehicle, or residence for weapons and to seize the weapons. [*State v. Elder,* 368 N.C. 70, 773 S.E.2d 51 (2015), *aff'g as modified* 232 N.C. App. 80, 753 S.E.2d 504 (2014).]

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

(a) This provision was effective Dec. 1, 2011, and is applicable to offenses committed on or after that date. [S.L. 2011-268, § 23.]

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

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

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

F. Consent Judgments

1. A G.S. Chapter 50B protective order includes orders entered by a court after a hearing or with consent of the parties. [G.S. 50B-1(c).]
   a. A protective order under Chapter 50B entered by the court with the consent of the parties is treated in all respects like any other protective order. [G.S. 50B-1(c).]
   b. The hearing held on an application for an ex parte domestic violence protective order (DVPO) is "exactly" the type of hearing contemplated by G.S. 50B-1(c). [*State v. Poole,* 228 N.C. App. 248, 745 S.E.2d 26 (citing *State v. Byrd,* 363 N.C. 214, 675 S.E.2d 323 (2009)) (that an ex parte hearing is not an adversarial hearing at which both parties are present does not mean that it is not a "hearing" for purposes of G.S. 50B-1(c)), *writ and review denied, appeal dismissed,* 367 N.C. 255, 749 S.E.2d 885 (2013).]
   c. Mutual protective orders are prohibited, except in limited circumstances, even if the mutual orders are entered by consent. [G.S. 50B-3(b).] See Section V.B, above.
2. Findings of fact in consent judgments.
   a. Consent orders entered **on or after** Oct. 1, 2013.
      i. A consent order may be entered pursuant to G.S. Chapter 50B without findings of fact and conclusions of law if the parties agree in writing that no findings and conclusions will be included. The consent protective order will be valid and enforceable and shall have the same force and effect as a protective order entered with findings of fact and conclusions of law. [G.S. 50B-3(b1), *added by* S.L. 2013-237, § 1, effective Oct. 1, 2013, and applicable to orders entered on or after that date.]
      ii. Form AOC-CV-306, Domestic Violence Order of Protection (Consent Order), has a section for the parties to sign acknowledging entry of a consent judgment without findings of fact.
   b. Consent orders entered **before** Oct. 1, 2013.
      i. All consent orders entered pursuant to G.S. Chapter 50B that do not contain a finding or conclusion that defendant committed an act of domestic violence are void *ab initio*. [*Kenton v. Kenton,* 218 N.C. App. 603, 606, 724 S.E.2d 79, 82 (2012) (citing *Bryant v. Williams,* 161 N.C. App. 444, 588 S.E.2d 506 (2003)) (consent DVPO that "lacked any finding that defendant committed an act of domestic violence . . . was void *ab initio*").]
   c. Mutual DVPO.
      i. G.S. 50B-3(b) requires that the court make detailed findings of fact when entering a **mutual** DVPO indicating that both parties have filed claims pursuant to Chapter 50B, that both parties acted as aggressors, that neither party acted primarily in self-defense, and that the right of each party to due process is preserved. The statute specifies that this requirement applies to consent orders involving mutual claims for a DVPO as well as to those orders entered after a contested hearing.

VI. Return of Firearms

A. Return of Surrendered Firearms

1. No protective order entered at the expiration of an ex parte or emergency order. [G.S. 50B-3.1(e).]
   a. If no protective order is entered at the expiration of an ex parte or emergency order, defendant may retrieve a surrendered weapon unless the court finds that defendant is precluded from owning or possessing a firearm by:
      i. State or federal law [See Section VI.B, below] or
      ii. Final disposition of criminal charges arising from acts against the domestic violence victim. [G.S. 50B-3.1(e).]
   b. A sheriff may not return surrendered firearms to a defendant unless the court orders the return of firearms after concluding that defendant is not precluded from owning or possessing a firearm. [G.S. 50B-3.1(d)(2).]
2. Motion for return at expiration of a protective order or final disposition of criminal charges. [G.S. 50B-3.1(f).]
   a. The defendant must timely file a motion.
      i. A defendant must file a motion for return of a firearm or other covered item no later than ninety days after expiration of a protective order or final disposition of any pending criminal charges for acts against the domestic violence victim. [G.S. 50B-3.1(f).]
   b. Hearing required.
      i. Upon receipt of a motion for return, the court must schedule a hearing and provide written notice to the domestic violence victim, who has the right to appear and be heard, and to the sheriff who has control of the items. [G.S. 50B-3.1(f).]
   c. At the hearing, the court must:
      i. Determine whether defendant is subject to any state or federal law or court order that precludes defendant from owning or possessing a firearm; [G.S. 50B-3.1(f). See Section VI.B, below, for a partial list of federal and state statutes that ban firearms.]
      ii. Inquire whether:
         (a) The protective order has been renewed;
         (b) Defendant is subject to any other protective orders;
         (c) Defendant is disqualified from owning or possessing a firearm pursuant to 18 U.S.C. § 922 or any state law;
         (d) Defendant has any pending criminal charges, in either state or federal court, for acts committed against the domestic violence victim; [G.S. 50B-3.1(f).]

iii. Make findings;

(a) G.S. 50B-3.1(f) requires the trial court to conduct an inquiry before returning a defendant's firearms and to find facts as to the only substantive issue raised by the motion for the return of weapons defendant had surrendered: whether defendant was subject to any state or federal law or court order precluding defendant from owning or possessing a fireman. [*Gainey v. Gainey,* 194 N.C. App. 186, 669 S.E.2d 22 (2008) (when trial court did not address this issue and instead directed return of firearms to defendant after finding that sheriff had illegally seized them, the legality of which was not raised by defendant's motion and on which no relevant evidence was presented, matter was reversed and remanded for court to conduct the proper inquiry).]

iv. Deny the motion for return of a firearm or other covered item if the court finds that:

(a) Defendant is prohibited from owning or possessing a firearm pursuant to state or federal law or

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

B. Statutes Banning Firearms and Statutes Addressing Removal of Firearms Bans

The statutes discussed below comprise a partial list of federal and state statutes that ban firearms or address removal of a firearms ban.

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

a. Federal disability and restoration.

i. 18 U.S.C. § 922(g)(4) makes it unlawful for a person who has been adjudicated a "mental defective" or who has been committed to a mental institution to possess any firearm or ammunition. [*See Gainey v. Gainey,* 194 N.C. App. 186, 669 S.E.2d 22 (2008) (order directing return of surrendered weapons was reversed and matter remanded for court to consider whether defendant was precluded by this law from owning or possessing a firearm; appellate court noted the "highly persuasive" evidence that defendant had been committed to a mental institution two years prior to entry of the ex parte domestic violence protective order).] Page 4 of Form AOC-CV-319, Motion for Return of Weapons Surrendered under Domestic Violence Protective Order and Notice of Hearing, sets out 18 U.S.C. § 922(g) in its entirety.

ii. 18 U.S.C. § 925(c) sets out a procedure for a person prohibited from possessing or receiving firearms or ammunition to apply to the U.S. Attorney General for relief from federal firearms disabilities, which may be granted if the applicant establishes to the satisfaction of the Attorney General that she will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. However, the Bureau of Alcohol, Tobacco, Firearms and Explosives, the agency to whom an application for restoration of firearm privileges is to be made, states on its website that it is no longer making the restoration form available due to Congressional

appropriation restrictions and recommends that persons seeking relief from a federal firearm disability seek a presidential pardon. [*See* www.atf.gov/forms/download/atf-f-3210-1-notice.html; Benjamin M. Turnage, John Rubin, & Dorothy T. Whiteside, North Carolina Civil Commitment Manual ch. 12 and app. D (UNC School of Government, 2d ed. 2011) (hereinafter Civil Commitment Manual), www.sog.unc.edu/publications/books/north-carolina-civil-commitment-manual-second-edition.]

b. State disability and restoration.

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

(a) An applicant shall not be ineligible to receive a handgun permit under G.S. 14-404(c)(4) because of involuntary commitment to mental health services if the individual's rights have been restored under G.S. 14-409.42 (formerly G.S. 122C-54.1). [G.S. 14-404(g), *added by* S.L. 2008-210, § 3.(a), effective Dec. 1, 2008; *amended by* S.L. 2015-195, § 11.(b), effective Aug. 5, 2015, to recodify G.S. 122C-54.1(a) as G.S. 14-409.42(a).]

(b) However, S.L. 2013-369, § 9, effective Oct. 1, 2013, removed G.S. 14-404 from the list of statutes eligible for removal of disability by petition under G.S. 122C-54.1(a). G.S. 14-404(g) was not amended and continued to reference restoration under G.S. 122C-54.1. In 2015, G.S. 404(g) was amended to change the reference from G.S. 122C-54.1 to G.S. 14-409.42, reflecting the recodification of G.S. 122C-54.1 to G.S. 14-409.42 pursuant to S.L. 2015-195, § 11.(b), effective Aug. 5, 2015. The 2015 amendment did not restore G.S. 14-404 to the list of statutes eligible for removal of disability by petition. It is not clear whether G.S. 14-409.42 is available to a person seeking to remove a firearm ban imposed pursuant to G.S. 14-404(c)(4) after Oct. 1, 2013.

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

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

(a) An applicant shall not be ineligible to receive a concealed carry permit under G.S. 14-415.12(b)(6) because of an adjudication of mental incapacity or illness or an involuntary commitment to mental health

services if the individual's rights have been restored under G.S. 14-409.42. [G.S. 14-415.12(c), *amended by* S.L. 2013-369, § 11, effective Oct. 1, 2013; *amended by* S.L. 2015-195, § 11.(l), effective Aug. 5, 2015.]

(b) Before the 2013 amendment set out immediately above, G.S. 14-415.12(c) read as follows: An applicant shall not be ineligible to receive a concealed carry permit under [G.S. 14-415.12(b)(6)] because of an involuntary commitment to mental health services if the individual's rights have been restored under G.S. 122C-54.1. [G.S. 14-415.12, *added by* S.L. 2008-210, § 3.(b), effective Dec. 1, 2008.]

iii. G.S. 14-409.42 provides a procedure for an individual over the age of 18 to petition for the removal of the mental commitment bar. [S.L. 2015-195, § 11.(b) recodified G.S. 122C-54.1 as G.S. 14-409.42 effective Aug. 5, 2015.]

(a) An individual may petition for the removal of the disabilities pursuant to 18 U.S.C. § 922(g)(4) (set out in Section VI.B.1.a.i, above) and G.S. 14-415.12 (set out in Section VI.B.1.b.ii, above) arising out of a determination or finding required to be transmitted to the National Instant Criminal Background Check System by G.S. 14-409.43(1) through (6). The petitioner must establish by a preponderance of the evidence that he will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. [G.S. 14-409.42(a), (c). Note that S.L. 2015-195, § 11.(b), effective Aug. 5, 2015, recodified G.S. 122C-54.1 as G.S. 14-409.42.] Form AOC-SP-211, Petition and Order for Removal of Disability Prohibiting the Purchase, Possession or Transfer of a Firearm, may be used.

iv. For a discussion of the collateral consequences of commitment or admission to a mental health treatment facility on the right to own or possess firearms and an overview of involuntary commitment and the Federal Gun Control Act, see Civil Commitment Manual ch. 12 and app. D, www.sog.unc.edu/publications/books/north-carolina-civil-commitment-manual-second-edition.

