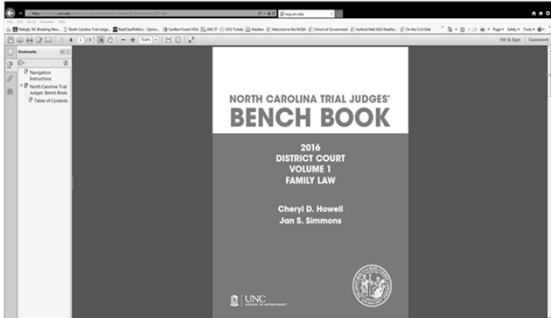


Family Law Update
Cheryl Howell
October 2017

sog.unc.edu/benchbook
password: judges



The screenshot shows a web browser window with the URL sog.unc.edu/benchbook and the password 'judges'. The main content is the cover of the '2016 NORTH CAROLINA TRIAL JUDGES' BENCH BOOK, DISTRICT COURT VOLUME 1 FAMILY LAW, edited by Cheryl D. Howell and Jan S. Simmons. The cover features the UNC logo and a seal.

Custody

S.L. 2017-22 (S 53) - Orders on or after Oct. 1, 2017 (p. 18-19)

- "§ 50-13.5. Procedure in actions for custody or support of minor children.

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

- (3) ... A temporary custody order that requires a law enforcement officer to take physical custody of a minor child shall be accompanied by a warrant to take physical custody of a minor child as set forth in G.S. 50A-311."

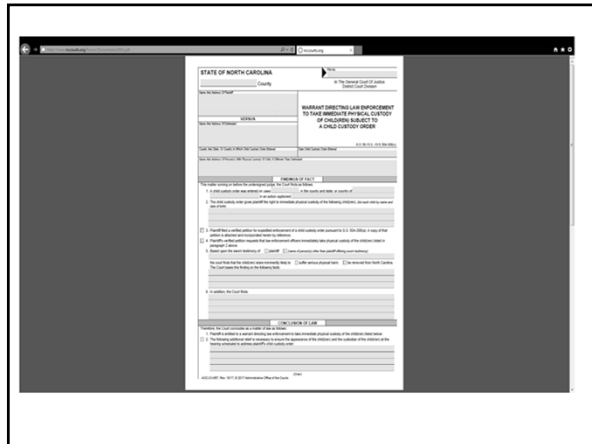
GS 50A-311 Warrant

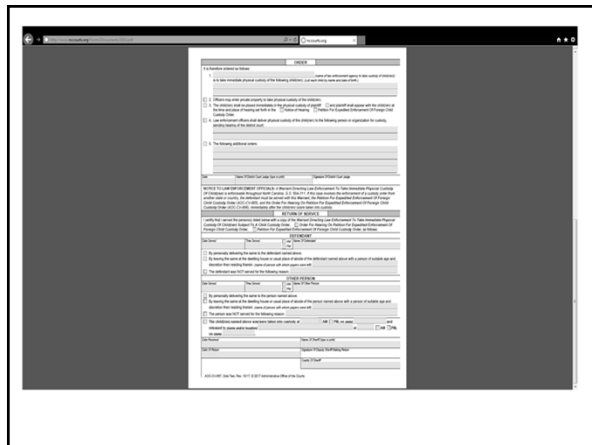
“(b) If the court, upon the testimony of the petitioner or other witness, finds that the child is imminently likely to suffer serious physical harm or be removed from this State, it may issue a warrant to take physical custody of the child. The petition must be heard on the next judicial day after the warrant is executed unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible.”

GS 50A-311 Warrant

“(c) A warrant to take physical custody of a child must:

- (1) Recite the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based;
- (2) Direct law enforcement officers to take physical custody of the child immediately; and
- (3) Provide for the placement of the child pending final relief.”





Wilson v. Guinyard

- Mom lives in NC with child
- Dad lives in SC
- Exchanges for visitation at South of the Border
- Father late for exchanges 40 times in 2-year period
- Trial court says civil contempt
 - Purge: be on time and pick up at mom's house next three visits. If late, forfeit next three visits and spend 72 hours in jail

Contempt in custody cases

- Was trial court required to inquire whether father wanted court-appointed counsel before the civil contempt proceeding?

