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# Frequently Asked Questions

# Domestic Relations Cases

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1. **Can I enforce or modify a custody order entered in another state if that order has not been registered in NC.**

   **Answer:** Yes with regard to enforcement. A North Carolina court always can enforce an order entered in another state. Yes to modification if NC has modification jurisdiction pursuant to the UCCJEA.

   **Discussion:** This is the most common question I hear. I think the confusion comes from the fact that child support orders from other states must be registered before a North Carolina court can enforce or modify the support order. See UIFSA, Chapter 52C. However, there is no similar requirement for child custody orders. The UCCJEA, Chapter 50A, contains an optional registration procedure that serves a very limited but important purpose. According to the Official Comment to GS 50A-305, the registration process for child custody orders allows a parent to send a custody order to North Carolina before sending the child that is the subject of the custody order. During the registration process, all defenses to enforcement of the order must be raised. Once the order is confirmed, a parent can send a child to the state without concern that the order will not be enforced if the parent in this state refuses to return a child.

   GS 50A-308 provides an expedited process for enforcement of a custody order from another state. There are AOC forms available for

this process. It is not an exclusive process, so attorneys may choose to file a separate enforcement proceeding. There is no requirement that an order from another state be registered before a party can use the expedited enforcement process. Such a requirement would defeat the expedited nature of the enforcement process, as registration requires 20 days' notice. A hearing on a petition for expedited enforcement must take place on the next judicial day following service of process.

Neither the UCCJEA nor Chapter 50 requires that a custody order from another state be registered before modification. There is no statutory procedure for registration, other than the one contained in Part 3 of the UCCJEA discussed above. GS 50A-202 and 203 determine when North Carolina courts have modification jurisdiction, and GS 50-13.7 allows the court to modify a custody order from another state as long as North Carolina has jurisdiction pursuant to Chapter 50A and the party seeking modification can show a substantial change in circumstances.

**2. When a divorce complaint is not verified at the time of filing, can the complaint be amended to fix the problem?**

**Answer:** Probably.

**Discussion:** The court of appeals has held that the requirement in GS 50-8 that a complaint for absolute divorce be verified is jurisdictional. *See Boyd v. Boyd,* 61 NC App 334 (1983). That case also held that the complaint must be verified at the time of filing and that it is not sufficient to obtain verification before the complaint and summons is served on defendant. According to the court, a complaint is not sufficient to 'commence' an action and invoke the jurisdiction of the court unless it is verified at the time it is filed. The court stated that plaintiff should have taken a voluntary dismissal and filed a new divorce complaint with the appropriate verification. *See also Arispe v. Arispe*, *unpublished opinion*, 165 NC App 904 (2004)(divorce judgment must be set aside where divorce complaint was not verified), and *In re. TRP*, 360 NC 588 (2006)(lack of verification of juvenile petition rendered all subsequent actions in the case void).

However, there is no indication in *Boyd* that plaintiff attempted to amend the complaint for divorce to include the verification. Instead, plaintiff simply verified the complaint that had been filed without verification. Rule 15 of the Rules of Civil Procedure allows a complaint to be amended once without leave of court at any time before a responsive pleading is filed. After a responsive pleading is filed, the party must request leave of court before amending and leave of court "shall be freely given when justice requires." Rule 15(a). In addition, Rule 15(c) provides that "a claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading."

There is no appellate case regarding whether a divorce complaint can be amended to add a verification, and the court in *Boyd* does not discuss amendment. However, in *Brisson v. Kathy A. Santoriello*, 134 NC App 65 (1999), the court of appeals held that a plaintiff in a medical malpractice case should have been allowed to amend the complaint to provide the certification required by Rule 9(j) of the Rules of Civil Procedure. Rule 9(j) provides that a medical malpractice complaint must be dismissed unless the complaint includes the certification. In *Brisson*, the court of appeals held that the trial court erred by dismissing the complaint rather than allowing the amendment. In addition, *Gladstein v. South Square Associates,* 39 NC App 171 (1979), the court of appeals held that a request to amend a negligence complaint in order to add a verification was a request for a 'technical' amendment that should have been allowed by the trial court.

