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Campbell Law Review

Volume 34
Issue 2 *Spring 2012*

Article 5

2012

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Recommended Citation

Amy L. Britt and Alicia Jurney Whitlock, *Can't Live With 'Em Can't Live Without 'Em: An Analysis of the Trial Court's Authority to Hear and Decide Child-Related Claims in North Carolina Post-Baumann*, 34 Campbell L. Rev. 449 (2012).

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Can't Live With 'Em Can't Live Without 'Em: An Analysis of the Trial Court's Authority to Hear and Decide Child-Related Claims in North Carolina Post-*Baumann*

AMY L. BRITT* AND ALICIA JURNEY WHITLOCK**

In *Baumann-Chacon v. Baumann*, decided in May 2011, the North Carolina Court of Appeals held for the first time that trial courts have the authority to enter orders related to child custody and child support before a husband and wife have separated.[1] The *Baumann* court carefully distinguished its decision from the holding in *Harper v. Harper*, a 1981 case in which the court held that the wife's pre-separation custody and child support claims should have been dismissed.[2] The *Baumann* decision raises some interesting questions about the limits of the trial court's ability to enter orders protecting the interests of children when those interests conflict with the rights of parents.

Part I of this Article discusses the historical background of the role of fault in divorce and other domestic claims in the United States and North Carolina. Part II analyzes the Court of Appeals' decision in *Harper* and the state of the law following the *Harper* ruling. Part III analyzes the Court of Appeals' decision in *Baumann*. Part IV considers how North Carolina's approach to pre-separation child custody and support claims compares to the law in other states. Finally, Part V discusses the implications and application of *Baumann* for North Carolina practitioners.

I. HISTORICAL BACKGROUND

In order to understand the significance of *Baumann*, it is important to consider the role of fault in domestic claims in a historical context.

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1. Baumann-Chacon v. Baumann, 710 S.E.2d 431 (N.C. Ct. App. 2011).
2. Harper v. Harper, 273 S.E.2d 731 (N.C. Ct. App. 1981).

Published by Scholarly Repository @ Campbell University School of Law, 2012

A. Historical Background of No-Fault Divorce in the United States

In the second half of the nineteenth century, most states' divorce laws included more expansive fault grounds for divorce and, therefore, were more permissive than they were in the early nineteenth century.[3] In the last quarter of the century, many blamed the expanded fault bases for the rising number of divorces and, "[i]n response, a number of states restricted [their] fault grounds."[4] Divorce laws in the United States varied extensively by the middle of the twentieth century, with some states reflecting fewer and more conservative fault grounds, and others maintaining their expanded fault grounds.[5] Notwithstanding discrepancies among the states, all of these laws reflected the same basic premise: "that divorce was an adversary proceeding in which an innocent spouse 'won' a divorce from a guilty spouse."[6]

The practical result of these fault-based divorce laws was a disparity between the statutory law and the law in action. For example, until 1967, New York recognized only adultery as grounds for divorce and, rather than having the intended effect of discouraging divorce, the practical effect was frequently collusion, perjury, and fabricated grounds for divorce.[7] This disparity illustrated American society's rejection of the severe limitations imposed by some states on the right to divorce.[8]

By the mid-1960s, reform was underway.[9] California led the way and proposed legislation that would allow a divorce upon a showing of "irreconcilable differences causing the irremediable breakdown of the marriage."[10] The enacted legislation eliminated the fault-based scheme in California and "the need for either party to establish [the] 'guilt' of the other . . . to end in law a marriage that one or both of the parties believed had ended in fact."[11]

In many ways, the California statute became the model of divorce reform in the 1970s. Like California, the Uniform Marriage and Divorce Act of 1973 (UMDA) "relied on [the] irretrievable breakdown [of the

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3. 2 SUZANNE REYNOLDS, LEE'S NORTH CAROLINA FAMILY LAW § 7.2 (5th ed. 1999).

4. *Id.* (citing N.M. BLAKE, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES 84 (1962)).

5. *Id.* (citing LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 503 (2d ed. 1985)).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* (citing 1969 Cal. Stat. 3324).

11. *Id.*

marriage] for the basis of the decree of dissolution."[12] Although few states have adopted the UMDA in its entirety,[13] divorce laws of most states reflect the concept of marriage breakdown as the most important inquiry in the granting of a divorce decree.[14] "Today the statutes of all states recognize at least one no-fault basis for divorce . . . ."[15]

B. *Historical Background of Fault Bases in North Carolina*

Prior to 1977, wrongful conduct barred a divorce based on separation in North Carolina. The doctrine of recrimination denied a divorce to a petitioning spouse guilty of misconduct that would entitle the other spouse to a divorce.[16] In *Byers II*, a 1943 decision, the North Carolina Court of Appeals stated in dicta:

> The law generally forbids redress to one for an injury done him by another, if he himself first be in the wrong about the same matters whereof he complains. . . . No one is permitted to profit by his own fraud, or to take advantage of his own wrong, or to found a claim on his own iniquity, or to acquire rights by his own crime. . . .
>
> *. . . Nor is it to be ascribed as the legislative intent that one spouse may drive the other from their home for [the statutory period of separation], without any cause or excuse, and then obtain a divorce solely upon the ground of such separation created by the complainant's own dereliction. Out of unilateral wrongs arise rights in favor of the wronged, but not in favor of the wrongdoer. One who plants a domestic thornbush or thistle need not expect to gather grapes or figs from it.*[17]

In 1977 and 1979, the General Assembly enacted amendments, which effectively eliminated the role of fault in divorce based on separa-

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12. *Id.*

13. *Id.* § 7.2 & n.50 (5th ed. Supp. 2011) (citing 9A U.L.A. 10 (Supp. 1998)) ("As of [the publication of this article], only Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana and Washington had adopted the UDMA or major parts of it.").

14. *Id.*

15. *Id.* § 7.3. Until August 2010, New York still lacked a unilateral "no-fault" divorce statute. Under New York divorce law only if *both parties* notarized a separation agreement and lived separately for one year, could a judge convert it into a divorce. New York governor David Paterson signed a no-fault divorce bill on August 13, 2010, which went into effect on October 12, 2010 making New York the last state in the United States to adopt no-fault divorce. *See* Act of Aug. 13, 2010, ch. 384, 2010 N.Y. Sess. Laws (McKinney) (codified as amended at N.Y. DOM. REL. LAW § 170.7 (McKinney 2010)).

