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Civil Domestic Violence

Legal Issues

1. **You are presented with a consent DVPO, on the AOC form. There are no findings of fact or conclusions of law, and the parties have signed in the correct place on the form indicating that they agree to entry of the order with no findings of fact or conclusions of law. The terms of the order include a provision that both parties are ordered to "not assault, threaten, abuse, follow, harass or interfere with the other."**

   If you sign that order, will it be a valid DVPO?

   <u>Comments:</u>

   Consent Orders

   a. Chapter 50B expressly authorizes entry of consent DVPOs. GS 50B-1(c).
   b. Findings of Fact
      i. *Kenton v., Kenton,* 724 S.E.2d 79 (NC App, 2012): consent DVPO without finding of fact/conclusion of law that defendant committed an act of domestic violence is *void ab initio*. *See Kennedy v. Morgan*, 726 SE2d 193, fn 2 (NC App, 2012) ('defendant committed an act of domestic violence' actually is a conclusion of law rather than a finding of fact).
      ii. S.L. 2013-237(H 209) adds new section GS 50B-3(b1) to provide that "A consent order may be entered pursuant to this Chapter without findings of fact and conclusions of law if the parties agree in writing that no findings of fact and conclusions of law will be included in the consent protective order."

iii. New law applies to **ORDERS ENTERED ON OR AFTER OCTOBER 1, 2013.**

c. "Mutual" consent orders: GS 50B-3(b) states: "Protective orders entered, including consent orders, shall not be mutual in nature unless both parties file a claim and the court makes detailed findings of fact indicating 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."

d. Mutual orders probably continue to need findings of fact/conclusions of law despite H 209.

2. The plaintiff has filed seeking a DVPO, using the AOC form complaint. She has requested an ex parte order as well as a one-year DVPO. There is no statement in the complaint regarding whether defendant is in the military.

Can you enter the ex parte order if she is able to prove there is a danger of acts of domestic violence?

At the hearing, defendant has been served but does not appear. There is nothing in the file regarding defendant's military status. Can you enter the one-year DVPO?

<u>Comments:</u>

The federal Servicemember's Civil Relief Act, 50 U.S.C. app. sec. 501, et. seq., (SCRA) applies to **all civil proceedings** involving service personnel, including domestic and juvenile cases.

The Act contains *no exception* for any civil proceeding. So it covers 50B cases.

If a defendant has not made an appearance, no judgment can be entered until plaintiff files an affidavit stating whether defendant is in the military. 50 U.S.C. app. sec. 521. The term 'judgment' is defined as "any judgment, decree, order, or ruling, final **or temporary**." 50 U.S.C. app. sec. 511(9). The Act states: "[T]he court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit –

> (A) Stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or
>
> (B) If the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service."

The Act places responsibility for making sure the Affidavit is filed on the court.

If plaintiff's affidavit does not establish that defendant is in the military, the court can proceed with the case. However, the court may require a bond to compensate a defendant later allowed to set aside a judgment because he or she actually was in military service. In addition, the court can enter any other order "the court determines necessary to protect the rights of the defendant under this Act." 50 U.S.C. app. sec. 521(b)(3).

If the affidavit shows, or if the court learns through other means, that defendant is in the military, the court cannot enter any order until an attorney is appointed for defendant. 50 U.S.C. app. sec. 521(b)(2). The SCRA does not define the role of the attorney, but it does require that the attorney attempt to contact the service member and consider requesting a stay of the proceedings. 50 U.S.C. app. sec. 521(d).

Can the court enter an ex parte DVPO?

I have not found case law addressing this issue. The SCRA states specifically that no 'temporary' order can be entered before the affidavit is filed and counsel appointed for defendants who have not made an appearance and

are in the military, but the Act does not specifically reference ex parte orders. However, ex parte orders are a category of temporary orders, and they are temporary orders that can have a significant impact on a servicemember.

It is best to assume the law does apply to ex parte orders. A court hearing a request for an ex parte DVPO can comply with the SCRA by requiring plaintiff to file the required affidavit at the time she requests the ex parte. If the affidavit shows defendant is in the military, the court can proceed with the request for an ex parte as soon as the court appoints a lawyer for defendant.

