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# Administration of Justice Memorandum

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## Magistrate's Authority To Issue Ex Parte Domestic Violence Protective Orders

Joan G. Brannon

In the recent crime session, the General Assembly, in Ch. 4, S.L. 1993 (1994 Extra Session), provided that chief district judges may allow magistrates in their judicial districts to hear requests for ex parte domestic violence protective orders and to issue show cause orders for contempt of domestic violence orders in certain limited circumstances. Ex parte orders issued by magistrates are valid for a period of no longer than 72 hours, and the magistrate issuing the order must schedule a second ex parte hearing before a district court judge by the time the magistrate's order expires. The magistrate has the same range of relief in an ex parte order as the district court judge, except the magistrate's authority to grant temporary child custody is subject to custody rules to be established by the chief district judge. When the clerk is not available, a magistrate who is authorized to hear ex parte motions may also issue orders to appear and show cause for failure to comply with domestic violence protective order on motion of the plaintiff. Ch. 4 takes effect May 1, 1994, and applies to motions for emergency relief filed on or after that date. This memorandum attempts to explain the new provisions to aide the chief district judges in making the decision whether to authorize magistrates to hear these cases and what steps must be taken in making that authorization. Unfortunately, the new law raises more questions than it answers. This memorandum may help in

identifying some of the issues to be resolved. It also includes some information for magistrates who are hearing motions for ex parte protective orders.

### When Magistrates May Hear Ex Parte Motions

Ch. 4 amends G.S. 50B-2 by adding a new subsection (c1) specifying that, if authorized by the chief district judge, magistrates may hear motions for emergency ex parte relief filed when "the clerk of superior court is not available, the district court is not in session, and a district court judge is not and will not be available to hear the motion for a period of four or more hours." By using the conjunction "and" to connect the three phrases, the act requires all three factors to be present before the magistrate may hear a motion for an ex parte order. In my opinion that means that a chief district judge may authorize magistrates to hear motions for ex parte orders at night after the clerk's office has closed and on the weekends and holidays. During weekday hours when no district judge is available whatever procedures are currently followed will continue.

The fact that magistrates would only hear these matters on weekends and evenings affects who and how many magistrates should be designated by the judge. Obviously, if the magistrates work shifts and only one or two magistrates are authorized to hear

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domestic violence cases, those magistrates might not be on duty when a person seeks a domestic violence protective order.

## **Procedural Issues in Hearing Ex Parte Domestic Violence Orders**

### **Filing a Civil Action**

A person may seek a domestic violence protective order by filing a civil action under Ch. 50B or by filing a motion in an already existing Ch. 50 proceeding. Although G.S. 50B-2(c1) provides that a magistrate may issue an ex parte order, no special provision is made for filing the action. G.S. 1A-1, Rule 3 provides that a civil action is commenced by filing a complaint with the court, and that the clerk shall enter the date of filing on the original complaint. No statutory authority exists to file a civil action with a magistrate. If a judge wishes to authorize magistrates to hear ex parte orders, two possible solutions seem possible. First, the plaintiff could be required to file the complaint and summons with the clerk, and if no district court judge is available, wait until that evening to go to the magistrate for ex parte relief. Second, the clerk may authorize the designated magistrates to receive the complaint and summons (in counties where the party fills out the summons) on behalf of the clerk's office; the magistrate notes the time and date of filing on the complaint, and delivers the complaint (and summons) to the clerk's office as soon as it opens. If the intention of the General Assembly was to allow a magistrate to grant immediate ex parte relief when a problem arises in the middle of the night or on the weekend, the second option would best promote that policy.

If civil actions will be filed with magistrates, the clerk must furnish copies of the necessary forms to the magistrates. A list of forms is included in the check list later in this memorandum.

### **Collecting Court Costs and Determining Indigence**

G.S. 7A-305(c) provides that the clerk, at the time of the filing of a complaint shall collect as advance court costs, the facilities fee and General Court of Justice fee, except in suits by indigent persons. Again, there is no provision for the

magistrate to collect court costs. If the plaintiff is not filing as an indigent and if the clerk authorizes the magistrate to accept the filing of the complaint, the clerk also should be able to authorize the magistrate to collect the court costs.

In some cases, the plaintiff might apply to file the action as an indigent. G.S. 1-110 authorizes plaintiffs in civil actions who cannot pay the costs in advance to file as indigents; and it is common in Ch. 50B actions for plaintiffs to seek to file as indigents. The statute specifies that a superior or district judge or a clerk must determine whether a plaintiff qualifies as an indigent. (The General Assembly specified in G.S. 7A-228 that a magistrate could determine indigence on appeals of a small claims action to district court.) Since that determination is a judicial act, I do not believe it can be delegated to a magistrate.

