Part 2. Jurisdiction.

§ 50A-201. Initial child-custody jurisdiction.

(a) Except as otherwise provided in G.S. 50A-204, a court of this State has jurisdiction to make an initial child-custody determination only if:

(1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;

(2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:

a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and

b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;

(3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208; or

(4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).

(b) Subsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a court of this State.

(c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination. (1979, c. 110, s. 1; 1999-223, s. 3.)

§ 50A-207. Inconvenient forum.

(a) A court of this State which has jurisdiction under this Article to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances, and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

(b) Before determining whether it is an inconvenient forum, a court of this State shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

(1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

(2) The length of time the child has resided outside this State;

(3) The distance between the court in this State and the court in the state that would assume jurisdiction;

(4) The relative financial circumstances of the parties;

(5) Any agreement of the parties as to which state should assume jurisdiction;

(6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(8) The familiarity of the court of each state with the facts and issues in the pending litigation.

(c) If a court of this State determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child-custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

(d) A court of this State may decline to exercise its jurisdiction under this Article if a child-custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding. (1979, c. 110, s. 1; 1999-223, s. 3.)

Jurisdiction Issues in Custody Cases

Cheryl Howell

April 2024

1

Topics for today.......

- "Custody" pending in difference counties
- Inconvenient forum determinations
- Temporary Absences

2

Consider.......

Permanent custody order entered in County A in 2020

In 2023, dad files action in County B requesting modification of the 2020 order

Can the case proceed in County B?

3

Yes because.......

- This is a question of venue rather than jurisdiction
- If party does not object to venue, case can proceed in district where it was filed
  - *Brooks v. Brooks*, 107 N.C. App. 44, 418 S.E.2d 534 (1992)

4

Consider

- Custody action pending in County A
  - Temporary order has been entered granting dad primary custody and mom limited visitation
- Juvenile petition alleging neglect of the child is filed in County B
- Mom requests trial on permanent custody in County A. Can the court proceed on permanent custody?

5

No because.....

GS 7B-200

(c) When the court obtains jurisdiction over a juvenile as the result of a petition alleging that the juvenile is abused, neglected, or dependent:

(1) Any other civil action in this State in which the custody of the juvenile is an issue is automatically stayed as to that issue, unless the juvenile proceeding and the civil custody action or claim are consolidated pursuant to subsection (d) of this section or the court in the juvenile proceeding enters an order dissolving the stay.

(2) If an order entered in the juvenile proceeding and an order entered in another civil custody action conflict, the order in the juvenile proceeding controls as long as the court continues to exercise jurisdiction in the juvenile proceeding.

6

GS 7B-200

(d) …[T]he court in a juvenile proceeding may order that any civil action or claim for custody filed in the district be **consolidated** with the juvenile proceeding. If a civil action or claim for custody of the juvenile is filed in another district, the court in the juvenile proceeding, for good cause and after consulting with the court in the other district, may:

(i) order that the civil action or claim for custody be **transferred** to the county in which the juvenile proceeding is filed; or

(ii) order a change of venue in the juvenile proceeding and **transfer the juvenile proceeding** to the county in which the civil action or claim is filed.

The court in the juvenile proceeding may also proceed in the juvenile proceeding while the civil action or claim remains stayed or dissolve the stay of the civil action or claim and **stay the juvenile proceeding** pending a resolution of the civil action or claim.

7

Consider

50B action filed in County A by mom

- Ex parte order entered
- Includes custody to mom

A few days later, 50B action filed in County B by dad

- Ex parte order entered
- Includes custody to dad

Which order controls?

8

Weaver v. Early, 325 NC 535 (1989)

- "It is the rule in this state that the pendency of a prior action between the same parties for the same cause in a state court of competent jurisdiction abates a subsequent action in another court of the state having like jurisdiction."
- "[T]he ordinary test for determining whether or not the parties and causes are the same for the purpose of abatement by reason of the pendency of a prior action is whether the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded."
- "This rule has been applied not only when there is a prior civil action pending which is identical to the subsequent action but also when there is a prior action in which a party could by motion in the cause achieve what he is attempting to achieve in the subsequent action."

9

Question????

- Chapter 50 custody order entered in County A
- One year later, 50B ordered entered in County B with custody provisions that contradict the Chapter 50 order
- Which order controls?

10

Probably the DVPO ....