2. Person subject to a civil protection order or in violation of a protection order.

a. Federal disability.

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

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

(b) This provision was correctly applied when the order at issue resulted from defendant's conviction in state court of assault and battery of a family or household member, with a 30-day sentence suspended for two years upon

the judge's hand-written condition "no violent, threatening or abusive contact [with] victim." [*United States v. Larson,* 843 F. Supp. 2d 641, 646 n.1 (W.D. Va. 2012) (rejecting defendant's argument that the court order described immediately above was not the type of order contemplated by the statute and holding that a formal DVPO issued after a hearing pursuant to state law is not required, only a "court order" that satisfies the elements of 18 § U.S.C. 922(g)(8)), *aff'd per curiam*, 502 F. App'x 336 (4th Cir. 2013) (**unpublished**).]

b. State disability.

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

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

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

(b) An emergency or ex parte order is a "protective order" for purposes of G.S. 14-269.8 and 50B-3.1. [*State v. Poole,* 228 N.C. App. 248, 745 S.E.2d 26, *writ and review denied, appeal dismissed,* 367 N.C. 255, 749 S.E.2d 885 (2013).]

(c) Criminal prosecution for violation of an ex parte order requiring the surrender of a defendant's firearms does not violate a defendant's due process rights under the U.S. or North Carolina Constitutions. [*State v. Poole,* 228 N.C. App. 248, 745 S.E.2d 26 (basis for a possible due process violation is entry of an ex parte order prior to notice and an opportunity to be heard, but exigencies of the domestic violence context justify a post-deprivation hearing; moreover, deprivation of the right to bear arms is for a short period of time and statutory requirements for issuance of an ex parte order

limit the risk of an erroneous deprivation), *writ and review denied, appeal dismissed*, 367 N.C. 255, 749 S.E.2d 885 (2013).]

iii. G.S. 50B-3.1(j), in accordance with G.S. 14-269.8, makes it a Class H felony to possess, purchase, or receive, or attempt to do so, a firearm, machine gun, ammunition, or a permit to purchase or carry a firearm if that person is subject to a DVPO or any successive protective order. [G.S. 50B-3.1(j), *amended by* S.L. 2011-268, § 24, effective Dec. 1, 2011, and applicable to offenses committed on or after that date.] Prosecutions for offenses committed before Dec. 1, 2011, are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions. [S.L. 2011-268, § 26.]

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

iv. G.S. 14-415.12(b)(8a) prohibits issuance of a permit to carry a concealed handgun (concealed handgun permit) to a person who is or has been adjudicated guilty of or received a prayer for judgment continued or suspended sentence for one or more crimes of violence constituting a misdemeanor under G.S. 50B-4.1 (violation of a protective order). [G.S. 14-415.12(b)(8a), *added by* S.L. 2015-195, § 7, effective July 1, 2015, and applicable to permit applications submitted on or after that date (other offenses listed in the statute).]

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

a. Federal disability.

i. 18 U.S.C. § 922(g)(9) makes it unlawful for a person convicted in any court of a misdemeanor crime of domestic violence to ever possess or receive any firearm or ammunition. [A misdemeanor crime of domestic violence is defined by 18 U.S.C. § 921(a)(33)(A) in part as an offense having as an element the use or attempted use of physical force.] For a discussion of the type of conviction that can serve as a predicate to the federal conviction under 18 U.S.C. § 922(g)(9), see Jeff Welty, *Vinson, Voisine, and Misdemeanor Crimes of Domestic Violence*, N.C. Crim. L., UNC Sch. of Gov't Blog (July 18, 2016), https://www.sog.unc.edu/blogs/nc-criminal-law/vinson-voisine-and-misdemeanor-crimes-domestic-violence. *See also United States v. Castleman,* 134 S. Ct. 1405 (U.S. 2014), *rev'g* 695 F.3d 582 (6th Cir. 2012) (defendant's guilty plea to "intentionally or knowingly caus[ing] bodily injury to" the mother of his child, a misdemeanor domestic assault under the relevant Tennessee statute, qualified as a misdemeanor conviction of domestic violence under 18 U.S.C. § 922(g)(9); the requirement of physical force in § 922(g)(9) was satisfied by the degree of force that supports a common law battery conviction; defendant's argument that the Tennessee statute did not have a use of physical force element was rejected when the indictment made clear that use of physical force was an element of his state conviction).]

(a) The Fourth Circuit has held that application of 18 U.S.C. § 922(g)(9) did not violate a defendant's Second Amendment right to bear arms for self-defense. [*United States v. Staten,* 666 F.3d 154 (4th Cir. 2011) (applying an intermediate scrutiny standard, defendant's as-applied Second Amendment challenge was rejected), *cert. denied*, 132 S. Ct. 1937 (U.S. 2012); *United States v. Chester,* 847 F. Supp. 2d 902 (S.D. W. Va. 2012) (applying intermediate level of scrutiny to a conviction under 18 U.S.C. § 922(g)(9) for illegal possession of firearms by a defendant convicted of a misdemeanor crime of domestic violence did not violate Second Amendment as applied to defendant), *aff'd per curiam*, 514 F. App'x 393 (4th Cir. 2013).]

ii. North Carolina convictions for communicating threats and misdemeanor stalking are not convictions for misdemeanor crimes of domestic violence pursuant to 18 U.S.C. § 921(a)(33)(A). [*Underwood v. Hudson*, 781 S.E.2d 295 (N.C. Ct. App. 2015). For further discussion, see Cheryl Howell, *Return of Firearms after a DVPO,* UNC Sch. of Gov't: On the Civil Side Blog (Dec. 18, 2015), http://civil.sog.unc.edu/return-of-firearms-after-a-dvpo, and Jeff Welty, *Vinson, Voisine, and Misdemeanor Crimes of Domestic Violence*, N.C. Crim. L., UNC Sch. of Gov't Blog (July 18, 2016), https://www.sog.unc.edu/blogs/nc-criminal-law/vinson-voisine-and-misdemeanor-crimes-domestic-violence.

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

b. State disability.

i. G.S. 14-415.12(b)(8b) prohibits issuance of a permit to carry a concealed handgun (concealed handgun permit) to a person who is prohibited from possessing a firearm pursuant to 18 U.S.C. § 922(g) as a result of a conviction of a misdemeanor crime of domestic violence. [G.S. 14-415.12(b)(8b), *added by* S.L. 2015-195, § 7, effective July 1, 2015, and applicable to permit applications submitted on or after that date.]

ii. North Carolina's restoration statute, G.S. 14-415.4, set out in Section VI.B.4.c, below, applies to felony convictions and does not cover misdemeanor convictions. [*See* Relief from a Criminal Conviction, UNC School of Government Microsite, "Firearm Rights after Felony Conviction," www.sog.unc.edu/resources/microsites/relief-criminal-conviction/firearm-rights-after-felony-conviction (hereinafter Firearm Rights after Felony Conviction).]

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

4. Person convicted of a felony.
    a. Disability under federal law.
        i. 18 U.S.C. § 922(g)(1) makes it unlawful for a person convicted of a crime punishable by imprisonment for a term exceeding one year, to ship, transport, possess, or receive any firearm or ammunition.
        ii. The term "crime punishable by imprisonment for a term exceeding one year" does not include any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less. [18 U.S.C. § 921(a)(20)(B).] This "describes almost all misdemeanors in North Carolina." [Firearm Rights after Felony Conviction, at n.3.]
    b. Federal law restoration.
        i. Federal law lifts the federal ban imposed by 18 U.S.C. § 922(g)(1) for felony convictions "if a person's civil rights have been restored unless the restoration does not permit the person to ship, transport, possess, or receive firearms." [*See* Firearms Rights after Felony Conviction; 18 U.S.C. § 921(a)(20).]
        ii. For a discussion of the effect of a restoration of firearm rights under G.S. 14-415.4, set out in Section VI.B.4.c, below, on the federal firearms ban, see John Rubin, *Restoring State Firearm Rights as a Condition for Restoring Federal Firearm Rights*, UNC Sch. of Gov't: NC Crim. L. Blog (Sept. 14, 2015), https://nccriminallaw.sog.unc.edu/restoring-state-firearm-rights-as-a-condition-for-restoring-federal-firearm-rights/. *See also* Firearm Rights after Felony Conviction (discussing North Carolina's restoration statute).
    c. Disability under state law.
        i. G.S. 14-404(c)(1) prohibits issuance of a permit for the purchase or receipt of a pistol (handgun permit) to a person who is under indictment for or has been convicted in any state or federal court, of a felony, unless the person is later pardoned or the person's firearm rights have been restored pursuant to G.S. 14-415.4, if the purchase or receipt of a handgun does not violate a condition of the pardon or restoration of firearm rights (exception for felonies pertaining to antitrust violations, unfair trade practices, or restraints of trade). [G.S. 14-404(c)(1), *amended by* S.L. 2010-108, § 4, effective Feb. 1, 2011, to add restoration under G.S. 14-415.4, and S.L. 2011-2, § 1 (clarifying effective date).]
        ii. G.S. 14-415.12(b)(3) prohibits issuance of a permit to carry a concealed handgun (concealed handgun permit) to a person who has been adjudicated guilty in any court of a felony, unless the person's firearm rights have been restored pursuant to G.S. 14-415.4 (exception for felonies pertaining to antitrust violations, unfair trade practices, or restraints of trade). [G.S. 14-415.12(b)(3).]
        iii. G.S. 14-415.1(a) makes it unlawful for any person who has been convicted of a felony to purchase, own, possess, or have custody, care, or control of any firearm.

(a) G.S. 14-415.1 does not apply to a person who, pursuant to the law of the jurisdiction in which the conviction occurred, has been pardoned or has had his or her firearm rights restored if such restoration of rights could also be granted under North Carolina law (exception for felonies pertaining to antitrust violations, unfair trade practices, or restraints of trade). [G.S. 14-415.1(d), (e), *amended by* S.L. 2011-268, § 13, effective Dec. 1, 2011, and applicable to offenses committed on or after that date; prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions). *See Booth v. State,* 227 N.C. App. 484, 742 S.E.2d 637 (affirming trial court determination that G.S. 14-415.1(d) did not apply to a plaintiff who had been granted a Pardon of Forgiveness in 2001 arising from a guilty plea in 1981 to one felony count of non-aggravated kidnapping; only requirement of statute, that both plaintiff's conviction and pardon occur in North Carolina, was met), *writ and review denied, review dismissed as moot*, 367 N.C. 224, 747 S.E.2d 525 (2013).]

d. State law restoration.