16. *See* Hyder v. Hyder, 1 S.E.2d 540 (N.C. 1939); Brown v. Brown, 196 S.E. 333 (N.C. 1938); Reynolds v. Reynolds, 181 S.E. 338 (N.C. 1935).

17. Byers v. Byers, 25 S.E.2d 466, 469–470 (N.C. 1943) (emphasis added) (citations omitted).

tion. In the first 1977 amendment, all defenses based upon misconduct as established in section 50-5 of the North Carolina General Statutes were abolished.[18] "The second 1977 amendment abolished all defenses based on misconduct as established in [s]ection 50-7."[19] Finally, the 1979 "amendment abolished the defenses of res judicata and recrimination without regard to any statutory reference to . . . misconduct."[20]

Despite the 1977 and 1979 amendments to the divorce statutes, fault bases survived in a support context until 1995. Prior to 1995,

> The entitlement provision for alimony, which the law applied also to alimony *pendente lite*, gave marital misconduct a central role: alimony *pendente lite* was not available unless it appeared to the court that the dependent spouse could prove that the supporting spouse had committed an act of marital misconduct enumerated in the statute.[21]

The 1995 statutory amendments increased attention to needs, reimbursement and rehabilitation, and "eliminated the role of marital misconduct as a prerequisite to entitlement."[22] In its 1995 revisions, the General Assembly made need the only requirement for an award of alimony.[23] According to Professor Suzanne Reynolds, with the 1995 amendments, "[n]eed is the central inquiry in the alimony determination, with fault relegated to 'factor' status. . . . Although the list starts with marital misconduct, all of the other fifteen factors focus on the economic circumstances of the parties."[24] The current statute downgrades "fault to a secondary position, only one of many, often more significant, factors."[25] An award of post-separation support, like an award of alimony, is based on economic factors, and the court may appropriately award spousal support if neither spouse offers evidence of misconduct.[26] As between post-separation and alimony, fault is even less significant for post-separation support.[27]

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18. REYNOLDS, *supra* note 3, § 7.4 (citing N.C. GEN. STAT. §§ 50-5(1)–(5) (Repl. Vol. 1976)).

19. *Id.*

20. *Id.*; *see also* N.C. GEN. STAT. § 50-6 (2011); 1979 N.C. Sess. Laws 775, 775–76.

21. REYNOLDS, *supra* note 3, § 8.2; *see also* N.C. GEN. STAT. §§ 50-16.2–.3 (1994), *repealed by* 1995 N.C. Sess. Laws 641.

22. REYNOLDS, *supra* note 3, § 8.2.

23. *See* N.C. GEN. STAT. § 50-16.3A (2011); 1995 N.C. Sess. Laws 641, 643–45.

24. REYNOLDS, *supra* note 3, § 9.3.

25. *Id.*

26. *Id.* § 8.2.

27. *See id.*

II. THE *HARPER* DECISION

At the time of the *Harper* decision in 1981, fault was still required to receive alimony or alimony *pendente lite*. In *Harper*, the mother only filed claims for child custody, child support, and attorney's fees, and sought possession of the marital residence and a car incident to her claims for child custody and support. In her complaint, she alleged that she and the children's father were not happy and that it was in the best interests of the parties and the children for the parties to separate.[28] She did not allege that the father had committed misconduct or that he had failed to provide adequate support for the family.[29] Because the mother did not file a claim for alimony or alimony *pendente lite*, she was not required to allege, and the trial court was not required to rule on, the existence of any of the statutorily enumerated fault grounds.

Judge John H. Parker, the trial judge presiding in *Harper*, recalled, "I tried to avoid memorializing the parties' bad acts on paper unless I had to, by statute, in order to support the decision."[30] Judge Parker explained that had he deemed such a finding necessary, the evidence before the trial court could have supported a finding of misconduct. Specifically, he recalled that the mother in *Harper* was a soft-spoken, quiet homemaker while the father was controlling, uncompromising, and emotionally abusive to the rest of the family.[31] He ran the parties' household in military fashion and subjected the family to radical religious rituals against their wishes.[32] Judge Parker omitted such findings in the record because he was convinced that the court had the inherent authority to provide for the support and welfare of children, including their shelter and transportation, without a finding of misconduct of either party.[33] Working on the premise that the children's interests were more important than the rights of the parties, Judge Parker found it to be in the children's best interests for the court to award possession of the home to the children and custody of the children to the mother.[34]

The Court of Appeals disagreed with the trial court's belief that it had the inherent authority to award use and possession of the marital

28. Harper v. Harper, 273 S.E.2d 731 (N.C. Ct. App. 1981).

29. *Id.* at 735.

30. Interview with The Honorable John H. Parker, Partner, Cheshire Parker Schneider & Bryan, PLLC, in Raleigh, N.C. (Aug. 3, 2011).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

residence incident to child custody and support.[35] Reasoning that the mother's complaint attempted to assert a claim for a "no fault" divorce from bed and board, the Court of Appeals found that she "fail[ed] to state a claim upon which relief [could] be granted" under North Carolina law.[36] The court specifically held that:

> [W]here, as here, husband and wife are living together, the children being in their joint custody and being adequately supported by the supporting spouse, in the absence of allegation[s] that would support an award of alimony or divorce, one spouse may not maintain an action to evict the other, get sole custody of the children, and obtain an order for child support .[37]

The court relied on the language of section 50-13.4(e) in effect at the time of the ruling, which stated, in relevant part, "*Payment for the support of a minor child shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property of any interest therein, or a security interest in real property, as the court may order*"; and contrasted the language of section 50-13.4 to the language of the alimony statute, section 50-16.7(a), which expressly authorized the trial court to award "possession of real property," as opposed to only a security interest, as part of an alimony award.[38] The court reasoned that, "[e]ven if the wife and children had been living separate from the husband and there was a justiciable controversy as to custody and support," a judge may not "evict [the husband] from his home and assign it to his wife for her use and that of the children, in the absence of allegations and proof of matters that would also support an award of alimony or divorce [from bed and board]."[39] Summarizing its ruling, the court concluded, "plaintiff, without just cause or excuse, wants out of the marriage, but not out of the marital home. The law cannot require her to live with her husband, but it will not allow her to evict him."[40]

A. *State of the Law Pre-*Baumann

Shortly after *Harper* was decided, the General Assembly amended sections 50-13.4(e) and (f)(2) of the North Carolina General Statutes to allow the trial court to award the possession of real property incident to child support, despite the holding in *Harper*. As the trial judge respon-

35. Harper v. Harper, 273 S.E.2d 731, 735 (N.C. Ct. App. 1981).
36. *Id.* at 733–34.
37. *Id.* at 733.
38. *Id.* at 734.
39. *Id.*
40. *Id.* at 735.

sible for the decision on appeal, Judge Parker received a copy of the Court of Appeals' decision before it was released as a slip opinion. Concerned about the potential implications and the weight the appellate court placed on the inconsistency in statutory remedies for alimony and child support, Judge Parker immediately approached Representative Joe Hackney about amending the statutes and codifying what he believed was the trial court's inherent authority to provide shelter as a form of child support.[41] Within 72 hours of his meeting with Judge Parker, Representative Hackney proposed a bill that would expressly amend sections 50-13.4(e) and (f)(2) to allow courts to award the possession of real property as a form of child support and a means to enforce non-payment of support.[42] The effect of the amendment should have been that a trial court could award possession of the home to the party who was the recipient of child support payments. However, some courts still referred to *Harper* to interpret section 50-13.4, despite the fact that the statute had been amended.