- Abatement does not apply; not the same actions
  - Temporary custody is a form of relief
  - Limited to one-year total duration

- GS 50B-7(b):

"Any subsequent court order entered supersedes similar provisions in protective orders issued pursuant to this Chapter."

11

What do you do if.....

- Custody action pending in your district,
- NC was the home state when the action was filed.
- Dad files motion, asking court to "transfer" the case to Virginia.
- Mom and child have moved to Florida.
- Dad has moved to Virginia.

12

You cannot “transfer”, but you can……

- Consider whether Virginia is a more convenient forum pursuant to GS 50A-207
  - Authorizes a stay of the NC proceedings
  - **You must have a hearing and make findings of fact to support the stay of proceedings**
    - *In re C.M.B.*, 266 N.C. App. 448 (2019)
- But Virginia cannot exercise jurisdiction unless it also has significant connection/substantial evidence
  - GS 50A-201(b)

13

Consider.....

You are exercising emergency jurisdiction in a custody case because Kentucky has issued a permanent custody order and dad still lives in Kentucky.

Mom lives in NC; she filed the custody action in NC while child was in NC for a visit

You receive a letter from a judge in Kentucky. The letter states that Kentucky “relinquishes” jurisdiction to NC

Can you proceed?

14

The letter is sufficient.....

- *In re R.G.*, (NC App, March 5, 2024)(letter from judge in the other state was sufficient to show state with jurisdiction had determined NC was the more convenient forum)
- *In re T.R.*, 250 N.C. App. 386 (2016) (“docket entry” by judge in state with exclusive, continuing jurisdiction was sufficient).
- *Cf. In re T.E.N.*, 252 N.C. App. 461(2017) (where record contained nothing, other than parent’s testimony, showing court in state with jurisdiction had determined that North Carolina was the more convenient forum, North Carolina trial court erred in exercising jurisdiction)

15

But see GS 50A-203

"[A] court of this State may not modify a child-custody determination made by a court of another state unless a court of this State **has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2) and**:

- (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or
- (2) A court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

16

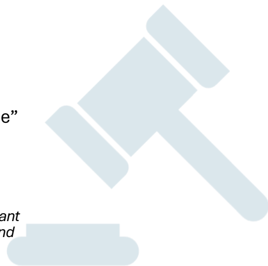
What do you think?

- Both children born in NC while dad stationed at Fort Bragg. Children lived in NC several years.
- August 2005: mom and kids move to Vermont. Dad remains at Fort Bragg.
- January 2006: mom and kids come to Fort Bragg so mom and dad can have free marriage counseling.
- February 2006 (6 weeks later): mom returns to Vermont with kids. Dad then moves to Vermont.
- July 2006: mom brings kids back to NC.
- Mom files for custody in NC in November 2006 - jurisdiction ?

17

Temporary absences

- Trial court and COA said No
- Vermont is home state.
- 6 weeks in NC was "temporary absence"
  - GS 50A-102(7)
  - Totality of circumstances test
- *Chick v. Chick*, 164 NC App 444 (2004); *Pheasant v. McKibben*, 100 NC App 379 (1990); *Hammond v. Hammond,* 209 NC App 616 (2012)



18

Child Custody: We Can't "Change Venue" to Another State; Determining NC is an inconvenient forum

**This is a post from October 28, 2016 that I decided to post again, with a couple of appellate case updates, due to the frequency with which I receive questions about this procedure.

I received a call once from a clerk of court asking what she should do with a voluminous court file received in the mail from a court in another state. It was a large box containing all of the pleadings, motions, reports and other filings for a custody case that had been litigated in another state for several years, accompanied by a court order signed by a judge in that other state "transferring venue" of the case to North Carolina, citing as authority that state's version of the Uniform Child Custody and Jurisdiction Act (the "UCCJEA").

Does the UCCJEA allow a judge to transfer a custody case to another state? When that clerk received the file and the order from the other state, is the North Carolina court required to act in the custody proceeding?

The answer to both of those question is no. Nothing in the UCCJEA or any other law allows a judge in one state to transfer a custody case to another state. However, we all tend to use the words 'change venue' when we are talking about GS 50A-207. That is the provision in North Carolina's version of the UCCJEA that allows a court to decline to exercise jurisdiction when it determines that North Carolina is an 'inconvenient forum' in which to litigate a pending custody issue and that another state is a more appropriate forum. A determination by a court with jurisdiction that it is an inconvenient forum has the effect of granting a basis for exercising jurisdiction to another state that would not otherwise have jurisdiction to act. *See for example,* GS 50A-201(a)(3)(North Carolina has jurisdiction to make an initial custody determination, even when it is not home state, if a court with jurisdiction determines NC is the more appropriate forum).

