

EX PARTE CUSTODY ORDERS

Judge Marty McGee
NCADCJ – Fall Conference
October 2011

Have you ever entered an *ex parte* custody order?

1. Yes
2. No
3. No, but I don't hear custody cases

Response	Percentage
Yes	33%
No	33%
No, but I don't hear custody cases	33%

N.C.G.S. Section 50-13.5

- Procedures in actions for custody or support of minor children
- 50-13.5(d)(2) and (3) make clear that the Court MAY enter *ex parte* orders “pending the service of process or notice” under certain circumstances
- Appears to be discretionary not mandatory

Have you ever entered an *ex parte* custody order that you have regretted after hearing all of the facts?

1. Yes, often
2. Yes, but rarely
3. No

Response	Percentage
Yes, often	33%
Yes, but rarely	33%
No	33%

If an attorney contacts you seeking an *ex parte* custody order, opposing counsel must be notified?

1. Always
2. Never
3. Depends

Response	Percentage
Always	33%
Never	33%
Depends	33%

Rule 3.5 of Revised Rules of Professional Conduct

Rule 3.5 (a) A lawyer shall not: . . . (3) communicate *ex parte* with a judge or other official except:

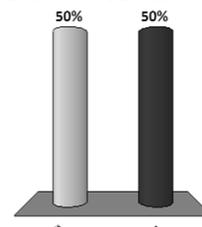
- (a) in the course of official proceedings;
- (b) in writing, if a copy of the writing is furnished simultaneously to the opposing party;
- (c) orally, upon adequate notice to opposing party; or
- (d) as otherwise permitted by law;

Exception to the Rule, but . . .

- G.S. 50-13.5 provides limited permission for a party (attorney) to communicate *ex parte* with a judge without violating the rules of professional conduct.
- BUT before I get to the facts, I always ask: "Is there a lawyer on the other side?"
- Professional courtesy and common sense compels, in nearly every instance, reaching out to opposing counsel.

When seeking an *ex parte* custody order, does counsel have an additional responsibility to let the judge know all material facts that he or she knows – even if those facts are bad for his or her client?

1. Yes
2. No



Rule 3.3 of Revised Rules of Professional Conduct

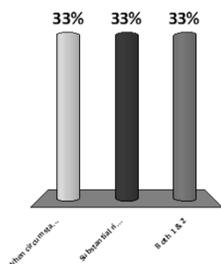
Rule 3.3 requires: "In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse."

Comment 15 of Rule 3.3

Comment 15 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."

When can you enter an *ex parte* custody order?

1. When circumstances render it appropriate (no change of custody or living arrangements)
2. Substantial risk of bodily injury, sexual abuse, or removal of child to avoid jurisdiction
3. Both 1 & 2

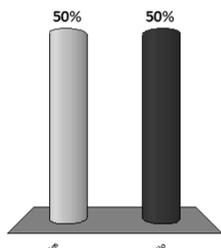


Authority for *Ex Parte* Custody orders

- 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."
- 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."

Is the authority to enter *ex parte* custody order limited to newly filed cases?

1. Yes
2. No



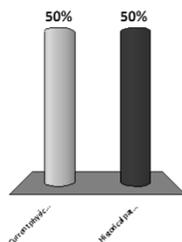
Fork in the Road



- G.S. 50-13.5(d)(2) – status quo orders
- G.S. 50-13.5(d)(3) – orders changing living arrangements of custody

For new cases, how do you determine the status quo of the child’s living arrangements or custody?

1. Current physical possession of the child when the motion is filed?
2. Historical pattern – Where does the child normally live?

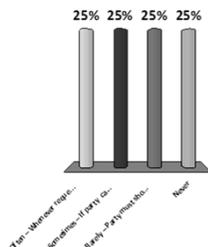


Status Quo

- 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.

How often do you enter status quo orders?

1. Often – Whenever requested by a party in a newly filed case
2. Sometimes – If party can demonstrate some need for stability or other good reason
3. Rarely – Party must show substantial risk to child as required in G.S. 50-13.5(d)(4) or other extraordinary circumstances
4. Never



Should we enter status quo orders?

- Discretionary
- If no risk to the child, what purpose does it serve?

The Balance

- Purpose served -vs- Making a decision with incomplete information, heightened drama, and message that someone has private access to the judge

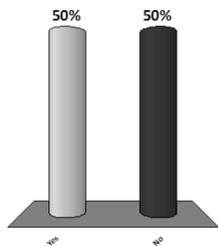


The Alternative

Enter order directing that the parents be in Court tomorrow with the child.

Can the Court use G.S. 50-13.5(d)(2) to direct the physical transfer of a child to comply with a previously entered custody order without a showing of risk to the child?

1. Yes
2. No

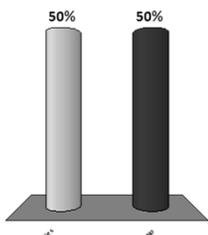


G.S. 50-13.5(d)(3) – Changing living arrangements or custody

- Heightened test when compared to what is required for status quo order
- Must show substantial risk of (1) bodily injury, (2) sexual abuse, or (3) removal of child from NC to evade jurisdiction

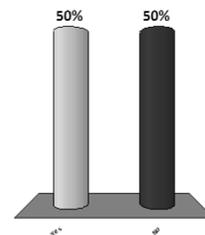
When evaluating a change, do the terms “living arrangements” and “custody” mean the same thing?

1. Yes
2. No



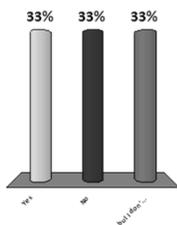
Can a judge modify an existing custody order with an *ex parte* order if a substantial risk to the child has been demonstrated?

1. Yes
2. No



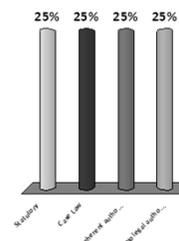
Have you entered an *ex parte* custody order that directs law enforcement to assist in transferring a child from one parent/party to another?

1. Yes
2. No
3. No, but I don't hear custody cases



What is the legal authority for involving law enforcement in a non-interstate case?

1. Statutory
2. Case Law
3. Inherent authority
4. No legal authority – Cannot do it



In re Bhatti

98 N.C. App. 493 (1990)

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.

Chick v. Chick

164 N.C. App. 444 (2004)

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.

If you enter an *ex parte* custody order, when is it reviewed:

1. The next business day
2. Within 10 days
3. More than 10 days
4. It depends