Given Rule 15 and the two cases cited above, it seems reasonable to conclude that the lack of verification can be fixed, but only if plaintiff files an amended complaint. If an amended complaint is filed, the verified complaint will relate back to the time of the original filing and should be sufficient to invoke the subject matter jurisdiction of the court. However, as previously discussed, the court in *Boyd* stated that plaintiff should have taken a voluntary dismissal of the divorce complaint rather than attaching the verification after filing. This statement does raise some question about whether amendment is an

appropriate alternative to dismissal, even though there is no indication in that opinion amendment was considered by either the trial court or the appellate court.

Remember that there is no requirement that all complaints be verified. A complaint must be verified only if there is a specific statute requiring verification. Domestic relations complaints that require verification include absolute divorce (GS 50-8), divorce from bed and board (GS 50-8) and postseparation support (GS 50-16.2A). In addition, civil contempt proceedings require a sworn statement or affidavit at time motion is filed or show cause order is requested. GS 5A-23.

However, Rule 11 of the North Carolina Rules of Civil Procedure does require that all complaints be signed. Unlike verification, Rule 11 provides that the lack of a signature can be remedied at any time.

**3. Can a divorce be granted in North Carolina to a same-sex couple married under the laws of another state?**

**Answer:** Probably not because of GS 51-1.2, but we will not know for certain until the appellate courts address the issue.

**Discussion:** The general rule is that North Carolina courts will recognize any marriage that was valid where entered. *See Overton v. Overton*, 260 NC 139 (1963). This is why North Carolina courts must recognize the validity of a common law marriage formed pursuant to the law of another state which allows for common law marriage, even though the law of North Carolina does not allow for such marriages. *See Parker v. Parker*, 46 NC App 254 (1980). *See also State v. Ross*, 76 NC 242 (1877)(for purposes of a criminal prosecution on the charge of fornication, the state was required to recognize as valid a marriage between a white person and a black person even though at that time, both a state statute and the state constitution prohibited such marriages, because the marriage was valid in South Carolina where the marriage had occurred). This is an old and well-established rule of common law, adopted and followed by most states. *See* Oppenheimer, No Exit: The Problem of Same-Sex Divorce, 90 NC Law Review 73 (2011).

Despite the general rule of recognition, North Carolina courts will not recognize marriages that violate a fundamental public policy of the state. *State v. Ross, id.* However, in *State v. Ross,* the North Carolina Supreme Court also stated that public policy exceptions to the general recognition rule "are considerably limited." The court held that, at least at the time of that decision, the public policy exception prohibited only the recognition of incestuous and bigamous marriages. According to the court in *Ross*, "all Christian countries agree that [incest and polygamy] is unlawful, consequently such marriages will be held null everywhere, because they were null in the place of the contract." Similarly, in addressing a bigamous marriage, the North Carolina Supreme Court later again stated in *State v. Cutshall*, 110 NC 538 (1892):

"As a rule, the validity of marriages contracted in any foreign country must be determined by the courts of another nation with reference "to the law of the country wherein they exchange the mutual consent to be husband and wife, …" 1 Bish. Mar. & Div. §§ 855, 856; State v. Ross, supra. Such marriages may be declared unlawful, not simply because they are contrary to the law of the state in which the question arises, but for the reason that they fall under the condemnation of all civilized nations, like marriages between persons very nearly related or those that are polygamous. 1 Bish. Mar. & Div. §§ 857-862."

*See also State v. Williams*, 220 NC 445 (1941)("polygamy is an offense against society").