Similarly, GS 50A-208 also allows a court to decline to exercise jurisdiction when the court has jurisdiction due to the "unjustifiable conduct" of one party. That section will be the subject of a future blog post.

As my call from the clerk indicates, our lack of care in accurately describing the authority granted in GS 50A-207 can result in confusion and annoyance, especially to court personnel who receive the physical court files. But significant legal errors also can occur. For example, I received another call regarding a situation where a court believed that because it was transferring venue of the custody matter, it also was required to transfer all of the other issues pending in the case to the other state. This resulted in the court attempting to send claims for equitable distribution, child support and alimony to another state along with the custody matter because all of the claims had been filed in

the same action.

What does GS 50A-207 actually authorize a court to do?

A court with jurisdiction to make a child custody determination "may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances, and that a court of another state is a more appropriate forum." GS 50A-207. A court may consider declining jurisdiction pursuant to GS 50A-207 when requested by a party or on the court's own motion, or when requested by the court of another State. GS 50A-207(a).

If the court declines to exercise jurisdiction, GS 50A-207(c) states that the court "*shall stay the proceeding* upon the condition that a child-custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper." (italics added).

The Official Comment to GS 50A-207 explains:

"[T]he court may not simply dismiss the action. To do so would leave the case in limbo. Rather the court shall stay the case and direct the parties to file in the State that has been found to be the more convenient forum. The court is also authorized to impose any other conditions it considers appropriate. This might include the issuance of temporary custody orders during the time necessary to commence a proceeding in the designated State, dismissing the case if the custody proceeding is not commenced in the other State or resuming jurisdiction if a court of the other State refuses to take the case."

See also In the Matter of M.M., 230 NC App 225 (2013) (the "shall" in GS 50A-207 means the stay is the mandatory procedure when the court determines NC is an inconvenient forum; dismissal of the case is inappropriate).

When is North Carolina an inconvenient forum?

North Carolina is an inconvenient forum when the court rules that North Carolina is an inconvenient forum and determines that another State is a more appropriate forum. GS 50A-207(b) sets forth the factors the court is required to consider to make these determinations. That statute requires that the court consider "all relevant factors", specifically including the following:

(1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

(2) The length of time the child has resided outside this State;

(3) The distance between the court in this State and the court in the state that would assume

jurisdiction;

(4) The relative financial circumstances of the parties;

(5) Any agreement of the parties as to which state should assume jurisdiction;

(6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(8) The familiarity of the court of each state with the facts and issues in the pending litigation.

In order to support a determination that North Carolina is an inconvenient forum, the court must make sufficient findings of fact regarding these statutory factors. *In the Matter of M.M.*, 230 NC App 225 (2013). *See also* *Halili v. Ramnishta*, 848 S.E.2d 542 (September 1, 2020)(these statutory factors do not include the requirement that the trial court conclude litigation in another state would be in the best interest of the child).

While the court must have evidence upon which to base these findings of fact, the North Carolina Court of Appeals has held that the trial court can rely on evidence presented in the form of affidavits or verified motions to support the required findings of fact. Harter v. Eggeston, 847 S.E.2d 444 (Aug. 4, 2020).

The Official Comment to GS 50A-207 reminds us that when making this decision, the court "may communicate, in accordance with [GS 50A-110], with a court in another State and exchange information pertinent to the assumption of jurisdiction by either court."

Can a court determine NC is an inconvenient forum when there is no custody claim pending?

What if, after a custody trial is conducted in North Carolina and the court enters a custody order, one party files a motion asking that the court determine North Carolina is an inconvenient forum for any future custody issue that may arise, such as a motion to modify? Can a court determine North Carolina is an inconvenient forum outside of the context of a pending custody issue?

Our appellate courts have not answered this specific question, and GS 50A-207(a) states that the court may decline to exercise jurisdiction "at any time" it determines North Carolina is an inconvenient forum. *See also* *Halili v. Ramnishta*, 848 S.E.2d 542 (September 1, 2020)(the trial court can consider post-filing occurrences to determine that another state is a more convenient forum because the court can make this determination at any time during a pending custody action).

