

Cheryl Howell

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Child Custody Jurisdiction

Discussion Questions and Answers

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?

Answer: Yes. NC is the home state for both children. See definition of home state – GS 50A-102(7); 50A-201(a)(1). Home state has priority over significant connection jurisdiction. See GS 50A-201. Result would be the same under UCCJEA, PKPA and the UCCJA. See *Potter v. Potter*, 131 NC App 1 (1998)(even under UCCJA, home state had priority because of PKPA).

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

Answer: Maybe. Tennessee remains home state until children have been in NC for six months because dad remains in Tennessee, so NC has no basis for jurisdiction under GS 50A-201. However, NC can exercise temporary emergency jurisdiction pursuant to GS 50A-204 if exercise of jurisdiction is “necessary in an emergency to protect the child[ren] because the child[ren], or a sibling or parent of the child[ren], is subjected to or threatened with mistreatment or abuse.” Neglect is not sufficient to allow the exercise of emergency jurisdiction, see Comment to GS 50A-204(citing the PKPA), but a trial court can find an emergency and a threat of mistreatment or abuse in a case initiated by a petition alleging neglect if the facts support such a finding. See *In re: MB*, 179 NC App 572, 635 SE2d 8 (2006)(trial court determined child to be “neglected” but also found grounds to exercise temporary emergency jurisdiction based on threats of mistreatment and abuse made by mother).

The court of appeals has held that the order must contain findings of fact to show basis for emergency jurisdiction. See *In re Matter of EJ*, 225 NC App 333, 738 SE2d 204 (2013)(order void because it did not contain findings of fact sufficient to invoke the jurisdiction of the court); *Foley v. Foley*, 156 NC App 409 (2003)(order vacated and remanded to trial court for findings to support jurisdiction even though neither party contested jurisdiction on appeal); and *Brewington v. Serrato*, 77 NC App 726 (1985)(order from Texas not entitled to enforcement because it contained no

findings of fact to show the court had jurisdiction at the time the order was entered. *But cf. In the Matter of NTU*, 234 NC App 722, 760 SE2d 49 (2014)(court held that facts must exist to support jurisdiction but failure to find facts does not result in a lack of jurisdiction); *In re J.C.*, 235 NC App 69 (2014)(findings are the ‘better practice’ but order is not void if record shows facts sufficient to support jurisdiction).

Generally, the exercise of emergency jurisdiction is temporary. However, if the state with jurisdiction (Tennessee in this case) is not acting now and has not acted in the past, a temporary order by the NC court can become “permanent” if the order so provides and NC acquires home state status before the other state acts. See GS 50A-204; *In re: MB*, 179 NC App 572 (2006) (NC order stated that adjudication and disposition were “temporary” until such time as child resided in NC for six months, if home state did not act before that time); *In the Matter of N.T.U.*, 234 NC App 722, 760 SE2d 49 (2014). See blog post by Sara DePasquale, July 20, 2023

<https://civil.sog.unc.edu/uccjea-transitioning-from-temporary-emergency-jurisdiction-to-home-state-jurisdiction-in-a-n-d-cases/>

While it is clear that a trial court can issue a nonsecure custody order using temporary emergency jurisdiction, case law from the North Carolina Court of Appeals has been inconsistent on the issue of whether the trial court can adjudicate using temporary emergency jurisdiction. See *In the Matter of E.J.*, 225 NC App 333, 738 SE2d 204(2013)(cannot use emergency jurisdiction to adjudicate); *In re A.G.M.*, 773 SE2d 123 (NC App 2015)(emergency jurisdiction is limited to taking custody of the children and doing only what is necessary to take care of them). *But cf. In re M.B.*, 179 NC App 572 (2006)(okay to adjudicate using temporary emergency jurisdiction when state with jurisdiction has not acted as long as order is temporary until NC acquires jurisdiction).

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). Does NC have jurisdiction?

Answer: Maybe. Because mom, dad and the kids have left Tennessee, there is no home state in this case. That means you can consider whether there is a basis to exercise jurisdiction under one of the other grounds found in GS 50A-201. Section (a)(2) of that statute provides for “significant connection/substantial evidence” jurisdiction. The court of appeals has stated that you need to find that there is evidence within this state that will address aspects of the child’s “interest, care, protection, training and personal relationships” – evidence in NC “beyond statements of the competing parents about the child’s welfare.” *Holland v. Holland*, 56 NC App 96 (1982)(no significant connection jurisdiction where 11 year-old child had lived in Georgia for 6 years immediately prior to coming to NC); *Pheasants v.*

***McKibben*, 100 NC App 379 (1990)(significant connection jurisdiction upheld where child had lived in NC for all but 10 months out of the last two years and mom had lived here for entire 2 year period); *In re T.N.G.*, 781 SE2d 93 (NC App 2015)(child and parents had significant connection with NC). Since family lived for so long in Tennessee and has resided in NC for only 4 months, it may be difficult to support a conclusion of significant connection jurisdiction.**

If no significant connection jurisdiction, you may consider using emergency jurisdiction, unless the only allegation in the petition is neglect.

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?