As a result, prior to the ruling in *Baumann*, it was unclear whether a party could rely successfully on the child support statutes as authority to seek possession of the home prior to separation. Many district court judges relied on *Harper* in support of the proposition that there was no justiciable issue as to custody and support of children between parents as long as the parents were living together and the children were being adequately supported, absent allegations of fault. Accordingly, before *Baumann*, the general belief among most North Carolina family law practitioners was that possession could only be ordered before separation as part of a Chapter 50B domestic violence protective order, or as part of an order for child support, post-separation support, or alimony entered *after* a divorce from bed and board had been granted.

III. THE *BAUMANN* DECISION

In *Baumann*, the mother filed a complaint against the father seeking "temporary and permanent custody of the parties' children, temporary and permanent child support, post-separation support and alimony, and attorney's fees."[43] At the time the mother filed the complaint, the parties had not separated.[44] The mother alleged that she "desire[d] to separate

41. Interview with The Honorable John H. Parker, *supra* note 30.

42. *See* N.C. GEN. STAT. §§ 50-13.4(e), (f)(2) (2011); Act of May 28, 1981, ch. 472 § 1, 1981 N.C. Sess. Laws 736.

43. Baumann-Chacon v. Baumann, 710 S.E.2d 431, 432 (N.C. Ct. App. 2011).

44. *Id.*

from [Defendant], but believe[d] it [was] in the parties' and minor children's best interest that the issues set forth [in her complaint] be resolved before said separation occurr[ed.]"[45] Neither party filed a claim for divorce from bed and board, and, as in *Harper*, the mother "made no written allegations of marital misconduct on the part of [the father] in her Complaint."[46] In addition, and in contrast to *Harper*, the mother in *Baumann* did not ask the court to remove the Defendant from the marital home.[47] The trial court concluded as a matter of law that it did not have subject-matter jurisdiction over any of the mother's claims "because there was no evidence of a physical separation and there was no pending claim by [the mother] for divorce from bed and board or possession of the marital residence."[48]

The Court of Appeals affirmed in part and reversed in part the trial court's judgment, holding that the trial court did, in fact, have subject-matter jurisdiction over the mother's claims for custody and child support, even though the parties had not physically separated and no complaint for divorce from bed and board had been filed.[49] As to the wife's post-separation support claim, the Court of Appeals found that the trial court lacked subject-matter jurisdiction over that claim prior to a physical separation of the parties or a filing of divorce from bed and board.[50] The Court of Appeals remanded the case to the trial court for further proceedings not inconsistent with the opinion.[51]

The Court of Appeals relied on the statutory language governing child custody, child support, and post-separation support in making its decision. Citing multiple references to "date of separation" in the statutory provisions governing post-separation support, the Court of Appeals found that the General Assembly did not contemplate the availability of this remedy prior to separation.[52] However, the court distinguished claims relating to the economic needs of dependent spouses from those related to the custody and care of children, finding that the statutory

45. *Id.*

46. *Id.* at 433.

47. *Id.*

48. *Id.*

49. *Id.* at 436

50. *Id.* at 437–38.

51. Immediately after the temporary hearing resulting in the order on appeal in *Baumann*, the parties separated. Thereafter, and before the case came back before the trial court on remand, the parties settled their issues privately outside of court via Separation Agreement; their divorce is now final. E-Mail from Alyscia Gray Ellis, Principal, Ellis Family Law, PLLC, (Feb. 13, 2012) (on file with authors).

52. *Baumann*, 710 S.E.2d at 437.

language governing child custody and child support does not require physical separation or a complaint for divorce, either absolute or from bed and board, to be filed before a court can address custody or support.[53] Specifically, section 50-13.5(g) states, "orders for custody and support of minor children may be entered when the matter is before the court as provided by this section, *irrespective of the rights of the wife and the husband as between themselves in an action for annulment or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce*."[54] The appellate court reasoned that the "history of the applicable statutory provisions and the reasons underlying their enactment" did not reveal a legislative intent to require physical separation of the parents.[55]

In support of its ruling, the Court of Appeals relied on *Martin v. Martin*, in which it stated, "we have previously rejected the contention that our courts may not award possession of real estate as a part of child support" on the theory that "shelter is a necessary component of a child's needs and in many instances it is more feasible for a parent to provide actual shelter than it is for the parent to provide monetary payments to obtain shelter."[56] With respect to custody, the court cited *Lee's North Carolina Family Law*, which states: "a court may order possession of real property as a payment of child support or as a way to effectuate an order for custody."[57]

Ultimately, the *Baumann* court asserted that "the purpose of actions for child custody and child support is, consistently with the law's overriding interest in protecting minor children, to assure that the needs of such children are adequately met."[58] Relying on the principle set forth in *MacKenzie v. MacKenzie*,[59] that "[a] court having jurisdiction of children located within the state surely has the inherent authority to protect those children and make such temporary orders as their best interests may require[,]" the Court of Appeals held that child custody and child support claims are not precluded by the fact that the parties have neither physi-

53. *See* N.C. GEN. STAT. §§ 50-13.1, -13.5 (2011).

54. N.C. GEN. STAT. § 50-13.5(g) (emphasis added).

55. *Baumann*, 710 S.E.2d at 435; N.C. GEN. STAT § 50-13.5.

56. Martin v. Martin, 242 S.E.2d 393, 396–97 (N.C. Ct. App. 1978) (quoting Boulware v. Boulware, 208 S.E.2d. 239, 240–41 (N.C. Ct. App. 1974)).

57. 1 SUZANNE REYNOLDS, LEE'S NORTH CAROLINA FAMILY LAW § 6.23(A) (5th ed. 1993).

