# Chapter 3
# Jurisdiction and Venue[1]



1. Some content in this chapter is based on: JANET MASON, TERMINATION OF PARENTAL RIGHTS IN NORTH CAROLINA (UNC School of Government, 2012).

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## 3.1 Summary and Scope of Jurisdiction Issues

### A. Introduction

Orders entered by a court that does not have subject matter jurisdiction are void. A court's action with respect to a person over whom the court does not have personal jurisdiction, when personal jurisdiction is required, is not binding on that person. Therefore, an early inquiry in every case should be whether the court has the requisite jurisdiction to proceed in the matter.

In abuse, neglect, dependency, and termination of parental rights cases:

- Subject matter jurisdiction generally depends on the proper initiation of proceedings, including the filing of a proper pleading, and compliance with the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA).
- Personal jurisdiction generally depends on a statutory basis for exercising jurisdiction and proper issuance and service of process, unless an individual's actions constitute consent to personal jurisdiction. G.S. 1-75.3, 1-75.7.
- Venue in juvenile cases depends generally on where the child resides or is found. Improper venue does not affect the court's jurisdiction, and in some circumstances the court has broad discretion to order a change of venue.

## B. Juvenile Court Jurisdiction

The juvenile court has exclusive, original jurisdiction over the following proceedings that are discussed in this manual:

- any case involving a juvenile who is alleged to be abused, neglected, or dependent;
- proceedings to deal with petitions alleging obstruction of or interference with a DSS assessment required by G.S. 7B-302;
- proceedings on petitions for judicial review of DSS determinations that someone is a "responsible individual";
- proceedings under the Interstate Compact on the Placement of Children, Article 38 of the Juvenile Code;
- termination of parental rights proceedings and proceedings for reinstatement of parental rights; and
- proceedings to review voluntary foster care placements.

The juvenile court also has exclusive, original jurisdiction over the following, not discussed in this manual:

- proceedings involving judicial consent for emergency treatment for a juvenile when the juvenile's parent (or other responsible person) refuses to consent for treatment;
- proceedings involving waiver of the parental consent requirement for an unemancipated minor's abortion;
- proceedings involving authorization for an underage party to marry;
- emancipation proceedings; and
- any proceeding in which a juvenile is alleged to be undisciplined or delinquent.

G.S. 7B-200(a), 7B-1600, 7B-1601.

In addition, adoption proceedings that are transferred by the clerk of superior court or appealed to district court generally are handled in juvenile court, although they technically are special proceedings, not juvenile cases.

## C. Continuing and Ending Jurisdiction

Once a court obtains jurisdiction in a juvenile case in which abuse, neglect, or dependency is alleged, any other civil action in which custody is an issue, whether filed before or after the juvenile petition, is automatically stayed as to that issue. If a juvenile order conflicts with an order in a civil custody action, the juvenile order controls as long as the court continues to exercise jurisdiction in the juvenile case, unless the court specifically orders otherwise. G.S. 7B-200(c)(2). For a discussion of the relationship between juvenile and private custody matters, including conversion of a juvenile custody order to a civil custody order, see *supra* § 1.4.B.

The Code provides that once jurisdiction is obtained in a juvenile case, it continues until whichever of the following occurs first:

- jurisdiction is terminated by the court;
- the juvenile reaches age 18;
- the juvenile is emancipated.

G.S. 7B-201(a). Because juvenile cases are subject to the UCCJEA, jurisdiction also would end if the court did not have jurisdiction under G.S. 50A-202(b) to modify its custody determination. *See* § 3.3.C.2 below. Although the Code does not say so explicitly, the court's jurisdiction probably ends when the child becomes the subject of a final order of adoption. *See* G.S. 7B-908(b) (providing for cancellation of post-termination of parental rights review hearing when notice is given of entry of a final order of adoption).

When the court's jurisdiction terminates, whether automatically or by court order, the legal status of the juvenile and the custodial rights of the parties revert to the status they were before the petition was filed, unless an applicable law or a court order in another action provides otherwise. After jurisdiction terminates, the court may not modify or enforce any order entered in the case, including any juvenile court order relating to custody, placement, or guardianship. However, termination of jurisdiction in an abuse, neglect, or dependency proceeding does not affect:

- a civil custody order entered pursuant to G.S. 7B-911;
- an order terminating parental rights;
- a pending action to terminate parental rights, unless the court orders otherwise;
- any delinquency or undisciplined proceeding; or
- any proceeding related to a new petition alleging abuse, neglect, or dependency.

G.S. 7B-201(b).

Because jurisdiction continues until an order stating otherwise or until the juvenile's 18th birthday or emancipation, parties and judges should avoid using the term "closed" in reference to the jurisdictional status of a case. It is not a statutory term and is subject to varying interpretations.

The court of appeals has said, "Closing a case file is not the equivalent of the trial court terminating its jurisdiction." *In re S.T.P.*, 202 N.C. App. 468 (2010) (holding that trial court had jurisdiction to consider DSS's motion to reassume custody years after court entered order that "vested" custody with grandparents and ordered, "Case closed"). Earlier cases seem to say the opposite. *See In re D.D.J.*, 177 N.C. App. 441 (2006) ("DSS [did not] include in its brief any citation of statutory or case law authority that would allow the court to act after it had closed the case"); *In re P.L.P.*, 173 N.C. App. 1 (2005), *aff'd per curiam*, 360 N.C. 360 (2006) (concluding that trial court's jurisdiction in earlier action was terminated by the trial court's order to "close" the case); *see also In re A.P.*, 179 N.C. App. 425 (2006) (Levinson, J., dissenting), *rev'd per curiam for reasons stated in dissenting opinion*, 361 N.C. 344 (2007).

In *Rodriguez v Rodriguez*, 211 N.C. App. 267 (2011), the court of appeals (distinguishing the case from *S.T.P.*, cited above*)* held that despite the absence of a specific order terminating jurisdiction in a juvenile case, the contents of the order amounted to a termination of jurisdiction as contemplated by G.S. 7B-201(a). The order placed the children in the physical and legal custody of the defendant, ended involvement of DSS and the GAL program, and included no provisions requiring ongoing supervision or court involvement. Even so, the court of appeals in *Rodriguez* stressed the need for including sufficient documentation in the record relating to jurisdiction and termination of jurisdiction. A court order should state explicitly whether the court retains or terminates jurisdiction, so that the court's intentions will not be subject to misinterpretation.

Reference to "closing" a case may be appropriate when referring to administrative action by DSS to end its involvement in a child protective services case. *See, e.g., In re H.D.F.*, 197 N.C. App. 480 (2009) (noting that DSS completed a family assessment and "closed the case"); *In re H.T.*, 180 N.C. App. 611 (2006) (stating that respondents complied with their treatment plan and "their case was closed"). However, even if DSS administratively closes its case because judicial reviews have been waived, DSS remains a party in the action until the court's jurisdiction is terminated, so that if a motion for review is filed, DSS must reactive its case. G.S. 7B-401.1(a).

