

What Magistrates Need to Know About Domestic Violence

WHETHER AND HOW TO ISSUE AN EX PARTE DVPO

1

Magistrates don't issue 50B Orders, but you still need to know about the law.

GS 50B-2: DVPOs

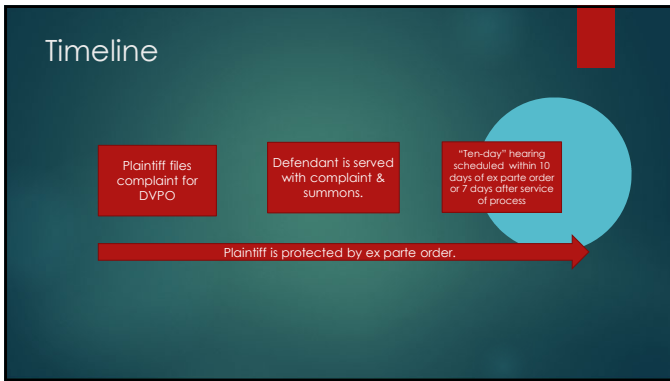
- ▶ Any NC resident can file a lawsuit asking for protection for herself or for a child residing with her or in her custody because the defendant has committed acts of DV. This is a civil action, and like all civil actions, it is initiated when a plaintiff files a complaint or a motion in an existing civil proceeding.
- ▶ No lawyer is required, and no court costs or other fees are charged.
- ▶ The remedy requested by the plaintiff is a coercive order directing or prohibiting the defendant from engaging in certain acts.
- ▶ Enforceable by contempt or criminal charge of violating DVPO.

2

Where you come in

- ▶ All magistrates in the criminal section are likely to be involved at the enforcement stage.
- ▶ Magistrates authorized by their chief district court judge are also involved at a very early stage of the civil proceedings.
- ▶ An ex parte DVPO is a temporary order put in place to protect the plaintiff during the time before the case comes to trial.
- ▶ An ex parte DVPO issued by a magistrate is an even briefer order put in place to protect the plaintiff until a district court judge can conduct a hearing on the request for an ex parte order.

3



4

GS 50B-2(c1): Ex parte DVPOs Translation

- ▶ The chief district court judge may authorize a magistrate or magistrates to hear any motions for emergency relief ex parte. Prior to the hearing, if the magistrate determines that at the time the party is seeking emergency relief ex parte the district court is not in session and a district court judge is not and will not be available to hear the motion for a period of four or more hours, the motion may be heard by the magistrate.
- ▶ A CDCJ may give a magistrate authority to hear requests for ex parte DVPOs when:
 - ▶ district court is not in session, &
 - ▶ no dcj will be available for 4 hrs

5

Procedure for ex parte DVPOs

- ▶ Generally, plaintiff files action as usual with clerk. If complaint includes request for ex parte order, you're the next step.
- ▶ When the clerk's office is closed, plaintiff may "file" complaint with magistrate as first step.

"The clerk shall provide a supply of pro se forms to authorized magistrates who shall make the forms available to complainants seeking relief under subsection (c1) of this section."

Magistrates don't have authority to issue a summons, and local practice varies in terms of what happens next.

6

AOC-CV-303: Instructions for DV Forms

- ▶ Complaint & Motion for DVPO (CV-303)
- ▶ Notice of Hearing on DVPO (CV-305)
- ▶ Ex Parte DVPO (CV-304)
- ▶ Civil Summons DV (CV-317)
- ▶ Identifying Info about a DV Action (CV-312)
- ▶ Affidavit as to Status of Minor Child (CV-609)

7

More . . .

Translation

- ▶ An ex parte order entered under this subsection shall expire and the magistrate shall schedule an ex parte hearing before a district court judge by the end of the next day on which the district court is in session in the county in which the action was filed.
- ▶ Order automatically expires at midnight on next day court is in session.
- ▶ Magistrate is responsible for scheduling a second ex parte hearing, before a DCJ, before order expires.

8

Ultimate questions

- ▶ "If it clearly appears to the magistrate from specific facts shown that there is a danger of acts of domestic violence against the aggrieved party or a minor child, the magistrate may enter orders as it deems necessary to protect the aggrieved party or minor children from those acts."
- ▶ **GS 50B-(c1).**
- ▶ If the magistrate "finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from any further acts of domestic violence."
- ▶ **GS 50B-3 (a).**

9

Definition of DV:
Personal Relationship + Act

10

Personal Relationship: a relationship in which the parties involved:

- ▶ (1) Are current or former spouses;
- ▶ (2) Are persons of opposite sex who live together or have lived together;
- ▶ (3) Are related as parents and children; → including others acting in loco parents to a minor child, or as grandparents and grandchildren. A must be 16+.
- ▶ (4) Have a child in common;
- ▶ (5) Are current or former household members;
- ▶ (6) Are persons [of the opposite sex] who are or have been in a dating relationship.

11

What's a dating relationship?

- ▶ "... 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." GS 50B-1(b)(6).
- ▶ Thomas v. Williams: No magic minimum length of time. Court should consider all the circumstances. "Dating relationship" should be interpreted broadly to cover a wide range of romantic relationships, with "only the least intimate of personal relationships" excluded.