Appointed Counsel for Civil Contempt

- *Jolly v. Wright*, 300 NC 83 (1980)
 - Due process does not require appointment of counsel in civil contempt because respondent “holds the keys to the jail.”
- *Hodges v. Hodges*, 64 NC App 550 (1983)
 - Right to counsel in civil contempt determined on “case-by-case basis;” only required when “necessary for an adequate presentation of the merits, or to otherwise insure fundamental fairness.”

Appointed Counsel for Civil Contempt

- *McBride v. McBride*, 334 NC 124 (1993)
 - Overruled *Jolly v. Wright*
 - Indigent persons likely to be incarcerated for civil contempt for the nonpayment of child support have a right to appointed counsel
- *Wilson v. Guinyard*, 801 SE2d 700 (NC App 2017)
 - *McBride* applies only to civil contempt for the nonpayment of child support
 - Entitlement to counsel for civil contempt arising out of other types of cases is determined on a case-by-case basis
 - Counsel required when “necessary for an adequate presentation of the merits or to otherwise ensure fundamental fairness.”

Wilson v. Guinyard

- Counsel not required in this case
- Respondent father had “the ability to comply with the purge conditions as imposed and [the case] presents no unusually complex issues of law or fact that would necessitate the appointment of counsel.”
- Plus father.....
 - Had hired a lawyer but asked lawyer to withdraw
 - Never said he was indigent and never asked the court to appoint a lawyer

But there’s a statute.....

- GS 7A-451(a)(1)
 - Indigent entitled to counsel in “any case in which imprisonment, or a fine of \$500, or more, is likely to be adjudged.”

Child Support

Modification

- GS 50-13.7
 - Support order can be “modified or vacated at any time, upon motion in the cause and a showing of changed circumstances”
- Failure to file a motion does not deprive the trial court of jurisdiction
 - Modification entered by consent is not void
 - Court has continuing jurisdiction in a support case until child reaches majority or party dies
 - *Catawba County ex rel. Rackley v. Loggins*, NC Supreme Ct

What *Rackley* does not say.....

- That a motion is not required before modification
 - Failure to file a motion is legal error subject to direct appeal
- That changed circumstances are not required
 - Failure to find changed circumstances is legal error subject to direct appeal
- That a court has jurisdiction to modify/re-open civil cases other than support or custody
 - See *Whitworth*, 222 NC App 771 (2012)(no jurisdiction for court to act in ED case after entry of final judgment absent appropriate post-judgment motion)

Domestic Violence

2017 S.L. 92 (H343)

- Effective October 1, 2017, GS 50B-4 is amended to add new section (g) to provide that a **DVPO is enforceable in the trial court pending appeal**, unless the court of appeals issues a stay.

2017 S.L. 92 (H343)

- New GS 50B-3(b2):
 - Upon request of either party
 - At a hearing after notice or service of process
 - The court can **modify any protective order after finding good cause**
 - Effective October 1, 2017
- Good cause requires findings of fact
 - *See Ponder v. Ponder*, 786 SE2d 44 (2016)
- New AOC forms
 - CV-313(revised): Motion to Renew, Modify, Set Aside DVPO
 - CV-326(new): Modified DVPO

Consider

- Mom has primary physical custody
- Dad has 'standard' visitation
- Mom alleges dad has committed acts against the child
- Who should be listed as plaintiff in the caption of the complaint?

Consider.....

- Child is 15 years old and lives with parents
- Child has been dating the defendant for several months
- Child alleges defendant committed acts of domestic violence
- Defendant also is 15 years old.
- Who should be listed as plaintiff in the caption of the complaint for a DVPO?
- Who should be listed as defendant?

Minor Parties: General Rules

- A minor can be a plaintiff or a defendant
- When child is the plaintiff or defendant, the child should be named as the plaintiff or defendant
- Minors generally need a Rule 17 GAL appointed when they are parties
 - No GAL is required if child has general or testamentary guardian
 - Parent is not a general or testamentary guardian

Rule 17 GAL

- Any competent adult
- Is not a court appointed attorney
- Is not a party to the action
 - So should not be named as a party on the complaint or on the answer
- Is paid as a part of court costs

50B Actions

- Plaintiff must be an “aggrieved party”
- “Aggrieved party” means a person who has one of the listed relationships with the defendant
- Act alleged against either:
 - The aggrieved party, or
 - A minor child “residing with” or “in the custody of” the aggrieved party