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

(a) For the definition of "nonviolent felony", see G.S. 14-415.4(a)(2). For the criteria that must be satisfied before a court can grant a petition to restore firearm rights pursuant to G.S. 14-415.4, see G.S. 14-415.4(d)(1) to (6). For matters that require a court to deny a petition to restore firearm rights pursuant to G.S. 14-415.4, see G.S. 14-415.4(e)(1) to (10).

ii. Restoration of firearms rights under G.S. 14-415.4 does not constitute an expunction or pardon of any criminal history record information. [G.S. 14-415.4(i).]

iii. The Felony Firearms Act, G.S. 14-415.1 *et seq.*, has been challenged on constitutional grounds.

(a) North Carolina's Felony Firearms Act has been found constitutional when challenged on procedural due process grounds. [*Johnston v. State,* 224 N.C. App. 282, 735 S.E.2d 859 (2012) (the Felony Firearms Act did not violate plaintiff's procedural due process rights under the North Carolina or U.S. Constitution; the portion of the trial court's order that found federal and state substantive due process violations when the act was applied to plaintiff was reversed and remanded for additional findings as to plaintiff's felony convictions and post-conviction history), *temporary stay allowed,*

366 N.C. 422, 562, 736 S.E.2d 180, *writ allowed, review on additional issues denied,* 366 N.C. 562, 738 S.E.2d 360, *appeal dismissed*, 366 N.C. 562, 738 S.E.2d 361, *aff'd per curiam*, 367 N.C. 164, 749 S.E.2d 278 (2013).]

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

C. Disposal of Surrendered Firearms if Items Not Returned to Defendant

1. The sheriff must apply to the court for an order to dispose of the surrendered items if:
   a. The defendant does not file a timely motion for return of surrendered items, or
   b. The court determines that the defendant is not entitled to have the surrendered items returned, or
   c. The defendant or third-party owner does not timely pay all fees owed for storage. [G.S. 50B-3.1(h).]
2. For return of a surrendered firearm or other surrendered item pursuant to a motion of a third-party owner, see G.S. 50B-3.1(g).

D. Copies of Orders Regarding Firearms to Be Provided to Parties and Certain Others

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

VII. Modification, Expiration, and Renewal of a Protective Order

A. Modification of a Protective Order

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

2. A party may move under G.S. 1A-1, Rule 60(b) to set aside a DVPO and also may seek to have a new order issued. Form AOC-CV-313, Motion to Renew or Set Aside Domestic Violence Protective Order/Notice of Hearing, may be used.

B. Setting Aside a Domestic Violence Protective Order (DVPO) pursuant to G.S. 1A-1, Rule 60(b)

1. A party may move under G.S. 1A-1, Rule 60(b) to set aside a DVPO and may also seek to have a new order issued. Form AOC-CV-313, Motion to Renew or Set Aside Domestic Violence Protective Order/Notice of Hearing, may be used.
2. A judge can consider setting aside a DVPO pursuant to Rule 60 on the court's own motion. [*Pope v. Pope*, 786 S.E.2d 373 (N.C. Ct. App. 2016).]
3. The trial court did not err in setting aside a DVPO pursuant to Rule 60(b)(5), which allows relief from judgment when "it is no longer equitable that the judgment should have prospective application," after finding that plaintiff no longer feared the defendant. [*Pope v. Pope*, 786 S.E.2d 373 (N.C. Ct. App. 2016).]

C. Expiration of a Protective Order

1. Protective orders shall be for a fixed period not to exceed one year. [G.S. 50B-3(b).]
2. A person who knowingly makes a false statement to a law enforcement agency or officer that a protective order entered pursuant to G.S. Chapter 50B or by the court of another state or Indian tribe remains in effect shall be guilty of a Class 2 misdemeanor. [G.S. 50B-4.2.]

D. Renewal of a Protective Order

1. Before expiration of the current order, the court may renew a domestic violence protective order (DVPO) for good cause for a fixed period of time not to exceed two years, including an order that previously has been renewed. [G.S. 50B-3(b), *amended by* S.L. 2005-423, § 1, effective Oct. 1, 2005, and applicable to orders entered on or after that date; limit was one year before that amendment.] While the motion must be filed before expiration of the current order, the hearing may be held after the current order expires.
   a. "Good cause" for the first renewal of a DVPO was that defendant had violated the DVPO since it was entered "and that plaintiff remained in fear of defendant for both her and her family." "Good cause" for a later renewal of the DVPO was that defendant admitted in court that he had been to the plaintiff's home and the trial court's finding that plaintiff remained in fear of defendant. [*Metts v. Metts,* 223 N.C. App. 210 (2012) (**unpublished**) (not paginated on Westlaw).]
   b. It is error to renew a DVPO without findings of fact to support the conclusion that good cause exists to support the renewal. [*Ponder v. Ponder*, 786 S.E.2d 44 (N.C. Ct. App. 2016), *review denied*, 797 S.E.2d 290 (N.C. 2017).]
2. Note, however, that temporary custody provisions cannot exceed one year in total duration. [G.S. 50B-3(a1)(4).] So, if the DVPO being renewed has provided for temporary custody for a year, the custody provision *cannot* be renewed.

3. A new act of domestic violence is not required for a renewal. [G.S. 50B-3(b). *Ponder v. Ponder*, 786 S.E.2d 44 (N.C. Ct. App. 2016) (noting that facts supporting entry of original DVPO may be sufficient to support conclusion of good cause to renew the order) *review denied*, 797 S.E.2d 290 (N.C. 2017). *See also Metts v. Metts,* 223 N.C. App. 210 (2012) (**unpublished**) (no criminal act required for renewal of a DVPO).]
4. G.S. 50B-3(b) contains no limit on the number of times a protective order may be renewed.
5. An order renewing a DVPO must be based on sufficient findings of fact and conclusions of law. [*Basden v. Basden,* 154 N.C. App. 520, 572 S.E.2d 442 (2002) (**unpublished**) (AOC form renewal order at the time contained only one pre-printed finding of fact, but renewal order was upheld because it incorporated by reference the original protective order, which was attached and contained sufficient findings of fact).] The current form, AOC-CV-314, Order Renewing Domestic Violence Protective Order, has space for the trial judge to state the findings of fact regarding good cause to renew the order.

VIII. Enforcement of a Civil Domestic Violence Protective Order

A. Generally

1. A valid protective order entered pursuant to G.S. Chapter 50B must be enforced by all North Carolina law enforcement agencies without further order of the court. [G.S. 50B-4(c).]
2. A valid protective order entered by the courts of another state or by the courts of an Indian tribe must be given full faith and credit and must be enforced in North Carolina as if it were an order issued by a North Carolina court, whether or not the order has been registered in North Carolina. [G.S. 50B-4(d). See Section VIII.E, below, for more on enforcement of an out-of-state domestic violence protective order.]
3. The term "valid protective order" as used in G.S. 50B-4(c) and (d) includes an emergency or ex parte order entered under G.S. Chapter 50B. [G.S. 50B-4(f), *added by* S.L. 2009-342, § 4, effective July 24, 2009.]

B. Two Ways to Enforce a Domestic Violence Protective Order

1. A motion for contempt, as set out in G.S. 50B-4(a), and
2. Criminal prosecution for the crime of violating a protective order, as set out in G.S. 50B-4.1(b).

C. Contempt [G.S. 50B-4.]

For an online module on contempt, see Michael Crowell, *Contempt of Court* (UNC School of Government, Nov. 2010), https://sog.adobeconnect.com/p30019876.

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

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

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

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

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

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

2. Contempt hearing.

a. Venue.

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

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

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

b. Right to court-appointed counsel.

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

ii. An alleged contemnor is entitled to court-appointed counsel in a civil contempt proceeding if (1) she is indigent **and** (2) there is a significant likelihood that she will actually be incarcerated as a result of the hearing. [*See McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993) (right based on Fourteenth Amendment

Due Process Clause); *King v. King,* 144 N.C. App. 391, 547 S.E.2d 846 (2001) (for appointment of counsel, a defendant must show that he is indigent and that his liberty interest is at stake); *Young v. Young,* 224 N.C. App. 388, 736 S.E.2d 538 (2012) (citing *Turner v. Rogers,* 564 U.S. 431, 131 S. Ct. 2507 (2011), and *King*) (father who failed to meet his burden of proving indigence not entitled to counsel at civil contempt hearing for failure to pay child support); *cf. Turner* (the Fourteenth Amendment Due Process Clause does not automatically require the State to appoint counsel at civil contempt proceedings for an indigent individual who is subject to a child support order, even if the individual faces incarceration for up to a year; nor is counsel required for an indigent individual who is subject to a child support order where the opposing parent or other party is not represented by counsel and the State provides "alternative procedural safeguards").] It has not been clear whether the holding in *McBride* was broad enough to require the appointment of counsel for civil contempt proceedings arising in contexts other than child support enforcement. In *D'Alessandro v. D'Alessandro*, 235 N.C. App. 458, 464, 762 S.E.2d 329, 334 (2014), the court of appeals extended the right to court-appointed counsel to an indigent defendant subject to civil contempt for failure to comply with a child custody order. In separate proceedings, consolidated on appeal, a trial court found a *pro se* father in civil contempt of custody and child support orders. After finding an "obvious likelihood" that father might be incarcerated if found in contempt, that father had not been advised of his right to counsel and had not waived that right, and that it appeared from the record that father was indigent, both orders were reversed "to the extent that they [held] defendant in contempt of the custody order and the child support order."

iii. For more on this issue, see *Contempt of Court*, Bench Book, Vol. 2, Chapter 4.

c. Award of attorney fees.

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

ii. Trial court's order requiring defendant in civil contempt of a marital dissolution agreement to pay attorney fees for his violation of the agreement was upheld. [*Marshall v. Marshall,* 233 N.C. App. 238, 757 S.E.2d 319 (2014) (defendant husband violated Tennessee marital dissolution agreement, registered and confirmed in North Carolina, that prohibited him from harassing his wife and two named individuals and authorized attorney fees upon a party's noncompliance).]

3. Criminal contempt.

a. In most domestic violence cases, the proceeding will be for criminal contempt rather than civil contempt because the purpose will be to punish a violation rather than to coerce compliance. [*See Hodges v. Hodges*, 156 N.C. App. 404, 577 S.E.2d 121 (2003) (when defendant was being punished for violation of a domestic violence protective order, contempt was criminal).] **NOTE**: The relevant AOC forms may be used for either civil or criminal contempt. [Form AOC-CV-307, Motion for Order to Show Cause Domestic Violence Protective Order; Form AOC-CV-308, Order to Appear

and Show Cause for Failure to Comply with Domestic Violence Protective Order; and Form AOC-CV-309, Contempt Order Domestic Violence Protective Order.]

