

Temporary custody orders

1. Jurisdiction.

a) G.S. § 50-13.5(c)(2) and (d)(2) give the district court jurisdiction to enter temporary custody and support orders for minor children. [*Story v. Story*, 57 N.C.App. 509, 291 S.E.2d 923 (1982) (trial court properly granted a temporary order after concluding that the order would serve the best interest of the child); *see* G.S. § 50-13.5(d)(2) (temporary orders may be entered “[i]f the circumstances of the case render it appropriate.”).]

b) G.S. 50B gives the district court jurisdiction to enter temporary custody and support orders as part of a domestic violence protection order. For discussion of custody in a domestic violence proceeding, *see* Bench Book, Vol. 1, *Domestic Violence*, Chapter 7.

2. Generally.

a) Temporary custody orders establish a party’s right to custody pending the resolution of a claim for permanent custody. [*Regan v. Smith*, 131 N.C.App. 851, 852-53, 509 S.E.2d 452 (1998).]

b) Temporary orders may be based on affidavits. [*See Story v. Story*, 57 N.C.App. 509, 291 S.E.2d 923 (1982).]

c) Temporary orders may be entered ex parte under appropriate circumstances. [G.S. § 50-13.5(d)(3); *Regan v. Smith*, 131 N.C.App. 851, 853, 509 S.E.2d 452 (1998); *see Brandon v. Brandon*, 10 N.C.App. 457, 179 S.E.2d 177 (1971) (finding that ex parte order was appropriate where father alleged mother was not suitable to exercise custody).]

(1) However, a temporary order that changes custody or changes the living arrangements of a child cannot be entered ex parte, unless the child risks bodily injury, sexual abuse, or removal from the state for purpose of evading the jurisdiction of the court. [G.S. § 50-13.5(d)(3)]

(2) A temporary custody order entered ex parte does not expire automatically after ten days. [*Campen (Featherstone) v. Featherstone*, 150 N.C.App. 692, 564 S.E.2d 616, *review denied*, 356 N.C. 297, 570 S.E.2d 504 (2002) (recognizing that Chapter 50 does not limit a temporary custody order to a specific length of time, nor does case law establish a definite period of viability for temporary custody orders).]

3. Third party actions against parents.

(a) There is nothing in case law or statutes indicating a different standard for temporary orders in cases initiated by non-parent third parties against parents, when the constitutional rights of the parent are at issue. *See Smith v. Barbour*, 154 N.C. App. 402, 571 S.E.2d 872 (2002)(where trial court made findings to show plaintiff had standing to bring action against parent, trial court had authority to enter a temporary custody order granting temporary visitation to third party).

(b) In addition, numerous third party cases reviewed by both the Supreme Court and the Court of Appeals included temporary orders entered by the trial court, and the appellate courts have not indicated such orders are inappropriate. *See e.g., Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997)(trial court awarded temporary custody to plaintiff after blood tests revealed he was not the father of the child); *Owenby v. Young*, 357 N.C. 142, 579 S.E.2d 264 (2003)(ex parte and temporary orders removed child from parent and granted temporary custody to third party); *Speagle v. Seitz*, 354 N.C. 525, 557 S.E.2d 83 (2001)(ex parte order granted custody to grandparent following arrest of mother for murder of father); *Mason v. Dwinnell*, 660 S.E.2d 58 (N.C. App., May 6, 2008)(temporary order gave non-parent significant temporary visitation following denial of parent’s motion to dismiss complaint for failure to state a claim); *Brewer v. Brewer*, 139 N.C. App. 222, 533 S.E.2d 541 (2000)(ex parte granted custody to non-parent and temporary order granted custody to parent, all based on “best interest”).

4. When an order is temporary.

(a) An order is temporary if either:

(1) It states a clear and specific reconvening time and the time interval between the two hearings is reasonably brief; or

(2) It does not determine all issues pertinent to custody or visitation. [*Anderson v. Lackey*, 163 N.C.App. 246, 593 S.E.2d 87 (2004); *Simmons v. Arriola*, 160 N.C.App. 671, 586 S.E.2d 809 (2003).]

(b) There is no absolute test for determining whether a custody order is temporary or final. [*LaValley v. LaValley*, 151 N.C.App. 290, 564 S.E.2d 913 (2002).]

(c) A trial court’s designation of an order as temporary is not controlling. [*Simmons v. Arriola*, 160 N.C.App. 671, 586 S.E.2d 809 (2003); *Lamond v. Mahoney*, 159 N.C.App. 400, 583 S.E.2d 656 (2003).]

(d) Long-term temporary orders are not favored. [*See Simmons v. Arriola*, 160 N.C.App. 671, 586 S.E.2d 809 (2003) (stating that it is the public policy in North Carolina that where practicable, custody orders should be permanent or final to avoid the “turmoil and insecurity” that children face from constant litigation of their custody status).]

(e) An order has been found to be temporary when it:

(1) Was entered without prejudice to either party. [*Senner v. Senner*, 161 N.C.App. 78, 587 S.E.2d 675 (2003); *LaValley v. LaValley*, 151 N.C.App. 290, 564 S.E.2d 913 (2002).]

(2) Expressly provided for further proceedings to consider appropriateness of unsupervised visitation for a three month period and to consider permanent visitation after that period. [*Lamond v. Mahoney*, 159 N.C.App. 400, 583 S.E.2d 656 (2003).]