12

Consider these factors:

- 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?

Thomas v. Williams, NC COA (7/7/2015)

13

M.E. v. T.J., NC App. Filed 12/31/2020

COURT HELD "OF THE OPPOSITE SEX" LANGUAGE IN 50B-1 (B)(6) UNCONSTITUTIONAL .
ORDERED THAT STATUTE BE READ TO COVER SAME SEX DATING RELATIONSHIPS.
DECISION IS ON APPEAL AT NC SUPREME COURT
STAY TUNED!

14

An Act:

- ▶ Attempting to cause bodily injury, or intentionally causing bodily injury;
or
- ▶ Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury
or
continued harassment,
as defined in G.S. 14-277.3A,
that rises to such a level as to inflict substantial emotional distress;
- or
- (3) Committing any act defined in G.S. 14-27.21 through G.S. 14-27.33

15

Notes on the Act

- ▶ Acts in self-defense are not included
- ▶ Plaintiff must be involved in personal relationship with Δ, but act may be directed to specified others
- ▶ "Fear" in #2 refers to actual, subjective fear. Objective test N/A.
- ▶ "Imminent" ≠ immediate, but rather "without significant delay."
- ▶ "Harassment" is knowing conduct (including electronic communication) that torments or terrorizes the other person & serves no legitimate person.
- ▶ Offenses specified in #3 are criminal sex offenses.

16

Special rules for kids . . .



17

"[A] temporary order for custody ex parte and prior to service of process and notice shall not be entered unless the magistrate finds that the child is exposed to a substantial risk of physical or emotional injury or sexual abuse.

If the magistrate finds that the child is exposed to a substantial risk of physical or emotional injury or sexual abuse,

upon request of the aggrieved party,

the magistrate shall consider and may order the other party to

-stay away from a minor child, or

-to return a minor child to, or

-not remove a minor child from, the physical care of a parent or person in loco parentis,

if the magistrate finds that the order is in the best interest of the minor child and is necessary for the safety of the minor child.

18

Special rules for guns . . .



Magistrate must always ask about defendant's ownership and/or access to firearms, ammunition, along with identifying information, in addition to permits to purchase and/or to carry concealed.

If statutory requirements exist, magistrate must order that defendant surrender all firearms, ammunition and permits to the sheriff

19

Statutory factors: your interview must cover whether defendant

- has 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;
- has made threats to seriously injure or kill plaintiff or minor child;
- has threatened suicide;
- has inflicted serious injuries on plaintiff or child.

20

Ultimate questions

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- **GS 50B-(c1).**
- If the magistrate "finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from any further acts of domestic violence."
- **GS 50B-3 (a).**

21

THE COURT HEREBY ORDERS THAT:

The above named Respondent/Defendant shall not commit any further acts of domestic violence or make any threats of domestic violence (G.S. 50B-1).

The above named Respondent/Defendant shall have no contact with the Petitioner/Plaintiff. No contact includes any defendant-initiated contact, except through an attorney, direct or indirect, by means such as telephone, personal contact, email, pager, gift-giving or teleconference machine. [45]

Additional terms of this order are as set forth on Pages 3 and 4.

The terms of this order shall be effective until . .

AOC-CV-304: Ex Parte Domestic Violence Order of Protection

If the magistrate "finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from any further acts of domestic violence."
GS 50B-3 (a).

22

Requests for custody: consider the possibilities

- Plaintiff may be making a false allegation in order to gain an advantage in a custody dispute.
- Plaintiff may be attempting to use the DVPO action as a substitute for a custody case.
- Plaintiff may have genuine concerns about the safety and well-being of the children that, impartially assessed, fall short of "substantial risk" of injury.
- Plaintiff's decision to leave relationship and seek DVPO is motivated, either entirely or in large part, by defendant's threats or actions directed at children.
- Defendant is angry/devastated/desperate about separation and plaintiff has justified concerns about children's safety.

23

Gersch v. Fantasia (facts taken from opinion)
 Plaintiff and defendant were once engaged, and the couple had a child before ending their relationship.

On the afternoon of 24 January 2006, Denice Gersch drove to her parent's house with the parties' infant son for a visitation exchange with defendant.

Upon parking her automobile in the driveway, Ms. Gersch's father, Mr. Gersch, took the infant carrier out of the automobile, and carried the infant towards his house.

Defendant (Peter Fantasia) asked Mr. Gersch, "Where [are] you going with my son?" and grabbed the infant carrier.

When Mr. Gersch tried to push defendant back, defendant punched Mr. Gersch, who fell to the ground.

Defendant then kicked Mr. Gersch in the head.

Ms. Gersch testified that she "jumped on Mr. Fantasia, grabbing him, trying to pull him off my 62-year-old father and my five-month old son. He slung me... I ended up being slung into the railing."

Mr. Gersch then rushed into the house, with the baby, and locked the door.

Ms. Gersch testified that her mother took photos of the bruises she developed on her side as the result of being flung into the railing.

The police were called and, after conferring with their supervisor, declined to charge anyone at the scene.

Later that night Mr. Gersch was taken to the hospital for stitches on his face.

24