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

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

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

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

   iii. If imprisonment is ordered, the judge should specify the beginning and end dates of the sentence; [Note that a sentence of imprisonment for criminal contempt is served day for day with no credit for good time, gain time, or earned time. *See* State of N.C. Dep't of Public Safety, Prisons—Policy and Procedure Manual ch. B (Inmate Conduct Rules, Discipline), §§ .0111(d)(2) (good time); .0112(c)(2) (gain time); .0113(f)(1) (earned time), www.doc.state.nc.us/dop/policy_procedure_manual/b0100.pdf.]

   iv. Indicate that the court applied the reasonable doubt standard; [G.S. 5A-15(f); *State v. Ford,* 164 N.C. App. 566, 596 S.E.2d 846 (2004) (citing *State v. Verbal,* 41 N.C. App. 306, 254 S.E.2d 794 (1979)) (superior court order of contempt, entered in a de novo plenary proceeding on appeal from a summary finding of contempt in district court, must indicate that the reasonable doubt standard of proof was applied); *State v. Phillips,* 230 N.C. App. 382, 750 S.E.2d 43 (citing *Ford* and *Verbal*) (order for indirect criminal contempt reversed for failure to indicate application of beyond a reasonable doubt standard), *temporary stay allowed,* 751 S.E.2d 212 (N.C. 2013), *review allowed*, 367 N.C. 329, 755 S.E.2d 629, *review dismissed as improvidently granted*, 367 N.C. 715, 766 S.E.2d 340 (2014).]

   v. Include findings of fact and be entered as a judgment. [G.S. 5A-15(f).]

d. Sanctions allowed for criminal contempt.

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

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

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

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

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

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

e. Bail procedure upon appeal if confinement ordered.

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

ii. A person found in criminal contempt who has given notice of appeal may be retained in custody no more than twenty-four hours from the imposition of confinement without a bail determination being made by a judicial official as set out in G.S. 5A-17(b), discussed immediately above. If the designated judicial official has not acted within twenty-four hours of the imposition of confinement, any judicial official shall act under G.S. 5A-17(b) and hold the bail hearing. [G.S. 5A-17(c), *added by* S.L. 2013-303, § 1, effective Dec. 1, 2013, and applicable to confinement imposed on or after that date.]

f. Double jeopardy may prohibit a subsequent criminal action against a defendant held in criminal contempt. [See discussion in Section XI.C, below.]

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

4. Civil contempt.

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

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

i. In *Marshall v. Marshall,* 233 N.C. App. 238, ___, 757 S.E.2d 319, 326 (2014), defendant was found in civil contempt for violating provisions in a DVPO prohibiting him from harassing and having contact with his former wife, even though defendant did not contact his former wife but contacted her friends and family members; court found that hateful and vulgar voicemail and email messages to wife's elderly parents, other family members, and friends resulted in wife being "incredibly tormented" and were intended to, and did, abuse and harass wife in violation of the domestic violence protective order (DVPO); moreover, messages directing the recipients to "tell" wife certain things "were indirect contacts with [wife] specifically barred by the DVPO."

ii. The defendant in *Marshall* also was found in civil contempt of a Tennessee marital dissolution agreement, registered and confirmed in North Carolina, that specifically prohibited him from harassing two named individuals, the Moores, even though the Moores were not parties to the agreement or to related court orders entered in Tennessee and North Carolina, based on the trial court's finding that the Moores were third-party beneficiaries of the agreement. [*Marshall v. Marshall,* 233 N.C. App. 238, 757 S.E.2d 319 (2014) (agreement of defendant's wife in the dissolution agreement to accept an unequal division of divisible property in exchange for defendant's agreement to stop harassing her and the Moores gave the Moores third-party beneficiary status).]

c. The remedy for civil contempt is imprisonment until respondent complies with the purge conditions set out in the civil contempt order. [G.S. 5A-21.] A person found in civil contempt may not be ordered to pay a fine. [G.S. 5A-21(d), *added by* S.L. 2015-210, § 1, effective Oct. 1, 2015, and applicable to civil contempt orders entered on or after that date, enacted to overrule decision to the contrary in *Tyll v. Berry*, 234 N.C. App. 96, 758 S.E.2d 411 (2014).]

D. Criminal Prosecution for the Crime of Violating a Domestic Violence Protective Order [G.S. 50B-4.1(b).]

1. For purposes of G.S. 50B-4.1, the term "valid protective order" includes an emergency or ex parte order entered under G.S. Chapter 50B. [G.S. 50B-4.1(h), *added by* S.L. 2009-342, § 5, effective July 24, 2009.] G.S. 50B-4.1(h) was added to clarify that a "valid protective order" is an order valid under whichever statute it falls, whether an ex parte order pursuant to G.S. 50B-2(c), an emergency order pursuant to G.S. 50B-2(b), or an order effective for one year pursuant to G.S. 50B-3. [*State v. Poole,* 228 N.C. App. 248, 745 S.E.2d 26, *writ and review denied, appeal dismissed,* 367 N.C. 255, 749 S.E.2d 885 (2013).]

   a. Under the revised statute, violation of an ex parte 50B order is a crime. [*See* G.S. 50B-4.1(a) (knowing violation of a valid protective order is a class A1 misdemeanor).]

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

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

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

i. "Knowledge may be implied from the circumstances. . . . Knowledge means 'an impression of the mind, the state of being aware; and this may be acquired in numerous ways and from many sources. It is usually obtained from a variety of facts and circumstances. Generally speaking, when it is said a person has knowledge of a given condition, it is meant that his relation to it, his association with it, his control over it and his direction of it are such as to give him actual information concerning it.' " [*Underwood*, 278 N.C. at 632, 181 S.E.2d at 7 (citations omitted).]

ii. In considering whether a licensee knowingly permitted the consumption of alcoholic liquors, *Underwood* further states that a licensee "who is aware of violations on his premises but who arranges never to see them cannot be said to be ignorant of their existence. He must take steps to avoid violations or suffer the penalties prescribed." [*Underwood*, 278 N.C. at 632, 181 S.E.2d at 7.]

iii. *See also State v. Bogle,* 324 N.C. 190, 376 S.E.2d 745 (1989) (North Carolina law allows knowledge to be inferred from circumstances); *State v. Williams,* 207 N.C. App. 136, 698 S.E.2d 542 (2010) (objective knowledge—meaning defendant reasonably should have known—is sufficient to support a criminal conviction); and *State v. Avery,* 315 N.C. 1, 31, 337 S.E.2d 786, 803 (1985) (defendant must know or "ha[ve] reasonable grounds to know" that person assaulted was a police officer).

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

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

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

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

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

a. To properly charge a defendant with felony violation of a DVPO, the state must comply with G.S. 15A-928 and charge the prior two misdemeanor convictions in either a special indictment or in a separate count in the principal indictment. Failure to do so is jurisdictional and deprives the trial court of jurisdiction over the felony charge. [*State v. Friend,* 221 N.C. App. 670, 729 S.E.2d 129 (**unpublished**) (when the state did not use a special indictment to charge defendant's prior misdemeanor convictions and did not incorporate the misdemeanor convictions in a separate count for each principal indictment, the principal indictments only charged defendant with misdemeanor violations of a DVPO; trial court lacked jurisdiction to enter judgment on the felony convictions), *writ denied, review denied,* 366 N.C. 392, 732 N.C. 349 (2012).]

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

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

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

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

   b. Language in two AOC forms addresses the issue. [See Form AOC-CV-306, Domestic Violence Order of Protection (Consent Order), and Form AOC-CV-304, Ex Parte Domestic Violence Order of Protection, both stating "[o]nly the Court can change this order," "plaintiff cannot give you [defendant] permission to violate this order," and the "court or judge is the only one that can make changes to this order."]

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

N.Y.S.2d 337 (App. Div. 2006) (express invitation to resume cohabitation, in violation of protective orders, did not provide a defense to criminal contempt convictions for violation thereof). *Cf. Mohamed v. Mohamed,* 232 N.J. Super. 474, 557 A.2d 696 (App. Div. 1989) (under the New Jersey Prevention of Domestic Violence Act of 1981, reconciliation of the parties destroys the viability of the protective order; protective order providing for temporary custody ceased to be effective upon reconciliation).]

8. Arrest with or without a warrant is mandatory if requirements in G.S. 50B-4.1(b) are met.
   a. A law enforcement officer must arrest a person and take a person into custody, with or without a warrant or other process, if the officer has probable cause to believe that the person knowingly has violated a domestic violence protective order (DVPO) that:
      i. Excludes the person from the victim's residence or household or
      ii. Enjoins the person from threatening, abusing, or following the victim, harassing the victim, cruelly treating or abusing a pet owned or held by either party or minor child residing in the household or otherwise interfering with the victim. [G.S. 50B-4.1(b), *amended by* S.L. 2009-389, § 2, effective July 31, 2009.]
         (a) "Notwithstanding the holding by the North Carolina Court of Appeals in Cockerham-Ellerbee v. Town of Jonesville, 176 N.C. App. 372, 626 S.E.2d 685 (2006), G.S. 50B-4.1(b) creates a mandatory provision requiring a law enforcement officer to arrest and take a person into custody without a warrant or other process if the requirements set forth in the subsection are met." [S.L. 2009-389, § 1, effective July 31, 2009.]
         (b) In *Cockerham-Ellerbee v. Town of Jonesville,* 176 N.C. App. 372, 376, 626 S.E.2d 685, 688 (2006), the court of appeals held that although the use of the word "shall" in G.S. 50B-4.1(b) and 50B-4(c) "implied" that law enforcement had a mandatory duty to arrest those in violation of a protective order, law enforcement had "some level of discretionary authority" in carrying out the enforcement of the protective order at issue in the case.
         (c) The public duty doctrine shields the state and its political subdivisions from tort liability arising out of discretionary governmental actions that by their nature are not ordinarily performed by private persons. [*Cockerham-Ellerbee v. Town of Jonesville,* 176 N.C. App. 372, 626 S.E.2d 685 (2006) (citing *Stone v. Dep't of Labor,* 347 N.C. 473, 495 S.E.2d 711 (1998)).] The statutory language in section 1 of the Session Law amendment making clear that arrest is mandatory upon a knowing violation of a DVPO (see Section VIII.D.8.a.ii.(a), above) should make the public duty doctrine unavailable as a defense to a claim similar to that in *Cockerham-Ellerbee.*
   b. A warrantless arrest is authorized for:
      i. Domestic criminal trespass (which occurs when a person who is forbidden to enter or remain on premises by the lawful occupant so enters or remains on premises occupied by a present or former spouse or by a person with whom the defendant has lived as if married and from whom the defendant is presently living apart, including by virtue of a DVPO). [G.S. 14-134.3; 15A-401(b)(2)c.]

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

iii. A misdemeanor violation of violating a DVPO under G.S. 50B-4.1(a). [G.S. 15A-401(b)(2)e.]

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

9. Pretrial release/bail.

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

   b. For special conditions of pretrial release pursuant to G.S. 15A-534.1, see Appendix A, Domestic Violence 48-Hour Rule Offense Chart, below.

