

## **EX PARTE CUSTODY**

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## One Judge's View of Ex Parte Custody Orders

by Martin B. (Marty) McGee

Friday, 4:25 p.m. "Judge, can I talk to you for a minute about an ex parte custody motion?"

As dread washes over me, I say: "Sure – come on into my office and have a seat."

Why do I dread considering ex parte custody motions? Because I know that I am being asked to make an important, high-risk, decision without complete – and occasionally with false – information. I do not have the other side's story and I have only an affidavit or verified motion from the movant, which cannot be cross-examined. On top of all of this, time is usually short – the clerk's office is closing, I have to get back to court, some other responsibility is pressuring me to move too quickly, or the movant contends that there is no time to lose.

I know many practitioners dread ex parte custody orders as well. Who wants to learn that their client has been less than candid with them after they have asked a judge to enter an ex parte order or, being on the other side of the case, to see the unfairness of a child being removed by a parent - with the police in tow - based upon inaccurate information being presented to a judge?

While we may dislike these difficult situations, we will continue to face them because emergency custody orders can be an important tool in protecting children. Below, I explore a few points that I hope will be helpful as we work to meet these challenges.

1. *Rule 3.3 of the Revised Rules of Professional Conduct requires: "In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse."* An ex parte custody motion asks a judge to knowingly make a critical decision with partial information. In this situation, our rules of professional responsibility impose an additional duty on the advocate. Comment 15 of Rule 3.3 makes clear that in an ex parte setting an attorney has a "duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision" to assist the court reach a "substantially just result." The judge must depend on you to use your best efforts to vet your client's allegations. If you seek an ex parte order, you should ask the tough questions of your client before the motion is filed in an attempt to find the truth. If you do not, you will have some explaining to do, your client's case will suffer, and your next ex parte motion will likely be met with heightened skepticism.
2. *Rule 3.5 of the Revised Rules of Professional Conduct requires: (a) A lawyer shall not . . . (3) communicate ex parte with a judge or other official except: . . . (B) in writing, if a copy of the writing is furnished simultaneously to the opposing party; (C) orally, upon adequate notice to opposing party; or (D) as otherwise permitted by law."* N.C.G.S. Section 50-13.5 provides limited permission for an attorney to

communicate ex parte with a judge without violating the rules of professional conduct, but my first question when considering these matters is always: “Is there a lawyer on the other side?” Professional courtesy and common sense compels, in nearly every instance, reaching out to opposing counsel. And “opposing counsel” includes the attorney of record or anyone reasonably believed to represent the opposing party. Many of these emotional disputes can be resolved by communication between attorneys or with a telephone conference with the trial judge without the stress created by a surprise order.

3. *N.C.G.S. Section 50-13.5(d)(2) provides: “If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending the service of process or notice as herein provided.”* These “status quo” orders are intended to add stability to a child’s custody situation until the case can be scheduled in court. Must the moving party have physical possession of the child for a temporary order to be entered under this subsection? The resolution of this question hinges on what constitutes a change “in the living arrangements of the child or changes custody” as provided in N.C.G.S. Section 50-13.5(d)(3). Should the snapshot of the “status quo” be taken at the time the ex parte motion is heard or at a prior time before one parent acted in an unexpected way – such as not returning a child after a custody visit? The statute is murky and there is no case law on point.

I take the narrow view that if the moving party does not have physical custody of the child at the time of the hearing and cannot show a risk to the child, then the court should hear from the other parent before ordering a change of physical custody. Perhaps the non-moving party has a valid reason for restricting access, but has not yet made it to the courthouse. Instead of acting with partial vision, which may put the child at risk, the case can be immediately scheduled for a temporary hearing to hear from both parties.

Additionally, just because the court has authority to enter a status quo order does not mean the court should always do so. Many district court judges are reluctant to enter these orders absent some substantial risk to the child regardless of whether the moving party presently has physical custody of the child. In addition to the drawback of being entered based upon ex parte allegations, status quo orders send the wrong message that one party has private access to the judge and they usually increase the drama of the dispute for everyone involved – the child, the parents, and the lawyers. If there is no risk to the child, few purposes served by an ex parte status quo order outweigh these problems in my view.