58. *Baumann*, 710 S.E.2d at 436; *see also* Price v. Howard, 484 S.E.2d. 528, 530 (N.C. 1997).

59. MacKenzie v. MacKenzie, 204 S.E.2d 561, 563 (N.C. Ct. App. 1974).

cally separated nor asserted divorce from bed and board claims against each other.[60]

The Court of Appeals' ruling in *Baumann* was consistent with the trial court's belief in *Harper* that the interests of children are paramount to the rights of the parties as between themselves, whether to occupy the marital residence or otherwise. As to parents' "rights," Judge Parker contends they are secondary and consist, arguably, of "constitutional standing that allows them a preeminent claim to seek custody/visitation as to the rest of the world" and "the right to ask for support as trustee on behalf of a child."[61] He contends that children, on the other hand, have the rights to be safe and secure in the custody of a party with "standing," and to be supported adequately.[62] Both Judge Parker and the Court of Appeals' ruling in *Baumann* suggest that, where children are involved, North Carolina courts should have the authority to protect the interests of the child over the interests of the parents, and the parents "rights," whatever they are, are secondary.

Distinguishing Harper *from* Baumann

As the Court of Appeals noted in its *Baumann* decision, *Baumann* and *Harper* are distinguishable.[63] Footnote four of the *Baumann* opinion reads as though the Court of Appeals viewed *Harper* as focusing more narrowly on the issue of whether one spouse could be evicted from the marital residence incident to custody or child support before separation without allegations or findings of fault.[64] In *Baumann*, the issue was whether the trial court had subject-matter jurisdiction to enter any custody or child support order before separation of the parties.[65] While *Harper* held that a trial court could not enter an order that resulted in a marital separation without establishing fault on the part of the non-custodial parent,[66] *Baumann* relied on section 50-13.4 of the North Carolina General Statutes to conclude that the court can enter pre-separation orders addressing child custody and child support, which may effectuate separation by awarding possession of the parties' residence to the custodial parent.[67] Accordingly, the court's holding in *Baumann* is broader

60. *Baumann*, 710 S.E.2d at 436 (quoting *MacKenzie*, 204 S.E.2d at 563).
61. Interview with The Honorable John H. Parker, *supra* note 30.
62. *Id.*
63. *Baumann*, 710 S.E.2d at 436 n.4.
64. *Id.*
65. *Id.* at 432.
66. Harper v. Harper, 273 S.E.2d 731, 735 (N.C. Ct. App. 1981).
67. *Baumann*, 710 S.E.2d at 436.

than the holding in *Harper*, and creates a procedural gateway for litigants who want to address custody and child support issues while they are still living together.

Consistent with the trial court's belief in *Harper*, the court's ruling in *Baumann* clarified that the interests of children are paramount to rights of the mother and father as between themselves. The *Baumann* ruling is also consistent with the evolving concept of needs over fault in other domestic claims. Because a finding of fault is not necessary to determine the best interests of a child or to provide the support necessary to meet a child's reasonable needs, post-*Baumann* trial court judges now have the clear authority to do what the appellate court found the trial court could not do in *Harper*.

IV. INTERSTATE COMPARISON

A sampling of other states' approaches to the court's subject-matter jurisdiction to enter orders awarding exclusive possession of the marital residence, custody or support demonstrates some important trends in this area of the law, especially as it relates to fault grounds and separation.

A. New York

In New York, claims for child custody, child support and *pendente lite* spousal maintenance, as well as payment of expenses for the house (mortgage, taxes, insurance, utilities, etc.) by the supporting spouse, can be initiated while the parties are still living in the same house. New York Domestic Relations Law section 236(B)(8)(b) provides that:

> In any action where the court has ordered temporary maintenance, maintenance, distributive award or child support, the court may direct that payment be made directly to the other spouse or a third person for real and personal property and services furnished to the other spouse, or for the rental or mortgage amortization or interest payments, insurances, taxes, repairs, or other carrying charges on premises occupied by the other spouse, or for both payments to the other spouse and to such third persons. *Such direction may be made notwithstanding that the parties continue to reside in the same abode* and notwithstanding that the court refuses to grant the relief requested by the other spouse.[68]

68. N.Y. DOM. REL. LAW § 236(B)(8)(b) (McKinney 2010) (emphasis added).

Thus, in New York, temporary spousal support, child support, and counsel fees may be awarded where the parties continue to reside in the same household.[69]

As to child custody, subdivision 1 of section 240 requires the court to inquire into both the custody and support arrangements for children in the context of certain matrimonial litigation (i.e., actions to annul a marriage; to declare the nullity of a void marriage; for a separation; and for a divorce),[70] whether the parents or other adult litigants raise issues concerning the children or not. Consistent with the North Carolina Court of Appeals' rationale in *Baumann*, New York courts have an affirmative obligation to ensure that children who are within its jurisdiction are placed in the care of the most appropriate custodian, and that the persons legally responsible for their support are obligated to provide an appropriate level of support.[71] Jurisdiction to determine child custody and support is not dependent on whether matrimonial relief is granted, and the court may provide for child custody and support even if matri-

69. *See* Salerno v. Salerno, 531 N.Y.S.2d 101, 103 (N.Y. App. Div. 1988) ("[M]ere fact that parties continue to reside in same household after commencement of matrimonial action does not preclude award of temporary maintenance or temporary child support; such awards are designed to insure that reasonable needs are met during the pendency of matrimonial litigation." (citing Cohen v. Cohen, 514 N.Y.S.2d 45, 45 (N.Y. App. Div. 1987))); *see also* Malin v. Malin, 326 N.Y.S.2d 30, 31–32 (N.Y. App. Div. 1971) (noting that denial of temporary alimony, child support, and counsel fees was not appropriate simply because the complaint was not served on the husband even though wife was living with husband when the separation action was brought).