10. The Justice Reinvestment Act of 2011 (JRA) [S.L. 2011-192, effective June 16, 2011, except as otherwise provided in the Act, and as *amended by* S.L 2011-412.]

    a. The JRA may apply to the crime of knowingly violating a valid DVPO or to the domestic violence crimes set out in Appendix A, Domestic Violence 48-Hour Rule Offense Chart, below.

    b. For more on the JRA, see the Justice Reinvestment Act Resource Page on the UNC School of Government's Criminal Law in North Carolina Microsite, www.sog.unc.edu/resources/microsites/criminal-law-north-carolina/justice-reinvestment-act-resource-page.

E. Enforcement of an Out-of-State Domestic Violence Protective Order

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

2. The federal Violence Against Women Act requires that a protection order issued by a state court or Indian tribe be accorded full faith and credit by the court of another state, Indian tribe, or territory and be enforced by the court and law enforcement personnel as if it were the order of the enforcing state or tribe if:

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

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

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

3. An out-of-state order is enforced in the same manner as any protective order issued in North Carolina.
   a. The party protected by the out-of-state order may seek an order to show cause for contempt pursuant to G.S. 50B-4(a), discussed in Section VIII.C.1, above, or
   b. The person violating the out-of-state order may be arrested and charged with the crime of violating a domestic violence protective order pursuant to G.S. 50B-4.1, discussed in Section VIII.D, above.

IX. Appeal

A. Standard of Review

1. When the trial court sits without a jury regarding a domestic violence protective order (DVPO), the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. [*Hensey v. Hennessy,* 201 N.C. App. 56, 685 S.E.2d 541 (2009) (citing *Burress v. Burress,* 195 N.C. App. 447, 672 S.E.2d 732 (2009)); *Kennedy v. Morgan,* 221 N.C. App. 219, 726 S.E.2d 193 (2012) (citing *Hensey*).]
2. When a party appeals both an ex parte DVPO and a DVPO, the appellate court must consider each appeal independently of the other. [*Hensey v. Hennessy,* 201 N.C. App. 56, 685 S.E.2d 541 (2009) (because the two orders appealed from were independent of one another, the appellate court had to consider defendant's arguments as to the DVPO independent of the issues regarding the ex parte DVPO).]

B. Appeal of an Ex Parte Domestic Violence Protective Order

1. Appeals from the following actions are interlocutory and not immediately appealable:
   a. Entry of an ex parte domestic violence protective order (DVPO). [*Doyle v. Doyle,* 176 N.C. App. 547, 626 S.E.2d 845 (2006) (citing *Smart v. Smart,* 59 N.C. App. 533, 297 S.E.2d 135 (1982)).] Appeal may be taken from an ex parte DVPO when the party files a notice of appeal after entry of the DVPO and notice of appeal is given as to both the ex parte DVPO and the DVPO. [*Hensey v. Hennessy,* 201 N.C. App. 56, 685 S.E.2d 541 (2009).]
   b. The dismissal or vacation of an ex parte DVPO. [*Hayes v. Hayes,* 139 N.C. App. 831, 534 S.E.2d 639 (2000).]

C. Appeal of a Domestic Violence Protective Order

1. A domestic violence protective order (DVPO) entered after an evidentiary hearing is a final order of the trial court from which a party may appeal. [*Doyle v. Doyle,* 176 N.C. App. 547, 626 S.E.2d 845 (2006).]
2. When appeal of a domestic violence matter is moot.
   a. Generally, an appeal should be dismissed as moot when events occur during the appeal that cause the underlying controversy to cease to exist. [*Smith ex rel. Smith*

v. Smith, 145 N.C. App. 434, 549 S.E.2d 912 (2001) (citing *In re Hatley*, 291 N.C. 693, 231 S.E.2d 633 (1977)); *Wilson v. Wilson*, 134 N.C. App. 642, 518 S.E.2d 255 (1999) (husband's appeal from a DVPO prohibiting him from possessing a firearm for one year was moot because the order had expired and defendant was no longer attempting to avoid dismissal from his position as a corrections officer).]

b. But if collateral legal consequences of an adverse nature can reasonably be expected to result from an expired DVPO, an appeal is not moot. [*Smith ex rel. Smith v. Smith*, 145 N.C. App. 434, 437, 549 S.E.2d 912, 914 (2001) (citing *In re Hatley*, 291 N.C. 693, 231 S.E.2d 633 (1977)) (issues raised in defendant's appeal of an expired DVPO were not moot because of a possible collateral legal consequence arising from consideration of the DVPO in a later custody action involving defendant, as well as "numerous non-legal collateral consequences to entry of a domestic violence protective order that render expired orders appealable"); *Rudder v. Rudder,* 234 N.C. App. 173, 759 S.E.2d 321 (2014) (citing *Smith*) (the numerous nonlegal consequences arising from entry of a DVPO render expired protective orders appealable; appeal of an expired ex parte order and a DVPO that would expire five days after case was heard by the appellate court not moot); *Eagle v. Johnson,* 159 N.C. App. 701, 583 S.E.2d 346 (2003 (citing *Smith*) (recognizing that a protective order can have collateral legal and nonlegal consequences, including the stigma of a judicial determination of domestic violence; appeal of an expired DVPO not moot).] For an online resource setting out collateral consequences imposed under North Carolina law for a criminal conviction, see John Rubin and Jeffery Austin, Collateral Consequences Assessment Tool (C-CAT), www.sog.unc.edu/resources/tools/collateral-consequences-assessment-tool-c-cat.

X. Miscellaneous Civil Domestic Violence Issues

A. Emergency Assistance from Law Enforcement

1. A local law enforcement agency must respond as soon as practicable to a request for assistance by a person who alleges that he or she or a minor child has been the victim of domestic violence. [G.S. 50B-5(a).]
2. The local law enforcement agency may take whatever steps are reasonably necessary to protect the complainant from harm and may advise the complainant of sources for shelter, medical care, counseling, and other services. [G.S. 50B-5(a).]
3. Upon request and where feasible, a law enforcement officer may transport the complainant to appropriate facilities and accompany the complainant to his or her residence to remove food, clothing, medication, and other personal property that is reasonably necessary to allow the complainant and any minor children to remain elsewhere pending further proceedings. [G.S. 50B-5(a).]
4. In providing assistance, an officer may not be held criminally or civilly liable for reasonable measures taken pursuant to G.S. 50B-5(a). [G.S. 50B-5(b). *See also Braswell v. Braswell,* 98 N.C. App. 231, 390 S.E.2d 752 (1990) (this statute, and others in G.S. Chapter 50B,

do not impose an affirmative duty on officers to assist anyone threatened with domestic violence), *aff'd in part, rev'd in part,* 330 N.C. 363, 410 S.E.2d 897 (1991).]

B. Effect of Domestic Violence Allegations on G.S. Chapter 50 Custody Cases

1. An allegation of domestic violence between the parents of a child may be considered good cause for waiver of the mandatory setting of a contested custody or visitation matter for child custody mediation. [G.S. 50-13.1(c).]
2. If the court in a Chapter 50 custody/visitation action finds that domestic violence has occurred, the court must enter orders designed to protect the child and party who were the victims of domestic violence, in accordance with the provisions of G.S. 50B-3(a1)(1), (2), and (3). [G.S. 50-13.2(b).]
3. If a party to a Chapter 50 custody/visitation case is absent or relocates with or without children due to an act of domestic violence, the absence or relocation shall not be a factor that weighs against the party in determining custody or visitation. [G.S. 50-13.2(b).]
4. A subsequent Chapter 50 custody order supersedes a Chapter 50B temporary custody order. [G.S. 50B-3(a1)(4).]

C. Effect of Domestic Violence or Violation of a Protective Order on Immigration Status

1. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 makes the following acts, among others, grounds for deportation:
   a. Conviction of a crime of domestic violence or violation of a court's protective order. [8 U.S.C. § 1227(a)(2)(E).]

D. Domestic Violence Victim's Right to Apply for a Handgun Permit

1. A domestic violence victim may apply for a temporary (up to forty-five days) concealed handgun permit upon showing proof of a G.S. Chapter 50B protective order. [G.S. 14-415.15(b).] The Chapter 50B protective order is evidence of an emergency situation. [G.S. 14-415.15(b).]
   a. When a Chapter 50B protective order is filed with the clerk's office, the clerk is to provide the plaintiff in the action an information sheet that explains the plaintiff's right to apply for a concealed handgun permit under G.S. 14-415.15. The information sheet also must include information about domestic violence agencies and services, sexual assault agencies and services, victim compensation services, and legal aid services, and it must address confidentiality services. [G.S. 50B-3(c1).]

E. Malicious Prosecution Claims Following Dismissal of G.S. Chapter 50B Complaint

1. If an ex parte domestic violence protective order (DVPO) is issued but the judge at the emergency hearing finds that the complainant failed to prove an act of domestic violence and dismisses the complaint, the defendant in the domestic violence proceeding may have the basis for a malicious prosecution suit if she can show that:
   a. The complainant in the domestic violence case initiated the proceeding maliciously and without probable cause,

b. The domestic violence proceeding was terminated in favor of the defendant in the domestic violence proceeding, and

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

F. Workplace Violence Prevention Act [G.S. Chapter 95, Article 23.]

1. G.S. 95-230 *et seq*. allows an employer to seek a civil no-contact order on behalf of an employee who has suffered unlawful conduct from any individual that can reasonably be construed to be carried out, or to have been carried out, at the employee's workplace.
2. Upon a finding that the employee is the victim of an act of unlawful conduct by the defendant, the court may grant one or more of the following forms of relief:
   a. "Order the respondent not to visit, assault, molest, or otherwise interfere with the employer or the employer's employee at the employer's workplace, or otherwise interfere with the employer's operations;" [G.S. 95-264(b)(1).]
   b. "Order the respondent to cease stalking the employer's employee at the employer's workplace;" [G.S. 95-264(b)(2).]
   c. "Order the respondent to cease harassment of the employer or the employer's employee at the employer's workplace;" [G.S. 95-264(b)(3).]
   d. "Order the respondent not to abuse or injure the employer, including the employer's property, or the employer's employee at the employer's workplace;" [G.S. 95-264(b)(4).]
   e. "Order the respondent not to contact by telephone, written communication, or electronic means the employer or the employer's employee at the employer's workplace;" [G.S. 95-264(b)(5).]
   f. "Order other relief deemed necessary and appropriate by the court." [G.S. 95-264(b)(6).]

XI. Miscellaneous Criminal Domestic Violence Issues

A. Domestic Violence Protective Order or Proceeding as an Aggravating Circumstance for Criminal Sentencing

1. The trial court did not err in a capital sentencing proceeding by submitting to the jury either of the following as an aggravating circumstance:
   a. That the murder of a domestic violence victim was committed to disrupt or hinder a governmental function; defendant murdered his wife, in part, to stop the proceeding to renew a domestic violence protective order (DVPO). [*State v. Anthony,* 354 N.C. 372, 555 S.E.2d 557 (2001) (victim was scheduled to return to court the day after her

murder to obtain an extension of a DVPO), *cert. denied,* 536 U.S. 930, 122 S. Ct. 2605 (2002).]

b. That the murder of a domestic violence victim was committed because of the victim's exercise of her official duty as a witness; defendant murdered his wife, in part, because she exercised her official duty as a witness when she obtained a protective order against the defendant. [*State v. Anthony,* 354 N.C. 372, 555 S.E.2d 557 (2001), *cert. denied,* 536 U.S. 930, 122 S. Ct. 2605 (2002).]