However, GS 50A-207 indicates that a decision about the most appropriate forum should be made only in the context of a pending request for a custody determination. The Official Comment to the statute states that the purpose of the statute is to authorize the court "to decide that another state is in a better position to make *the* custody determination*,* taking into consideration the relative circumstances of the parties." It seems obvious the drafters mean the circumstances of the parties at the time the custody determination is to be made. Similarly, several of the factors the court must consider specifically reference a pending issue; for example, (6) "the nature and location of evidence needed to resolve *the pending issue*," (7) the ability of the court of each state to *decide the issue* expeditiously," and "the familiarity if the court of each state with the facts and issues in the *pending litigation*."

Anyone familiar with custody litigation knows that it is impossible to anticipate what the circumstances of the parties will be by the time they need to return to court. The decision about the appropriate forum for litigation needs to made based upon consideration of the facts at the time the court is being asked to act.

Child custody jurisdiction: what happens when everyone leaves the state while the case is pending?

Suppose mother files an action for custody when North Carolina is the home state of the child and mother and father both reside in North Carolina. Temporary orders are entered in the case and a couple of years go by without a permanent order being entered. When mom requests a trial date for entry of a permanent order, dad files a motion to dismiss the case for lack of jurisdiction because mom, the child and dad all now reside in other states. No one resides in North Carolina. Should the case be dismissed?

The answer to that question is no. The North Carolina court continues to have jurisdiction. The court may consider whether another state is a more convenient forum pursuant to G.S. 50A-207, but unless the court determines it is appropriate to stay the North Carolina proceeding pursuant to the inconvenient forum statute, the custody claim must be tried in North Carolina.

Subject matter jurisdiction is determined at the time an action is initiated

The provisions in NC Chapter 50A, the Uniform Child Custody and Jurisdiction and Enforcement Act, define the subject matter jurisdiction of the North Carolina courts relating to child custody matters. The determination of whether a court has subject matter jurisdiction in a particular case is determined at the time the case is initiated. *In re T.N.G.,* 244 N.C. App. 398 (2017); *Gerhauser v. VanBougondien,* 238 N.C. App. 275 (2014). In a custody matter, that means at the time a complaint seeking custody is filed or at the time a motion to modify is filed. *See Gerhauser* (determination made at time motion to modify was filed by father).

Once the court acquires jurisdiction, the court keeps it until the matter is finally resolved

The North Carolina Supreme Court explained in *In re Peoples,* 296 N.C. 109 (1978):

"(O)nce jurisdiction of a court attaches it exists for all time until the cause is fully and completely determined."

In re Peoples, 296 N.C. at 146, quoting *Kinross-Wright v. Kinross-Wright*, 248 N.C. 1, 11 (1958).

According to the court, "[j]urisdiction is not a light bulb which can be turned off or on during the course of a trial. Once a court acquires jurisdiction over an action, it retains it throughout the proceeding. … If the converse of this were true, it would be within the power of the defendant to preserve or destroy the jurisdiction of the court at his own whim."

In re Peoples, 296 N.C. at 146, quoting *Silver Surprise, Inc. v. Sunshine Mining,* 445 P.2d 334 (Washington 1968).

Waly v. Alkamary

The N.C. Court of Appeals recently addressed this issue directly in the case of Waly v. Alkamary, N.C. App. (Aug. 17, 2021). Father filed a complaint in 2016 for an initial determination of custody. Father, mother and child had lived in North Carolina for at least six months at the time the action was initiated, so North Carolina was the home state of the child at the time of filing. Very shortly after the complaint was filed, mother and child moved to New Jersey and father moved to Florida. The court entered temporary orders but did not enter a final custody order until 2019. The final custody order awarded primary physical custody to father and visitation to mom. Mother appealed, arguing that the NC court lost jurisdiction to enter a custody order when all parties left the state shortly after the complaint for custody was filed.

The court of appeals rejected mother's argument that the NC court lost jurisdiction when the parties left the state. The appellate court held that the complaint was a request for an initial custody determination and NC was the home state of the child at the time the complaint was filed. Therefore, the court had initial determination jurisdiction pursuant to GS 50A-201. Because subject matter jurisdiction is determined at the time of filing and "once jurisdiction attaches to a child custody matter, it exists for all time until the cause is fully and completely determined," the fact that both parties left the state while the action was pending had no impact on the jurisdiction of the court.