70. N.Y. DOM. REL. LAW § 240. The Equitable Distribution Law defines the term matrimonial action to include, in addition to the four categories listed above, actions for the "dissolution of a marriage" (i.e., Enoch Arden proceedings, *see* N.Y. DOM. REL. LAW §§ 220, 221); for the declaration of the validity or nullity of a foreign judgment of divorce; for the declaration of the validity of a marriage; and proceedings to obtain equitable distribution or maintenance following a foreign judgment of divorce. N.Y. DOM. REL. LAW § 236(B)(2); *see also* CPLR 105 (subd. p). While these actions are defined as matrimonial actions for equitable distribution and other economic purposes, no jurisdiction is conveyed to permit custody determinations to be made as ancillary relief in such actions. *Cf.* Gontaryk v. Gontaryk, 246 N.Y.S.2d 270, 270–71 (N.Y. App. Div. 1964). In order to obtain a custody determination, an independent proceeding must be initiated in either the Supreme Court or Family Court. However, subdivision 7 of Part B of section 236 permits the court to award temporary or permanent child support in "any matrimonial action." N.Y. DOM. REL. LAW § 236(B)(2). Thus, in any matrimonial action, defined as such by the Equitable Distribution Law, the court may determine child support but may not decide the issue of custody unless the action is one of the types of action specifically identified in section 240 of New York's Domestic Relations Laws. Alan D. Sheinkman, *Practice Commentaries*, N.Y. DOM. REL. LAW § 240 (2010).

71. Sheinkman, *supra* note 70, § 240.

monial status relief is denied.[72] In fact, New York courts have ordered custody or parenting schedules, including weeknight responsibility for the children, between parents living in the same house and awarding each spouse exclusive use and occupancy of different portions of the same house.[73]

While New York does not statutorily address whether a trial court may award possession of the marital residence incident to child custody or child support, New York Domestic Relations Law section 234 vests the court with the authority to award exclusive occupancy of the marital residence during the pendency of an action.[74] Section 234 specifically states, in relevant part, that the court may:

> [M]ake such direction, between the parties, concerning the possession of property, as in the court's discretion justice requires having regard to the circumstances of the case and of the respective parties. Such direction may be made in the final judgment, or by one or more orders from time to time before or subsequent to final judgment.[75]

Notwithstanding this broad statutory language, certain decisional standards have evolved, limiting the trial court's application of section 234 to award possession of the marital residence to a party on an interim basis. For example, courts have consistently held that a *pendente lite* award of exclusive occupancy of the marital residence should not be granted unless it is demonstrated that it "is necessary to protect the safety of persons and property."[76] In most situations, possession of the marital residence may not be awarded on an *ex parte* basis.[77] However, where extrinsic evidence (such as police reports, medical records, the issuance of an order of protection, or third-party affidavits) corroborates the moving party's allegations, the court may grant exclusive occupancy without a hearing.[78]

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72. E.g., Caldwell v. Caldwell, 81 N.E.2d 60 (N.Y. 1948); Miller v. Miller, 198 N.Y.S.2d 320 (N.Y. App. Div. 1960); La Rosa v. La Rosa, 373 N.Y.S.2d 985 (N.Y. Sup. Ct. 1975).

73. E-mail from Theresa A. Girolamo, Associate, Goldschmidt & Genovese LLP (Oct. 19, 2011) (on file with authors).

74. N.Y. DOM. REL. LAW § 234.

75. *Id.*

76. 2 TIMOTHY TIPPINS, NEW YORK MATRIMONIAL LAW AND PRACTICE § 17:33 (2011) (citing Blumenfield v. Blumenfield, 466 N.Y.S.2d 63 (N.Y. App. Div. 1983)); *see also* Tillinger v. Tillinger, 502 N.Y.S.2d 493, 493 (N.Y. App. Div. 1986) (noting that relief will be denied where there is insufficient evidence to show that exclusive use and occupancy is necessary to protect the safety of persons or property).

77. TIPPINS, *supra* note 76, § 17:33 (citing *Blumenfield*, 466 N.Y.S.2d at 63).

78. *See* Vallet v. Vallet, 446 N.Y.S.2d 605 (N.Y. App. Div. 1982).

Other factors that have been considered by New York courts in determining motions for exclusive occupancy of the marital residence on an interim basis include the availability of alternative accommodations to the spouse seeking exclusion, the availability of housing to the party who is the target of the motion, the proximity of the marital residence to one party's employment, and the fact that the marital residence also serves as the place of business of one of the spouses.[79] These standards reflect a judicial recognition in New York that an indiscriminate granting of exclusive occupancy orders would be tantamount to a summary eviction proceeding by parties to matrimonial litigation not intended by the statute,[80] echoing the concerns of the North Carolina Court of Appeals in *Harper*.[81]

B. *California*

In California, one may seek *pendente lite* exclusive occupancy of the marital residence upon a showing that he or she is "more entitled" to reside there based upon a balancing of factors specified in section 6321 of the California Family Code (for domestic violence cases) and section 6340 (for non-domestic violence cases). Specifically, section 6321(a) states,

> The court may issue an *ex parte* order excluding a party from the family dwelling, the dwelling of the other party, the common dwelling of both parties, or the dwelling of the person who has care, custody, and control of a child to be protected from domestic violence for the period of time and on the conditions the court determines, regardless of which party holds legal or equitable title or is the lessee of the dwelling.[82]

Section 6340(b) states,

> The court may issue an order described in Section 6321 excluding a person from a dwelling if the court finds that physical or emotional harm would otherwise result to the other party, to a person under the care,

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79. TIPPINS, *supra* note 76, § 17:33 (citing Baylek v. Baylek, 442 N.Y.S.2d 60, 61 (N.Y. App. Div. 1981); Rauch v. Rauch, 441 N.Y.S.2d 749, 750 (N.Y. App. Div. 1981); Binet v. Binet, 385 N.Y.S.2d 564, 565 (N.Y. App. Div. 1976)).

80. *Id.*

81. Exclusive use and occupancy of the marital residence can also be awarded in New York where one spouse has voluntarily established an alternative residence and the spouse's presence has caused domestic strife. *See* Kristiansen v. Kristiansen, 534 N.Y.S.2d 104 (N.Y. App. Div. 1988); *see also* Preston v. Preston, 537 N.Y.S.2d 824 (N.Y. App. Div. 1989); Wolfe v. Wolfe, 490 N.Y.S.2d 555 (N.Y. App. Div. 1985).