## 3.2 Subject Matter Jurisdiction

### A. Introduction

The district court has exclusive, original jurisdiction over any case involving a juvenile alleged to be abused, neglected, or dependent. G.S. 7B-200. The district court also has exclusive original jurisdiction over termination of parental rights cases. G.S. 7B-200(a)(4); G.S. 7B-1101. In a particular case, however, the court may lack subject matter jurisdiction if steps necessary to invoke the court's jurisdiction have not been taken. Subject matter jurisdiction cannot be conferred by consent, waiver, stipulation, estoppel, or failure to object. *In re T.R.P.*, 360 N.C. 588 (2006). A lack of subject matter jurisdiction can be raised at any time, including for the first time on appeal. *See In re K.J.L.*, 363 N.C. 343 (2009); *In re T.R.P.*, 360 N.C. 588. Any order entered by a court that lacked subject matter jurisdiction is

void. *See In re T.R.P.*, 360 N.C. 588 (concluding that because trial court lacked subject matter jurisdiction, review hearing order was "void ab initio"). *See also* N.C. R. CIV. P. 12(h)(3). The better practice is for the court to make findings of fact to support a stated conclusion of law that the court has subject matter jurisdiction. However, a lack of specific findings in the order will not prevent the court from having jurisdiction where evidence in the record supports the court's conclusion that it has jurisdiction. *See In re E.X.J.*, 191 N.C. App. 34 (2008), *aff'd per curiam*, 363 N.C. 9 (2009).

## B. Key Issues in Determining Subject Matter Jurisdiction

**1. Proper petitioner (standing).** The court does not have subject matter jurisdiction if the petition (or TPR motion) is filed by someone who does not have standing.

**(a) Abuse, neglect, dependency.** The DSS director, or the director's authorized representative, is the only proper petitioner in an abuse, neglect, or dependency proceeding. G.S. 7B-401.1(a). Even when someone who made a report appeals a DSS decision not to file a petition, after reviewing the case the prosecutor may direct DSS to file a petition but may not initiate a juvenile proceeding himself or herself. DSS has standing, though, only after an assessment results in a finding of abuse, neglect, or dependency. *See* G.S. 7B-403(a); *In re S.D.A.*, 170 N.C. App. 354 (2005) (holding that the trial court lacked subject matter jurisdiction where one county DSS, after investigating reports referred to it by a second county DSS, determined there was no abuse, neglect, or dependency, but the second county DSS, which did not conduct an investigation, filed a petition based on the allegations it referred to the first county for investigation, failing to follow procedures required by G.S. 7B-302).

**(b) Termination of parental rights.** Persons who have standing to file a petition or motion to terminate parental rights include:

- either parent seeking termination of the other parent's rights (except for a father convicted under G.S. 14-27.2 or 14-27.3 of a rape occurring on or after December 1, 2004, or under G.S. 14-27.2A of a rape occurring on or after December 1, 2008, if the rape resulted in the birth of the child who is the subject of the TPR proceeding);
- any judicially appointed guardian of the person of the child;
- any county DSS or licensed child-placing agency to which (i) a court has given custody of the child or (ii) a parent or guardian of the person of the child has surrendered the child for adoption pursuant to G.S. Chapter 48;
- any person with whom the child has lived for a continuous period of two years or more immediately preceding the filing of the petition or motion;
- any guardian ad litem appointed to represent the child pursuant to G.S. 7B-601 who has not been relieved of his or her duties;
- any person who has filed a petition to adopt the child.

G.S. 7B-1103.

A DSS or child-placing agency that does not have (or fails to establish that it has) custody of the child when it files a termination of parental rights petition or motion does not have standing to initiate the action and the court therefore lacks subject matter jurisdiction. *See In re E.X.J.*, 191 N.C. App. 34 (2008), *aff'd per curiam*, 363 N.C. 9 (2009); *In re T.B.*, 177 N.C. App. 790 (2006); *In re Miller*, 162 N.C. App. 355 (2004). However, when custody is clear from the record, failure to attach a copy of the custody order to the petition or motion to terminate parental rights does not deprive the trial court of subject matter jurisdiction. *See In re H.L.A.D.*, 184 N.C. App. 381 (2007), *aff'd per curiam*, 362 N.C. 170 (2008); *In re W.L.M.*, 181 N.C. App. 518 (2007); *In re D.J.G.*, 183 N.C. App. 137 (2007).

If the trial court lacked subject matter jurisdiction in the underlying action in which custody was awarded to DSS, the order giving DSS custody is void and DSS does not have standing to file a termination action. *See In re S.E.P.*, 184 N.C. App. 481 (2007). *See also In re A.J.H-R.*, 184 N.C. App. 177 (2007) (holding custody order void for lack of proper verification of petition).

In the case *In re A.D.N.*, __ N.C. App. __, 752 S.E.2d 201 (2013), the court of appeals held that a grandmother had standing to petition for TPR, where evidence in the record showed that the child stayed with her 85% of the time. Although the trial court did not make detailed findings as to standing, it did make the ultimate finding that the child resided with the grandmother continuously for two years before the action was initiated, and the court of appeals found competent evidence in the record to support the finding.

**2. Proper initiation of proceedings.** The court does not have subject matter jurisdiction in the absence of a valid pleading. *See, e.g.*, *In re S.D.W.*, 187 N.C. App. 416 (2007) (holding that a parent could not initiate a termination action by filing a counterclaim for termination in the other parent's civil action for visitation); *In re McKinney*, 158 N.C. App. 441 (2003) (rejecting a motion in the cause as insufficient to initiate a termination action where it contained no prayer for relief).

**3. Verification of petition.** The petition must be properly signed and verified or the petition is fatally defective and the court will be deprived of subject matter jurisdiction. *See* G.S. 7B-403(a); *In re T.R.P.*, 360 N.C. 588 (2006); *In re T.R.M.*, 208 N.C. App. 160 (2010). For a discussion of what constitutes proper verification, see *infra* § 4.2.B.

Note that effective October 1, 2014, the court is required at every pre-adjudication hearing to consider "[w]hether the petition has been properly verified and invokes jurisdiction." S.L. 2014-16 (amending G.S. 7B-800.1, effective Oct. 1, 2014).

**4. Indian Child Welfare Act.** In a case involving the custody of a child who is, or is eligible to be, a member of a federally recognized Indian tribe, the tribe must be given notice pursuant to the Indian Child Welfare Act (ICWA). If the Indian child resides or is domiciled on Indian land, the Indian tribe has exclusive jurisdiction. *See* 25 U.S.C. 1911(a). However, the tribe may enter into an agreement with the state for the transfer of jurisdiction on a case by case basis or for concurrent jurisdiction. *See* 25 U.S.C. 1925. For Indian children who are not

residing or domiciled on Indian land, the case may be commenced in state court; however, the case is subject to transfer to a tribal court, or the tribe may intervene in the state court proceeding. *See* 25 U.S.C. 1911(b), (c).

The means by which a North Carolina court may exercise jurisdiction over a child subject to ICWA include: 1) emergency jurisdiction over an Indian child temporarily located off the reservation, in order to prevent imminent harm; and 2) pursuant to an agreement between the state and a specific tribe, such as one in which the tribe defers to the state to handle child protective proceedings. *See* 25 U.S.C. 1922 (addressing emergency situations); *In re E.G.M.*, __ N.C. App __ , 750 S.E.2d 857 (2013) (acknowledging that an agreement pursuant to 25 U.S.C. 1919 between the state and tribe would allow for state jurisdiction, but remanding because nothing in the trial court record referred to the agreement, and the copy attached to the appellee's brief was not certified and could not be validated).