Finally, can this subsection be used to direct the physical transfer of a child to comply with a previously entered custody order without a showing of risk to the child? Again, there is no appellate case on point, but this does not appear to be an

appropriate circumstance to use the authority of N.C.G.S. Section 50-13.5(d)(2) given the court's contempt powers.

4. *N.C.G.S. Section 50-13.5(d)(3) provides: "A temporary order for custody which changes the living arrangements of a child or changes custody shall not be entered ex parte and prior to service of process or notice, unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse or that there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts."* If – and only if - this standard is met, the ex parte order can change the living arrangements or custody of a child without the other party even knowing that a lawsuit or motion has been filed. If a "substantial risk" had been demonstrated, the trial judge has clear authority to act to protect the child. While there is no specific case that cites this provision to modify an existing custody order ex parte, it appears that the court has authority to do so to protect a child. *Id.* See **MacKenzie v. MacKenzie**, 21 N.C. App. 403 (1974). In other words, it does not appear that this subsection is limited to new actions in which the defendant has not been served.
  
5. *Law enforcement involvement.* Based in part upon my judicial district's legal culture, I have taken for granted that an ex parte order transferring a child from one parent to another may include a directive that law enforcement assist with the transition or pickup of a child. What would be the point of the authority to issue an emergency custody order if the order could not be immediately enforced? However, in the interstate context, the North Carolina Court of Appeals ruled that it was "unaware of any statutory basis for invoking the participation of law enforcement officer in producing the children" and indicated that the trial court should have used traditional contempt proceedings instead of directing law enforcement officers to assist in enforcing a Georgia child support order in a pre-UCCJEA case. **In re Bhatti**, 98 N.C. App. 493, 497-98 (1990). North Carolina's version of the UCCJEA now specifically addresses the role of law enforcement in N.C.G.S. Section 50A-316 and provides statutory authority to issue a warrant to take physical custody of a child in emergency situations in N.C.G.S. Section 50A-311. **Chick v. Chick**, 164 N.C. App. 444 (2004). Is it correct that the trial court has inherent authority, or implicit authority derived from N.C.G.S. Section 50-13.5, to direct law enforcement involvement in a non-interstate case without the corresponding specific authority provided by N.C.G.S. Section 50A-311 in interstate cases? If so, in each case, it should be asked if it is absolutely necessary to involve law enforcement given the contempt powers of the court.

In ruling on ex parte custody motions, trial judges often must assess the risk to a child based upon uncross-examined information that typically comes from an interested witness. On other occasions, when substantial risk to a child is not alleged, the trial judge must balance the need to freeze the status quo against the interests advanced by the non-moving parent being heard. Over the years, I have become less likely to grant ex parte motions for custody because of the ones I now regret having entered after hearing from both sides. It seems the better course

in many cases is to direct that both parties appear the following morning to be heard. It cannot be doubted that ex parte custody orders can be an important tool in protecting the safety of a child, but it is with great caution that law enforcement should be ordered to act without both parties being heard. To act in a child's best interest, judges must count on lawyers to be more than mere advocates for their client's position, but to also fulfill their professional responsibility to be officers of the court as contemplated in Rule 3.3 of the Revised Rules of Professional Conduct.

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

...

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

- (1) Service of process in civil actions for the custody of minor children shall be as in other civil actions. Motions for support of a minor child in a pending action may be made on 10 days notice to the other parties and compliance with G.S. 50-13.5(e). Motions for custody of a minor child in a pending action may be made on 10 days notice to the other parties and after compliance with G.S. 50A-205.
- (2) **If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending the service of process or notice as herein provided.**
- (3) **A temporary order for custody which changes the living arrangements of a child or changes custody shall not be entered ex parte and prior to service of process or notice, unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse or that there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts.**

### **Rule 3.3 Candor Toward the Tribunal**

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(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

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#### *Ex Parte Proceedings*

[15] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

### **Rule 3.5 Impartiality and Decorum of the Tribunal**

(a) A lawyer shall not:

- (1) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;
- (2) communicate *ex parte* with a juror or prospective juror except as permitted by law;
- (3) communicate *ex parte* with a judge or other official except:
  - (A) in the course of official proceedings;
  - (B) in writing, if a copy of the writing is furnished simultaneously to the opposing party;
  - (C) orally, upon adequate notice to opposing party; or
  - (D) as otherwise permitted by law;

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