The SCRA does not impact criminal proceedings, so a plaintiff also can request immediate protection through the criminal process.

3. The plaintiff seeking a one-year DVPO testifies that the defendant is her brother. Is that a relationship sufficient to support a conclusion that there has been an act of domestic violence?

To prove an act of domestic violence, a plaintiff must prove that a person with whom plaintiff has a personal relationship committed one of the listed acts either against plaintiff or against a minor child residing with or in the custody of the plaintiff. GS 50B-1. Covered personal relationships include:

- GS 50B-1(b)(2): "persons of the opposite sex who live together or have lived together", and
- GS 50B-1(b)(5): "current or former household members"

The North Carolina appellate courts have not defined "current or former household members, but in *Tyll v. Willets*, 748 SE2d 329 (NC App, August 20, 2014), the court held that a plaintiff's allegation that the defendant is her brother was not sufficient to prove the two were ever "current or former household members."

"Household" is defined by Webster's Dictionary as "the people in a family or other group living together in one house".

The statute contains no indication that plaintiff must have been in a household with the defendant in the recent past as opposed to sometime in the distant past. So for example, the brother and sister in *Tyll* will have a covered personal relationship even if they have not lived together since they were children.

Similarly, the statute does not contain any indication that current or former household members must be members of the opposite sex.

4. What if plaintiff testifies that defendant is her roommate?

Comments:

See discussion above. The roommates clearly will be a covered relationship if they are opposite sex. If they are the same gender, are roommates included in the definition of "household"? There is no case law interpreting this term in the context of a 50B case.

It is important that judges in a district try to have a consensus if possible as to the answers to these last two questions. If a relationship is not covered by 50B, the plaintiff may be able to seek protection pursuant to Chapter 50C. It is difficult for a clerk of court to assist plaintiffs when judges in the district disagree about these definitions.

5. At the hearing for the one-year DVPO, plaintiff proves:

In April 2013, defendant – plaintiff's live-in boyfriend at that time- stated to plaintiff while trying to break down the door to the room where plaintiff had locked herself in: "I'm going to f-ing kill you."

In November 3, 2013, defendant 'hacked' plaintiff's Facebook account and posted embarrassing things about her.

These things bothered and annoyed her.

November 13, 2013, she filed the complaint for the DVPO

Has plaintiff proved an act of domestic violence?

Comments:

In addition to an appropriate personal relationship, a plaintiff must prove defendant committed one of the acts listed in GS 50B-1(a):

(1) Attempting to cause bodily injury, or intentionally causing bodily injury; or
(2) 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. 14-27.2 through G.S. 14-27.7.

In a recent unpublished case with these facts, the court of appeals reversed a DVPO entered by the trial court after concluding plaintiff failed to prove defendant committed one of the required acts. *Jackson v. Jackson*, unpublished, (NC App, Dec. 16, 2015). Regarding the threat to kill her, plaintiff testified that she was "concerned defendant might carry out his threat." Nevertheless, she spent the next two months attempting to reconcile the relationship and testified that she did not feel any concern for her safety during that time. According to the court of appeals, plaintiff's testimony failed to prove defendant had placed plaintiff "in fear of *imminent* serious bodily injury."

Regarding the hacking of the Facebook account, the trial court specifically asked plaintiff during the trial whether she believed she had suffered substantial emotional distress and she responded no. The court of appeals held that to prove fear of "continued harassment that rises to such a level as to inflict substantial emotional distress, plaintiff must prove that she actually suffered substantial emotional distress. Substantial emotional distress has been defined to mean "significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

Noting that the statute requires only a subjective fear, the court held that plaintiff at no point during the trial offered evidence that she felt emotional distress.

For more on the case law relating to proof required to establish an act of domestic violence, see Domestic Violence Chapter of Bench Book, pages 7-3 through 7-5.

6. **Mother files for DVPO against father of her two minor daughters. She proves father placed a video camera in the bathroom of the minor girls and taped the girls dressing and undressing. Mother found the camera and removed the video before father saw it. Mother testifies that she fears for the safety of her children. The children are not parties to the action and did not testify.**

Has mom proved an act of domestic violence?