Answer: No. Home state jurisdiction is determined at the time the action is commenced. GS 50A-201; *In re T.N.G.*, 781 SE2d 93 (NC App 2015)(jurisdiction determined based on circumstances at the time the action is commenced); *In re CMB*, 266 NC App 448 (2019)(jurisdiction continues until court terminates juvenile court jurisdiction); *Peoples v. Judicial Standards Commission of NC*, 442 US 929 (1979)(Jurisdiction is not a light bulb that can be turned on and off; cannot be affected by conduct of parties).

However, either at the request of a party or on the court's own motion, you may consider whether Virginia is now the more convenient forum for this proceeding. GS 50A-207. If so, the NC action may be stayed while Virginia considers whether to exercise jurisdiction. There is no authority to 'transfer' the case to another state – it is up to the other state to take it or not when requested – and you cannot dismiss the NC action until the other state accepts jurisdiction. See *In the Matter of M.M.*, 230 NC App 225, 750 SE2d 50 (2013).

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?

Answer: Only if NC can exercise temporary emergency jurisdiction. See discussion under question 2 above. Tennessee was the home state before the child left - see GS 50A-102(7)(for a child less than 6 months old, home state is where the child has lived since birth) – and it remains home state for six months after child left because father remains in that state. Because there is a home state, NC does not have jurisdiction unless there are grounds to exercise emergency jurisdiction.

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?

Answer: Maybe. See response to #3 above. You may consider significant connection jurisdiction. As this child is so young, there may be no state with significant connection jurisdiction. GS 50A-201(a)(4) allows a court to exercise what has been referred to as ‘default jurisdiction’ or ‘jurisdiction by necessity’ if you can reach the conclusion that no other state has any basis for exercising jurisdiction under section 201 of the UCCJEA. To date, NC has only one case discussing default jurisdiction. *Gerhauser v. VanBourgondien*, 238 NC App 275, 767 SE2d 378 (2014)(can only use default when no other state is home state and no other state has significant connection jurisdiction).

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?

Answer: Only if NC can exercise temporary emergency jurisdiction. Tennessee has continuing exclusive jurisdiction in this case. See GS 50A-202 and 203. A state that has made a custody determination (in this case - the custody order entered following the divorce of the parents) retains the exclusive authority to decide whether it has a basis for exercising jurisdiction as long as one party remains in that state. If both parties have left, or if Tennessee decides it does not have grounds to exercise jurisdiction, then NC can exercise jurisdiction if it has initial determination jurisdiction under GS 50A-201(a)(home state jurisdiction) or (b)(significant connection/substantial evidence jurisdiction).

NC may be able to exercise emergency jurisdiction if facts support it. If NC uses emergency jurisdiction, the order must be temporary and provide a specific termination date (provision allowing temporary order to become “permanent” does not apply in this case because state with jurisdiction has acted). If NC exercises emergency jurisdiction, because the state with jurisdiction has acted in the past, the trial judge must immediately communicate with court in Tennessee to determine how to best resolve the emergency. GS 50A-204(d). *See In re JWS*, 194 NC App 439 (2008)(failure to contact other court immediately results in a loss of subject matter jurisdiction). *See also In re Malone*, 129 NC App 338 (1998) (trial court must make the contact; not sufficient for DSS to make contact).

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?

Answer: As everyone has left Tennessee, you do not need to worry about continuing exclusive jurisdiction. However, the juvenile case in Tennessee actually may be an on-going proceeding. While civil custody actions are completed when a custody judgment is entered, a juvenile case is on-going until the juvenile court terminates jurisdiction. In other words, there is no final judgment resolving the case until the court terminates jurisdiction. If Tennessee's law is the same as NC, this is not a modification situation but rather it is a matter to be resolved by application of GS 50A-206 regarding Simultaneous Proceedings. *See Jones v. Whimper*, 366 NC 367, 736 SE2d 170 (2013)(affirming but vacating portions of NC App opinion)(discussing application of simultaneous proceedings provision). The NC court cannot proceed if another state is exercising jurisdiction in accordance with the UCCJEA. The NC court is required to contact the Tennessee court to determine whether the Tennessee court is inclined to rule that NC is the more convenient forum. If Tennessee does not decide NC is the more convenient forum, NC must dismiss the NC petition. GS 50A-206(b).

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?

Answer: Only if you determine it is appropriate to exercise emergency jurisdiction. Many lawyers assume NC can exercise modification jurisdiction if a NC court entered the original custody determination. However, GS 50A- 202(b) provides that if the state making the original custody determination does not have continuing exclusive jurisdiction, it can modify its own order only if there is a basis for exercising initial determination jurisdiction (which NC does not have in this case because Tennessee remains the home state of the children). North Carolina lost continuing exclusive jurisdiction when everyone left the state. See Official Comments to GS 50A-202("Exclusive, continuing jurisdiction is not reestablished if, after the child, the parents, and all persons acting as a parent leaves the state, the noncustodial parent returns. As subsection (b) provides, once a state has lost exclusive, continuing jurisdiction, it can modify its own determination only if it has jurisdiction under the standards set out in Section 201").