B. Testimonial Statements of an Unavailable Witness

1. In a criminal prosecution, if the declarant is unavailable at trial and the defendant has not had a prior opportunity to cross-examine the declarant, the Sixth Amendment right to confrontation bars admission of an out-of-court statement by the declarant that is testimonial in nature. [*Crawford v. Washington,* 541 U.S. 36, 124 S. Ct. 1354 (2004).] For the most recent analysis of the *Crawford* decision, see Jessica Smith, N.C. Superior Court Judges' Benchbook, "A Guide to *Crawford* and the Confrontation Clause" (UNC School of Government, Aug. 2015), http://benchbook.sog.unc.edu/evidence/guide-crawford-confrontation-clause. For earlier publications analyzing the *Crawford* decision, see Jessica Smith, *Understanding the New Confrontation Clause Analysis:* Crawford, Davis, *and* Melendez-Diaz, Admin. of Just. Bull. No. 2010/02 (UNC School of Government, Apr. 2010), http://sogpubs.unc.edu/electronicversions/pdfs/aojb1002.pdf; Jessica Smith, "Emerging Issues in Confrontation Litigation: A Supplement to *Crawford v. Washington:* Confrontation One Year Later" (UNC School of Government, Mar. 2007), http://sogpubs.unc.edu//electronicversions/pdfs/crawfordsuppl.pdf; and Jessica Smith, "*Crawford v. Washington*: Confrontation One Year Later" (UNC School of Government, Apr. 2005), http://sogpubs.unc.edu/electronicversions/pdfs/crawford.pdf. All of these publications, and others discussing *Crawford*, also are available from the School of Government's Publications Division webpage, https://www.sog.unc.edu/publications?keys=crawford&content_type=All&roles=All&topics=All&author=&sort_by=score.

2. If a statement is nontestimonial in nature, the Confrontation Clause is not implicated and the statement's admissibility is merely a matter of applying evidentiary rules regarding hearsay and various hearsay exceptions. [*Crawford v. Washington,* 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004); *Davis v. Washington,* 547 U.S. 813, 821, 126 S. Ct. 2266, 2273 (2006); *State v. Blackstock,* 165 N.C. App. 50, 598 S.E.2d 412 (2004) (*Crawford* does not require that victim's nontestimonial statements to family members be excluded from trial; statements' admissibility decided pursuant to exceptions to the general rule against hearsay), *review denied, appeal dismissed*, 359 N.C. 283, 610 S.E.2d 208 (2005).]

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

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

b. Testimonial when the circumstances objectively indicate that there is no such ongoing emergency and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. [*Davis v. Washington,* 547 U.S. 813, 822, 126 S. Ct. 2266, 2273–74 (2006).]

4. *Crawford v. Washington,* 541 U.S. 36, 124 S. Ct. 1354 (2004), is not applicable to a civil DVPO proceeding. [*See In re B.D.*, 174 N.C. App. 234, 620 S.E.2d 913 (2005) (citing *In re D.R.,* 172 N.C. App. 300, 616 S.E.2d 300 (2005)) (*Crawford* not applicable to a civil termination of parental rights proceeding), *review denied*, 360 N.C. 289, 628 S.E.2d 245 (2006); *In re T.M.*, 180 N.C. App. 539, 638 S.E.2d 236 (2006) (citing *B.D.* and *D.R.*) (protections of the Confrontation Clause do not apply in a civil neglect proceeding).]

5. However, because victims in domestic violence cases are frequently unwilling to testify, *Crawford v. Washington,* 541 U.S. 36, 124 S. Ct. 1354 (2004), often will be implicated in criminal domestic violence prosecutions and related criminal prosecutions. [*See Davis v. Washington,* 547 U.S. 813, 833, 126 S. Ct. 2266, 2280 (2006) (noting that a victim in a domestic violence case is "notoriously susceptible to intimidation or coercion" to ensure that she does not testify at trial); *see also* Tom Lininger, *Prosecuting Batterers After Crawford*, 91 Va. L. Rev. 747, 768 (2005) (stating that "*Crawford's* impact has been particularly great on prosecutions of domestic violence, because these cases are more likely than others to rely on hearsay statements by accusers who may recant or refuse to cooperate with the prosecution at the time of trial"), and Jessica Smith, *Understanding the New Confrontation Clause Analysis*: Crawford, Davis, *and* Melendez-Diaz, Admin. of Just. Bull. No. 2010/02, p.4 (UNC School of Government, Apr. 2010), http://sogpubs.unc.edu/electronicversions/pdfs/aojb1002.pdf (*Crawford* issues arise when the state seeks to admit out-of-court statements of a nontestifying domestic violence victim to first-responding officers or to a 911 operator). For a resource briefly discussing *Crawford* in the domestic violence context, see Alyson Grine, "Domestic Violence Offenses: What New Defenders Need to Know" (UNC School of Government, Feb. 2015), www.ncids.org/Defender%20Training/2010NewMisdDefender/DomesticViolenceOffenses.pdf.]

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

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

   b. For more on the doctrine of forfeiture, see:

      i. Jessica Smith, N.C. Superior Court Judges' Benchbook, "A Guide to *Crawford* and the Confrontation Clause" (UNC School of Government, Aug. 2015), http://benchbook.sog.unc.edu/evidence/guide-crawford-confrontation-clause.

      ii. Jessica Smith, *Understanding the New Confrontation Clause Analysis:* Crawford, Davis, *and* Melendez-Diaz, Admin. of Just. Bull. No. 2010/02 (UNC School

of Government, Apr. 2010), http://sogpubs.unc.edu/electronicversions/pdfs/aojb1002.pdf.

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

C. Criminal Contempt for Violating a Civil Domestic Violence Protective Order May Bar a Subsequent Criminal Prosecution

1. The Double Jeopardy Clause constitutes a bar to a subsequent criminal prosecution if the elements of the offense at issue in the contempt proceeding match the elements of the subsequently charged criminal offense. [*See State v. Freeland,* 316 N.C. 13, 340 S.E.2d 35 (1986) (defendant could not be punished for both first-degree kidnapping and the underlying sexual assault, which is an element of first-degree kidnapping).]
2. When wife was in criminal contempt for violating a provision in a civil consent order that prevented her from "coming to" the residence of her ex-husband, double jeopardy precluded subsequent prosecution of wife for domestic criminal trespass, as the elements of the offenses in both proceedings were the same. [*State v. Dye,* 139 N.C. App. 148, 532 S.E.2d 574 (2000).]
3. Double jeopardy precluded conviction for assault on a female in light of defendant's prior adjudication of criminal contempt based upon violation of a DVPO that prohibited defendant from assaulting his wife. [*State v. Gilley,* 135 N.C. App. 519, 522 S.E.2d 111 (1999), *cert. denied,* 549 S.E.2d 860 (2001).]

D. Special Pretrial Release Rules for Domestic Violence Crimes

1. Only a judge can determine the conditions of pretrial release for the first forty-eight hours after the defendant's arrest for domestic violence crimes set out below (the "48-Hour Rule"). "Judge" means either a district or a superior court judge. For a brief discussion of the 48-hour rule, see Jeff Welty, *Domestic Violence Cases and the 48 Hour Rule*, N.C. Crim. L., UNC Sch. of Gov't Blog (Sept. 7, 2011), http://nccriminallaw.sog.unc.edu/domestic-violence-cases-and-the-48-hour-rule.
   a. The 48-Hour Rule applies when a defendant is charged with:
      i. Assault on, stalking, communicating a threat to, or committing a felony provided in Articles 7B, 8, 10, or 15 of G.S. Chapter 14 upon a spouse or former spouse, a person with whom the defendant lives or has lived as if married, or a person with whom the defendant is or has been in a dating relationship as defined in G.S. 50B-1(b)(6);
      ii. Domestic criminal trespass; or
      iii. Violation of a G.S. Chapter 50B order. [G.S. 15A-534.1(a), *amended by* S.L. 2015-62, § 4.(c), effective June. 5, 2015.] See Appendix A, Domestic Violence 48-Hour Rule Offense Chart, below.
   b. The judge must direct a law enforcement officer or a district attorney to provide a criminal history report for the defendant and must consider the criminal history when setting conditions of release. [G.S. 15A-534.1(a), *amended by* S.L. 2010-135, § 1, effective Oct. 1, 2010.]

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

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

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

d. If a judge has not set conditions of pretrial release within forty-eight hours of arrest, a magistrate is to set conditions of pretrial release. [G.S. 15A-534.1(b).] A magistrate does not have authority to set conditions of pretrial release for the first forty-eight hours after arrest. [Magistrate Discretion to Set Conditions of Pretrial Release for Crimes of Domestic Violence, 2002 N.C. Op. Att'y Gen. 526 (Jan. 24, 2002).]

e. Form AOC-CR-630, Conditions of Release for Person Charged with a Crime of Domestic Violence, may be used in conjunction with Form AOC-CR-200, Conditions of Release and Release Order.

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

a. G.S. 15A-534.1(b) "does not *require* pretrial detention or prescribe any minimum period of detention." [*State v. Thompson,* 349 N.C. 483, 496, 508 S.E.2d 277, 285 (1998) (emphasis in original) (further noting that "[i]ndividuals charged with domestic violence might not be detained at all under the statute; they might be brought before a judge for a pretrial-release hearing immediately following arrest").]

b. G.S. 15A-534.1 "is not and has never been a provision authorizing a domestic violence defendant to be held without bond for 48 hours." [Joan G. Brannon, *Domestic Violence Special Pretrial Release and Other Issues*, Admin. of Just. Bull. No. 2001/06, at 3 (UNC Institute of Government, Dec. 2001), www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/aoj200106.pdf.]

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

ii. Defendant's due process rights were violated when defendant was held approximately thirty-nine hours despite the availability of judges pursuant to a release order that specified that he was to be held forty-eight hours. [*State v. Clegg,* 142 N.C. App. 35, 542 S.E.2d 269 (citing *State v. Thompson,* 349 N.C. 483, 508 S.E.2d 277 (1998)) (new trial not required when defendant failed to show that he was prejudiced in the prosecution of the superseding charges based on his detention

related to the original charge), *appeal dismissed, review denied,* 353 N.C. 453, 548 S.E.2d 529 (2001).]

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

i. Magistrate's order providing that defendant be brought before a judge on the day after his arrest did not unreasonably delay defendant's post-detention hearing. [*State v. Malette,* 350 N.C. 52, 509 S.E.2d 776 (1999) (court noted that the magistrate had not arbitrarily set a forty-eight-hour limit as in *State v. Thompson,* 349 N.C. 483, 508 S.E.2d 277 (1998)).]

