


Family Law Update
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Ex Parte 50B Orders

- ▶ “Prior to the hearing, if it clearly appears to the court from specific facts shown, that there is a danger of acts of domestic violence against the aggrieved party or a minor child, the court may enter orders it deems necessary to protect the aggrieved party or minor child from those acts...”
 - GS 50B-2(c)

Considering Ex Parte request

- ▶ Do you – or did you until last November – consider 50B ex parte requests by reviewing the verified complaint only – without talking to the plaintiff?



Without talking to plaintiff?

1. Yes - almost always
2. Sometimes but not often
3. No - never
4. I don't hear ex parte 50B requests

Ex Parte 50B Orders

- ▶ “Prior to the hearing, **if it clearly appears to the court from specific facts shown**, that there is a danger of acts of domestic violence against the aggrieved party or a minor child, the court may enter orders it deems necessary to protect the aggrieved party or minor child from those acts...”
 - *Hensey v. Hennessy*, N.C. App. November 17, 2009

Findings of fact in ex parte order

- ▶ When you grant a 50B ex parte order, do you incorporate the complaint by reference rather than write out specific findings in the order?



Incorporate Complaint?

1. Yes – almost always
2. Sometimes but not often
3. No – never
4. I don't hear ex parte 50B requests

Ex Parte 50B Orders

▶ “Prior to the hearing, if it clearly appears to the court from *specific facts* shown *that there is a danger of acts of domestic violence against the aggrieved party or a minor child*, the court may enter orders it deems necessary to protect the aggrieved party or minor child from those acts...”

- Rule 52 ‘generally’ applies
 - “potentially serious consequences” for defendant
 - *Hensey v. Hennessy*

Denying 50B ex parte request

▶ When you deny a plaintiff’s request for ex parte relief, is plaintiff still entitled to a trial on the allegations in the complaint?



Still have a trial?

1. Yes
2. No
3. It depends on the allegations in the complaint
4. Yes – unless I dismiss the case pursuant to Rule 12(b)(6) [or some other Rule]



When ex parte is denied...

- ▶ *Hensey*
 - 50B is a 'regular' civil action
 - Rules of Civil Procedure apply
 - 'Final' DVPO is not dependent on ex parte order
 - *Ex parte* can be reviewed on appeal
- ▶ Rule 12(b)(6) allows dismissal for failure to state a claim
 - Can judge consider on own motion?
 - Cannot dismiss for failure to prove act of DV

Hensey v. Hennessy



- ▶ Cannot base ex parte on verified pleading alone
- ▶ Can incorporate allegations in complaint as facts to support ex parte
 - But should comply with Rule 52
- ▶ Ex parte proper only when you find "substantial risk of future harm"
 - "predictive in nature"

Default???

- ▶ Must hear evidence to support order even if defendant does not file an answer and does not appear at trial – *unless* default was entered by the Clerk
 - *Hensey v. Hennessy*



Simultaneous Proceedings

- ▶ Divorce filed by H in Mecklenburg County
 - No judgment entered yet
- ▶ One month later, W files for divorce in Wake County
- ▶ Divorce comes on for hearing in Wake – can Wake judge enter divorce judgment?



Can Wake judge grant divorce?

1. Yes – fastest judge wins
2. No
- ✓ 3. Not if H objects
4. I have no idea

Abatement

- ▶ Two actions:
 - In same state
 - Between the same parties
 - On the same issue

- ▶ 2nd case filed 'abates'
 - See *N.C. Dept. of Human Resources v. Armstrong*, N.C. App (March 10, 2010)

- ▶ Probably is an affirmative defense
 - See *Reece v. Reece*, 231 NC 321 (1949)



Simultaneous Proceedings

- ▶ Divorce filed by W in Ohio
 - No judgment entered yet
- ▶ One month later, H files for divorce in Wake County
- ▶ Divorce comes on for hearing in Wake - can Wake judge enter divorce judgment?



Can Wake judge grant divorce

1. Of course, who cares about Ohio?
- ✓ 2. Yes, fastest judge wins
3. No
4. Only if both consent
5. I have no idea

Muter v. Muter

- ▶ Abatement applies when two actions filed in the **same state**
- ▶ Abatement does not stop one judge from proceeding when same action is pending in another state
 - But remember *res judicata* and collateral estoppel
- ▶ GS 1-75.12
 - NC judge may consider staying NC action if proceeding in NC would "work a substantial injustice"

Child Support



- ▶ Private school expense
 - *Allen v. Allen*
 - Is guideline support so no findings required
 - Can include even if obligor's income is in 'shaded' area
 - *Parrot v. Kriss*
 - Is not 'child support' ?????
- ▶ Imputing Income – deliberate disregard
 - *Thomas v. Thomas*
 - Investment income decrease/should work more
 - *Tardini v. Tardini*
 - Employed below skill/experience level




Child Support



- ▶ Consent Orders
 - Need consent when order signed
 - *Walker v. Tate*
- ▶ Contempt
 - "I joined a commune" defense
 - *Shippen v. Shippen*




UIFSA

- ▶ Child support order entered in **NY** 
- ▶ Dad and child move to **NC** 
- ▶ Mom moves to **Florida** 
- ▶ Dad files motion to modify in **NC**
- ▶ Does **NC** have modification jurisdiction?