Failure to comply with ICWA can deprive the court of subject matter jurisdiction. *See, e.g., In re E.G.M., Id.*; *In re Bluebird*, 105 N.C. App. 42 (1992) (explaining that where the putative father was a registered member of the Cherokee Nation of Oklahoma and the child was eligible for tribal membership, ICWA applied and the trial court properly proceeded only after the Cherokee Nation declined to assume jurisdiction or intervene). A parent who seeks to invoke ICWA has the burden of showing that the Act applies. *In re Williams*, 149 N.C. App. 951 (2002) (affirming the trial court's decision to deny a motion to dismiss for lack of subject matter jurisdiction where the respondent merely mentioned his Indian heritage and provided no supporting evidence). *See also In re A.D.L.*, 169 N.C. App. 701 (2005). For details about ICWA, including additional case law related to its applicability, see *infra* § 13.6.

**5. Appeal in underlying action.** The trial court does not have subject matter jurisdiction in a TPR proceeding if there is a pending appeal in an underlying abuse, neglect, or dependency case. *See* G.S. 7B-1003(b)(1); *In re C.N.C.B.*, 197 N.C. App. 553 (2009); *In re P.P.*, 183 N.C. App. 423 (2007). Note that the pending appeal does not deprive the trial court of jurisdiction to continue holding hearings in the abuse, neglect, or dependency case itself. *See* G.S. 7B-1003. For a more detailed discussion of permissible actions by a court pending appeal, see *infra* § 12.10.

**6. Uniform Child-Custody Jurisdiction and Enforcement Act.** Abuse, neglect, dependency, and termination of parental rights proceedings are child-custody actions for purposes of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) contained in G.S. Chapter 50A. Thus, the court should make findings to support a conclusion in every case that it has subject matter jurisdiction under the Act. For a detailed discussion of the UCCJEA, see *infra* § 3.3.

**7. Location of child.** In a TPR case, the court has jurisdiction only if, when the petition or motion is filed,

- the child resides in or is found in the district in which the action is filed, or is in the legal or actual custody of a DSS or licensed child-placing agency in that district (G.S. 7B-1101); or

- the court has exclusive continuing jurisdiction under the UCCJEA. *In re H.L.A.D.*, 184 N.C. App. 381 (2007), *aff'd per curiam*, 362 N.C. 170 (2008).

## C. Issues that Do Not Affect Subject Matter Jurisdiction

**1. Defects in or lack of summons.** Lack of a proper summons or problems with issuance of a summons implicate personal jurisdiction, not subject matter jurisdiction. Failure to follow the required procedures with respect to issuance of the summons, defects or irregularities in the contents of the summons, problems with service of the summons, or expiration of the summons will not deprive a court of subject matter jurisdiction. *See In re K.J.L.*, 363 N.C. 343 (2009) (holding that defects in the summons *and* failure to issue a summons do not deprive a court of subject matter jurisdiction and relate only to personal jurisdiction); *In re J.T.*, 363 N.C. 1 (2009) (preceding *In re K.J.L.* and holding that problems with the summons or service of the summons related to personal, not subject matter, jurisdiction—a holding that did not explicitly disconnect *issuance* of the summons from subject matter jurisdiction, but abrogated a number of appellate decisions that had found a lack of subject matter jurisdiction due to problems with summonses); *In re J.D.L.*, 199 N.C. App. 182 (2009) (holding that failure to serve a summons within the time allowed affects only personal jurisdiction and can be waived).

Issuance and service of a proper summons are required, however, in order for the court to have *personal* jurisdiction over a party, unless that party waives any defect in the summons or service. *See infra* § 3.4 (related to personal jurisdiction); § 4.3 (related to proper summons and issuance of summons). Note that although the child is a party, issuance of a summons to the child or the child's guardian ad litem in an abuse, neglect, dependency, or TPR proceeding is not required. G.S. 7B-406(a), 7B-1106.

**2. Failure to include certain information in petition.** While the Juvenile Code sets out requirements for the contents of a petition alleging abuse, neglect, or dependency and a petition or motion for TPR, failure to adhere exactly to the requirements concerning contents may not be a jurisdictional defect where the court can get the necessary information from the record or from the face of the petition and no prejudice is shown. [Note that the requirements concerning contents should be distinguished from the requirement of verification, which is a jurisdictional necessity and is discussed *supra* § 3.2.B.3, *infra* § 4.2.B.]

**(a) Child's address and "clerical information."** Failure to list the child's address in a dependency petition did not deprive the court of subject matter jurisdiction because it was "routine clerical information" and the court could determine from information provided in the petition whether it had subject matter jurisdiction. *In re A.R.G.*, 361 N.C. 392 (2007).

**(b) Language regarding UCCJEA.** Failure to include in a TPR petition or motion the statutorily required statement that the pleading was not filed to circumvent provisions of Uniform Child Custody Jurisdiction and Enforcement Act does not deprive the trial court of subject matter jurisdiction absent a showing of prejudice. *In re J.D.S.*, 170 N.C. App. 244 (2005). *See also In re Humphrey*, 156 N.C. App. 533 (2003).

**(c) Affidavit as to child's status.** Failure to attach the affidavit as to the child's status required by G.S. 50A-209 to an abuse, neglect, dependency, or TPR petition (or motion) does not, by itself, deprive the court of subject matter jurisdiction where the court can get necessary information from the record or direct that the information be provided within a reasonable time and there is no prejudice. *See In re D.S.A.*, 181 N.C. App. 715 (2007) (neglect petition); *In re J.D.S.*, 170 N.C. App. 244 (2005) (TPR petition).

**(d) Custody order.** Failure to attach a custody order, if one exists, to a TPR petition or motion as required by G.S. 7B-1104(5) does not deprive the court of subject matter jurisdiction where the court can get the necessary information concerning custody from the petition itself or from the record, and no party is prejudiced by the omission. *See, e.g., In re T.M.H.*, 186 N.C. App. 451 (2007); *In re T.M.*, 182 N.C. App. 566, *aff'd per curiam*, 361 N.C. 683 (2007); *In re W.L.M.*, 181 N.C. App. 518 (2007); *In re B.D.*, 174 N.C. App. 234 (2005). However, failure to attach the custody order has been found to be reversible error when the court is unable to get the needed information concerning custody from the petition or record. *See In re T.B.*, 177 N.C. App. 790 (2006); *Z.T.B.*, 170 N.C. App. 564 (2005) (holding that failure to include the custody order or the name and address of the appointed guardian rendered the petition facially defective).

**3. Statutory timelines.** The timeline for initiating a termination proceeding is not jurisdictional. *In re B.M.*, 168 N.C. App. 350 (2005) (rejecting the argument that DSS's failure to initiate the termination proceeding within 60 days after the permanent plan was changed to adoption was a jurisdictional defect). *See infra* § 4.5.D.5 (explaining delays beyond statutory timelines and remedy of mandamus for delays).