In re C.M.B.

It is important to remember that juvenile abuse, neglect and dependency cases are not finally resolved until court explicitly terminates jurisdiction. This means that a court can retain subject matter jurisdiction and the juvenile case can remain pending for many years, even when a child has been placed with a guardian pursuant to a permanent plan and the juvenile court has stopped actively litigating the case.

In the case of *In re C.M.B.*, 266 N.C. App. 448 (2019), DSS filed a petition alleging the child was a neglected juvenile in 2009. After the petition was filed, mother moved to Virginia. In 2011, the court adjudicated the child neglected, appointed an aunt as the child's guardian, released and discharged mother's attorney and waived all future review hearings.

In late 2013 or early 2014, the aunt and child moved to Tennessee. In 2017, the aunt filed a motion to modify in Tennessee. After responding to the matter in Tennessee, mother filed a motion in North Carolina, asking the North Carolina court to exercise jurisdiction. The North Carolina court eventually entered an order concluding that North Carolina was an inconvenient forum pursuant to GS 50-207 and that Tennessee was a more convenient forum and mother appealed.

In explaining that North Carolina continued to have subject matter jurisdiction in the case originally initiated in 2009, the court of appeals stated that the trial court will retain jurisdiction in a juvenile

case until a child reaches the age of 18 unless the court enters an order that explicitly terminates jurisdiction. The court in this case had ordered permanent guardianship and waived all future hearings, but the court had not terminated jurisdiction. The fact that all parties and the child had left the state had no impact on the trial court's jurisdiction. As the juvenile case had not been finally resolved, the court continued to exercise the jurisdiction originally invoked in 2011.

Domestic Violence: Any New Court Order Supersedes an Existing DVPO. What Exactly Does that Mean?

S.L. 2019-168 amended GS 50B-7 to specify that "[a]ny subsequent court order entered supersedes similar provisions in protective orders issued pursuant to this Chapter." The amendment applies to DVPOs in effect on or after December 1, 2019. Legislation was introduced during the last session of the NC General Assembly to narrow the category of superseding orders to only those orders entered in Chapter 50 And Chapter 110 cases, but neither bill was enacted. See SB 156 and HB 1097.

Most Important Thing This Statute Means: Whenever a judge is being asked to enter *any* order involving litigants in a personal relationship as defined in Chapter 50B, the judge must know whether there is an existing DVPO between those parties and must understand the impact of the order the judge is being asked to enter on any existing DVPO. I realize that often is much easier said than done, but it the only way to avoid unintended consequences that may leave families in situations that are at best confusing and at worst dangerous.

[NOTE on this issue: When child custody is requested in any type of civil action, parties are required to include information regarding existing custody orders. GS 50A-209; AOC CV-609 (Affidavit as to the Status of the Minor Child). The same statute that requires the party to provide information about existing custody orders also requires that party to inform the court of "proceedings relating to domestic violence" and "protective orders." GS 50A-209(a)(2).]

What orders supersede provisions in a DVPO?

As originally drafted, Chapter 50B clearly was intended to provide temporary relief only. All protective orders initially must be limited to no more than one-year duration, GS 50B-3(b), and temporary custody orders entered as relief in a DVPO cannot exceed a total of one-year duration. GS 50B-3(a1)(4). The temporary nature of the relief became less clear when the statute was amended to allow DVPOs to be renewed for good cause for an unlimited number of successive two-year terms. GS 50B-3(b).

The recent enactment of GS 50B-7(b) seems intended to clarify that DVPOs still are intended to provide temporary relief only and to encourage parties to seek more permanent relief in other types of proceedings. At least theoretically, most remedies available for victims of violence in Chapter 50B also are available to victims on a more permanent basis through proceedings brought pursuant to Chapter 50 or Chapter 110 or through other common law civil tort actions and criminal proceedings. Of course, these other civil proceeding are not as accessible to parties without the

ability to hire an attorney.

In recognition of the more permanent nature of a Chapter 50 custody order, GS 50B-3(a1)(4) long provided that "any subsequent custody order entered under Chapter 50 of the General Statutes supersedes a temporary order issued pursuant to this Chapter." The recent amendment replaced this provision regarding custody with the provision that "any" court order entered subsequent to the entry of a DVPO will supersede "similar provisions" in an existing DVPO.

So, for example, the terms of a custody order, a child support order, a PSS or alimony order, an equitable distribution order, or another 50B order involving the same parties will supersede similar terms in an existing DVPO.