At the time *Ross* was decided, the North Carolina State Constitution provided that "[a]ll marriages between a white person and a negro .. are hereby forever prohibited," and a state statute provided that such marriages were "forever prohibited, and shall be void." Nevertheless, the North Carolina Supreme Court held that the South Carolina interracial marriage was entitled to recognition, stating that while "[t]he State of North Carolina, with the general concurrence of its citizens of both races, has declared its conviction that marriages between them are immoral and opposed to public policy…, the decided weight of English and American authority requires us to hold that the relation thus lawful in its inception continues to be lawful here."

North Carolina now has a different state statute and a different constitutional provision addressing specifically the recognition of a marriage. The question to be answered by our appellate courts is whether this statute and/or the constitutional amendment change the rule set out in *Ross.*

N.C. Gen Stat. 51-1.2 states that "[m]arriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina." In addition, as of May 23, 2012, Art. XIV, sec. 6 of the North Carolina Constitution provides that "[m]arriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State."

While the meaning of the language in the constitutional amendment presently is the subject of much debate, the language of GS 51-1.2 is less ambiguous. That statute appears to specifically address and change the rule of recognition set out in *Ross* with regard to marriages between people of the same gender. The statute and constitutional provision at issue in *Ross* simply declared interracial marriages "invalid" and "void" in North Carolina. The present North Carolina statutory provision specifically provides that same gender marriages formed in other states cannot be recognized. In addition, the constitutional amendment prohibits 'recognition' of marriage between any people other than one man and one woman.

Some appellate courts in other states with similar statutes have decided that the statutes prohibit the granting of divorce to same gender couples married in other states. *See Christiansen v. Christiansen*, 253 P.3d 153 (Wyo 2011); *In re J.B. and H.B.,* 326 SW3rd 654 (Texas 2010); and *Kern v. Taney*, 11 Pa D&C5th 558 (2010). *But see* Byrn and Holcomb, Same-Sex Divorce in a DOMA State, Family Court Review, April 2012 (author argues this is an incorrect interpretation of the law, that granting a divorce does not mean the state is 'recognizing' the marriage, that Georgia is the only state with a statute that specifically prohibits granting divorces, and that states with statutes like the one in North Carolina should grant divorces to same-sex couples). Similarly, courts in states without similar statutes have granted divorces to same-sex couples even

though the law of the state prohibited same-sex marriage, citing the general common law rule requiring recognition of marriages valid in the state where performed. *Beth R. v. Donna M.*, 853 NYS2d 501 (2008) and *C.M. v. C.C.*, 867 NYS2d 884 (2008).

For more thorough discussion of this issue and the response in other states, see Byrn and Holcomb article referenced above, as well as Oppenheimer, No Exit: The Problem of Same-Sex Divorce, 90 NC Law Review 73 (2011).

**4. Is a consent custody order void if it is entered in a case between a nonparent and a parent and the consent order does not include the conclusion of law that the parent has waived his or her constitutional right to exclusive, care, custody and control of the child?**

**Answer.** No. Existing case law indicates that such consent orders are valid. A parent's constitutional rights can be waived voluntarily. However, consent orders entered in cases where the party requesting custody did not have standing at the time of filing are *void ab initio*.

**Discussion:** The court of appeals has held that consent custody orders generally are not required to contain any findings of fact and conclusions of law. *Buckingham v. Buckingham*, 134 NC App 82 (1999)(but stating the trial court should review a consent custody order to "ensure that it does not contradict statutory, judicial, or public policy."). In addition, there are three cases from the court of appeals involving trial court orders entered in third party custody matters without any specific finding of fact or conclusion of law regarding the parent's waiver of constitutional protections. In each of those cases, the court of appeals held that the order awarding custody to the nonparent third party could not be modified unless the parent showed there had been a substantial change in circumstances since the time the custody order was entered and then established that modification of custody was in the best interest of the child. There is no indication in any opinion to date that the waiver of parental rights is a matter of subject matter jurisdiction. Rather, it appears that all protections are waived if the parent does not raise the constitutional issue it at the time of the initial custody proceeding. [An exception is those cases

where the original order was between the two parents only, meaning there was no reason either parent would have raised the issue of constitutional rights. In those cases, parents continue to enjoy constitutional protections if a third party nonparent later files a motion to modify. *Brewer v. Brewer*, 139 NC App 222 (2000).]

