

Child Custody Jurisdiction

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- ## Subject Matter Jurisdiction
- ▶ Cannot be conferred by consent or waiver
 - *Foley*, 156 NC App 409 (2003)
 - ▶ Trial and appellate courts can review on own motion
 - *In re N.R.M.*, 598 SE2d 147 (2004)
 - ▶ Order needs findings to support jurisdiction
 - *Foley*; *Brewington v. Serrato*, 77 NC App 726 (1985); *In Matter of E.J.*, (NC App 2013)

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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)
- ▶ Probably also for paternity, but no case law yet

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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
 - 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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3 Types of Proceedings

- ▶ Initial determination
- ▶ Modification
- ▶ Enforcement

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Does NC have jurisdiction?

- ▶ Mom, dad and kids live in Florida for years
- ▶ Florida court enters custody order
- ▶ Mom and kids move to NC
- ▶ 3 weeks later, dad asks NC court to enforce visitation provisions in Florida order
 - Does NC Have Jurisdiction to Enforce the Florida order?

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Does NC have jurisdiction?

1. Yes
2. No

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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
- ▶ 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)
- ▶ 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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Practice

- 2 children born in Tennessee.
 - Dad moved to NC 8 months ago.
 - Children “live” with mom in Tennessee:
 - attend school in Tennessee
 - spend most weekends and most holidays in NC with father and father’s parents.
 - receive medical treatment both in NC and Tenn.
 - Go to church, have friends and play sports in both states.
- Does NC have jurisdiction to make a custody determination?

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Does NC have jurisdiction?

1. Yes
2. No

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Home state priority

- ▶ No
 - *Potter v. Potter*, 131 N.C. App. 1 (1998)
- ▶ Tennessee is home state, and has priority over NC's significant connection/substantial evidence

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Practice

Amy and Scott were born in South Carolina.
When Amy was 10 and Scott was 8, mom moved to NC and brought Amy with her.
Scott stayed with his father in SC.
Mom has been living in NC for 8 months.
Does NC have jurisdiction to make a custody determination?

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Does NC have jurisdiction

1. Yes
2. No
3. Yes for Amy but no for Scott
4. Maybe

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Practice

- ▶ Jurisdiction determined for each individual child
- ▶ NC is home state for Amy
- ▶ SC is home state for Scott
- ▶ *Beck v. Beck*, 123 N.C. App. 629 (1996)
 - But perhaps SC is the more convenient forum?

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Amy and Scott

- ▶ What if mom brought both kids to NC
- ▶ Dad stays in SC
- ▶ After 5 months, mom files in NC
 - Does NC have jurisdiction?

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Does NC have jurisdiction?

1. Yes
2. No

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Amy and Scott

- ▶ No
 - SC remains home state for 6 months after kids leave if one parent stays in that state

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Amy and Scott

- ▶ What if mom brought both kids with her to NC
- ▶ Dad leaves SC and moves to Kentucky
- ▶ After mom is in NC for 5 months, she files for custody
 - Does NC have jurisdiction?

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Maybe?

- ▶ If NC has significant connection/substantial evidence jurisdiction, or
- ▶ SC enters order concluding NC is the more convenient forum
- ▶ Or, other grounds??

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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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One more Amy and Scott

- ▶ Mom, Dad, Amy and Scott leave SC and come to NC
- ▶ After living in NC for 5 years, Mom files for custody in NC
- ▶ Mom and Dad go to mediation but nothing is resolved
- ▶ Dad moves to Kentucky; Mom and kids go back to SC
- ▶ 8 months later, dad schedules custody trial
 - Can the NC case proceed to trial?

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Can NC court proceed with trial?

1. Yes
2. No

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▶ Yes

Subject Matter Jurisdiction is Determined at Time of Filing

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Baby

- ▶ Child born in New York in Nov. 2004
- ▶ Mom and child move to NC in March 2005
- ▶ Dad stays in New York
- ▶ Mom files custody in NC in April 2005

- Does North Carolina have 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
- ▶ New York has home state jurisdiction because dad still there
- ▶ What if dad had left New York?

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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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More practice

- Mom and dad have 3 children in custody of Virginia DSS following an adjudication of serious neglect by Virginia court.
- Mom moves to NC to live with her sister.
- Child #4 is born in NC less than a month after she moves to NC.
- When child is 2 months old, NC DSS files petition alleging neglect.
 - Does NC have jurisdiction?

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Does NC have jurisdiction?

1. Yes
2. No

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Yes

- ▶ Initial determination for this child
- ▶ NC is home state
 - Child less than 6 months, home state is where child has lived since birth

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Practice

- 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?

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Does NC have jurisdiction

1. Yes
2. No
3. I'm confused

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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)

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Another Practice

- ▶ Pro se custody case filed in NC
- ▶ Pleadings say kids in NC 1 year
- ▶ During testimony, mom shows you a "temporary custody" order from Vermont entered 1 year ago awarding custody to her
- ▶ What do you do?

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Simultaneous Proceedings GS 50A-206

- ▶ NC court may not proceed if another state is litigating custody "in substantial conformity with" the UCCJEA
 - *Jones v. Whimper*, 736 SE2d 170 (NC 2012)
- ▶ NC court "shall stay proceedings and immediately communicate with court in other state"
- ▶ NC must dismiss unless other court determines NC is more convenient forum

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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

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Question

- . Child born in Kentucky.
- . When child is 3 months old, mom brings child to NC and dad stays in Kentucky.
- . When child is 5 months old, NC DSS files petition alleging abuse and requests nonsecure custody order.
- . Does NC have jurisdiction?

