

## Child Custody Jurisdiction

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## Subject Matter Jurisdiction

- ▶ Cannot be conferred by consent or waiver
  - *Foley*, 156 NC App 409 (2003)
  - *Gerhauser v. Van Bourgondien*, 238 NC App 275 (2015)
- ▶ Trial and appellate courts can review on own motion
  - *In re N.R.M.*, 165 NC App 294 (2004)

## Subject Matter Jurisdiction

- ▶ Order needs findings to support jurisdiction
  - *Foley; Brewington v. Serrato*, 77 NC App 726 (1985);
  - *In Matter of E.J.*, 225 NC App 333 (2013)(order void due to lack of findings to show basis for emergency jurisdiction).
  - *But cf., In the Matter of N.T.U.*, 234 NC App 722 (2014)(order not void due to lack of findings when circumstances supported emergency jurisdiction);
  - *In re J.C.*, 235 NC App 69 (2014)('better practice' is to make findings but order okay if evidence is in the record)

## Subject Matter Jurisdiction is Determined at Time of Filing

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## Personal Jurisdiction

- ▶ Long-arm statute and “minimum contacts” generally not required for custody
  - *Harris*, 104 NC App 574 (1991)
- ▶ Exception for TPR
  - *Finnican*, 104 NC App 157 (1991)

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## Statutes

- ▶ PKPA: Parental Kidnapping Prevention Act
  - 28 U.S.C. sec. 1738A
- ▶ UCCJEA: Uniform Child Custody Jurisdiction and Enforcement Act
  - G.S. 50A effective October 1, 1999
  - Incorporates PKPA requirements
  - Adopted in all states

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## Key Concepts from Statutes

- Priority of Home State Jurisdiction
- Limitation of Modification Jurisdiction
  - *Even if* original order entered in NC

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## So What?

- Orders entered without subject matter jurisdiction are void *ab initio*
- Orders not entered in substantial conformity with jurisdictional requirements of PKPA and UCCJEA are not entitled to recognition in other states

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## “Custody Determination”

- 50A-102(3)
  - Any order or judgment providing for legal or physical custody or visitation of a child
  - Includes permanent, temporary and modification orders

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## “Custody Proceeding”

- ▶ Proceeding *where custody is at issue*
- ▶ Includes:
  - Divorce and separation
  - Neglect, abuse and dependency
  - Guardianship
  - TPR (custody always at issue?)
  - Paternity
  - Domestic Violence Protection (50B)

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## Custody Jurisdiction

- ▶ Based primarily upon past and present location of the child and the parties
- ▶ Every pleading, petition and motion in the cause dealing with custody must have information required by GS 50A-209

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## Type of Proceeding Determines Jurisdiction Analysis

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### 3Types of Proceedings

- Initial determination
- Modification
- Enforcement

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### Enforcement is Easy

- States Always Have Jurisdiction to Enforce
  - Chapter 50A, Part 3 has procedure
    - AOC forms
    - CV-660 through CV-668

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### No Registration Required

- There is no statute or appellate case indicating registration is required before order can be enforced
- *And see* Official Comment, GS 50A-305
  - Purpose of registration process is to allow parent to send order to state before sending child to state

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## Child 'Pick-Up' Orders

- ▶ Requires a warrant pursuant to GS 50A-311
  - Goal of statute is to limit use of law enforcement
  - AOC form CV-667
  - *See Chick v. Chick*, 164 NC App 444 (2004)
- ▶ No warrant can be issued without:
  - Verified motion
  - Sworn testimony
  - Findings of fact showing:
    - Child is likely to suffer serious physical harm, or
    - Child is likely to be removed from state

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## Initial Determinations

- ▶ G.S. 50A-201. NC can enter an initial order if:
  - N.C. has "Home State" jurisdiction, or
  - There is no "Home State" and NC has significant connection/substantial evidence jurisdiction, or
  - State with jurisdiction decides NC is the more convenient forum, or
  - No state has jurisdiction (default)

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## Home State Jurisdiction

- ▶ State where child lived for at least six months immediately before the filing of the action
  - G.S. 50A-102(7)
  - Live means reside, not domicile
    - *In re B.L.H.*, 767 SE2d 905 (2015)
- ▶ Or, state that was the home state within six months of filing, and one parent or person acting as a parent continues to reside in the state
  - G.S. 50A-201(a)(1)

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## Significant Connection Jurisdiction

- ▶ The child and the child's parent (or person acting as a parent) have significant connection with the state other than physical presence, *and*
- ▶ Substantial evidence is available in the state concerning the child's care, protection, training and personal relationships
  - *Pheasant v. McKibben*, 100 NC App 379
  - *Holland v. Holland*, 56 NC App 96