What provisions of the DVPO will be superseded?

Any provision in the new order that is 'similar' to a provision in an existing DVPO will supersede the provisions in the DVPO. In the previous version of the statute, only 'temporary custody provisions' in the DVPO were superseded by a new Chapter 50 custody order. Provisions in a DVPO not designated as temporary custody were not superseded, such as provisions in a DVPO requiring that a parent have no contact with a child or that a parent stay away from the child's school or day care. Similarly, if the child was the actual plaintiff in the domestic violence case, none of the provisions in the DVPO could be considered temporary custody orders and were unaffected by subsequent Chapter 50 custody orders.

Under the new statute, the terms of a new custody order will supersede all provisions in the DVPO between the parents relating to a parent's contact with the child, not just those designated as temporary custody in the DVPO. It is not clear, however, that the new statute will change the impact of a new Chapter 50 custody order on an existing DVPO wherein the child is the actual plaintiff rather than either parent. This is because I believe it would be a violation of Due Process to interpret the statute to allow a court to affect the rights and protections of a person not subject to the jurisdiction of that court. *See e.g. Dechkovskaia v. Dechkovskaia*, 232 NC App 350 (2014). Since the child is not a party to a Chapter 50 custody case between the parents, it seems unlikely that interpreting GS 50B-7(b) to allow the terms of the custody order to supersede the rights and protections granted to the child in the DVPO would comply with Due Process.

Regarding custody, the court entering a Chapter 50 order after a DVPO has been entered between the parties should keep in mind that GS 50-13.2(b) specifies that when addressing custody in a Chapter 50 case, "[i]f the court finds that an act of domestic violence has occurred, the court shall enter such orders that best protect the children and the party who were the victims of domestic violence, in accordance with the provisions of GS 50B-3(a1)(1)(2) and (3)." This provision should help ensure that a judge considering Chapter 50 custody following the entry of a DVPO between the parents will consider all of the same safety related issues that the judge considered in the Chapter 50B proceeding.

Second DVPO between same parties.

A situation that arises with considerable frequency is one where a judge grants an ex parte DVPO giving plaintiff mother possession of the home and temporary custody of the children. On the same day or within a very short time thereafter, another judge grants an ex parte DVPO in another action filed by the defendant in the first action. The second DVPO grants plaintiff father possession of the home and temporary custody of the children. Which order is enforceable?

Until new GS 50B-7(b) was enacted, the answer was not at all clear. There simply is no legal doctrine holding that the first or second order is superior to the other or invalid due to the other. We simply have inconsistent orders that need to be reconciled by a judge. However, GS 50B-7(b) now seems to clearly provide that the terms relating to possession of the home and temporary custody of the children in the second order will supersede the similar provisions in the first ex parte DVPO.

However, that does not mean that the second claim can proceed to final trial on the request for a DVPO by father. If the second claim for domestic violence protection is based on the same incident upon which the first claim is based, the plaintiff in the first filed action can request that the second action be dismissed due to abatement, also referred to as the prior pending action doctrine. That doctrine provides that if a claim is one involving the same parties and the same cause of action as in a previously filed pending action, the court is required to dismiss the second claim. *See Jessee v. Jessee*, 212 NC App 426 (2011)("Under the law of this state, where a prior action is pending between the same parties for the same subject matter in a court within the state having like jurisdiction, the prior action serves to abate the subsequent action." *Eways v. Governor's Island,* 326 N.C. 552, 558, 391 S.E.2d 182, 185 (1990)(further citations omitted)).

However, the prior pending action doctrine is not jurisdictional; the second claim can proceed to final adjudication if defendant in the second action does not raise the doctrine and request dismissal. *See Bethea v. Bethea*, 43 NC App 372 (1979).

If the second action is based on different incidents of alleged domestic violence, the prior pending action doctrine will not apply. However, a court has the discretion to either stay the second proceeding or to consolidate the two proceedings for trial to avoid the possibility of inconsistent orders. *See* G.S. 1A, Rule 42 (consolidation)*, and Baldelli v. Baldelli*, 249 NC App 603 (2016)(action was not abated but due to the clear interrelationship between the actions, the second action should be held in abeyance until conclusion of first case).

I am sure the application of GS 50B-7(b) will be the subject of many future blog posts as we struggle to interpret it in light of the myriad of complicated situations certain to arise.