**4. GAL representation in underlying action.** In a termination of parental rights case, the trial court's jurisdiction was not affected by the earlier failure to appoint guardians ad litem for the children when the initial neglect and dependency petitions were filed or to ensure consistent representation of the children by guardians ad litem in those proceedings, when the children were represented by a guardian ad litem and attorney advocate throughout the termination proceeding. *In re J.E.*, 362 N.C. 168 (2008), *rev'g per curiam for the reasons stated in the dissent*, 183 N.C. App. 217 (2007).

## 3.3 Uniform Child-Custody Jurisdiction and Enforcement Act[2]

### A. Introduction

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), G.S. Chapter 50A, addresses the need for uniformity in custody cases involving multiple states, for rules requiring courts to honor orders of other states, and for ways to prevent forum shopping by

2. Some content for this section is based on: 1 CHERYL DANIELS HOWELL & JANICE S. SIMMONS, NORTH CAROLINA TRIAL JUDGES' BENCH BOOK ch. 4 (UNC School of Government, 2009) (the 2014 version of this publication is available for purchase online) and JANET MASON, TERMINATION OF PARENTAL RIGHTS IN NORTH CAROLINA (UNC School of Government, 2012).

parties in private custody matters. The UCCJEA sought to harmonize the former UCCJA with the federal Parental Kidnapping Prevention Act (PKPA) and Violence Against Women Act (VAWA). The UCCJEA ensures that in any type of custody case the appropriate state is exercising jurisdiction. Parties cannot confer jurisdiction by consent on a court that does not have jurisdiction pursuant to the UCCJEA. *See* Official Comment, G.S. 50A-201; *In re K.U.-S.G.*, 208 N.C. App. 128 (2010); *Foley v. Foley*, 156 N.C. App. 409 (2003).

An initial question in every case is whether the court can properly exercise jurisdiction under the UCCJEA. The court must conclude that it has:

- temporary emergency jurisdiction, or
- jurisdiction to enter an initial child-custody order, or
- exclusive continuing jurisdiction, or
- jurisdiction to modify an order from this state, or
- jurisdiction to modify an order of another state.

Evidence in the record must support the trial court's conclusion of law that it has subject matter jurisdiction under the UCCJEA. Some appellate cases have indicated that findings of fact to support that conclusion are desirable, but not legally required. *See In re J.C.*, __ N.C. App. __, 760 S.E.2d 778 (2014), *rev'd on other grounds*, __ N.C. __ (June 11, 2015); *In re E.X.J.*, 191 N.C. App. 34 (2008), *aff'd per curiam*, 363 N.C. 9 (2009); *In re T.J.D.W.*, 182 N.C. App. 394, *aff'd per curiam*, 362 N.C. 84 (2007). Other cases appear to require specific findings on subject matter jurisdiction under the UCCJEA. *See In re E.J.*, __ N.C. App. __, 738 S.E.2d 204 (2013) (stating that to exercise emergency or exclusive jurisdiction, the trial court must make specific findings of fact to support its action); *Foley v. Foley*, 156 N.C. App 409 (2003) (vacating and remanding because order contained no findings as to jurisdiction, but also stating that there was no evidence in the record to support such findings).

## B. Applicability of the UCCJEA

**1. Abuse, neglect, dependency, and TPR.** The UCCJEA applies to any case in which the court is making determinations related to child custody, and G.S. 50A-102 includes within the definition of child custody proceedings abuse, neglect, dependency, and TPR.

**2. Initial actions and modifications**. Initial and modification custody determinations are covered by the UCCJEA, but different rules govern initial jurisdiction and jurisdiction to modify an existing order. *See infra* § 3.3.C.1 (initial orders) and § 3.3.C.2 (modification of orders).

**3. Not applicable to adoption, emergency medical care, or juvenile delinquency.** The UCCJEA does not govern an adoption proceeding, a proceeding pertaining to the authorization of emergency medical care for a child, or a proceeding in which a juvenile is alleged to be delinquent or undisciplined. G.S. 50A-102(4), 50A-103.

Note, however, that in an adoption proceeding in North Carolina:

- the petition must include any information required by the UCCJEA that is known to the petitioner (G.S. 48-2-304(b)(4)), and
- the court may not exercise jurisdiction if, when the adoption petition is filed, a court in another state is exercising jurisdiction substantially in conformity with the UCCJEA, unless that state's court dismisses its proceeding or releases its exclusive, continuing jurisdiction within 60 days after the adoption petition is filed.

G.S. 48-2-100(c).

**4. Indian Child Welfare Act controls.** Custody proceedings pertaining to Indian children are not subject to the UCCJEA to the extent that they are governed by the Indian Child Welfare Act. State courts, however, must treat tribes as if they were states for most purposes under the UCCJEA. G.S. 50A-104. *See infra* § 13.6 (explaining the Indian Child Welfare Act).

**5. Foreign countries.** Foreign countries are treated as states for most purposes of the act. The UCCJEA is not applicable if the child-custody law of a foreign country violates human rights. G.S. 50A-105. For an example of a court dealing with a foreign country, see *Tataragasi v. Tataragasi*, 124 N.C. App. 255 (1996) (holding that the trial court had emergency jurisdiction despite the father's pending custody action in Turkey).

### C. Jurisdictional Basis for Making Custody Determination

Jurisdictional criteria under the UCCJEA differ depending on whether the court is making an initial custody determination, modifying an existing custody order, or dealing with a temporary emergency custody situation.

**1. Initial child custody jurisdiction.** [G.S. 50A-201] When a court makes an initial child custody determination one of the following four criteria must be met:

**(a) Home state.** A North Carolina court has jurisdiction if (i) North Carolina is the child's home state on the date of commencement of the proceeding; or (ii) North Carolina was the child's home state within six months before the commencement of the proceeding, the child is absent from North Carolina, and a parent or person acting as a parent continues to live in North Carolina. G.S. 50A-201(a)(1).

"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. In the case of a child less than six months of age, the term means the state in which the child lived from birth with a parent or person acting as a parent. G.S. 50A-102(7). *See also In re M.G.*, 187 N.C. App. 536 (2007) (holding that where children had lived in North Carolina less than six months, it could not be considered their home state), *rev'd in part on other grounds*, 363 N.C. 570 (2009). In cases where children have moved more frequently than six months, the court may determine that there is no "home state" and make a determination as to whether N.C. has significant connection jurisdiction. G.S. 50A-201(1)(2); *see, e.g.*, *Gerhauser v. Van Bourgondien*, __ N.C. App. __, 767 S.E.2d 378 (2014).

A period of temporary absence of any of the mentioned persons is part of the six-month period. G.S. 50A-102(7). *See also Ellison v. Ramos*, 130 N.C. App. 389 (1998); *Brewington v. Serrato*, 77 N.C. App. 726 (1985). The court of appeals has adopted a "totality of the circumstances" approach to determining whether an absence from a state is a temporary absence or a change of residence sufficient to change home state status.