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## Initial Orders

- ▶ If NC is not the home state – need to be very cautious about jurisdiction
- ▶ If NC has jurisdiction, NC court can “give” jurisdiction:
  - To a “more convenient forum” G.S. 50A–207, or
  - To another state if NC court finds “unjustifiable conduct”. G.S. 50A–208

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## “More Convenient Forum”

- ▶ GS 50A–207. Court with jurisdiction may stay proceedings and allow another state the opportunity to act if upon considering statutory factors, court determines other state is the more convenient forum within which to litigate custody
- ▶ DO NOT EVER ‘TRANSFER’ CASE TO ANOTHER STATE

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### Question #1

- Two children were born in Tennessee. When children were 6 and 8 years old, mom and children moved to North Carolina. Dad stayed in Tennessee. Eight months after they moved to NC, DSS filed a petition alleging the children are neglected. Does NC have jurisdiction?

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### Home state priority

- Yes
- NC is the home state and has priority over Tennessee's significant connection/substantial evidence
  - See *Potter v. Potter*, 131 N.C. App. 1 (1998)

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### Question #2

- If mom and children had been in NC only four months at the time DSS filed the petition, can NC exercise jurisdiction?

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## Question #2

- ▶ If mom and children had been in NC only four months at the time DSS filed the petition, can NC exercise jurisdiction?

Only if NC can exercise temporary emergency jurisdiction

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## Emergency Jurisdiction: Grounds

- ▶ NC may exercise TEMPORARY jurisdiction if child is present in NC and:
  - Child has been abandoned, or
  - It is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse
    - GS 50A-204

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## Emergency Jurisdiction: Process

- ▶ If state with jurisdiction has acted or is acting:
  - ▶ NC order must be of limited duration
    - ▶ See *In re: E.J.*, 738 SE2d 204 (COA Feb. 2013)
  - ▶ NC court must communicate "immediately" with that court to resolve the emergency
  - ▶ "Court" means the judge and not DSS or attorney
    - See *In re: J.W.S.*, 194 NC App 439 (2008); *In re: Malone*, 129 NC App 338 (1998)
- ▶ Failure to contact immediately results in loss of subject matter jurisdiction
  - ▶ See *In re: J.W.S.*, 194 NC App 439 (2008)

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## Emergency Jurisdiction: Process

- If state with jurisdiction has not acted and does not act:
  - NC order may become permanent “if it so provides”.
    - *See In re M.B.*, 635 NC App 8 (2006)
  - Statute does not require communication
    - *But see Van Kooten*, 126 NC App 764

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## Question #2

- Two children were born in Tennessee. When children were 6 and 8 years old, mom and children moved to North Carolina. Dad stayed in Tennessee. Four months after they moved to NC, DSS filed a petition alleging the children are neglected.
- Can NC exercise emergency jurisdiction?

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## Emergency Jurisdiction: Grounds

- NC may exercise TEMPORARY jurisdiction if child is present in NC and:
  - Child has been abandoned, or
  - It is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse
    - GS 50A-204

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## Neglect is Insufficient

- ▶ Official Comment, GS 50A-204
  - Emergency is defined as “mistreatment or abuse”
  - ‘Neglect’ alone is not a basis for the assumption of jurisdiction
  - “Under the PKPA, if a State exercised temporary emergency jurisdiction based on a finding that a child was neglected without a finding of mistreatment or abuse, the order would not be entitled to federal enforcement in other States.”

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## Question #2: Emergency Jurisdiction?

- ▶ Child is present in the state
- ▶ If facts show child had been abandoned or it is necessary in an emergency to protect the child from abuse
- ▶ Tennessee is the home state
- ▶ Tennessee is not acting and has not acted
- ▶ So temporary order can be entered
  - Include provision for order to “become permanent”?
    - See *In re MB*, 179 NC App 572 (2006) and *In re KM and JH*, (unpublished COA July 2, 2013)

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## Emergency Jurisdiction

- ▶ Nonsecure custody order is a temporary emergency order
- ▶ Can court adjudicate with temporary emergency jurisdiction?
  - *Van Kooten*, 126 NC App 764 (1998)(no)
  - *Brode*, 151 NC App 690 (2002)(no)
  - *In re E.J.*, 738 SE2d 204 (NC App 2013)(no)
  - *But see In re M.B.*, 179 NC App 572 (2006)(yes)
  - *In re A.G.M.*, 773 SE2d 123 (2015)(can do only what is necessary to take care of child)

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### Question #3

- What if both mom and dad had left Tennessee 4 months before the petition was filed in North Carolina? (children had been here with mom for 4 months).
- If allegations involve only neglect, does NC have jurisdiction to act?