Another unpublished opinion reminded us that a subjective fear for the safety of others is not sufficient to support a conclusion that defendant committed an act of domestic violence as defined in GS 50B-1. In this case, there was no evidence that the children - members of the aggrieved party's family - were placed in fear of imminent serious bodily injury or continued harassment. *Fairbrother v. Mann, unpublished*, 738 SE2d 454 (2013). The court of appeals held that there needed to be evidence that the children

actually had fear to meet the definition in GS 50B-1(a)(2). *See also Smith ex. Rel. Smith v. Smith*, 145 NC App 434 (2001)(where child testified that defendant's actions made her feel 'creepy' and not afraid, no act of domestic violence established).

7. The AOC form complaint states in the 'Plaintiff' box: "Jane Smith o/b/o Wendy Smith"

At trial, Jane Smith proves that she is Wendy's mother and defendant is Wendy's father. Jane also proves defendant committed an act of domestic violence against Wendy. As part of the one-year DVPO, can you enter a temporary custody order?

<u>Comments</u>:

It depends on whether Jane is a party or just a Rule 17 GAL. It is difficult to tell when the case is captioned in this way. No order should be entered until you determine whether Jane or Wendy is the plaintiff. If there is an order from the clerk appointing Jane as the Rule 17 GAL for Wendy, Jane is not a party. Similarly, if Wendy is the party, someone must be appointed as a Rule 17 GAL.

If the child is the only plaintiff, it is not clear whether the child can request that a temporary custody order be entered. See GS 50B-3 (all relief other than custody specifies that it can be granted only to a "party". However, the custody provision simply states that the court can "award temporary custody"). Assuming that it is permissible, mom needs to be made a party before she is granted custody or visitation rights.

Both Jane and Wendy are appropriate plaintiffs in this situation, but this is a case where Wendy probably can be protected by the DVPO without being an actual party to the case.

Chapter 50B allows any "aggrieved party" to initiate an action. An aggrieved party is anyone with one of the specified personal relationships with

defendant. An aggrieved party can prove an act of domestic violence by showing defendant committed one of the specified acts either against the aggrieved party or against a minor child residing with or in the custody of the aggrieved party. GS 50B-1.

Assuming Wendy either "resides with or is in the custody of" Jane, Jane can be the only plaintiff in the case seeking protection for Wendy.

8. **You granted plaintiff's request for an ex parte DVPO and the hearing was set for 10 days following the entry of the ex parte. Defendant was served 5 days after the ex parte was entered and appears at the hearing. Defendant requests a continuance, arguing that his time to file an Answer has not expired. Do you have to grant the continuance?**

   Comments:

   According to *Henderson v. Henderson,* 758 SE2d 681 (NC App 2014), a defendant in a 50B proceeding does not have a right to 10 days to file an Answer. The court in that case rejected defendant's argument that the trial court exceeded subject matter jurisdiction by conducting the trial on the merits of the 50B claim 5 days after he was served with process. Therefore, *Henderson i*ndicates you have the discretion to deny the continuance. It is important to note, however, that the defendant in *Henderson* argued only that the statute did not authorize the court to adjudicate on the merits before he had at least 10 days to file an Answer. The defendant made no argument that the statutory process violates Due Process.

9. **Defendant is in front of you to respond to an order to show cause issued upon the allegation he violated an ex parte DVPO. Defendant argues that the ex parte order was no longer valid at the time of the alleged violation because it had been in effect for well over one year, having been**

'continued in effect' 13 times since it was entered originally. Can you hold him in contempt for violating the ex parte?
Comments:

The court of appeals has not answered this question directly, but there is a significant likelihood that the ex parte no longer is valid.

GS 50B-2(c)(5) states that when an ex parte order is entered, "a hearing shall be held within 10 days from the date of issuance of the order or within 7 days from the date of service of process on the other party, whichever occurs later."

Recent amendment to GS 50B-2(c)(5) provides that this hearing may be continued only once for no more than 10 days "unless all parties consent or good cause is shown".