Protection for Minors

- The only time a minor *must* be a plaintiff in order to get protection is when the parent with whom child is residing or “in the custody of” has no personal relationship with the defendant
- But, only time minor *cannot* be a plaintiff is when minor has no personal relationship with defendant

Minors in 50B Action

- Minor should not be named as a plaintiff on the complaint unless minor actually is a plaintiff
- If minor is a plaintiff, there must be a GAL appointed
 - But GAL is not named in the caption to the complaint
 - Separate AOC form: CV-318
- If minor is not a plaintiff, there should be no GAL appointed

Consider

- Mom has primary physical custody
- Dad has 'standard' visitation
- Mom alleges dad has committed acts against the child
- Who should be listed as plaintiff in the caption of the complaint?

DVPO complaint

- Mom can be plaintiff because she is an "aggrieved party"
- Mom can request protection for child without naming child as plaintiff because child resides with her and is in her custody
- If child is not a plaintiff, no GAL is required
- Child can be plaintiff because child also is an "aggrieved party"
- If child is plaintiff, GAL must be appointed
 - But child is listed as plaintiff in caption

Consider.....

- Child is 15 years old and lives with parents
- Child has been dating the defendant for several months
- Child alleges defendant committed acts of domestic violence
- Defendant also is 15 years old.
- Who should be listed as plaintiff in the caption of the complaint for a DVPO?
- Who should be listed as defendant?

DVPO complaint

- Child must be the plaintiff because child is the only “aggrieved party”
- Child listed as plaintiff on complaint
- GAL appointed for child plaintiff on CV-318
- Defendant child is listed as defendant
- GAL appointed for defendant; GAL not listed as defendant

Marriage

US Supreme Court

- “the Constitution ... does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.”
 - *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015)
- A state “must provide same-sex couples the constellation of benefits that the States have linked to marriage.”
 - *Paven v. Smith*, 137 S.Ct. 2075 (2017)

2017 S.L. 102, section 35, effective July 12, 2017

- **G.S. 12-3** (definitions applicable throughout General Statutes) is amended by adding two new subdivisions to read:

- "(16) "Husband and Wife" and similar terms. – The words "husband and wife," "wife and husband," "man and wife," "woman and husband," "husband or wife," "wife or husband," "man or wife," "woman or husband," **or other terms suggesting two individuals who are then lawfully married to each other** shall be construed to include **any two individuals** who are then lawfully married to each other.

- (17) "Widow" and "Widower." – The words "widow" and "widower" mean the surviving spouse of a deceased individual."

Some examples.....

- Chapter 39, Article 2
 - Conveyances between spouses
- Chapter 50
 - Annulment, DBB, Divorce, Alimony and Equitable Distribution
- Chapter 52
 - Powers and Liabilities of Married Persons
 - GS 52-10 - Contracts between spouses
 - Torts: Alienation of Affection and Criminal Conversation

Statutes re Parentage

- Step-parent adoption GS 48-4-401 et seq.
 - Adoption by a "spouse" of a parent
- Heterologous Insemination, GS 49A-1
 - "Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife requesting and consenting in writing to the use of such technique."

Statutes re Parentage

- Birth certificates, GS 130A-101(e)
 - “Husband” of mother must be listed on birth certificate
 - GS 12-3 now requires any spouse of mother to be listed
 - *Paven v. Smith*, 137 S.Ct. 2075 (2017)
 - Birth certificates often used “for important transactions like making medical decisions for a child or enrolling a child in school.”
 - Statute allowing only male spouses to be listed is unconstitutional
 - “*Obergefell* proscribes such disparate treatment.”

Common Law Presumption???

- When a child is born to a married woman, the law presumes the child to be legitimate
 - *Wright v. Wright*, 281 NC 159 (1972)
 - *Eubanks v. Eubanks*, 273 NC 189 (1968)
- Legitimate presumes child is the biological child of the husband
- *Paver* seems to require that presumption be applied to any spouse of the mother
- *Paver* says nothing about rebutting the presumption

Alienation of Affection/Criminal Conversation

- These torts are not facially unconstitutional
 - *Malecek v. Williams*, NC App (Sept. 5, 2017)

Alimony

Green v. Green: Income

- Orders must contain finding as to present actual income of both parties at the time of the trial
- Cannot consider average income from past years to set support unless there is no other credible evidence of income
- But – past income can be used to support a finding of actual present income
 - See *Hartsell v. Hartsell*, 189 N.C.App. 65 (2008)

Equitable Distribution

LLCs and other business entities

When does a marital business have to be joined as a party to the ED case?