However, there is no need to make the determination of indigence at the time of filing. It is certainly possible to allow the magistrate to accept the complaint and the application to file as an indigent, to determine whether to issue an ex parte order, and to leave the decision of whether the plaintiff qualifies as an indigent for the district judge or the clerk. Since the plaintiff must return to court within 72 hours for another ex parte order, the determination of indigence can be made at that time. If the judge or clerk concludes that the plaintiff is not an indigent, no further proceedings need be held until the costs are paid.

### **Relief Granted By Magistrates**

Another issue the judge must decide is whether to limit the kinds of relief the magistrate may grant in the ex parte order. Except for child custody, the statutory relief that a magistrate may grant is identical to that of a district court judge. G.S. 50B-3 allows the following kinds of relief: (1) directing a party to refrain from acts of domestic violence; (2) ordering a party to refrain from harassing or interfering with the other party; (3) granting one spouse possession of the residence and excluding the other spouse from residence; (4) requiring a party to provide suitable alternative housing for spouse; (5) awarding temporary child custody; (6) ordering eviction of one spouse from the residence; (7) ordering child support payments; (8) ordering support of spouse; (9) providing for possession of

personal property; and (10) awarding costs and attorney's fees. G.S. 50B-2(c1) specifies that the purpose of the ex parte order is to protect the aggrieved party or minor children from acts of domestic violence. The judge might wish to limit the magistrate to relief that directly deals with stopping the violence and leave broader remedies for the second ex parte hearing before a district judge or the regular domestic violence protective order.

A temporary order for custody of the minor children may not be given at an ex parte hearing unless the magistrate or judge finds that the child is exposed to a substantial risk of bodily injury or sexual abuse. However, before a magistrate may award custody, the new law requires the chief district judge to establish custody rules. What is totally unclear from the statute is the nature of such rules. The standard for temporary custody in this case seems to be that the child is exposed to a substantial risk of bodily injury or sexual abuse. It's unclear what else can be said to the magistrate about making the determination of substantial risk of bodily injury or sexual abuse.

Whether or not temporary custody is granted, a magistrate who after reading the complaint and motion has cause to suspect that a child is "at substantial risk" has a legal duty under G.S. 7A-543 to report to the Department of Social Services. The Department must begin its investigation within 24 hours and, of course, has the authority to remove custody of the child from a dangerous situation.

### **Life of Magistrate's Ex Parte Order**

An ex parte order issued by a magistrate expires "within 72 hours of the filing for relief . . . or by the end of the next day on which the district court is in session in the county in which the action was filed, whichever occurs first." The maximum the order can be in force is 72 hours. It is not entirely clear what the "end of the next day on which district court is in session" means. Literally, it seems to say midnight of that day. However, if the purpose is to require the plaintiff to obtain a second ex parte order from a judge at the earliest possible point, the end of the day might be 5:00 p.m. when court closes. Examples of the life of a magistrate's ex parte order might be useful. If the complaint, with a request for ex parte relief, is filed in at midnight on Saturday evening and district court will be in session on the following

Monday, the order expires at either midnight or 5:00 p.m. on Monday. However, if the next session of district court is scheduled for Thursday instead of Monday, the order will expire at midnight Tuesday since 72 hours is the maximum length of the validity of the order. Because law enforcement officers will be asked to enforce ex parte orders, it is important for the magistrate to indicate on the ex parte order the time it expires.

### **Setting Hearing Before District Court Judge**

A magistrate who issues an ex parte order is required to schedule a second ex parte hearing before a district court judge within 72 hours or by the end of the next day in which the district court is in session in the county in which the action was filed, whichever is earlier. The chief district court judge should set up a procedure with magistrates for scheduling subsequent ex parte hearings. If no judge will be available in the county within 72 hours, the general procedure of setting a hearing before a district court judge who is holding court in another county within the district court district may be followed. In addition to notifying the plaintiff about the second ex parte hearing, a procedure must be developed for notifying the judge of the hearing. At the end of this memorandum, I have enclosed a notice of hearing that may be used by magistrates until a form is developed by the Administrative Office of the Courts Form Committee. Magistrates should not put the time of hearing on the Ex Parte Domestic Violence Order because that will be served on defendant.