The three cases are: *Bivens v. Cottle*, 120 NC App 467 (1995)(trial court entered order giving custody to grandmother without concluding mother had waived her constitutional rights and instead finding that mom was 'fit and proper' to care for child. Mother was not entitled to modification without showing of changed circumstances and best interest.); *Speaks v. Fanek*, 122 NC App 389 (1996)(same result where initial order was a consent order. Court of appeals held that constitutional presumptions in favor of parents apply only when initial custody order is entered and not at modification hearing, apparently even if constitutional issues were not raised at initial hearing); *Sloan v. Sloan*, 164 NC App 190 (2004)(trial court gave visitation to grandmother in original custody order without reaching any conclusion that mother had waived constitutional rights but mom did not appeal. Mom could not later object to grandmother's request for increased visitation on the basis of mom's constitutional protections).

However, the court of appeals has held on several occasions that third party custody complaints must be filed by a person who has standing. Standing refers to the relationship between the person seeking custody and the child. *See Ellison v. Ramos*, 130 NC App 389 (1998). The court in *Ellison* held that the standing requirement comes from the statement by the North Carolina Supreme Court in *Petersen v. Rogers*, 337 NC 397 (1994), that "strangers" have no right to seek custody or visitation with a child. Therefore, to have standing, the person seeking custody must show a relationship sufficient to keep that person from being a stranger. *Ellison* held that standing must be determined on a case by case basis. To date, the court of appeals has found standing for persons who have a "relationship in the nature of parent and child" with the child, *see e.g. Ellison* and *Seyboth v. Seyboth*, 147 NC App 63 (2001)(step-father had parent-like relationship sufficient to grant standing), and for persons who are "relatives" of the child. *Rodriquez v. Rodriquez,* 710 SE2d 235 (2011)(grandparents have standing); and

*Yurek v. Baker*, 678 SE2d 738 (2009)(sister and brother-in-law of child's father had standing as relatives).

According to the court of appeals, standing is a matter of subject matter jurisdiction and cannot be waived by the parties. Therefore, consent orders will be void if the action was initiated by a person who lacked a sufficient relationship with the child at the time of filing. *See Myers v. Baldwin and Baker,* 205 NC App 696(2010)(appellate court can raise standing issue even if not argued by either party; unrelated couple who cared for child for two months before filing custody action did not have relationship with child sufficient to give them standing, so judgment giving them custody was void *ab initio*); and *Tilley v. Diamond, unpublished opinion,* 184 NC App 758 (2007)(same result where plaintiffs knew child only for a couple of days before filing; consent order declared void several years after it was entered).

**5. Can I appoint a Rule 17 GAL for a party when I think the party is incompetent even though the party never has been adjudicated incompetent? If so, who pays the Rule 17 GAL?**

**Answer:** Yes, you can determine the litigant is incompetent and appoint a Rule 17 GAL. Costs are allocated between the parties in your discretion. No state funding is available to pay for the Rule 17 GAL.

**Discussion.** Rule 17 of the Rules of Civil Procedure require that a GAL be appointed for any plaintiff or defendant in a civil action if the party is a minor or incompetent, and that minor or incompetent party has no general or testamentary guardian. In *Culton v. Culton*, 96 NC App 620 (1989), *rev'd* on other grounds, the court of appeals held that a district court judge did not have authority to adjudicate incompetency of a litigant. The court held that while the district court had this authority before Chapter 35A was enacted, G.S. 35A-1101 granted exclusive jurisdiction to determine incompetency to the clerk of superior court. Following that opinion from the court of appeals, the General Assembly amended GS 35A-1102 to provide that "nothing in [this Chapter] shall interfere with the authority of a judge to appoint a guardian ad litem for a party to litigation under Rule 17(b) of the North

Carolina Rules of Civil Procedure." Session Laws 2003-236, sec. 4. The court of appeals has not addressed the issue since the statute was amended, but the official comment to Rule 17 states that the amendment 'supersedes' the *Culton* decision.