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

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

a. For a list of the most common offenses to which the special pretrial release rule applies, see Appendix A, Domestic Violence 48-Hour Rule Offense Chart, below.

b. Note that for the special pretrial release rule to apply, the defendant and the complainant must be either current or former spouses or must be living together or have lived together as if married [G.S. 14-134.3 (domestic criminal trespass); G.S. 15A-534.1(a) (for other offenses).] Effective June 5, 2015, a person with whom the defendant is in or has been in a dating relationship as defined in G.S. 50B-1(b)(6) was added to G.S. 15A-534.1. [G.S. 15A-534.1(a), *amended by* S.L. 2015-62, § 4.(c), effective June 5, 2015.]

i. A complainant and a defendant may have a relationship to which the special pretrial release rule does not apply, for example, they may have a child in common but are not current or former spouses, may have never lived together as if married or may not have been in a dating relationship as defined in G.S. 50B-1(b)(6).

ii. For a list of offenses to which the special pretrial release rule does not apply because the relationship between the complainant and the defendant is other than that specified in the statutes set out above, see Appendix A, Domestic Violence 48-Hour Rule Offense Chart, below.

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

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

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

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

b. A judge can use G.S. 15A-534.1(a)(1) to determine conditions of pretrial release even if the defendant has been held for some time before bond is set. [*See State v. Thompson,* 349 N.C. 483, 508 S.E.2d 277 (1998); for more discussion on the point, see Joan G. Brannon, *Domestic Violence Special Pretrial Release and Other Issues*, Admin. of Just. Bull. No. 2001/06 (UNC Institute of Government, Dec. 2001), www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/aoj200106.pdf, and Alyson Grine, "Domestic Violence Offenses: What New Defenders Need to Know" (UNC School of Government, Feb. 2015), www.ncids.org/Defender%20Training/2010NewMisdDefender/DomesticViolenceOffenses.pdf.]

Appendix A. Domestic Violence 48-Hour Rule[a] Offense Chart

Crime Charged	Relationship between the Parties	Does the 48-Hour Rule Apply?	Is the Case Covered by the Crime Victims' Rights Act?
Simple assault, G.S. 14- 33(a)	Current or former spouses (same sex or opposite sex)	Yes	Yes
Assault with a deadly weapon, G.S. 14-33(c)(1)	Currently live or formerly lived together as if married (same sex or opposite sex)[b]		
Assault inflicting serious injury, G.S. 14-33(c)(1)	Currently or formerly in a dating relationship[c] (opposite sex)		
Assault by pointing a gun, G.S. 14-34	Currently or formerly in a dating relationship (same sex)[d]	Yes	No
Misdemeanor stalking, G.S. 14-277.3A	Child in common	No	Yes
	Parent (or person in a parental role)/child		
	Grandparent/grandchild		
	Current or former members of the same household		

Source: Jeff Welty, UNC School of Government (Dec. 2015).

a. The so-called "48-hour rule" of G.S. 15A-534.1 provides that, for certain domestic violence crimes, only a judge may set conditions of release in the first 48 hours after the defendant's arrest. The rule does not require or permit the defendant to be held if a judge is available to set conditions of release. Effective Dec. 1, 2015, the rule applies "[i]n all cases in which the defendant is charged with assault on, stalking, communicating a threat to, or committing a felony provided in Articles 7A, 8, 10, or 15 of Chapter 14 of the General Statutes upon a spouse or former spouse, a person with whom the defendant lives or has lived as if married, or a person with whom the defendant is or has been in a dating relationship as defined in G.S. 50B-1(b)(6), with domestic criminal trespass, or with violation of an order entered pursuant to Chapter 50B, Domestic Violence, of the General Statutes." S.L. 2015-62. This chart indicates whether several common offenses are or are not covered by the rule. This chart is not comprehensive. For the listed offenses, the chart also indicates whether they are covered by the Crime Victims' Rights Act, G.S. 15A-830 *et seq*. When creating criminal processes in NCAWARE (an automated, web-based statewide warrant repository), magistrates are required to indicate whether an offense is a "domestic violence case" and whether it is a "victim rights" case. This chart is intended to assist magistrates in making those determinations.

b. The Crime Victims' Rights Act applies to certain misdemeanor offenses "when the offense is committed between persons who have a personal relationship as defined in G.S. 50B-1(b)." G.S. 15A-830(7)(g). The portion of the definition of "personal relationship" in G.S. 50B-1(b) that concerns "persons . . . who live together or have lived together" applies only to people "of opposite sex." However, another portion of the definition includes all "current or former household members" regardless of sex. Thus, same-sex individuals who live together or have lived together as if married share a "personal relationship" as "current or former household members," and the Crime Victims' Rights Act applies when one such individual is charged with committing a covered misdemeanor against another.

c. Effective Dec. 1, 2015, G.S. 15A-534.1(a) makes the 48-hour rule applicable to covered offenses committed against "a person with whom the defendant is or has been in a dating relationship as defined in G.S. 50BI-1(b)(6)." G.S. 50B-1(b)(6) provides in pertinent part that "a dating relationship is one wherein the parties are romantically involved over time and on a continuous basis during the course of the relationship. A casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship."

d. Effective Dec. 1, 2015, G.S. 15A-534.1(a) makes the 48-hour rule applicable to covered offenses committed against "a person with whom the defendant is or has been in a dating relationship as defined in G.S. 50B-1(b)(6)." G.S. 50B-1 contains definitions pertinent to the issuance of domestic violence protective orders. G.S. 50B-1(b) defines the term "personal relationship". G.S. 50B-1(b)(6) states that a "personal relationship" includes "persons of the opposite sex who are in a dating relationship or have been in a dating relationship. A dating relationship is one wherein the parties are romantically involved over time and on a continuous basis during the course of the relationship. A casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship." Nothing in the definition of "dating relationship" requires the parties to be of different sexes. Under the statute, a "dating relationship" is a "personal relationship" only if the parties are of different sexes, but the applicability of the 48-hour rule turns on the existence of a "dating relationship," not the existence of a "personal relationship." By contrast, the Crime Victims' Rights Act applies to certain misdemeanor offenses "when the offense is committed between persons who have a personal relationship as defined in G.S. 50B-1(b)." Thus, the existence of a same-sex dating relationship does not trigger the misdemeanor provisions of the Crime Victims' Rights Act, though the existence of an opposite-sex dating relationship does. Whether it is constitutional to distinguish between same-sex and opposite-sex couples in this way is beyond the scope of this document but might be questioned under *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015) (holding that laws limiting marriage to same-sex couples are unconstitutional, in part on equal protection grounds).

(*continued*)

Appendix A. Domestic Violence 48-Hour Rule Offense Chart (*continued*)

Crime Charged	Relationship between the Parties	Does the 48-Hour Rule Apply?	Is the Case Covered by the Crime Victims' Rights Act?
Assault on a female, G.S. 14-33(c)(2) (note that this offense requires a male defendant and a female victim, so issues concerning same-sex couples do not arise)	Current or former spouses Currently live or formerly lived together as if married Currently or formerly in a dating relationship	Yes	Yes
	Child in common Parent (or person in a parental role)/child Grandparent/grandchild Current or former members of the same household	No	
Assault with a deadly weapon with intent to kill, G.S. 14-32(c) Assault with a deadly weapon inflicting serious injury, G.S. 14-32(b) Assault with a deadly weapon with intent to kill inflicting serious injury, G.S. 14-32(a) Assault inflicting serious bodily injury, G.S. 14-32.4(a) Habitual misdemeanor assault, G.S. 14-33.2 Felony stalking, G.S. 14-277.3A	Current or former spouses (same sex or opposite sex) Currently live or formerly lived together as if married (same sex or opposite sex) Currently or formerly in a dating relationship (same sex or opposite sex)	Yes	Yes
	Child in common Parent (or person in a parental role)/child Grandparent/grandchild Current or former members of the same household	No	
Assault by strangulation, G.S. 14-32.4(b) Communicating a threat, G.S. 14-277.1	Current or former spouses (same sex or opposite sex) Currently live or formerly lived together as if married (same sex or opposite sex) Currently or formerly in a dating relationship (same sex or opposite sex)	Yes	No
	Child in common Parent (or person in a parental role)/child Grandparent/grandchild Current or former members of the same household	No	
Harassing telephone calls, G.S. 14-196 Cyberstalking, G.S. 14-196.3	Any	No	No
Domestic criminal trespass, G.S. 14-134.3	• Current or former spouses (same sex or opposite sex) • Currently live or formerly lived together as if married (same sex or opposite sex) (Note that having one of the above relationships is an element of the offense)	Yes	Yes[e]

e. Domestic criminal trespass normally is a Class 1 misdemeanor but is a Class G felony if the defendant trespasses "upon property operated as a safe house or haven for victims of domestic violence and . . . is armed with a deadly weapon." G.S. 14-134.3(b). The felony offense is not listed in G.S. 15A-830(7), so the Crime Victims' Rights Act does not appear to apply to the felony.

Appendix A. Domestic Violence 48-Hour Rule Offense Chart (*continued*)

Crime Charged	Relationship between the Parties	Does the 48-Hour Rule Apply?	Is the Case Covered by the Crime Victims' Rights Act?
Violating a domestic violence protective order (DVPO), G.S. 50B-4.1	Any (Such orders may be issued only when a "personal relationship" exists, as defined in G.S. 50B-1(b), but a magistrate considering a violation of a DVPO should not second-guess the determination of the judicial official who issued the order that such a relationship existed)	Yes	Yes
Rape (any kind/degree), G.S. 14-27.21, 14-27.22, 14-27.23, 14-27.24, 14-27.25 Sex offense (any kind/degree), G.S. 14-27.26, 14-27.27, 14-27.28, 14-27.29, 14-27.30[f]	Current or former spouses (same sex or opposite sex) Currently live or formerly lived together as if married (same sex or opposite sex) Currently or formerly in a dating relationship (same sex or opposite sex)	Yes	Yes
	Child in common Parent (or person in a parental role)/child Grandparent/grandchild Current or former members of the same household	No	
Kidnapping, G.S. 14-39 Felonious restraint, G.S. 14-43.3	Current or former spouses (same sex or opposite sex) Currently live or formerly lived together as if married (same sex or opposite sex) Currently or formerly in a dating relationship (same sex or opposite sex)	Yes	Yes
	Child in common Parent (or person in a parental role)/child Grandparent/grandchild Current or former members of the same household	No	
Arson, G.S. 14-58	Current or former spouses (same sex or opposite sex) Currently live or formerly lived together as if married (same sex or opposite sex) Currently or formerly in a dating relationship (same sex or opposite sex)	Yes	Yes
	Child in common Parent (or person in a parental role)/child Grandparent/grandchild Current or former members of the same household	No	

f. As of this writing, G.S. 15A-534.1 refers in pertinent part to felonies "provided in Article[ ] 7A . . . of Chapter 14 of the General Statutes." However, S.L. 2015-181 gutted Article 7A and moved the rape and sex offense crimes to new Article 7B. The General Assembly certainly did not intend to remove these crimes from the scope of the 48-hour rule, and the Revisor of Statutes is expected to correct G.S. 15A-534.1 to refer to Article 7B under the authority in section 47 of S.L. 2015-181. Crimes committed before Dec. 1, 2015, will be prosecuted under the former statutes set forth in Article 7A, and the 48-hour rule should apply to those cases as well.