- Nearly six months that children spent in Japan prior to the commencement of the child custody action was a temporary absence from North Carolina. *Hammond v. Hammond*, 209 N.C. App. 616 (2011).
- Where children spent a six-week period of time in North Carolina it was considered to be a temporary absence from Vermont. *Chick v. Chick*, 164 N.C. App. 444 (2004).
- Ten months spent by children in Georgia pursuant to a temporary custody order was considered to be a "temporary absence" from North Carolina. *See Pheasant v. McKibben*, 100 N.C. App. 379 (1990).
- Military deployment is one of the circumstances considered in determining whether absence from a state is temporary, and a court may look to actions taken by a parent after the commencement of the custody proceeding when determining if the relocation was a temporary absence. *Gerhauser v. Van Bourgondien*, __ N.C. App. __, 767 S.E.2d 378 (2014).

**(b) Significant connection and available evidence.** A North Carolina court has jurisdiction if there is no home state or the home state has declined to exercise jurisdiction and:

- 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 North Carolina other than mere physical presence; and
- substantial evidence is available in North Carolina concerning the child's care, protection, training, and personal relationships.

G.S. 50A-201(a)(2). *See Holland v. Holland*, 56 N.C. App. 96 (1982) (explaining that to the evidence required to invoke significant connection jurisdiction is "more than a scintilla" and the court must address each aspect of the child's interest, care, protection, training, and personal relationships).

When there is no home state, the parties cannot consent to subject matter jurisdiction. In a private custody case where there was no home state jurisdiction, the court must consider whether there was jurisdiction due to significant connection or available evidence. *Gerhauser v. Van Bourgondien*, __ N.C. App. __, 767 S.E.2d 378 (2014). In that case, although the original custody order in 2003 was in North Carolina and subsequent motions and orders were filed in N.C. through 2013, neither the parent nor the children had lived in North Carolina since 2009. North Carolina could not be said to have significant connection simply because past custody proceedings had taken place there. *Id.*

**(c) Convenience and unjustifiable conduct.** A North Carolina court has jurisdiction if all courts that would have jurisdiction under the above criteria (home state or significant connection) have declined to exercise it because a North Carolina court is the more

appropriate forum under G.S. 50A-207 (convenience) or G.S. 50A-208 (unjustifiable conduct by the person seeking jurisdiction). While the UCCJEA does not specifically define "unjustifiable conduct," the official comments to G.S. 50A-208 give the example of one parent abducting a child and establishing a new home state prior to a custody decree (but excludes a parent who is a domestic violence victim fleeing for protection).

G.S. 50A-207 sets out specific factors for the court to consider in determining whether it is an inconvenient forum. Findings about these factors are necessary when the court determines that the current forum is inconvenient, but not when the court determines that it is a convenient forum. *See In re M.M.*, __ N.C. App. __, 750 S.E.2d 50 (2013); *Velasquex v. Ralls,* 192 N.C. App. 505 (2008). The trial court has discretion at any point to determine that another state is a more appropriate forum. *See In re M.E.*, 181 N.C. App. 322 (2007) (affirming the trial court's determination that Ohio was the more convenient forum pursuant to G.S. 50A-207, where evidence showed that the child had been placed with the father in Ohio for three years, the family had been receiving counseling in Ohio during that time, and the child's therapist and school were in Ohio, among other factors).

A court cannot determine that another state is a more convenient forum and dismiss its case in deference to the other state's jurisdiction unless a custody action is pending in that other state. Where it is determined that another jurisdiction is a more convenient forum, the trial court must stay the proceedings on the condition that a proceeding be promptly commenced in the other designated state. G.S. 50A-207; *In re M.M.*,181 N.C. App. 322 (2007) (reversing trial court order that purported to transfer jurisdiction to another state without properly establishing that it was an inconvenient forum and without staying the North Carolina case, effectively dismissing the case and leaving the child in legal limbo).

**(d) No other court would have jurisdiction.** A North Carolina court has jurisdiction if no court of any other state would have jurisdiction under any of the above criteria. G.S. 50A-201(a)(4).

The UCCJEA addresses simultaneous proceedings stating that a court may not exercise jurisdiction "if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this Article, unless the proceeding has been terminated or is stayed by the court." G.S. 50A-206. This language was interpreted by the North Carolina Supreme Court to mean that the court must determine whether the other state has substantially the same type of jurisdiction as its own state, and not whether the other state complied with the statute, as the court of appeals improperly interpreted the language to mean. *Jones v. Whimper*, 366 N.C. 367 (2013).

In the case *Gerhauser v. Van Bourgondien*, __ N.C. App. __, 767 S.E.2d 378 (2014), the court of appeals determined that two states besides North Carolina could exercise significant connection jurisdiction under the UCCJEA, but the N.C. court need not determine which state had the most significant connection.

**2. Jurisdiction to modify custody determination and continuing jurisdiction.** A North Carolina court may modify a child-custody determination made by a court of another state only if North Carolina would have jurisdiction to make an initial custody determination under G.S. 50A-201(a)(1) (home state criteria) or G.S. 50A-201(a)(2) (significant connection and available evidence criteria) and:

- the court of the other state has determined that it no longer has exclusive, continuing jurisdiction or that North Carolina would be a more convenient forum; or
- either the court of the other state or a North Carolina court determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state. *See* G.S. 50A-203 and its Official Comment. "Presently reside" has been interpreted to mean where someone actually lives and does not refer to a technical domicile. *See In re B.L.H.*, __N.C. App. __, 767 S.E.2d 905 (2015) (affirming subject matter jurisdiction based on G.S. 50A-203 and holding that father who had been residing in Virginia when convicted and sent to prison in Texas could not be considered to be "presently residing" in Virginia).

Once a North Carolina court has made a child-custody determination in compliance with G.S. 50A-201 (initial determination) or 50A-203 (modification), this state has exclusive, continuing jurisdiction over the determination until:

- a North Carolina court determines that neither the child, the child's parents, nor any person acting as a parent has a significant connection with North Carolina and that substantial evidence is no longer available in North Carolina concerning the child's care, protection, training, and personal relationships; or
- a North Carolina court or a court of another state determines that the child, the child's parent, and any person acting as a parent do not presently reside in North Carolina.

A North Carolina court that has made a child-custody determination and does not have exclusive continuing jurisdiction may modify its own determination only if it would have jurisdiction to make an initial custody determination under G.S. 50A-201, 50A-202.

Although initial custody orders and modifications to those orders took place in North Carolina, the court of appeals determined that N.C. did not have jurisdiction to modify orders where neither the parties nor the children had lived in N.C. for several years and N.C. had no home state jurisdiction nor significant connection jurisdiction. *Gerhauser v. Van Bourgondien*, __ N.C. App. __, 767 S.E.2d 378 (2014).

Where initial custody orders were entered in New York but the New York court specifically ordered that it was "relinquishing jurisdiction to the State of North Carolina," the court of appeals held that this was a sufficient relinquishment of jurisdiction. In doing so, the court rejected the mother's argument that the New York order was insufficient due to its lack of findings indicating the basis for relinquishment under New York law. The court of appeals reasoned that the UCCJEA did not require North Carolina to undertake collateral review of a facially valid order from another state before exercising jurisdiction. *In re N.B. and L.B.*, __ N.C. App. __, 771 S.E.2d 562 (2015).