In *Van Every v. McGuire*, 125 NC App 578 (1997), the court of appeals held that the cost of any GAL appointed by the trial court pursuant to Rule 17 is a court cost subject to apportionment by the court between the parties. There is no state funding available to pay a Rule 17 GAL. There also is no requirement that a Rule 17 GAL be an attorney.

6. **When an order of prospective child support ends based upon the age of the child, but the obligor must continue to pay support in the same amount as the child support order until all arrearages are paid in full, can the court modify the court order setting out the monthly amount to be paid in the future?**

   **Answer:** There is no case law on point, but I think the payments still are considered 'child support' and subject to modification pursuant to GS 50-13.7.

   **Discussion.** GS 50-13.4(c) provides "[i]f an arrearage for child support or fees due exists at the time that a child support order terminates, payments shall continue in the same total amount that was due under the terms of the previous court order or income withholding in effect at the time of the support obligation. The total amount of these payments is to be applied to the arrearage until all arrearages and fees are satisfied or until further order of the court."

   GS 50-13.7 provides that "an order of a court of this State for the support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances." I think the language of this statute is broad enough to cover the payments made on arrears pursuant to GS 50-13.4(c).

**7. When a motion to modify child support is filed but not heard for a significant length of time, what is the effective date of the new order?**

**Answer:** The general rule is that the effective date of the new order is the date the motion to modify was filed. However, you have discretion to set a different effective date.

**Discussion:** For an initial 'permanent' child support order, there is an implied presumption that prospective child support payments begin at the time of the filing of the complaint. *Albemarle Child Support Enforcement Agency ex. rel. Miller v. Hinton*, 147 NC App 700 (1998)(holding that unless trial court finds that beginning the payments on the date of filing is unjust or inappropriate, it is error to begin payments at any time other than initial filing). This rule applies even when there has been a temporary support order in place. *Cole v. Cole, 149 NC App 427 (2002)*. One opinion by the court of appeals held that a decision not to order prospective support to begin at the time the complaint was filed is a deviation from the guidelines that must be supported with the same findings of fact necessary for all other deviations. *See State obo Gillikin v. McGuire*, 174 NC App 347 (2005).

A court modifying an existing support order may make the modification effective as of the date the motion to modify was filed, or any ensuing date, as to the obligations that accrue after that date. *Mackins v. Mackins*, 114 NC App 538 (1994)(ordering an increase in support); *Spencer v. Spencer*, 133 NC App 38 (1999)(ordering decreases in support); *Mason v. Erwin*, 157 NC App 284 (2003)(court held that it is 'well settled' that modification of support takes effect on the date the petition for modification is filed). *Cf. Barham v. Barham,* 127 NC App 20 (1997)(no error where trial court made order effective as of date modification order was entered).

However, a modification cannot be made effective prior to the date the motion to modify is filed because vested arrears cannot be modified. GS 50-13.10; *Mackins, id*.

**8. Do I have the authority to 'transfer' a custody or child support case to another state?**

**Answer:** No, but UIFSA contains a procedure for child support and alimony that resembles a transfer. However, most of those interstate proceedings are handled by the child support enforcement agency and the clerk of court.

**Discussion:** While state venue statutes allow a court actually to transfer a case to another district within the state, there is no authority for a trial court in North Carolina to transfer a case to another state and no rule of law requiring the other state to accept and litigate the case transferred.

The Uniform Child Custody Jurisdiction and Enforcement Act – which now is the law in almost every state in the country – contains provisions that allow a court to decline to exercise jurisdiction under appropriate circumstances. *See* GS 50A-207 and 208. When a court declines to exercise jurisdiction pursuant to these statutes, the court does not transfer the case to the state determined to be the more appropriate state. Rather, the court in this state simply stays the case while the parties pursue litigation in the state determined to be the more appropriate forum. GS 50A-207(c). As the statute provides that the stay is conditioned upon the parties "promptly" commencing an action in the appropriate state, the parties probably have the right to ask the North Carolina court to lift the stay and exercise jurisdiction if the case actually is not pursued in the other state.