Do NOT Join the LLC.....

- To classify, value and distribute the ownership interest in the LLC that is the marital property
- *See eg Montague v. Montague*, 767 SE2d 71 (NC App 2014)

Join the LLC if you want to.....

- Order the LLC to do anything that affects the property or management of the LLC
 - *Campbell v. Campbell*, 777 SE2d 93 (NC App 2015)
 - *Geoghagan v. Geoghagan*, 803 SE2d 172 (NC App 2017)
- Impose an equitable trust on property owned by the LLC to make the parties to the ED the equitable owners of property titled to the LLC
 - *See eg Nicks v. Nicks*, 774 SE2d 365 (NC App 2015)

Joining the LLC

- When the LLC is a necessary party, the court has the obligation to join the party sua sponte
 - *Geoghagan v. Geoghagan*, 803 SE2d 172 (NC App 2017)

Military pensions

- Federal law allows state courts to distribute “disposable retired pay” in an ED proceeding
- The definition of “disposable retired pay” excludes amounts deducted from that pay as the result of a waiver required for service member to receive disability benefits
- Federal military disability benefits cannot be distributed by state courts

Military pensions

- What do you do?
 - ED order awards wife 50% of marital portion of husband’s military pension
 - Husband retires a year later. Wife begins to receive \$500 per month
 - 13 years later, husband converts part of his retirement to disability
 - Wife’s monthly payment now \$250 per month
 - Wife asks court to amend distribution order to award her higher percentage of remaining retirement pay

Conversion after judgment

- “We believe [the federal law does not prohibit] a state court from amending a qualifying order to increase a non-military spouse’s share of a military spouse’s retirement pay where the military spouse has, subsequent to the original qualifying order, elected to receive disability benefits in place of retired pay.”
 - *White v. White*, 152 NC App 588 (2002)
- “State court may not order a veteran to indemnify a divorced spouse for the loss in the divorced spouse’s portion of retirement pay caused by the waiver of retirement pay to receive disability benefits.”
 - *Howell v. Howell*, 581 US _ (May 15, 2017)

Pension distribution

- GS 50-20.1(d)

“The award shall be determined using the proportion of time the marriage existed (up to the date of separation of the parties), simultaneously with the employment which earned the ... pension ... to the total amount of time of employment.”

“The award ...shall not include contributions, years of service, or compensation which may accrue after the date of separation.”

“The award shall include gains and losses on the prorated portion of the benefit vested at the date of separation.”

Seifert, 319 NC 367 (1987)

- Distribution order: fraction to be applied to **disposable retired pay** when employee retires and begins to receive benefits to determine marital portion of pension payment

Time Earning Pension While Married Before Separation
Total Time Participating in the Plan [at retirement]
- Held: this fraction does not violate GS 50-20.1(d)
 - *Accord Gurganus v. Gurganus*, NC App (2/21/2017)(p.22)

Military pensions

- For purposes of state court property divisions, the definition of “**disposable retired pay**” was amended effective Dec. 23, 2016 to include only:
 - “(i) the amount of basic pay payable to the member for the member’s pay grade and years of service **at the time of the court order** (was at the time of retirement), as increased by
 - “(ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member’s retirement using the adjustment provisions under that section applicable to the member upon retirement.”

What do you think?

- Parties separate and wife files ED claim
- After a year, wife files for divorce and divorce is granted
- Six months after divorce is granted, wife files a voluntary dismissal of her ED claim pursuant to Rule 41
- Eight months after the dismissal, wife files a new ED claim
- Husband moves to dismiss, saying ED barred by divorce
- ??????

Stegall, 336 NC 473 (1994)

- GS 50-11(e)
 - Divorce destroys right to ED unless claim for ED is asserted before divorce
- Rule 41
 - After first voluntary dismissal, party has up to one year to refile claim
- As long as ED is pending at time of divorce, party can dismiss after divorce and have up to one year to re-file.
 - See also *Farquhar*, NC App (July 5, 2017)(one year period not tolled during remarriage of the parties)

Green v. Green

- Contingency fee received by lawyer husband after date of separation was not marital or divisible property
- Trial court is not required to order party to refinance mortgage when the debt is distributed to that party
 - Can you order party to refinance????