In the case of *In re J.W.S.*, 194 N.C. App. 439 (2008), the trial court's order was reversed for lack of subject matter jurisdiction because, although the court had properly exercised temporary emergency jurisdiction, the court had not made a proper determination that it had jurisdiction to modify another state's order. The record did not show that the New York court making the initial custody determination had made a subsequent determination that it no longer had exclusive, continuing jurisdiction; nor did the record show that there was a relinquishment of jurisdiction to North Carolina or a determination that no party still resided in New York.

Where an initial custody order was entered in Arkansas, the North Carolina trial court did not have jurisdiction because there was no order from the Arkansas court stating that Arkansas no longer had jurisdiction, Arkansas had not determined that North Carolina would be a more convenient forum, and the children's father continued to reside in Arkansas. *In re N.R.M.*, 165 N.C. App. 294 (2004).

For purposes of the UCCJEA, an action for termination of parental rights is considered an action to modify any existing custody order. *See, e.g., In re K.U.-S.G.*, 208 N.C. App. 128 (2010). In *K.U.-S.G.*, even though the record reflected that the judge in North Carolina had contacted the court in Pennsylvania and determined that it did not wish to retain jurisdiction, because there was no order from Pennsylvania in the North Carolina action reflecting that the Pennsylvania court determined that it no longer had exclusive continuing jurisdiction or intended to relinquish jurisdiction to North Carolina as a more convenient forum, the TPR order was vacated.

Where an initial child custody determination was made by a New Jersey court, the North Carolina trial court did not make findings required to establish jurisdiction. Nothing in the record indicated that New Jersey had determined that it no longer had jurisdiction, that North Carolina was determined to be a more convenient forum, or that the father no longer lived in New Jersey (per the requirements of G.S. 50A-203). The court of appeals also rejected the mother's argument that there was no New Jersey custody order in the record, since she was the petitioner and therefore the one required to attach the order pursuant to G.S. 50A-209 and her petition stated that custody was established through mediation in New Jersey. *In re J.A.P.*, __ N.C. App. __, 721 S.E.2d 253 (2012).

Where an initial custody order was entered in Indiana, the N.C. court erred in determining that the Indiana court had relinquished jurisdiction, and the trial court's order terminating respondent's parental rights was vacated for lack of subject matter jurisdiction. *In re J.D.*, __ N.C. App. __, 759 S.E.2d 375 (2014). Where the father respondent continued to reside in Indiana, continuing exclusive jurisdiction remained with Indiana. The denial of the grandparents' motion to intervene in the Indiana custody proceeding was not a relinquishment of jurisdiction, and nothing in the record showed a determination by the Indiana court that it no longer had jurisdiction.

**3. Temporary emergency jurisdiction.** A North Carolina court has temporary emergency jurisdiction to make a child custody determination if the child is present in North Carolina and the child has been abandoned or it is necessary to protect the child because the child, or a

sibling or parent of the child, is subjected to or threatened with mistreatment or abuse. G.S. 50A-204. Orders made pursuant to this section of the UCCJEA are meant to allow a court to protect a child in an emergency situation even if the court cannot claim home state or significant connection jurisdiction and does not have jurisdiction to modify an existing custody order. The temporary order can protect the child until a state that has jurisdiction to make an initial custody determination or to modify a determination enters an order. *See In re Brode*, 151 N.C. App. 690 (2002) (discussing the temporary nature of an order entered pursuant to G.S. 50A-204). An order based on temporary emergency jurisdiction must be for a specific period of time. *In re E.J.*, __ N.C. App. __, 738 S.E.2d 204 (2013) (holding that the trial court had temporary emergency jurisdiction to enter a nonsecure custody order, but not an adjudication order, and that the nonsecure custody order should have been limited in time).

The temporary emergency jurisdiction provisions of G.S. 50A-204 require that certain circumstances exist in order to exercise emergency jurisdiction, but the court is not required to make specific findings of fact as to the circumstances. *See In re N.T.U.*, __ N.C. App. __, 760 S.E.2d 49 (2014) (child was found with mother in North Carolina hotel room where mother was arrested and incarcerated on charges of robbery and murder, and there was no alternative placement); *In re E.X.J.*, 191 N.C. App. 34 (2008).

A temporary emergency custody order entered in North Carolina may become a final order if there is no existing custody determination, no custody proceeding is filed in a state with jurisdiction, and North Carolina becomes the child's home state. G.S. 50A-204 and Official Comment. For example, appellate cases have held that custody pursuant to a nonsecure custody order issued on the basis of temporary emergency jurisdiction is sufficient to give DSS standing to petition for termination of parental rights, when no custody action had been filed in another state and North Carolina had become the child's home state). *See, e.g.*, *In re N.T.U.*, __ N.C. App. __, 760 S.E.2d 49 (2014); *In re E.X.J.*, 191 N.C. App. 34 (2008), *aff'd per curiam*, 363 N.C. 9 (2009). *See also In re M.B.*, 179 N.C. App. 572 (2006) (holding that temporary emergency jurisdiction was exercised properly and that North Carolina became the home state for purposes of making an initial custody determination).

## D. Hearing and Communication Requirements

**1. Communication and records.** When custody actions are pending in more than one state, courts of different states may communicate with one another concerning the proceedings. G.S. 50A-110. The courts may allow parties to participate in the communication. If the parties are not allowed or are unable to participate, the court must give them an opportunity to present facts and legal arguments before a decision about jurisdiction is made. A record must be made of all communications except those concerning scheduling, court records, calendars, or similar matters. Except for communications about such administrative matter, the parties must be informed about communications between courts and given access to the record. The requirement to make a record of communications between courts is applicable not only to discretionary communications under G.S. 50A-110, but to *all* communications addressed in the UCCJEA, such as those required under G.S. 50A-206 when there are simultaneous proceedings in different states. *Jones v. Wimper*, 366 N.C. 367 (2013). "Record" is defined as "information that is inscribed on a tangible medium or that is stored in an electronic or other

medium and is retrievable in perceivable form." G.S. 50A-110(e). See the official comment to G.S. 50A-110 for an expanded explanation of this provision.

**2. Judicial cooperation and appearance of parties.** Courts may request assistance from and assist courts of other states. Specifically, a court of one state may request the court of another state to hold an evidentiary hearing, order a person to produce evidence, or order an evaluation related to child custody, and may request a certified copy of the record of any such hearing, evidence, or evaluation. A court also may request the court of another state to order a party to a child-custody proceeding or any person with physical custody of the child to appear in the proceeding with or without the child. A court may assess travel costs and other expenses incurred through these procedures against the parties. G.S. 50A-112.

**3. Notice and opportunity to be heard.** Before a child-custody determination is made, notice and an opportunity to be heard must be given to anyone who would typically be entitled to notice in child-custody proceedings in this state, including any parent whose rights have not been terminated and anyone having physical custody of the child. G.S. 50A-205. The court may order that the notice given to a party outside the state direct the party to appear in person with or without the child and inform the party that failure to appear may result in a decision adverse to that party. G.S. 50A-210.

**4. Testimony in another state.** A party to a child custody proceeding in another state may offer his or her own testimony or other witnesses' testimony by deposition or other means allowable in North Carolina for testimony taken in another state, in a manner determined by the court. The court may allow a person in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means, and must cooperate with courts of the other state in designating an appropriate location for the deposition or testimony. G.S. 50A-111.