### **Serving the Ex Parte Order and Other Papers**

Even though a second ex parte hearing will be held within 72 hours, G.S. 50B-3(b) requires that a copy of the protective order be issued to the defendant. Therefore, the magistrate must see that the law enforcement agency receives a copy for service on the defendant. The magistrate also must give the plaintiff (aggrieved party) and the local police department or sheriff's department copies of the order.

The new law does not make it clear when the complaint and summons must be given to the sheriff for service and when the notice for the 10-day

hearing is issued by the clerk. Since G.S. 1A-1, Rule 4 does not authorize a magistrate to issue a civil summons and does allow up to five days after the filing of the complaint for the summons to be issued, perhaps the best practice would be to wait until after the district judge holds the second ex parte hearing to issue the summons and to serve the complaint and summons. At that point, the court can follow the identical procedure that it would follow if the action had been initiated with filing a complaint with the clerk and having an ex parte hearing before a judge. If the district court judge issues a second ex parte order, the clerk would have the sheriff serve the judge's ex parte order, the complaint and summons, and the notice of hearing on the domestic violence protective order (referred to as the notice of 10-day hearing). If the district judge refuses to issue a second ex parte order or if the plaintiff fails to return for the second ex parte order at the specified time, the clerk would issue the summons and have the sheriff serve the complaint, summons and of the notice of hearing.

### **Magistrates Issuing Show Cause Orders**

G.S. 50B-4(a) provides that a plaintiff who believes that a defendant has violated a domestic violence protective order may file a motion for contempt with the clerk. The clerk, upon finding probable cause, issues an order to appear before a district court judge for contempt. Ch. 4 would allow magistrates who are authorized by the chief district judge to hear motions for ex parte domestic violence orders to also receive contempt motions and issue show cause orders at times when the clerk is not available.

This change does not affect the authority any magistrate now has under G.S. 50B-4(b) to issue a show cause order when a defendant is arrested by a law enforcement officer for violating a domestic violence protective order excluding the defendant from the residence or directing the defendant not to harass or interfere with the victim.

### **General Matters**

If chief district judges who authorize magistrates to hear ex parte motions would send me a copy of any policies developed, the Institute can act

as a clearinghouse for other judges who are interested in developing policies.

Also it might be worth reminding magistrates that in most cases the defendant's conduct also constitutes a crime. The defendant can be charged with a crime in addition to granting an ex parte domestic violence protective order, or for those judges who choose not to allow magistrates to issue ex parte orders charging the criminal act will be the only remedy available to magistrates. In setting conditions of pretrial release, a magistrate, under G.S. 15A-534 or -534.1, may impose conditions on the defendant, such as staying away from the home or place of business of the alleged victim or refraining from assaulting the alleged victim. In fact, under G.S. 15A-534.1, if immediate release will pose a danger of injury to or intimidation of the alleged victim and the execution of an appearance bond will not reasonably assure that injury or intimidation will not occur, a magistrate may retain a defendant in custody for a reasonable period of time while determining the conditions of pretrial release.

If a magistrate sets conditions on defendant's pretrial release and the magistrate has reason to believe the defendant has violated one or more of the conditions, G.S. 15A-534(e) authorizes the magistrate who issued the pretrial release order, at any time before a first appearance, to issue an order for arrest to have the defendant brought back before the magistrate for modification of the pretrial release order.

### **Check List for Chief District Judge Authorizing Magistrates To Hear Ex Parte Motions**

- Issue written administrative order designating those magistrates authorized to hear ex parte domestic violence orders. File order with clerk of superior court.
- Ask clerk to authorize the designated magistrates to accept complaints filed after hours (if you determine you will allow this), and determine with clerk how and when court costs will be paid, when indigence will be determined, and procedures to be followed in serving complaint and summons, and notice of 10-day hearing.
- Issue policy to magistrates outlining any rules you wish them to follow in carrying out your order, including relief to be granted, custody rules, scheduling second ex parte hearings, as well as

procedures for handling complaints and costs, and for serving orders and other papers.

● Request that the clerk furnish copies of the forms necessary for filing civil domestic violence actions to the magistrate. Forms that will be needed are AOC-CV-303 ("Complaint and Motion for Domestic Violence Protective Order"), AOC-CV-100 ("Civil Summons") (only in counties where the plaintiff fills out the summons), AOC-G-106 ("Petition To Sue As an Indigent"), AOC-CV-304 ("Ex Parte Domestic Violence Protective Order"), AOC-CV-307 ("Motion For Order To Show Cause Domestic Violence Protective Order"), and AOC-CV-308 ("Order to Appear and Show Cause for Failure to Comply With Domestic Violence Protective Order").