The Uniform Interstate Family Support Act (UIFSA) does not contain any provision similar to that in the UCCJEA allowing a court in this state to determine that another state should exercise jurisdiction. However, UIFSA does contain interstate procedures designed to allow a party pursuing support to remain in North Carolina while prosecuting an action against an obligor in another state. Pursuant to GS 52C-2-203 and GS 52C-3-304, North Carolina may act as an 'initiating state' by sending a request to another state asking that state to pursue the obligor and establish paternity and/or support, or collect past-due support. Similarly, pursuant to GS 52C-2-203 and GS 52C 3-305, North Carolina courts can be asked to serve as a responding state when another state acts as the initiating state. These provisions are

included in UIFSA because child support actions require personal jurisdiction over a defendant in the form of minimum contacts. Generally civil litigants are required to travel to the state which can exercise personal jurisdiction over an individual defendant in order to litigate a civil case. The UIFSA provisions are designed to facilitate the collection of support by allowing custodial parents to pursue obligors who have no connection to North Carolina without requiring the custodial parent to leave this state.

**9. Can I enter a QDRO to order division of a pension when there is no claim filed requesting equitable distribution?**

**Answer: Yes, as long as there is a complaint filed alleging an appropriate cause of action that will give the court jurisdiction to order the division of the pension.**

In *Gilmore v. Garner*, 157 NC App 664 (2003), the court of appeals upheld the entry of a QDRO by a trial court entered as part of an order requiring specific performance of a separation agreement. In that case, the separation agreement provided for the division of the pension. When ex-husband disagreed with ex-wife over the meaning of the separation agreement, wife filed action alleging breach of the contract and requesting specific performance. The trial court decided in favor of wife and entered the QDRO. The court of appeals affirmed. That case did not involve a claim for equitable distribution.

A QDRO is a "Qualified Domestic Relations Order." That term is defined as "[a]ny judgment, decree, or order (including approval of a property settlement agreement) which relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child or other dependent of a participant, and is made pursuant to State domestic relations law." 29 USC sec. 1056(d)(3)(B)(ii); Internal Revenue Code sec. 414(p)(1)(B). I think this means that in order for the QDRO to be valid, it must be entered as a remedy in a cause of action recognized by NC domestic relations law.

## 10. When I award custody to a nonparent third party, how do I calculate child support?

**Answer:** Do not include third party income in guideline determination. Support is ordered to be paid by parents only unless the third party has agreed in writing to pay support.

**Discussion:** Nonparent third parties have no support obligation for a child unless the third party undertakes a support obligation in writing. G.S. 50-13.4(b)("judge many not order support to be paid by a person who is not the child's parent or an agency, organization standing in loco parentis absent evidence and finding that such person, agency, organization or institution has voluntarily assumed the obligation in writing."). *See Duffey v. Duffey*, 113 NC App 382 (1994); *Moyer v. Moyer*, 122 NC App 723 (1996). Even when the obligation has been undertaken in writing, the support obligation of the nonparent is secondary to that of the parent. *Moyer.* The only exception is set out in GS 50-13.4(b), providing that grandparents may be liable for support if their minor child has a baby, as provided in that statute.

Therefore, there is no basis for including a third party's income in a child support calculation. *See Duffy. See also* 2011 Child Support Guidelines, p. 1 (guidelines cannot be used even if third party has undertaken support obligation in writing.)

So, when child is in custody of a third party, the support obligation of each parent is determined by using the guidelines. Amounts owed by each parent will be paid to the third party custodian. However, the fact that a child resides with a third party may be the basis for a deviation from guideline support for the parents. *See e.g. Guilford Cty ex .rel. Easter v*. *Easter*, 344 NC 166 (1996)(fact that third party nonparents contribute to support of child may be considered by trial court as a reason to deviate from the child support guidelines).