**5. Information concerning child's circumstances (affidavit).** Because jurisdiction under the UCCJEA is determined primarily by the past and present location of the child and any prior custody actions, information related to the child's living arrangements, location, and possible involvement in custody or other proceedings must be submitted in the initial pleading of every custody proceeding or by attached affidavit. *See* G.S. 50A-209. *See also In re Bhatti*, 98 N.C. App. 493 (1990). Appellate cases have stated that the better practice is to attach the affidavit as to the child's status, but failure to file it does not itself divest the court of subject matter jurisdiction. *See In re D.S.A.*, 181 N.C. App. 715 (2007); *In re J.D.S.*, 170 N.C. App. 244 (2005); *In re Clark*, 159 N.C. App. 75 (2003).

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***Tool:*** AOC Form AOC-CV-609, "Affidavit as to Status of Minor Child" (July 2011).

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**6. Declining jurisdiction.** A court that has jurisdiction can decline to exercise it if the court can define itself as an inconvenient forum under G.S. 50A-207 or if a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct under G.S. 50A-208.

**7. Deployed parents**. In 2013 the North Carolina legislature adopted the "Uniform Deployed Parents Custody and Visitation Act," creating a new Article 3 in the UCCJEA to address

custody and visitation issues when one or both parents are or may be deployed. This Act mostly impacts private custody cases, but could be relevant in a juvenile case if the court uses G.S. 7B-911 to create a civil custody order. *See* An Act to Adopt the Uniform Deployed Parents Custody and Visitation Act, S.L. 2013-27 (2013) (codified in various sections of G.S. 50 and 50A). A summary of the act can be found in *2013 Legislation of Interest to Court Officials*, UNC School of Government, p. 68. Additional information about the act is available on the website of the Uniform Law Commission, at "Deployed Parents Custody and Visitation Act."

## E. Enforcement of Custody Orders under the UCCJEA

**1. Enforcement generally.** A North Carolina court must enforce a custody determination made by a court of any other state if the other state exercised jurisdiction in substantial conformity with the UCCJEA or if the order was entered under factual circumstances meeting the jurisdictional standards of the UCCJEA. G.S. 50A-303(a). *See also Tataragasi v. Tataragasi*, 124 N.C. App. 255 (1996); *Schrock v. Schrock*, 89 N.C. App. 308 (1988). A custody order from one state may be registered and confirmed in another state, with or without a simultaneous request for enforcement, allowing for a predetermination of the enforceability of the order. *See* G.S. 50A-305 and Official Comment. A court may grant any relief normally available under its law to enforce a registered child-custody determination made by a court of another state. Expedited enforcement of a child-custody determination can be sought by filing a petition for enforcement, even if the order has not been registered and confirmed. *See* G.S. 50A-308. A North Carolina court does not acquire jurisdiction to modify another state's custody order merely because the order is registered and confirmed here or because a proceeding to enforce the order is filed here. The court may modify another state's custody determination only pursuant to the UCCJEA's requirements for modification. *See* G.S. 50A-306.

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***Tools:*** AOC Forms Related to UCCJEA Enforcement of Custody Orders

- Form AOC-CV-660, "Instructions For Registration Of Foreign Child Custody Order (Side 1)/Instructions For Expedited Enforcement Of Foreign Child Custody Order (Side Two)" (Mar. 2014).
- Form AOC-CV-660, "Petition For Registration Of Foreign Child Custody Order" (Oct. 2006).
- Form AOC-CV-661, "Notice Of Registration Of Foreign Child Custody Order" (July 2013).
- Form AOC-CV-663, "Motion To Contest Validity Of A Registered Foreign Child Custody Order And Notice Of Hearing" (Dec. 2006).
- Form AOC-CV-664, "Order Confirming Registration Or Denying Confirmation Or Registration Of Foreign Child Custody Order" (Dec. 2006).
- Form AOC-CV-665, "Petition For Expedited Enforcement Of Foreign Child Custody Order" (Dec. 2006).
- Form AOC-CV-666, "Order For Hearing On Motion For Expedited Enforcement Of Foreign Child Custody Order" (Feb. 2014).
- Form AOC-CV-667, "Warrant Directing Law Enforcement To Take Immediate Physical

Custody Of Child(ren) Subject To Foreign Child Custody Order" (June 2014).
- Form AOC-CV-668, "Order Allowing Or Denying Expedited Enforcement Of Foreign Child Custody Order" (Dec. 2006).

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**2. Temporary visitation.** Even if North Carolina does not have jurisdiction to modify an order, a court in this state can either (1) enforce a visitation schedule made by a court in another state, or (2) enter a temporary order setting out a visitation schedule where the order from the other state awarded visitation rights but did not set out a specific visitation schedule. G.S. 50A-304(a). A temporary visitation order entered by a North Carolina court must specify a date the order will expire, based on what the court deems a reasonable time for parties to return to the appropriate state for a new order concerning a visitation schedule. G.S. 50A-304(b).

**3. Registration and confirmation of orders from other states.** A custody order from another state may be registered and confirmed with or without a petition for enforcement. G.S. 50A-305(a); *see also* Official Comment, G.S. 50A-305 (explaining that registration and confirmation allows parties to "predetermine" the enforceability of a custody order before allowing the child to come to the state). A person may register an order by sending a certified copy of the order to the appropriate court with a letter or other document requesting registration. The letter or document must contain the information set out in G.S. 50A-305(a). Upon receipt of the request, the court must register the order and send instructions to the petitioner informing the petitioner of the notice requirements for confirmation. G.S. 50A-305(b).

A party seeking to object to registration must request a hearing within 20 days of service of the required notice. If no request for a hearing is made, the order is confirmed as a matter of law and the court must notify all parties of the confirmation. G.S. 50A-305(d), (e). If a hearing is requested and held, the court must confirm the order unless the party objecting to registration can show:

- the court that issued the order did not have appropriate jurisdiction; or
- the order has been vacated, stayed, or modified by a court having appropriate jurisdiction; or
- the person contesting registration was entitled to notice in the proceeding in the other state but was not given notice in accordance with the statute.

G.S. 50A-305(d).

Confirmation, either as a matter of law or as the result of a hearing, precludes further attack on the validity of the order for any of the reasons that could have been raised in objection to registration. G.S. 50A-305(f). A North Carolina court can enforce a registered order, but may modify the order only if North Carolina has modification jurisdiction. G.S. 50A-306.

**4. Expedited enforcement procedure.** (G.S. 50A-308 through 50A-317)

**(a) Petition, timing, and notice.** A petition seeking enforcement of a custody order from

another state must be verified. Certified copies of the custody order and of any order confirming the registration of the order must be attached to the petition. G.S. 50A-308(a). The petition must contain all information set out in G.S. 50A-308(b). Upon the filing of the petition, the court must issue an order to the respondent to appear with or without the child at a hearing. The hearing must be scheduled for the next judicial day following service of process, unless that date is impossible, in which case the hearing must be held on the first day possible. The hearing date can be continued only upon the request of the petitioner. G.S. 50A-308(c). The required content of the notice that must be sent by the court to the respondent upon the filing of a petition for enforcement is set out in G.S 50A-308(d).