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Does NC have jurisdiction

1. Yes
2. No
3. Of course, it's juvenile court

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Home state priority

- ▶ Kentucky is home state
- ▶ NC has no jurisdiction unless Kentucky decides NC is more convenient forum
- ▶ But what about protection of child?

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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
 - ▶ 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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Back to the Question

- Child born in Kentucky.
- When child is 3 months old, mom brings child to NC and dad stays in Kentucky.
- When child is 5 months old, NC DSS files petition alleging abuse and requests nonsecure custody order.
 - Does NC have jurisdiction?

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Emergency Jurisdiction

- › Child is present in the state
- › It is necessary in an emergency to protect the child from abuse
- › Kentucky is the home state
- › Kentucky is not acting and has not acted
- › So temporary order can be entered
 - Include provision for order to “become permanent”?

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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)
 - *Brode*, 151 NC App 690 (2002)
 - *In re E.J.*, 738 SE2d 204 (NC App 2013)
 - *But see In re M.B.*, 179 NC App 572 (2006)???

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Amy and Scott Again...

- ▶ Amy, Scott, Mom and Dad live in SC for several years.
 - ▶ Mom and dad separate; SC enters custody order
 - ▶ Mom and kids move to NC
 - ▶ Dad stays in SC
 - ▶ After mom and kids in NC for 2 years, mom files motion to modify custody in NC
- Does NC have jurisdiction?

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Does NC have jurisdiction?

1. Yes
2. No

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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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Amy and Scott Again...

- ▶ Amy, Scott, Mom and Dad live in SC for several years.
- ▶ Mom and dad separate; SC enters custody order
- ▶ Mom and kids move to NC
- ▶ Dad stays in SC
- ▶ After mom and kids in NC for 2 years, mom files motion to modify custody in NC
 - Does NC have jurisdiction?

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Amy and Scott

- ▶ No
- ▶ NC has no modification jurisdiction because SC has CEJ
- ▶ But, NC can modify if SC determines NC is a more convenient forum because NC now is home state

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Another Question

- ▶ Florida court declared child dependent and placed him in custody of foster parents; closed juvenile case
- ▶ Foster parents move to NC with the child. Dad remained in Florida.
- ▶ 7 months after moving to NC, foster parents file TPR petition against father in NC.
 - Does NC have jurisdiction to proceed?

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Does NC have jurisdiction?

1. Yes
2. No

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Modification

- ▶ No
- ▶ TPR would modify Florida order
- ▶ Florida has continuing exclusive jurisdiction because dad still lives there
 - *In re Bean*; 132 NC App 363 (1999); *In the Matter of N.R.M., T.F.M.*, 165 N.C. App. 294 (2004).

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What about.....

- ▶ Child born in NC
- ▶ When child is 6 years old, mom and dad begin litigating custody in NC; original custody order modified a couple of times
- ▶ Last modification entered when child is 10 years old (5 months ago)
- ▶ After last modification, mom takes child and moves to Germany; dad moves to Tennessee
- ▶ Dad files motion to modify in NC, arguing move to Germany is changed circumstances

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Can NC modify?

1. Of course, it's a NC order
2. No
3. Probably

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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 resides here and there is significant connection/substantial evidence jurisdiction) or
 - NC has initial determination jurisdiction under G.S. 50A-201

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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
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What about.....

- ▶ Child born in NC
- ▶ When child is 6 years old, mom and dad begin litigating custody in NC; original custody order modified a couple of times
- ▶ Last modification entered when child is 10 years old (5 months ago)
- ▶ After last modification, mom takes child and moves to Germany; dad moves to Tennessee
- ▶ Dad files motion to modify in NC, arguing move to Germany is changed circumstances

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??????

- ▶ NC does not have CEJ because no one lives here

- ▶ So, does NC have initial jurisdiction?
 - Is there a home state?
 - No, so we can consider significant connection/substantial evidence jurisdiction
 - Probably, but would need to make findings to support

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And another "What if"???

- ▶ What if modification motion was filed in NC after mom and kids had lived in Germany for 7 months?

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Does NC have jurisdiction to modify?

1. Yes
2. No

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Germany is the home state

- ▶ So, no modification jurisdiction in NC
- ▶ But dad argues NC the more convenient forum under GS 50A-207?
 - Will that work?

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More Convenient Forum

- ▶ Only the 'state' with jurisdiction can decide to stay its proceedings and allow another 'state' to litigate
- ▶ So, only Germany can make decision in this case because it is the home state
- ▶ STATE WITH JURISDICTION DOES NOT TRANSFER CASE TO STATE THAT IS THE MORE CONVENIENT FORUM

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Final Question

- 1996: Child born in Iowa.
- 1998: Family moved to Colorado.
- 1999: Colorado divorce judgment gives dad custody.
- 1999: Dad to Iowa with child, mom to NC.
- 2004: Child visits NC; diagnosed with post traumatic stress syndrome due to abuse by dad. Mom reports to NC DSS.
 - Can NC enter nonsecure?

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Can NC court enter nonsecure?

1. Yes
2. Yes, but only if judge calls Iowa
3. No

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***Van Kooten*, 126 NC App 764**

- › Modification
- › Colorado does not have continuing exclusive jurisdiction
- › But Iowa is home state
- › NC can exercise emergency jurisdiction
- › COA said NC court should contact Iowa to determine if Iowa willing to proceed
 - *But cf* GS 50A-204 (

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