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### Initial Determinations

- G.S. 50A-201. NC can enter an initial order if:
  - N.C. has "Home State" jurisdiction, or
  - There is no "Home State" and NC has significant connection/substantial evidence jurisdiction, or
  - State with jurisdiction decides NC is the more convenient forum, or
  - No state has jurisdiction (default)

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### Significant Connection Jurisdiction

- The child and the child's parent (or person acting as a parent) have significant connection with the state other than physical presence, *and*
- Substantial evidence is available in the state concerning the child's care, protection, training and personal relationships
  - *Pheasant v. McKibben*, 100 NC App 379
  - *Holland v. Holland*, 56 NC App 96

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**Question #4**

- Petition is filed when NC clearly is the home state of the children and children are placed with maternal grandmother living in Virginia. After the children had lived with grandmother in Virginia for 18 months, mom files motion to dismiss juvenile proceeding in North Carolina on basis that NC no longer is the child's home state. Do you grant the dismissal?

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▸ No

**Subject Matter Jurisdiction is  
Determined at Time of Filing**

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**Question #5**

- A child was born in Tennessee. When child was 3 months old, mom moved to NC with the child. Dad remained in Tennessee. When child was 6 months old, DSS filed a petition in NC alleging the child is abused. Can NC exercise jurisdiction?

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## Infants

- 50A-102(7): for a child less than 6 months old, home state is where the child has lived since birth
- Tennessee has home state jurisdiction because dad still there
- Maybe emergency jurisdiction

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## Question #6

- What if both mom and dad had left Tennessee when child was 3 months old? If child is now 6 months old, can NC exercise jurisdiction?

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## Significant Connection Jurisdiction

- The child and the child's parent (or person acting as a parent) have significant connection with the state other than physical presence, *and*
- Substantial evidence is available in the state concerning the child's care, protection, training and personal relationships

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### Question #7

- ▶ Children were born in Tennessee. When children were 6 and 8 years old, mom and dad divorced. The Tennessee court granted custody to mom and visitation to dad. Shortly thereafter, mom moved to NC with the children and dad stayed in Tennessee. One year after the move, DSS filed a petition alleging both children are neglected. Does NC have jurisdiction?

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### Modification Jurisdiction

- ▶ State entering initial order keeps continuing, exclusive jurisdiction until:
  - *That state* determines it no longer has significant connection/substantial evidence jurisdiction **or**
  - The parents and the child do not reside in that state
    - G.S. 50A-202 and 203

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### Modification G.S 50A-203

- ▶ NC Court cannot modify order from *another state* unless:
  - No other state has continuing exclusive jurisdiction – or state with continuing jurisdiction decides NC is the more convenient forum – **AND**
  - NC has a basis for jurisdiction under GS 50A-201(a)(1)(home state) or (a)(2)(significant connection/substantial evidence)

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## Emergency Jurisdiction? Process

- If state with jurisdiction has acted or is acting:
  - NC court must communicate "immediately" with that court to resolve the emergency. GS 50A-204(d)
  - NC order must be of limited duration
    - *See In re: E.J.*, 738 SE2d 204 (COA Feb. 2013)
  - "Court" means the judge and not DSS or attorney
    - *See In re: J.W.S.*, 194 NC App 439 (2008);
    - *In re: Malone*, 129 NC App 338 (1998)
- Failure to contact immediately results in loss of subject matter jurisdiction
  - *See In re: J.W.S.*, 194 NC App 439 (2008)

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## Communication Between Judges GS 50A-110

- Parties may be allowed to participate in discretion of judge
- If parties do not participate, parties must be allowed "to present facts and argument" before jurisdiction decision is made
- "Record" must be made of all communications unless dealing only with court records or scheduling
- *See Jones v. Whimper*, 366 NC 367 (2013)

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## Question #8

- Same facts as #7 above, except instead of a civil custody action, the children had been adjudicated neglected by the juvenile court in Tennessee. The juvenile court granted guardianship to maternal grandmother. Grandmother, both parents and the children came to North Carolina one year ago. North Carolina DSS now has filed a petition, alleging children are neglected.
- Can the NC court exercise jurisdiction?

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## Simultaneous Proceedings

- ▶ GS 50A-206
  - If another state is exercising jurisdiction over child when NC action is filed, NC "shall stay" the proceedings and communicate with other state
  - NC can exercise emergency jurisdiction while communicating with other state, if grounds exist
  - State where first action filed determines which state will exercise jurisdiction

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## Question #9

- ▶ Children were born in NC. When they were 3 and 5 years old, the NC court entered a custody order granting mom primary physical custody of the children and dad visitation rights. One year later, mom moves to Tennessee with the children and two months later, dad moves to Tennessee to be close to the children. Two years later, mom comes back to North Carolina with the kids. After two months, DSS files a petition alleging the kids are neglected.
- ▶ Does NC have jurisdiction?

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## Modification G.S. 50A-202(b)

- ▶ NC court cannot modify a NC order unless:
  - NC has continuing exclusive jurisdiction (meaning party continues to reside here and there is significant connection/substantial evidence jurisdiction) or
  - NC has initial determination jurisdiction under G.S. 50A-201

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