

When is a temporary child custody order really a temporary child custody order?

[G.S. 50-13.5](#) allows a court to enter a temporary custody order whenever the court deems it appropriate. The ability to enter a temporary order gives the court the power to address immediate needs of families going through the litigation process. There is no limit on the number of temporary orders that can be entered in a case and temporary orders can be changed at any time, by any judge, for any reason.

While temporary orders are an important tool for courts, it is the public policy of the State that custody orders should be made permanent as soon as possible “to avoid the turmoil and insecurity that children face from the constant litigation of their custody status.” [Simmons v. Arriola, 160 NC App 671 \(2003\)](#).

Sometimes it is not clear from the language in an order whether it is temporary or final. Sometimes orders designated as temporary clearly are intended to stay in effect for a long time. And sometimes orders clearly temporary when entered stay in effect so long the custody arrangement seems much more permanent than temporary.

Why does it matter whether an order is temporary or final?

It is important to know whether a custody order is temporary or ‘permanent’ for at least three reasons:

- **First, only a final 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 \(2009\)](#). However, the court of appeals can decide to grant *cert.* when there are special circumstances. See [Smith v. Barbour, 195 NC App 244 \(2009\)](#).
- **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 \(2003\)](#).
- **Third, a party is can 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).

In addition, the court of appeals has indicated that a court has broader authority in a temporary

order than in a final order. In *Jones v. Patience*, 121 NC App 434 (1996), the court held that while the court has the authority to order psychological assessment and treatment of the parties and child as part of a temporary order, the court does not have authority to include similar provisions in a final determination. *But see Maxwell v. Maxwell*, 212 NC App 614 (2011) (court had authority to order father's mental health evaluation as part of a final custody order pursuant to the trial court's "broad discretion in child custody cases").

How do we know if it's really temporary?

The court of appeals has stated numerous times that the temporary or 'permanent' nature of an order is not determined by its caption. 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 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," *Maxwell v. Maxwell*, 713 SE2d 489 (2011), or
- it does not determine all issues pertinent to custody or visitation. *Simmons v. Arriola*; *Brewer v. Brewer*, 139 NC App 222 (2000).

An order is temporary or final; it cannot be both. In *Smith v. Barbour*, 195 NC App 244 (2009), the court held that father should be awarded primary physical custody but determined mother's visitation schedule would be set after she completed an evaluation. Rejecting the argument that primary custody was final but visitation was temporary, the court held that any order that leaves issues such as visitation unresolved is a temporary order in all respects.

Will it stay temporary forever?

Even if an order is temporary when entered, the court of appeals has held that it will 'convert' to a permanent order if neither party seeks a final judgment within a reasonable time after entry of the temporary order. *LaValley v. LaValley* (temporary order converts because it "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 final 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).

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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 custody or engaging in the litigation process. See [Senner v. Senner, 161 NC App 78 \(2003\)](#) (20 months was reasonable where parties were negotiating a new custody arrangement which eventually broke down) and [Anderson v. Lackey, 163 NC App 246 \(2004\)](#) (20 months was reasonably brief where original order contained a specific reconvening time and there were intervening court hearings before that specified date).