82. CAL. FAM. CODE § 6321 (2004).

custody and control of the other party, or to a minor child of the parties or of the other party.[83]

In its practical application, the statutory language results in an airing of the equities for the court to decide who gets to remain in the marital residence. The court is to consider factors such as whether one party has primary custody of children who go to school nearby, the existence or non-existence of domestic violence, the need for one party to use the residence for work or employment purposes, and whether one party was the primary tenant or owner of the residence prior to marriage, among other things.[84] Consistent with its no-fault approach to the dissolution of marriage, California does not require a finding of fault to award possession of the marital residence to a party.[85]

Moreover, in California, intact couples can reside in separate residences while legally separated parties may reside in the same residence (though it is more difficult to prove a date of separation when parties have chosen not to physically separate).[86] In fact, the latter is an economic reality for many in certain regions of California, including the Bay area.[87] In California, one party may also seek custody or support orders while the parties are residing together, but separated. Support orders can be made, as can orders regarding the ongoing payment of various community property obligations (i.e., mortgages, credit card payments), and those obligations often impact the amount of support that is ordered.[88]

Family Code section 2010 is the basic jurisdictional statute for custody and support determinations in proceedings for dissolution of marriage, nullity or legal separation in California.[89] Independent actions for exclusive custody, brought pursuant to section 3120 without request for legal separation or dissolution of the marriage, are governed by all of the same statutory considerations as in custody disputes arising in regular dissolution proceedings.[90] Family Code section 3120 specifically states,

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83. *Id.* § 6340.

84. E-mail from Yasmine S. Mehmet, Principal, Law Offices of Yasmine S. Mehmet (Oct. 14, 2011) (on file with authors).

85. Juick v. Juick, 98 Cal. Rptr. 324, 329 (Cal. App. Dep't Super. Ct. 1971).

86. E-mail from Yasmine S. Mehmet, *supra* note 84.

87. *Id.*

88. *Id.*

89. CAL. FAM. CODE § 2010 (2004).

90. *Id.* § 3021(d) (2004); 1 JUDITH R. FORMAN & PATRICIA PHILLIPS, CALIFORNIA TRANSACTIONS FORMS—FAMILY LAW § 3:4 (2011).

> Without filing a petition for dissolution of marriage or legal separation of the parties, the husband or wife may bring an action for the exclusive custody of the children of the marriage. The court may, during the pendency of the action, or at the final hearing thereof, or afterwards, make such order regarding the support, care, custody, education, and control of the children of the marriage as may be just and in accordance with the natural rights of the parents and the best interest of the children. The order may be modified or terminated at any time thereafter as the natural rights of the parties and the best interest of the children may require.[91]

Accordingly, California practitioners have seen cases where one party lived upstairs and the other downstairs, and the children dutifully went between floors on the respective parents' custodial days.[92] Given the ruling in *Baumann*, the same or similar scenario may now be a possibility for parents residing together in North Carolina, whether they are contemplating separation or not.

C. Maryland

The development of the law in Maryland regarding subject-matter jurisdiction to make pre-separation orders for child-related claims has followed a very similar track to that in North Carolina, including an emphasis and subsequent de-emphasis on fault. For example, in the 1952 case of *Sheinin v. Sheinin*, the Maryland Court of Appeals upheld the trial court's decision to grant the wife a limited divorce[93] based on the husband's constructive desertion of her and awarded her alimony, custody of the children, and child support.[94] As the wife's complaint included a claim for limited divorce based on fault, and there appears to have been ample evidence to support finding the husband at fault,[95] it is likely the *Harper* court would have agreed with the decision in *Sheinin*.

However, in the more recent case of *Ricketts v. Ricketts*,[96] decided by the Maryland Court of Appeals in 2006, the court interpreted and explained Maryland's child custody and support statutes in the same way

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91. CAL. FAM. CODE § 3120.

92. E-mail from Yasmine S. Mehmet, *supra* note 84.

93. The term "divorce" as used by the court in *Ricketts*, refers to a "limited divorce." This is analogous to a divorce from bed and board under section 50-7 of the North Carolina General Statutes. *See* N.C. GEN. STAT. § 50-7 (2011).

94. Sheinin v. Sheinin, 89 A.2d 609, 612–13 (Md. 1952).

95. For instance, Mr. Sheinin had an extramarital relationship with his secretary, whom he moved into the marital home while he and Mrs. Sheinin were still living together with their children. *Sheinin*, 89 A.2d at 610–11.

96. Ricketts v. Ricketts, 903 A.2d 857 (Md. 2006).

that *Baumann* addressed sections 50-13.4 and 50-13.5 of the North Carolina General Statutes.[97] On its face, section 5-203(d)(1) of Maryland's Family Law Code appears to predicate the court's authority to enter orders regarding child custody upon the parties' separation. This section provides that "[i]f the parents live apart, a court may award custody of a minor child to either parent or joint custody to both parents."[98] The Court of Appeals in *Ricketts* carefully analyzed section 5-203(d)(1) in the context of section 1-201[99]—the statute granting power to courts of equity—and its previous decisions in cases concerning jurisdiction over child custody matters while the parties were not separated. The *Ricketts* court concluded that "[t]he trial court . . . , whether, or not, it concludes that Mr. Ricketts is entitled to a divorce, has the jurisdiction and the power to determine the custody, visitation, and support of the Ricketts' children."[100]

The Maryland Court of Appeals agreed that section 1-201 "does more than simply describe the court's jurisdiction; it instead is a grant of power, imbuing the courts with the responsibility to determine custody, visitation, and support regardless of whether the parents are divorced or physically separated."[101] Consistent with this interpretation, the court discussed its earlier decisions in *Barnhard*[102] and *Mower*.[103]

The court noted that the case of *Barnhard v. Godfrey* was decided "just months before the enactment of the predecessor legislation to [section] 5-203(a)" in 1929.[104] In that case, the Court of Appeals held that the "then applicable statute . . . empower[ed] the equity courts, whenever application for that relief was sought by one or both parents, to determine custody, support, and visitation 'without regard to the question of whether or not the parents of said child or children have been divorced or are living apart.'"[105] The court further noted that the predecessor to section 5-203(a) recognized the equity court's "'inherent power . . . over minors'"[106] and that the exercise of the power should be done "'with the paramount purpose in view of securing the welfare and pro-

97. *See* discussion *supra* Part IV.
98. MD. CODE ANN., FAM. LAW § 5-203(d)(1) (LexisNexis 2006).
99. *Id.* § 1-201.
100. *Ricketts*, 903 A.2d at 870.
101. *Id.* at 867.
102. Barnhard v. Godfrey, 145 A. 614 (Md. 1929).
103. Mower v. Mower, 121 A.2d 185 (Md. 1956).
104. *Ricketts*, 903 A.2d at 868.
105. *Id.* (quoting *Barnhard*, 145 A. at 615).
106. *Id.* (quoting *Barnhard*, 145 A. at 615).

moting the best interest of the children.'"[107] In light of its decision in *Barnhard*, the Court of Appeals reasoned that the legislature's enactment of a custody statute requiring separation as a condition to making a custody award "did not disturb the courts' right to determine custody, support, or visitation when divorce was not decreed."[108]