Even if the parties consented to every continuance, the court of appeals recently ruled that a trial court had no authority to enter a final "one-year DVPO" after an ex parte order had been continued in effect for more than one year and had been allowed to expire before the final "one-year DVPO" was entered. *Rudder v. Rudder,* 759 SE2d 321 (June 3, 2014). The court cited GS 50B-3(b) which provides that any "protective order" must be entered for a set time, not to exceed one year, indicating that at least this panel of the court of appeals believes the first protective order entered in any 50B case cannot last more than a total of one year.

10. Defendant is in front of you to respond to an order to show cause issued upon the allegation that he violated a consent order entered in a 50B file. The case was initiated on an AOC form 50B complaint and the file contains a voluntary dismissal of the 50B claims signed by plaintiff. The file also contains the consent order signed by both parties and a judge. The consent order states that plaintiff dismisses the domestic violence claims and both parties agree to entry of a Rule 65 injunction ordering

defendant not to assault, threaten, abuse, follow, harass or interfere with plaintiff.

Defendant argues that the consent order is invalid and cannot be enforced. Is it a valid order?

Comments:

Rule 65 of the NC Rules of Civil Procedure, GS 1A-1, Rule 65(authorizing emergency ex parte temporary restraining orders and preliminary injunctions) is an ancillary remedy used to "preserve the status quo pending a trial on the merits" of a claim. *A.E.P. Indus. Inc v. McClure*, 308 NC 393 (1983). **Rule 65 is not a cause of action – it is a remedy. This means a plaintiff cannot file an action simply asking for a Rule 65 injunction without also stating a claim that is the basis for the remedy.**

GS 50B-7 provides that the remedies in Chapter 50B "are not exclusive", so theoretically, a party can ask for Rule 65 relief in a 50B pleading, as a form of relief for the act of domestic violence. It is difficult to see the purpose in doing so however, because the relief allowed in 50B-3 is very broad and any order entered will be a DVPO entered pursuant to Chapter 50B.

Rule 65 relief can be requested as a remedy with many other causes of action. *See State v. Byrd*, 363 NC 214 (2009)(plaintiff requested Rule 65 injunction as temporary relief in claim for divorce from bed and board; supreme court ruled the Rule 65 TRO was not a DVPO). Other causes of action might include claim for civil assault or civil battery, intentional infliction of emotional distress, child custody, etc. Those actions probably also would support the final remedy of a permanent injunction. *See Roberts v. Madison County Realtors Ass'n, Inc.*, 344 NC 394 (1996)(distinguishing interlocutory injunctions from permanent injunctions). *Byrd* holds that such orders will not be considered DVPOs entered pursuant to Chapter 50B.

However, no order can be entered when all underlying claims in a case have been dismissed. When all claims are dismissed, the court loses jurisdiction to act. *See Bryant v. Williams*, 161 NC App 444 (2003). So in this

case, once the 50B claims were dismissed, there was no case within which the court could enter an order, meaning the consent order is void.

11. Defendant is in front of you to respond to a show cause order issued upon the allegation that defendant violated a provision in a DVPO. Defendant tells you that he was not served with a copy of the DVPO and did not know the specific terms of the order. The file shows he was served with process and notice of the 10-day hearing after which the DVPO was entered. There is no indication that a copy of the order was mailed to defendant.
Can you hold defendant in contempt for violating the DVPO? What if defendant is in front of you on a criminal charge of violating the DVPO?

Comments:

Service of DVPO.

i. GS 50B-3(c) states that "A copy of any order entered and filed under this Article shall be issued to both parties." An ex parte order is served along with service of process. GS 50B-2(c)(7).

ii. Neither the 50B statute nor the Rules of Civil Procedure explicitly requires that a defendant be served with a copy of the final DVPO.

iii. If the order is served, however, Rule 5 of the Rules of Civil Procedure applies to service of all orders issued after initial Rule 4 service of process has been accomplished. Rule 5 allows service by regular mail.

iv. If a civil order is served on a party, the party is deemed to have knowledge of the contents of the order for purposes of the civil proceeding. *Harriet Cotton Mills v. Local No. 578 Textile Workers Union of America*, 251 NC 218 (1959).

v. The general rule in civil law is that even if an order has not been served, all parties to a civil action have constructive knowledge of all motions and orders made during a term of court. *Danileson v. Cummings*, 43 NC App 546 (1979); *Hagins v. Redevelopment Commission of Greensboro*, 275 NC 90 (1969).