(3) Did not specify visitation periods and provided for regular review to assess mother's recovery from a traumatic brain injury. [*Simmons v. Arriola*, 160 N.C.App. 671, 586 S.E.2d 809 (2003).]

(4) Set out a specific reconvening time and the order was modified at a rehearing held within 20 months. [*Anderson v. Lackey*, 163 N.C.App. 246, 593 S.E.2d 87 (2004). *See also File v. File*, 195 N.C. App. 562 (2009)(order was temporary where it ordered a review hearing in 5 months); *Watts v. Winford, unpublished*, 687 S.E.2d 319 (2009)(order entered in May was temporary where it ordered review "this summer".]

(5) Awarded primary custody to father but left mom's visitation undecided until she completed mental health evaluation. [*Smith v. Barbour*, 195 N.C. App. 244 (2009)].

5. When an order is permanent. A permanent order is one that establishes a party's present right to custody and that party's right to retain custody indefinitely. [*Regan v. Smith*, 131 N.C.App. 851, 509 S.E.2d 452 (1998).]

6. Conversion of a temporary order into a permanent order.

(a) No case has determined the length of time that a temporary order remains in effect. [*See LaValley v. LaValley*, 151 N.C.App. 290, 564 S.E.2d 913 (2002) (noting in dicta that a temporary order "is not designed to remain in effect for extensive periods of time or indefinitely"); *see also Campen (Featherstone) v. Featherstone*, 150 N.C.App. 692, 564 S.E.2d 616, *review denied*, 356 N.C. 297, 570 S.E.2d 504 (2002) (recognizing that Chapter 50 does not limit a temporary custody order to a specific length of time, nor does case law establish a definite period of viability for temporary custody orders).]

(b) The court of appeals, however, has held that a temporary order converts into a permanent order when neither party seeks a permanent order within a reasonable time after entry of the temporary order. [*LaValley v. LaValley*, 151 N.C.App. 290, 564 S.E.2d 913 (2002).]

(c) Whether time is reasonable must be determined on a case-by-case basis. [*Senner v. Senner*, 161 N.C.App. 78, 587 S.E.2d 675 (2003).]

(1) Five months "reasonably brief" time. [*Cox v. Cox*, 133 N.C.App. 221, 233, 515 S.E.2d 61 (1999).]

(2) Twenty months reasonable where parties were negotiating a new custody arrangement, which eventually broke down. [*Senner v. Senner*, 161 N.C.App. 78, 587 S.E.2d 675 (2003); *see also Anderson v. Lackey*, 163 N.C.App. 246, 593 S.E.2d 87 (2004) (upholding modification within 20 months of earlier order).]

(3) One year not “reasonably brief” where there were no unresolved issues. [*Brewer v. Brewer*, 139 N.C.App. 222, 533 S.E.2d 541 (2000).]

(4) Twenty-three months between entry of temporary order and date set for hearing not reasonable; temporary order converted into permanent order. [*LaValley v. LaValley*, 151 N.C.App. 290, 564 S.E.2d 913 (2002).]

7. Modification of a temporary order.

(a) A court may modify a temporary custody order without finding a substantial change of circumstances. [*Simmons v. Arriola*, 160 N.C.App. 671, 586 S.E.2d 809 (2003) (upholding modification of visitation schedule in a temporary custody order under best interest standard); *see also Senner v. Senner*, 161 N.C.App. 78, 587 S.E.2d 675 (2003).]

(b) A court may modify a final or permanent custody order only if it determines that there has been a substantial change in circumstances. [*Simmons v. Arriola*, 160 N.C.App. 671, 586 S.E.2d 809 (2003); *Senner v. Senner*, 161 N.C.App. 78, 587 S.E.2d 675 (2003) (this standard applicable to a temporary order that has converted to a final order); *Lamond v. Mahoney*, 159 N.C.App. 400, 583 S.E.2d 656 (2003); *LaValley v. LaValley*, 151 N.C.App. 290, 564 S.E.2d 913 (2002) (trial court erred in modifying a custody consent order that had converted into a permanent order without applying substantial change of circumstances standard).]

8. Appeal of a temporary order.

(a) Order awarding temporary custody is interlocutory and not immediately appealable. [*Dunlap v. Dunlap*, 81 N.C.App. 675, 344 S.E.2d 806, *review denied*, 318 N.C. 505, 349 S.E.2d 859 (1986).]

(b) However, a permanent order may be appealed, even if the order is designated “temporary.” [*McRoy v. Hodges*, 160 N.C.App. 381, 585 S.E.2d 441 (2003) (order was not temporary and therefore not interlocutory where it granted “temporary” custody to grandparents and permanent custody to father, set no reconvening date, and established visitation rights and a schedule); *see section II.E.3* on page 8 regarding when an order is temporary.]

9. Effect of voluntary dismissal on temporary order.

(a) Voluntary dismissal of a custody claim probably vacates a temporary custody order, as long as no affirmative relief has been requested by the non-dismissing party. *See Doe v. Duke University*, 118 N.C. App. 406, 455 S.E.2d 470 (1995)(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, 60 S.E.2d 1 (2004)(voluntary dismissal nullified discovery order entered in case); *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 Rule 41 voluntary dismissal).

(b) However, a ‘final’ custody determination is not affected by the filing of a voluntary dismissal. *Massey v. Massey*, 121 N.C. App. 263, 465 S.E.2d 313 (1996).