In *Mower v. Mower*,[109] the wife's complaint for alimony *pendente lite*, child custody, child support, and attorney's fees included a claim for a limited divorce.[110] Finding no grounds for a limited divorce where both parties were at fault "as they were content to live in a state of animosity and estrangement and that, therefore, no desertion had occurred,"[111] the trial court refused to grant the divorce and dismissed the wife's other claims.[112] The Court of Appeals subsequently reversed the trial court's decision, holding that the court had jurisdiction to rule on the wife's claims for custody and support regardless of whether a limited divorce was granted.[113]

Ultimately, the Court of Appeals' rationale for its holding in *Ricketts* was the same as Judge Parker's reasoning[114] for awarding custody of the children and possession of the house to the wife in *Harper*. Like Judge Parker, the Court of Appeals concluded that its approach was "consistent with the primacy of the interests of the child and the courts' paramount concern 'to secure the welfare and promote the child's best interests.'"[115] Four years after the *Ricketts* decision, the North Carolina Court of Appeals reached the same conclusion in *Baumann*.

D. Missouri

In Missouri, either party may file a motion for temporary relief while the case is pending and prior to separation. Missouri courts do not have to address the questions of statutory interpretation that arose in *Harper* and *Baumann* to determine whether trial courts have jurisdiction to decide the issues of child custody and child support before separation because the legislature has unambiguously provided the courts with this

107. *Id.* (quoting *Barnhard*, 145 A. at 615).
108. *Id.*
109. Mower v. Mower, 121 A.2d 185 (Md. 1956).
110. *Id.* at 186.
111. *Ricketts*, 903 A.2d at 869 (citing *Mower*, 121 A.2d at 186).
112. *Id.*
113. *Id.* (citing *Mower*, 121 A.2d at 187).
114. *See supra* notes 29–33 and accompanying text.
115. *Ricketts*, 903 A.2d at 870 (quoting Stancill v. Stancill, 408 A.2d 1030, 1033 (Md. 1979)).

authority. Specifically, section 452.315 of Vernon's Annotated Missouri Statutes provides, in relevant part:

> In a proceeding for dissolution of marriage or legal separation, either party may move for temporary maintenance and for temporary support for each child entitled to support. . . . As a part of a motion for temporary maintenance or support or by independent motion accompanied by affidavit, either party may request the court to issue an order after notice and hearing: . . . excluding a party from the family home or from the home of the other party upon a showing that physical or emotional harm would otherwise result; [or] establishing and ordering compliance with a custody order and providing for the support of each child.[116]

The purpose of such temporary relief is to maintain the status quo during the pendency of litigation.[117]

Thus, in Missouri, claims for child custody, child support, alimony *pendente lite,* and counsel fees can be commenced and awards made while the parties are living under the same roof.[118] A more frequently litigated question than whether the trial courts have the authority to order pre-separation relief is whether a separation has actually occurred. Unlike North Carolina, and similar to California, the parties can be considered separated even while they are still living in the same residence. Missouri case law has defined the term 'living together as husband and wife' as meaning "the dwelling together in the same house, eating at the same table, the two parties, the man and woman in question, holding themselves out to the world and conducting themselves toward each other as husband and wife."[119] For example, in *O'Brien v. O'Brien,*[120] the Missouri Court of Appeals held that where plaintiff wife and defendant husband lived in the same residence during the hearing on the wife's motion for alimony and child support *pendente lite*, the trial court was not precluded from granting her motion[121] where the parties had been living separate and apart as far as their marital relationship, and she

116. MO. ANN. STAT. § 452.315 (West 2012).

117. *See* Coleberd v. Coleberd, 933 S.W.2d 863, 871 (Mo. Ct. App. 1996); Tisone v. Tisone, 881 S.W.2d 647, 648 (Mo. Ct. App. 1994); In re Marriage of Kovach, 873 S.W.2d 604, 607 (Mo. Ct. App. 1993); Berbiglia v. Berbiglia, 442 S.W.2d 949, 951–52 (Mo. Ct. App. 1969).

118. *See* Lipp v. Lipp, 117 S.W.2d 364, 365–66 (Mo. Ct. App. 1938) (holding that suit money was not precluded where husband and wife were sheltered by the same roof because the court concluded they were living separate and apart rather than as husband and wife).

119. *Id.* at 365 (citing Levy v. Goldsoll, 131 S.W. 420, 421–22 (1910)).

120. O'Brien v. O'Brien, 485 S.W.2d 674 (Mo. Ct. App. 1972).

121. *Id.* at 678.

moved to an apartment shortly after the hearing.[122] In contrast, and as further illustration, in the Missouri case of *Harper v. Harper*,[123] the wife brought suit for divorce and when the officer went to serve process on the defendant, the plaintiff and defendant were occupying the same bed; on those facts, the Supreme Court held that the parties had not separated and were living together as man and wife, and denied the relief requested.[124]

E. Kansas

Given its proximity to Missouri, one might expect a similar approach in the state of Kansas, but to no avail. Kansas takes a drastically different approach to pre-separation orders on temporary support and child custody from other states. Under section 60-1607(a) of the Kansas Annotated Statutes, a court has the authority to enter temporary orders concerning, among other things, "the disposition of the property of the parties,"[125] "the use, occupancy, management and control of [the parties'] property,"[126] and "the legal custody and residency of and parenting time with the minor children and the support, if necessary, of either party and of the minor children during the pendency of the action."[127] There is no requirement for the parties to be separated prior to commencing an action seeking temporary relief under section 60-1607. In addition, section 60-1607(b) expressly allows the court to hear and decide these matters on an *ex parte* basis, but restricts a party's ability to obtain an *ex parte* order that has "the effect of changing the residency of a minor child from the parent who has had the sole de facto residency of the child to the other parent"[128] to situations in which "there is sworn testimony to support a showing of extraordinary circumstances."[129] Accordingly, Kansas courts have the authority to enter orders regarding possession

122. *Id.* at 676.

123. Harper v. Harper, 29 Mo. 301 (1860).

124. *Id.* at 302–04. Note, however, that in Missouri there is no vehicle for the division of property prior to the final disposition, and the trial court has a duty to fully dispose of the property of the parties in its decree. *See* MO. ANN. STAT. § 452.330.5 (West 2012) ("The court's order as it affects distribution of marital property shall be a final order not subject to modification . . . ."); *see also In re* Long, 148 B.R. 904, 908 (Bankr. W.D. Mo. 1992); Morgan v. Morgan, 249 S.W.3d 226, 230–31 (Mo. Ct. App. 2008); Gurtz v. Gurtz, 186 S.W.3d 435, 439 (Mo. Ct. App. 2006).

