Ex Parte DVPOs

The North Carolina Court of Appeals has had quite a bit to say about ex parte DVPOs in the past few years. Repeatedly recognizing that while "an ex parte DVPO may be short-lived, … it has a potentially long-lasting and serious impact on a defendant, whether or not a DVPO is later issued," *Stancil v. Stancil,* NC App (June 16, 2015), the court consistently has interpreted GS 50B-2 strictly.

GS 50B-2(c)

A plaintiff in a 50B proceeding "may request ex parte relief any time prior to hearing." GS 50B-2(c)(1). If a party requests ex parte relief, the clerk must schedule a hearing within 72 hours or by the end of the next day on which court is in session, whichever occurs first. GS 50B-2(c)(6). Most districts schedule ex parte hearings for the same day the 50B complaint is filed.

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 ex parte orders it deems necessary for protection. GS 50B-2(c)(1).

Relief Authorized

All forms of relief listed in GS 50B-3 are available for ex parte orders, except that an ex parte may not include a custody order unless the court finds the child is exposed to "a substantial risk of physical or emotional injury or abuse." GS 50B-2(c)(2). Upon finding the child is exposed to "a substantial risk of physical or emotional injury or abuse," the statute states that the court shall consider and may order the other party to:

- Stay away from a minor child;
- Return a child to, or not remove the child from, the physical care of the parent or person in loco parentis.

The court in *Stancil v. Stancil*, NC App (June 16, 2015), held that a court must order the surrender of firearms in an ex parte DVPO upon finding one of the facts listed in GS 50B-3.1(a) – that defendant:

- Used or threatened to use a deadly weapon or has a pattern of prior conduct involving the use of threatened use of a firearm against a person;
- Has made threats to seriously injure or kill the aggrieved party or minor child;
- Has made threats of suicide; or
- Has inflicted serious injuries upon the aggrieved party or minor child.

Without such findings, the court probably cannot order surrender of weapons in a DVPO. *See State v. Elder,* NC (June 11, 2015)(because Chapter 50B addresses relief related to firearms directly in

GS 50B-3.1, the court cannot use the broad 'catch-all' provision in GS 50B-3 to enter other orders related to firearms).

There Must be a Hearing

Focusing on the specific language in GS 50B-2, the court in *Hensey v. Hennessy*, 201 NC App 56 (2009), held that an ex parte DVPO may not be issued or denied based on the verified pleading or on affidavits. The court must hold a hearing, take evidence and grant an ex parte only upon "specific facts shown" that there is a danger of domestic violence.

Ex Parte Hearing Must be Recorded

Stancil v. Stancil, NC App (June 16, 2015), tells us that hearings on requests for ex parte DVPO's are "civil trials" within the meaning of GS 7A-198 - the statute that requires that all civil trials in district court be recorded. The court supported based this conclusion on the following:

1. Parties have the right to appeal the granting of an ex parte DVPO. Review is very difficult without a record;
2. Unlike requests for Rule 65 restraining orders, Chapter 50B requires that ex parte DVPOs be granted or denied only after an evidentiary hearing; and
3. The court is required to make findings of fact and conclusions of law after hearing evidence.

There Must Be Findings of Fact

Again focusing on the specific language of GS 50B-2, the court in *Hensey* also held that while Rule 52 standard findings of fact are not required for an ex parte DVPO, a court must make findings of fact to support an ex parte DVPO. The court held "[w]hile the trial court need not set forth the evidence in detail, it does need to make findings of ultimate fact which are supported by the evidence; the findings must identify the basis for the 'act of domestic violence'." *Stancil, quoting Hensy*.

However, the court in *Hensey* also held that that explicitly incorporating the allegations in the complaint into the ex parte DVPO may be sufficient to support the order when those allegations contain sufficient detail.

But in following up on *Hensey*, the court in *Rudder v. Rudder*, 759 SE2d 321 (2014), held that when using the AOC form ex parte order, the trial court should not simply check the boxes when entering the order. Specifically, the court suggested that the trial court always write additional facts in box #2 to explain the basis for the ultimate findings made by checking the boxes.

Ex parte DVPOS Cannot Be Renewed Indefinitely

GS 50B-2(c)(5) was amended in 2012 to provide that there “shall” be no more than one continuance of no more than 10 days of a hearing after the issuance of an ex parte DVPO, unless all parties agree or good cause is shown. The statute does not define good cause. In *Rudder v. Rudder*, 759 SE2d 321 (2014), the court stated that this amendment is an indication of the General Assembly’s intent to limit the length of time an ex parte DVPO may continue in effect.

In *Rudder*, the ex parte DVPO had been continued 13 times before it was allowed to expire. After expiration, the trial court held a trial on the merits of the DV claim and entered a one-year DVPO. The court of appeals reversed, holding that because the ex parte DVPO had been in effect for over one-year and had been allowed to expire, the trial court had no jurisdiction to enter further protective orders.

More on ex parte DVPOs in my blog next Friday.