## 11. When does a temporary custody order convert to a final custody order and require a showing of changed circumstances before modification?

**Answer:** General rule seems to be approximately one year but more recent court of appeals opinions have ruled older orders to be temporary where the parties were actively engaged in the litigation process during the time the temporary order was in place.

**Discussion:** It is important to know whether a custody order is temporary or 'permanent' for at least three reasons. One, only a permanent order can be appealed to the court of appeals. An appeal of a temporary custody order is an inappropriate interlocutory appeal, *see File v. File*, 195 NC App 562 (2009), unless the court of appeals grants *cert*. *See Smith v. Barbour*, 195 NC App 244 (2009). The general rule is that an inappropriate interlocutory appeal does not divest the trial court of jurisdiction to act on the matter appealed. *See Harris v. Harris,* 58 NC App 175 (1983)(inappropriate appeal of an interlocutory order in a separation agreement case did not deprive the trial court of jurisdiction to proceed with the trial).

Second, a temporary order can be modified by the trial court for any reason, *Smith v. Barbour,* but a 'permanent' order only can be modified based on a showing of a substantial change in circumstances affecting the welfare of the child. GS 50-13.7; *Simmons v. Arriola*, 160 NC App 671 (2003).

And third, a party is entitled to take a voluntary dismissal of a custody claim after a temporary custody order is entered but not after a final custody order is entered. *Massey v. Massey,* 121 NC App 263 (1996). A voluntary dismissal following entry of a temporary order vacates the temporary order. *See Collins v. Collins*, 18 NC App 45 (1973)(party cannot be held in contempt of temporary order after case is dismissed by party); *Doe v. Duke University*, 118 NC App 406 (1995)(voluntary dismissals in civil cases "carries down with it previous rulings and orders in the case).

The court of appeals has stated numerous times that the temporary or 'permanent' nature of an order is not determined by the caption of the order. *See e.g. Simmons v. Arriola*, 160 NC App 671 (2003); *Lamond v.*

*Mahoney*, 159 NC App 400 (2003). Rather, the determination is made by examining the content of the order. Although there is no absolute test for determining whether a custody order is final or temporary, *LaValley v. LaValley*, 151 NC App 290 (2002), the court of appeals has held that an order is temporary if it states explicitly that it is entered "without prejudice to either party", it states a "clear and specific reconvening time and the interval between the two hearings is reasonably brief," or it does not determine all issues pertinent to custody or visitation. *Simmons v. Arriola; Brewer v. Brewer*, 139 NC App 222 (2000). *But cf. Maxwell v. Maxwell*, 713 SE2d 489 (2011)(holding that any order without a specific reconvening time will be considered permanent).

Even if a custody order is temporary when entered, the court of appeals has held that it will 'convert' to a permanent order if neither party seeks a permanent order within a reasonable time after entry of the temporary order. *LaValley v. LaValley* (temporary order converts because a temporary order "is not designed to remain in effect for extensive periods of time or indefinitely."). Whether a time period is 'reasonable' must be determined on a case-by-case basis. Generally speaking, a temporary order will convert to a permanent order at some time before it has been in effect one full year. *Compare File v. File* (five months was reasonably brief so temporary order did not convert); *Brewer v. Brewer*, (one year was not reasonably brief and order did convert); *LaValley* (23 months was not reasonably brief). However, the court of appeals has held that orders continued to be temporary even after periods of time in excess of one year when the parties had been negotiating regarding the custody case or other domestic matters. *See Senner v. Senner*, 161 NC App 78 (2003)(20months was reasonable were parties were negotiating a new custody arrangement which eventually broke down) and *Anderson v. Lackey*, 163 NC App 246 (2004)(20 months was reasonable brief where original order contained a specific reconvening time and there were intervening court hearings before that specified date).