### Issues for Magistrates Hearing Ex Parte Motions

This section is intended to help magistrates who have been designated by the chief district judge to hear ex parte orders clarify their role. Magistrates should also read the preceding part of this memorandum.

A plaintiff may initiate a request for a domestic violence protective order either by filing a complaint initiating a civil action or by filing a motion in the cause when a civil action under Chapter 50 has already begun. A Chapter 50 civil action would include an action for divorce, alimony, child custody or child support. Usually, the plaintiff will initiate the request by filing a "Complaint and Motion for Domestic Violence Protective Order," AOC-CV-303. The plaintiff must file a written complaint or motion in the cause and must request an Ex Parte Order before the magistrate may consider whether to issue one. As mentioned earlier designated magistrates are limited to hearing ex parte motions on weekends, holidays and evenings.

In hearing motions for ex parte relief, the magistrate's first step is to determine whether the plaintiff is entitled to the an ex parte hearing. G.S. 50B-1 provides that the perpetrator of the conduct must be the current or former spouse of the plaintiff (also referred to as the aggrieved party) or must be a person of the opposite sex with whom the aggrieved party lives or has lived as if married. Thus, if two males are living together and one assaults the other, the male who has been assaulted may not seek a

domestic violence protective order. Likewise, a grandmother who is constantly assaulted by her 19 year-old grandson who lives with her is not entitled to ex parte domestic violence relief. In both cases, of course, the magistrate may find probable cause that a crime as been committed. To be eligible for a domestic violence protective order, the couple must be married, have been married, or be of the opposite sex and lived together as if husband and wife. There is no limit on how long ago the couple separated. If they have ever been married or lived together as if married, the law authorizes domestic violence protective relief.

The second requirement is for the magistrate to find clearly from specific facts that there is a danger of acts of domestic violence against an aggrieved party or a minor child. Domestic violence means (1) an attempt to cause bodily injury or intentionally causing bodily injury upon an aggrieved party; (2) placing the aggrieved party in fear of imminent bodily injury by the threat of force; (3) attempting to cause bodily injury, or intentionally causing bodily injury upon a minor residing with or in the custody of the aggrieved party; (4) placing the minor in fear of imminent serious bodily injury by the threat of force; or (5) committing a sex offense against a minor who resides with or is in the custody of the aggrieved party. The statute requires that the magistrate make a finding of domestic violence based on specific facts not merely conclusions made by the plaintiff. The magistrate must know what the defendant did to the plaintiff or minor children and when. The standard of proof is that the magistrate "clearly" find the facts. That seems to me to be closest to the standard of proof of "clear, strong and convincing evidence," which is stronger than the normal civil standard of "greater weight of the evidence" but less than the criminal standard of "beyond a reasonable doubt."

A magistrate who determines that there is a danger of acts of domestic violence may issue an Ex Parte Domestic Violence Protective Order granting appropriate relief to protect the plaintiff within the parameters of the statute and the policy of the chief district court judge. The magistrate must indicate on the order when it expires. Until a new order is developed by the Administrative Office of the Courts, magistrates may check the "Other" block on the current Ex Parte Domestic Violence Protective Order form and write the following: "This order expires at (*insert time and date*)." The time to be filled in as

the expiration time is the earlier of 72 hours or the end of the next day district court is in session in the county. In signing the order, strike through district judge and put magistrate. A copy of a proposed order is attached.

When an ex parte order is issued, the magistrate must give one copy to the plaintiff, give one copy to the sheriff for service on the defendant, one copy to the local law enforcement agency for filing, and send the original to the clerk.

Finally, the magistrate must schedule a hearing

with a district judge for a second ex parte order at a time before the magistrate's order expires. This second hearing is also ex parte, which means only the plaintiff is given notice. A proposed hearing form is attached at the end of the memorandum.

Any magistrate who is designated to hear ex parte motions must follow the policy of the chief district judge regarding to the filing of complaints, scheduling of hearings, serving of complaints and notices on the defendant, and any other procedural issues.