vi. The crime of violating a domestic violence protective order requires that the defendant "knowingly" violated the order. GS 50B-4.1.

vii. The Pattern Jury Instructions for the crime of violating a domestic violence protective order provide that "where a domestic violence protective order has been served on a defendant, you may presume that the defendant knew the specific terms of the protective order." N.C.P.I. –Crim. 240.50. That instruction was referenced by the court of appeals in the unpublished opinion, *State v. Branch*, 720 SE2d 461 (2011).

viii. There is no case directly addressing whether a defendant can be found guilty of that crime if he/she was not present at the trial of the DVPO and he/she did not receive actual notice of the terms of the DVPO. The NC Supreme Court defined "knowledge" in *Underwood v. State Bd of Alcoholic Control*, 278 NC 623 (1971) as follows:

> Knowledge may be implied from the circumstances. State v. Stathos, 208 N.C. 456, 181 S.E. 273 (1935). 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.' State v. Hightower, 187 N.C. 300, 121 S.E. 616 (1924). Thus the holder of a license for the sale of wine and beer 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. Campbell v. Board of Alcoholic Control, 263 N.C. 224, 139 S.E.2d 197 (1964).

See also State v. Bogle, 376 SE2d 745 (1989)(court acknowledged that North Carolina law allows knowledge to be inferred from the circumstances); *State v. Williams*, 698 SE2d 542 (2010)(objective knowledge – meaning the defendant reasonably should have known – is sufficient to support a criminal conviction), and *State v. Avery*, 315 NC 1 (1985)(defendant must know or "have reasonable grounds to believe" person assaulted was a police officer).

These cases indicate that a defendant possibly could be found guilty of violating a DVPO even if defendant did not actually receive a copy of the DVPO if defendant was served with the civil complaint requesting the DVPO and was given notice of hearing before the order was entered because this notice was sufficient to give a defendant reasonable grounds to believe, or reason to know, that a protective order was entered in accordance with the request made by plaintiff in the DVPO complaint.

12. The one-year DVPO ordered defendant to attend abuser treatment. The order also required defendant to return to court in 3 months for the court to 'review' whether defendant was complying with all terms of the DVPO. During this review hearing, plaintiff testified that defendant was not attending abuser treatment. What can the trial court do if convinced defendant has not complied with the DVPO?

Comments:

There has been no case law in North Carolina addressing the propriety of review hearings as part of a DVPO.

GS 50B-3(a)(13) allows the court to include in a DVPO "any additional prohibitions or requirements the court deems necessary to protect any party or any minor child."

This provision seems to be broad enough to allow the court to require review hearings, as long as both parties are given notice and the opportunity to participate.

If the court learns of a violation of the DVPO during this review hearing, the court can consider initiating a contempt proceeding pursuant to Chapter 5A. The contempt statutes allow a court to initiate either a civil or a criminal contempt proceeding by issuing a show cause order. It is important that the court follow appropriate contempt procedure rather than imposing any type of punishment/response to the violation at the review hearing. Nothing in Chapter 50B gives the court that kind of enforcement authority.

If contempt or criminal sanctions are being considered, the court should take care not to compel defendant to incriminate himself during the review hearing.

13. You are conducting a custody trial. You find out there is a DVPO in effect that contains custody provisions. The DVPO grants custody to mom. In addition, the DVPO orders dad to stay away from and have no contact with mom, to stay away from and have no contact with the child at issue in your custody case, and to stay away from the family home. In addition, the DVPO orders dad to stay away from the child's school and all extracurricular activities.

How does the DVPO affect your authority in the custody case?

Comments:

GS 50B-3(a1)(4) states that "[n]othing in this section shall be construed to affect the right of the parties to a de novo hearing under Chapter 50 of the General Statutes. Any subsequent custody order entered under Chapter 50 of the General Statutes supersedes a temporary order entered pursuant to this Chapter."

While this provision makes it clear that custody provisions in the DVPO will not hinder your authority in the custody case, there is nothing to indicate that a custody judge can enter any order that contradicts the provisions in the DVPO that are not part of a temporary custody order entered pursuant to GS 50B-3(a1).