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Supplemental Navigation Instructions

The instructions below, which include screenshots for ease of use, will allow Adobe users (of both Acrobat Pro and Reader) to install a toolbar navigation feature (called "Previous view") that operates like a "Back" button on Web browsers.

Please note that if you are a Mac user, the appearance of your screens may differ slightly from the screens in the instructional images below (which were pulled from a PC). The selections from the pull-down menus, however, are essentially the same across both platforms.

For Users of Adobe Acrobat Pro

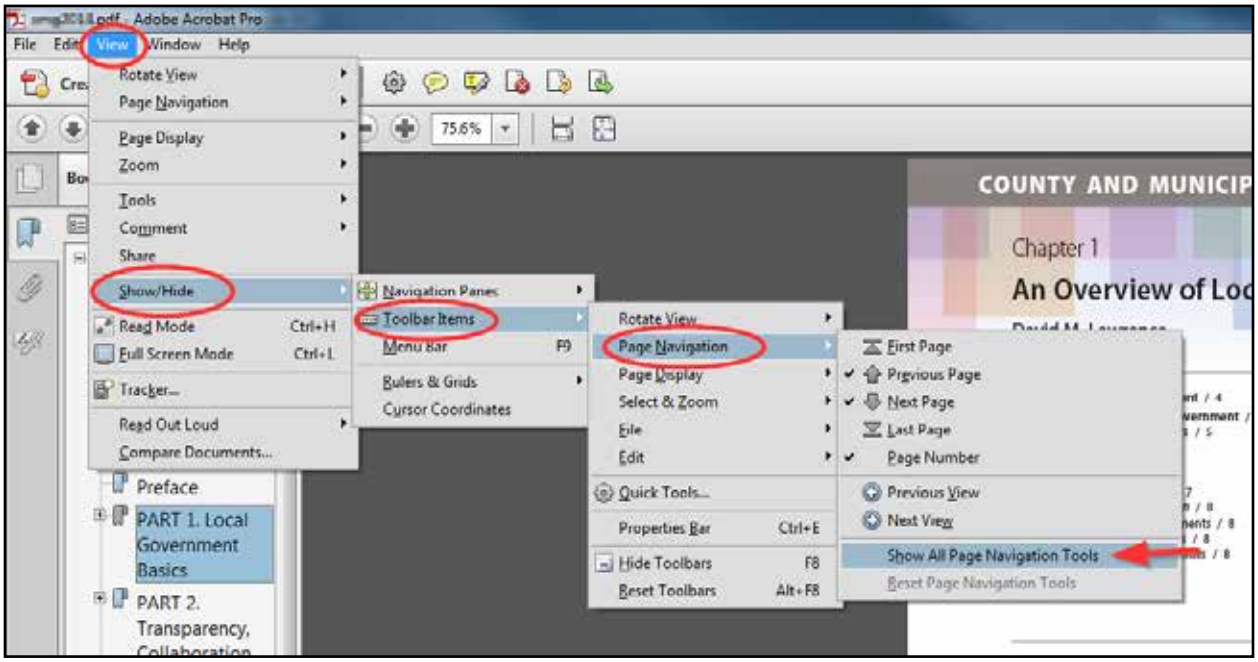
1. In the Acrobat Pro menu, click "View". In the drop-down menus that then appear, click the following options (as shown below):

   "Show/Hide"

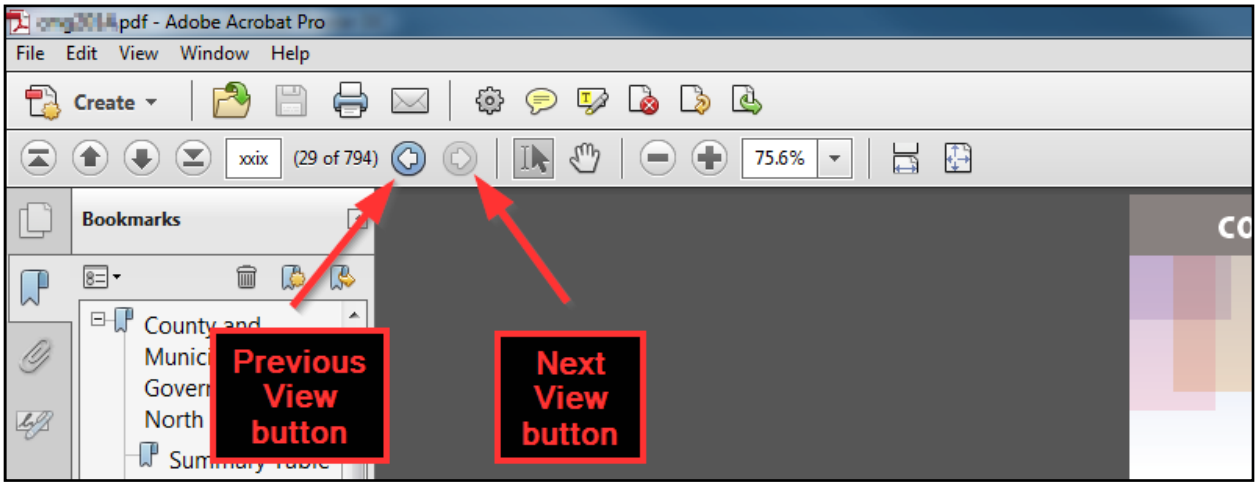
   "Toolbar Items"

   "Page Navigation"

   "Show All Page Navigation Tools"



2. You will now see the buttons for "Previous View" (which will be greyed out while you are on the first page you are viewing) and "Next View" (which will be greyed out if you haven't used the Previous View button to return to an earlier view) (see below). You are now ready to navigate!



For Users of Adobe Reader

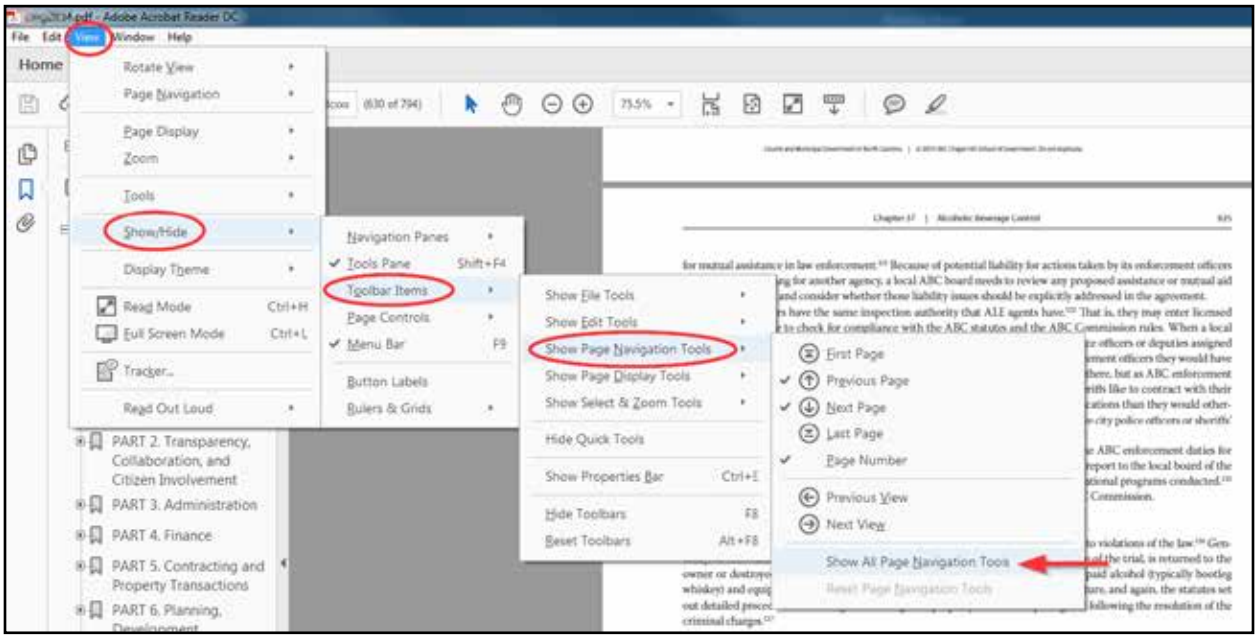
1. In the Acrobat Reader menu, click "View". In the drop-down menus that then appear, click the following options (as shown below):

   "Show/Hide"

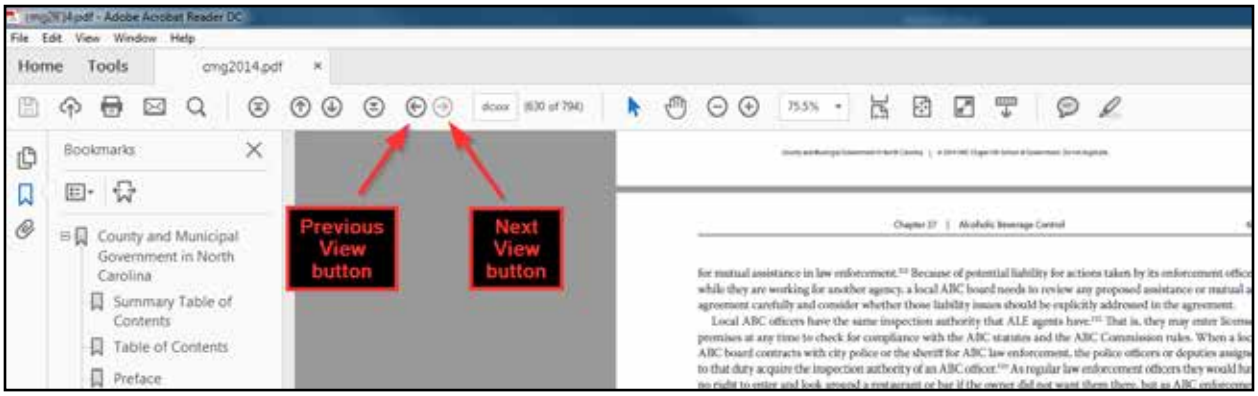
   "Toolbar Items"

   "Show Page Navigation Tools"

   "Show All Page Navigation Tools"



2. You will now see the buttons for "Previous View" (which will be greyed out while you are on the first page you are viewing) and "Next View" (which will be greyed out if you haven't used the Previous View button to return to an earlier view) (see below). You are now ready to navigate!



Additional Feature

You will notice a blue "TOC" button in all text pages of the Bench Book. When you are in a given chapter, clicking this button will take you to the table of contents at the beginning of the chapter (which is itself linked to the heads in text).