STATE OF NORTH CAROLINA

File No. 94 CV 345

No \_\_\_\_\_ County

In The General Court Of Justice  
District Court Division

Name Of Plaintiff

JANE DOE

VERSUS

Name Of Defendant

JOHN DOE

EX PARTE  
DOMESTIC VIOLENCE  
PROTECTIVE ORDER

G.S. 50B-2, -3

FINDINGS

This matter was heard before the district court judge named below, ex parte. The judge read the plaintiff's Complaint and request for temporary emergency relief under G.S. 50B-2(c) and heard from the plaintiff. The Court makes the following findings of fact:

- 1. The parties are:  married.  divorced.  
 not married but live together or have lived together as if husband and wife.
- 2. The defendant has attempted to cause or has intentionally caused bodily injury to the plaintiff or has threatened the plaintiff with immediate serious bodily injury; the last act of violence occurred on or about (give date) 5/1/94.
- 3. The defendant has attempted to cause or has intentionally caused bodily injury to the child(ren) living with or in the custody of the plaintiff or has threatened immediate serious bodily injury to the child(ren) or has sexually abused the child(ren); the last act of violence occurred on or about (give date) \_\_\_\_\_.
- 4. The parties are the parents of the child(ren) named below:

Name	Date Of Birth	Name	Date Of Birth

- 5. The  defendant  plaintiff is presently in possession of the parties' home at the address listed below:

Address Of Residence

5605 Yes Street, Beverly, N.C.

- 6. Other:

CONCLUSIONS

Based on these facts, the Court makes the following conclusions of law:

- 1. The defendant has committed acts of domestic violence.
- 2. The plaintiff is in danger of acts of domestic violence from the defendant.
- 3. The minor child(ren) is in danger of acts of domestic violence from the defendant.
- 4. The minor child(ren) is exposed to a substantial risk of bodily injury or sexual abuse.
- 5. The following relief is necessary to protect the plaintiff and any child(ren) from domestic violence.

ORDER

It is ORDERED that:

- 1. the defendant shall not assault, threaten, abuse, follow, harass or interfere with the plaintiff. A law enforcement officer shall arrest the defendant if the officer has probable cause to believe the defendant has violated this provision.
- 2. the defendant shall not assault, threaten, abuse, follow, harass, or interfere with the minor child(ren) residing with or in the custody of the plaintiff. A law enforcement officer shall arrest the defendant if the officer has probable cause to believe the defendant has violated this provision.
- 3. the plaintiff is granted possession of the parties' residence described above and all personal property located in the residence except for the defendant's personal clothing, toiletries and tools of trade.
- 4. the defendant shall immediately leave and stay away from the parties' residence. A law enforcement officer shall arrest the defendant if the officer has probable cause to believe the defendant has violated this provision.
- 5. the law enforcement agency named below shall evict the defendant from that residence and shall assist the plaintiff in returning to the residence.

Name And Address Of Law Enforcement Agency

- 6. the defendant shall stay away from the following places:

Name And Address Of Place(s)

- 7. the plaintiff is awarded temporary custody of the child(ren) named in Finding No. 4.
- 8. the request for Ex Parte Order is denied.
- 9. Other: *This order expires Monday, May 2 at midnight.*

Date *5/1/94*

Signature Of District Court Judge Magistrate

*Wiley Brown*

Name Of District Court Judge (Type Or Print) MAGISTRATE

WILEY BROWN

NOTE TO PLAINTIFF:

If the judge signs this Order and gives it to you, take it to the Clerk's office immediately.

NOTE TO CLERK:

Give or mail a copy of this Order to the plaintiff and to the appropriate local law enforcement agency. Collect fee from plaintiff and send copy to sheriff with Notice of Hearing and Complaint for service on defendant.



State of North Carolina

File No. \_\_\_\_\_

\_\_\_\_\_ County

In General Court of Justice  
District Court Division

Name of Plaintiff
Versus
Name of Defendant

**NOTICE OF EXPARTE  
HEARING BEFORE  
DISTRICT COURT JUDGE**

G.S. 50B-2(c1)

To The Plaintiff Named Above:

Because the initial ex parte domestic violence order was issued by a designated magistrate, it must be extended by a district court judge. The magistrate's order will automatically expire at the earlier of 72 hours from its issuance or the time set below for you to appear before a district judge to have another ex parte order issued. You must appear before a district court judge at the time and place listed below if you wish to have the order continued.

Date of Hearing	Date
Time of Hearing <input type="checkbox"/> a.m. <input type="checkbox"/> p.m.	Signature
Place of Hearing	<input type="checkbox"/> Designated Magistrate

NOTE: The designated magistrate should give one copy of this form to the plaintiff when the magistrate issues an ex parte order; give the original to the clerk, and follow policy issued by judge in notifying judge of hearing.