

On the Civil Side

A UNC School of Government Blog

<https://civil.sog.unc.edu>

Custody jurisdiction: When is an absence from the home state a 'temporary absence'?



This entry was contributed by Cheryl Howell on April 9, 2025 at 9:00 am and is filed under Family Law.

Most people familiar with the law relating to child custody are familiar with the definition of the 'home state' of a child and the importance of the home state when determining whether a state has subject matter jurisdiction to make a child custody determination.

G.S. 50A-102(7) states:

"Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. ... *A period of temporary absence of any of the mentioned persons is part of that period.*" [emphasis added]

When an 11-year-old child has lived in North Carolina with her parents for her entire life but traveled to Myrtle Beach with her mother for a two-week beach vacation, it seems obvious that North Carolina will continue to be the home state of the child when mother files a custody action in North Carolina one month after she and the child return from the beach trip. The two-week period when the child was not in North Carolina clearly was a temporary absence, meaning the two weeks out of the state is "part of" the six months immediately before the commencement of the child-custody proceeding.

But what if the time outside of North Carolina is much longer, several months for example, or if the reason for leaving North Carolina is not as clear as a family vacation? How does a court determine whether the time away was a temporary absence rather than a change of the state wherein the child "lives"?

Pheasant v. McKibbon

The first time the N.C. Court of Appeals addressed the 'temporary absence' provision in the definition of home state was in the case of *Pheasant v. McKibbon*, 100 NC App 379 (1990). The children involved in that case had lived with their parents in Georgia until mother moved to North Carolina with the children in March 1987. In April 1988, the father picked up the children

for visitation and returned with them to Georgia. While in Georgia, he obtained a temporary custody order granting him custody of the children. Approximately 10 months later, the Georgia temporary order was dismissed and the children returned to North Carolina. Three months after the children returned to North Carolina, in March 1989, mother filed a custody action in North Carolina.

The court of appeals affirmed the trial court's determination that North Carolina was the home state of the children when mother filed the custody action, stating:

"The children had lived in North Carolina continuously from March 1987 until March 1989 when this action was filed except for the ten-month period during which the children resided with defendant in Georgia pursuant to the Georgia temporary custody decree. Under N.C. Gen. Stat. § 50A-2(5), "periods of temporary absence of any of the named persons are counted as part of the six-month ... period." The period during which the children resided in Georgia pursuant to the temporary custody decree was a period of "temporary absence," and thus the six-month requirement was met."

***Chick v. Chick* and the totality of circumstances analysis**

The court of appeals revisited the meaning of temporary absence in 2004. In *Chick v. Chick*, 164 NC App 444 (2004), the parents and children lived in North Carolina and father was in the military. Due to financial hardship, the parties decided to move to Vermont to live with father's parents. The following occurred:

August 2001: Mother and children moved to Vermont with the understanding that father would join them when his military service ended.

November 2001: Father visited Vermont for Thanksgiving and mother returned to North Carolina with him to take advantage of free marital counseling available through the military. The children remained in Vermont.

January 2002: The parties brought the children to North Carolina to be with them.

February 2002 (six weeks later): Mother and children returned to Vermont.

End of February 2002: Father's military service ended, and he moved to Vermont.

July 1, 2002: Mother left Vermont with the children and came to North Carolina.

July 2, 2002: Mother filed a custody action in North Carolina.

The trial court dismissed mother's complaint after concluding Vermont was the home state of the children, and the court of appeals affirmed. Both the trial court and the court of appeals determined that the six-week period that the children were in North Carolina was a temporary absence, meaning the children had 'lived' in Vermont beginning in August 2001 and continuing until mother left for North Carolina in July 2002.

The court of appeals explained that during the time mother was in North Carolina with father for marriage counseling "the parties' intentions vacillated in a relatively short span of time between residing in Vermont, North Carolina, or an unknown state where father might be stationed if he reenlisted." The court rejected mother's argument that the six weeks the children were in North Carolina should not be seen as a temporary absence because, at the time the parties brought the children to North Carolina to be with them in January 2002, the parents had decided father would re-enlist in the military and mother hoped to remain in North Carolina.

The court of appeals explained:

"Some courts in sister states have adopted certain tests for determining whether an absence from a state was a temporary absence. These tests include (1) looking at the duration of absence, (2) examining whether the parties intended the absence to be permanent or temporary, and (3) adopting a totality of the circumstances approach to determine whether the absence was merely a temporary absence. *See T.H. v. A.S.*, 938 S.W.2d 910 (Mo.App.1997). We deem the third option to be the most appropriate choice for several reasons. First, it comports with the approach taken by North Carolina courts in determining the issue of whether an absence was temporary on the basis of the facts presented in each case. Second, it incorporates considerations, such as the parties' intent and the length of the absence, that courts of sister states have found important in making this determination. Third, it provides greater flexibility to the court making the determination by allowing for consideration of additional circumstances that may be presented in the multiplicity of factual settings in which child custody jurisdictional issues may arise."

Applying the totality of the circumstances analysis to the facts in that case, the court held that due to the numerous fluctuations in the intentions of the parties and their numerous moves "the parties' intent at the specific time they retrieved the minor children, standing alone, should not control the determination of whether the absence was temporary."

The court explained:

"[A]dopting mother's argument could produce absurd results. For example, if the parties retrieved the minor children with the intent to remain permanently in North Carolina only to change their minds within a couple of days, mother's test would vitiate Vermont's status as home state. That would be true even if the parties had debated the issue and changed their minds

regarding their intentions multiple times, so long as their intent at the precise time of leaving Vermont was to remain in North Carolina. A trial court's determination of whether an absence was temporary should not be solely decided on whimsy or caprice."

Noting that the children had spent almost a full year in Vermont except for the relatively short 6-week period in North Carolina, the court of appeals held that the totality of circumstances supported the conclusion that the time in North Carolina was a temporary absence from the home state of Vermont.

Cases after *Chick*

The court of appeals has applied the totality of the circumstances analysis to determine that six months in Japan was a temporary absence where the parties traveled to Japan to visit family and intended to return to North Carolina, *Hammond v. Hammond*, 209 NC App 616 (2011), and to determine that an 8-month period in Germany for a military assignment was not a temporary absence. *Gerhauser v. VanBourgondien*, 238 NC App 275 (2014).

In *Halili v. Ramnishta*, 273 NC App 235 (2020), the court of appeals affirmed a trial court decision that a family's 11-day trip to North Carolina was a vacation and therefore a temporary absence from the home state of New York, and an 11-day stay in Michigan was a temporary absence where a grandmother took a child to Michigan to hide the child from the child's step-father. *Sulier v. Venesky*, 285 N.C. App. 644 (2022). In an unpublished opinion, *Hosch v. Hosch-Carroll*, 286 NC App 158 (2022), the court of appeals vacated a custody order for lack of subject matter jurisdiction after concluding that summer months spent in North Carolina was a temporary absence from the child's home state of Texas.

This entry was tagged with the following terms: child custody, custody jurisdiction, home state, temporary absence.

Cheryl Howell

Cheryl Howell is a Professor of Public Law and Government at the School of Government specializing in family law.