125. KAN. STAT. ANN. § 60-1607(a)(1) (2011).

126. *Id.*

127. *Id.* § 60-1607(a)(3).

128. *Id.* § 60-1607(b).

129. *Id.*

and ownership of the marital residence, even on an *ex parte* basis, before the parties have separated.

If an *ex parte* order is entered, the court is required to hold a hearing "within 15 days of the date on which a party requests a hearing whether to vacate or modify the order."[130] The onus is on the defendant spouse to file a motion and establish why the court's decision, which was made without that spouse's input or involvement, is incorrect. The practical, if not legal, effect of section 60-1607(b) is to create a presumption in favor of the plaintiff spouse. In fact, it is entirely possible that one spouse could wake up in the morning at the marital residence, go to work, and then come home in the evening expecting to have dinner with his or her family, only to find that a court has awarded possession of the home to the other spouse, along with custody of the parties' children. As a result, the ousted spouse, who may not have even been aware that his or her partner was contemplating litigation, is immediately at a disadvantage.[131]

Kansas's approach can result in the type of outcome that the *Harper* court sought to prevent—a potentially innocent spouse who wants to remain in the parties' marriage being banned from the marital residence. While *Baumann* gives North Carolina judges the ability to exercise discretion to determine when it is appropriate to consider and rule on claims for custody and child support prior to separation, and award possession of the marital residence incident to those claims, *Baumann* specifically excepts the same relief incident to claims for post-separation support prior to the parties' separation. Kansas does not protect the rights of the defendant spouse in the same way and, some may argue, reaches too far into the lives of an otherwise intact family.

V. IMPLICATIONS OF *BAUMANN*

While in most instances it would be unnecessary to address child custody and child support before the parties have separated, there may be circumstances in which it would be appropriate or even essential for the trial court to resolve these issues prior to separation in order to ensure that the best interests of the children are met.[132] The holding in *Baumann* does not place any clear limitations on trial judges' authority to enter pre-separation child custody and child support orders in North

130. *Id.*

131. E-mail from Preston A. Drobeck, Assoc., Berkowitz, Cook & Gondring, (Oct. 14, 2011) (on file with authors).

132. *See* Baumann-Chacon v. Baumann, 710 S.E.2d 431, 436 (N.C. Ct. App. 2011).

Carolina. This means that trial courts will have to use their discretion in making determinations about the propriety of entering such orders on a case-by-case basis.

Because of its far-reaching implications, *Baumann* has already raised concerns for many North Carolina family law practitioners about the possibility of governmental intrusion into an "intact" family. As a result of the decision, there is vast uncertainty as to when it might now be plausible for a court to address these issues prior to separation. Examples may include a same-sex couple living together where a complaint is filed solely for the purpose of indicating that the non-biological parent has custodial rights with respect to medical or academic matters; a married couple that has no intention of separating, where one parent disagrees with the other as to whether a child should be baptized or raised in the Jewish faith, where one parent consents to a critical medical procedure but the other refuses to allow the treatment, or where one parent consents to private school enrollment and the other insists that the child attend public school. The current statutory and case law in North Carolina does not provide any clear parameters to the trial court's authority to rule in these cases and, as a result, some practitioners fear we are facing a slippery slope.

Practical Application

In addition to the substantive—and potentially problematic—implications described above, the *Baumann* ruling also has procedural implications that will affect the way North Carolina lawyers practice law.

The ruling in *Baumann* makes it clear that either party can now file claims for child custody and child support prior to separation. While the trial court can award possession of the house to the party *receiving* payment of child support,[133] the obligor cannot obtain possession of the house pursuant to section 50-13.4(e).[134] While the Court of Appeals relies on *Lee's North Carolina Family Law* for the premise that "a court may order possession of real property as payment of child support or as a way to effectuate an order for custody," it is unclear based on the strict statutory language whether a custody claim alone would be sufficient to obtain an award of possession of the marital residence.[135]

133. N.C. GEN. STAT. § 50-13.4(e) (2011).

134. Jill Jackson, Address at Intensive Seminar, N.C. Bar Ass'n: Essential Elements of Money Claims: What You Need to Allege and Prove to Prevail (Fall 2011).

135. REYNOLDS, *supra* note 57, § 6.23(A).

The *Baumann* ruling did not change the state of the law that either party can file a claim for divorce from bed and board prior to separation. The trial court can award possession of a house to a party who prevails on a claim for divorce from bed and board.[136] In addition, the trial court can award possession of a house to the party receiving payment of spousal support;[137] however, the obligor cannot obtain possession of the house pursuant to section 50-16.7(a) of the North Carolina General Statutes. In light of *Baumann*, it is unclear whether a dependent spouse can file post-separation support and/or alimony claims prior to separation if he or she also asserts a claim for divorce from bed and board. *Harper* discussed, but did not decide, whether a claim for alimony can be filed prior to separation because, in that case, the wife did not assert a claim for alimony. *Baumann* did not discuss divorce from bed and board because, in that case, the wife did not assert a claim for divorce from bed and board. However, *Baumann* clearly holds that post-separation support claims cannot be filed prior to separation and is silent as to whether any exception would apply if such a claim is filed simultaneously with a claim for divorce from bed and board. As a result, more conservative practitioners may elect to file a complaint for divorce from bed and board and, once adjudicated, assert claims for post-separation support and alimony by motion in the cause.

CONCLUSION

At this time, the statutory and case law in North Carolina does not provide any clear parameters or limits to the trial court's authority to hear and decide the issues of child custody and child support prior to the parties' separation, and it would be impossible to prescribe a framework that would encompass every situation that may arise with regard to child custody or support. North Carolina practitioners will have to wait on future interpretive appellate cases or legislative amendments for guidance on when it would be inappropriate for the trial court to invoke its authority to decide these issues. Until then, North Carolina district court judges will face the difficult task of balancing the competing concerns of governmental intrusion into an intact family with the duty to provide for the safety and welfare, support and maintenance of children within the jurisdiction. While we venture into the unknown, North Carolina will have to trust its trial judges to determine when it is neces-

136. *See* Harper v. Harper, 273 S.E.2d 731 (N.C. Ct. App. 1981) (requiring fault allegations that would support award of "alimony" or "divorce").

137. N.C. GEN. STAT. § 50-16.7(a).

sary to invoke the power of the state to protect the interests of children, even when those interests conflict with the rights of parents.