Does NC have jurisdiction?

1. Yes
2. No
3. Yes, if child has been here 6 months
- ✓ 4. Only if M and D consent in writing
5. I have no clue

Modification Jurisdiction

- ▶ UIFSA – Not UCCJEA
 - It would be too easy if custody and support rules were the same
- ▶ NY has continuing exclusive jurisdiction as long as one party remains in NY
- ▶ When both leave original state, moving party must travel to non-moving party
 - The ‘Play-Away’ Rule GS 52C-6-611 

Consent to Jurisdiction

- ▶ Child custody – UCCJEA
 - Consent NEVER gives jurisdiction
- ▶ Child support – UIFSA
 - Written consent almost ALWAYS gives jurisdiction
 - But NEVER for modification of alimony



Does NC have jurisdiction?

- ▶ Yes
 - Incorrect: Dad in NC but mom in Florida
 - *Lacarruba v. Lacarruba*: Play-away rule
- ▶ No
 - Close but doesn't consider consent
- ▶ Yes, if the child has been here 6 months
 - Wrong – 6 months is a custody concept
- ▶ Only if mom and dad consent in writing
 - **Correct Answer**
- ▶ I have no clue
 - Very reasonable answer

Custody

- ▶ And Paternity
 - Finding in custody order that defendant is biological dad is a judicial determination of paternity
 - *Helms v. Landry*, NC Supreme Ct, *reversing* COA
- ▶ And Guardianship
 - Once clerk appoints guardian, district court has no jurisdiction to consider custody
 - *McKoy v. McKoy*
- ▶ And Adoption
 - District court has no jurisdiction until clerk transfers or 'finally disposes' of adoption
 - *Norris v. Midkiff*

Communication with Judges in Other States



- ▶ GS 50A-110
 - You decide whether parties participate
 - If they do not participate, must be given chance to argue before you determine jurisdiction
 - Unless you discuss only schedules or records, 'record' of communication must be made

- ▶ Follow this statute only when contact is 'discretionary'?????
 - *Harris v. Harris*



Equitable Distribution



- ▶ If you cannot value an asset or a debt, you can't distribute it to either or both parties
 - *Ikechukwu v. Ikechukwu*

- ▶ No \$ 'credit' for postseparation rental value
 - *Martin v. Martin*

- ▶ When classification is disputed, order cannot simply list classification and value.
 - Findings required to support classification
 - *Duruanyim v. Duruanyim*

Divisible Property/Debt



- ▶ It's all about classification

- ▶ Statute says nothing about distribution

- ▶ Trial judges have discretion to distribute any way they deem equitable
 - Give 'credit' as you deem appropriate
 - *Wirth v. Wirth* (divisible property)
 - *McNeely v. McNeely*, 673 SE2d 778 (2009)(divisible debt)



Allmony



▶ Cohabitation requires:

- Two adults dwelling together continuously and habitually, **and**
- A voluntary mutual assumption of those rights, duties and obligations usually manifested by married people
- *Byrd v. Byrd*, NC Supreme Court



Cohabitation?

- ▶ Friend stayed 11 consecutive nights at W's home
- ▶ Vehicle of friend seen 'often' at W's home
- ▶ The two exchanged vehicles frequently
- ▶ Friend owned his own home but it appeared abandoned
- ▶ Friend was seen moving furniture and boxes into home of W
- ▶ Friend walked the dog, carried groceries and luggage into house and met repairman at W's home

W requests summary judgment

1. I would grant it due to insufficient evidence of cohabitation
2. I would not grant it because allegations are sufficient to raise genuine issue regarding cohabitation

Byrd v. Byrd



- ▶ Evidence of 'dwelling together'
 - Nights spent together
 - Friend's vehicle regularly at W's house
 - Exchanging vehicles
 - Moving furniture into W's home
 - Meeting repairmen at W's home

- ▶ Evidence of voluntary assumption of marital rights, duties, obligations
 - "activities such as sharing in chores and participating in typical family activities such as going out to dinner"

Cohabitation

- ▶ Statute reflects goal of terminating alimony in relationships that probably have an economic impact
 - *Craddock*, 188 NC App 806 (2008), citing Lee's *Family Law*

- ▶ *Byrd* doesn't mention economic impact of relationship



Subjective intent of parties

- ▶ "Where there is objective evidence, not conflicting, that the parties have held themselves out as man and wife, the court does not consider subjective intent of the parties."

- ▶ "Where the objective evidence of cohabitation is conflicting, the subjective intent of the parties can be considered."
 - *Oakley v. Oakley*, 165 NC App 859 (2004)
 - *Byrd v. Byrd*, NC Supreme Court