**(b) Hearing**. At a hearing for enforcement, the court must enforce the order by allowing the petitioner immediate possession of the child unless the respondent can show that the order has not been confirmed (or that the order has been appropriately stayed, modified, or vacated since confirmation) and that:

- the issuing court did not have appropriate jurisdiction at the time the order was entered; or
- the order has been stayed, vacated, or modified by a court with appropriate jurisdiction; or
- the respondent was entitled to notice in the proceeding in the other state but notice was not given in accordance with the UCCJEA.

G.S. 50A-310(a). If the order has been confirmed, respondent cannot contest enforcement based on any of the grounds that could have been raised in objection to the confirmation. G.S. 50A-305(f).

**5. Law enforcement involvement.** A party who files a petition to enforce a custody order may also file a verified application for issuance of a warrant to take physical custody of the child. If the court finds from testimony of the petitioner or other witness "that the child is imminently likely to suffer serious physical harm or be removed from this State," the court may issue a warrant that:

- recites the facts on which the court's conclusion of imminent serious physical harm or removal from the state is based,
- directs law enforcement to take physical custody of the child immediately, and
- provides for the child's placement pending final relief.

G.S. 50A-311.

If the court does not issue a warrant for custody, the court should not invoke the assistance of law enforcement. *See Chick v. Chick*, 164 N.C. App. 444 (2004) (holding that the trial court erred in ordering law enforcement to assist with enforcement of a Vermont custody order when there was no statutory basis for their participation); *In re Bhatti*, 98 N.C. App. 493 (1990) (holding that the trial court lacked statutory authority to order law enforcement to pick up children in an effort to assist in the enforcement of a Georgia custody order).

***Practice Note:*** If a child is "imminently likely to suffer serious physical harm," a report to DSS will be required if there is cause to suspect that the child is abused, neglected, or dependent as defined in G.S. 7B-101. *See* G.S. 7B-301. If DSS finds a risk of immediate harm, the agency may take temporary custody of the child, file a petition, and seek an order for nonsecure custody. When DSS involvement is appropriate, the court should make a report to DSS rather than directly ordering DSS to assume custody of the child.

**6. Prosecutor's role**. Note also that G.S. 50A-315 allows a prosecutor or other appropriate public official to bring an enforcement action on behalf of the court under the circumstances described in that statute, and while this has not been a practice in North Carolina, there are circumstances in which prosecutors from other states have become involved.

## 3.4 Personal Jurisdiction

### A. Service of Process

The court has jurisdiction over a parent, guardian, custodian, or caretaker of a juvenile who has been adjudicated abused, neglected, or dependent if that person has been properly served with a summons (under G.S. 7B-406 for abuse, neglect, dependency, or under G.S. 7B-1106 for TPR) or waived service of process. G.S. 7B-200(b). Note, however, that personal jurisdiction for out-of-state parents in TPR cases is more complicated and is addressed *infra* § 3.4.C.

#### 1. Who must be served.

**(a) Abuse, neglect, dependency.** For an abuse, neglect, or dependency petition, the summons must be issued to and served on each party named in the petition, except the juvenile. G.S. 7B-406, 7B-407. Although the statute does not require service of a summons on the child, the clerk is required to provide a copy of the petition and any notices of hearings to the local GAL office immediately after a petition is filed. G.S. 7B-408.

Every petition and summons should name both parents, even if one or both can be identified only as "unknown." Efforts should be made to serve both parents as expeditiously as possible. However, the court's ability to address the child's circumstances is not dependent on the whether the parents have been served. The court acquires subject matter jurisdiction and can act to protect the child as soon as a proper petition is filed. *See In re Poole*, 357 N.C. 151 (2003), *rev'g per curiam for the reasons stated in the dissent,* 151 N.C. App. 472 (2002). Nevertheless, both of the child's parents have a constitutional interest in the proceeding and should be served whenever possible and as soon as possible. At every hearing on the need for continued nonsecure custody and dispositional hearing the court is required to inquire and make findings about efforts that have been made to locate and serve a missing parent. G.S. 7B-506(h)(1); G.S. 7B-901.

**(b) Termination of parental rights.** For a termination of parental rights proceeding initiated by the filing of a *petition*, service of the summons is required for:

- the parents of the juvenile (except a parent whose rights have already been terminated, who has surrendered the child for adoption to DSS or a licensed child placing agency, or who has consented to adoption by the person petitioning for TPR);
- a judicially appointed guardian of the person of the child;
- a judicially appointed custodian of the child;
- any county DSS or licensed child placing agency to which a parent has relinquished the child for adoption; and
- any county DSS to which a court has given placement responsibility for the child.

G.S. 7B-1106(a).

No summons is required to be issued to or served on the child or the child's guardian ad litem if there is one. However, if the child has a guardian ad litem, either the guardian ad litem or attorney advocate must be served, pursuant to Rule 5 of the Rules of Civil Procedure, with a copy of all pleadings and other papers required to be served. G.S. 7B-1106(a1). If an attorney has been appointed for a respondent parent in an underlying abuse, neglect, or dependency case and has not been relieved of responsibility, a copy of all pleadings and other papers required to be served on the respondent must also be served on the respondent's attorney pursuant to Rule 5 of the Rules of Civil Procedure. G.S. 7B-1106(a2).

**2. Proper service.** Proper service of a summons for abuse, neglect, and dependency cases is addressed in G.S. 7B-407; for termination of parental rights, service is addressed in G.S. 7B-1106. Both statutes require service pursuant to Rule 4 of the Rules of Civil Procedure, so the means of accomplishing proper service are the same as in other civil actions. For details relating to proper service, see *infra* § 4.4.

## B. Consent and Waiver Establishing Personal Jurisdiction

Where service is not completed on a party or there is a defect in service or process, a party's own actions may subject the party to the court's jurisdiction. Unlike subject matter jurisdiction, challenges to personal jurisdiction must be raised by the parties themselves and can be waived. *See In re J.T.*, 363 N.C. 1 (2009); *In re K.J.L.*, 363 N.C. 343 (2009).

**1. Making an appearance.** In the case of *In re A.J.M*, 177 N.C. App. 745 (2006), service was not completed on the mother, but because she was present in court and did not raise an objection regarding insufficient service of process or personal jurisdiction, her actions amounted to a waiver of her right to challenge personal jurisdiction. *See also In re K.J.L.*, 363 N.C. 343 (2009); *In re H.T.*, 180 N.C. App. 611 (2006). However, the court did not view parents as having consented to jurisdiction by appearing at the hearing when the purpose of their appearance was the timely challenge to the sufficiency of process. *In re Mitchell*, 126 N.C. App. 432 (1997).

**2. Failing to raise the defense.** A parent may waive the defenses of lack of personal jurisdiction or insufficiency of service of process by filing an answer, response, or motion without raising the defense. *See* N.C. R. CIV. P. 12; *In re H.T.*, 180 N.C. App. 611 (2006); *In re J.W.J.*, 165 N.C. App. 696 (2004) (holding that the respondent waived the defense of lack of personal jurisdiction by mailing a handwritten response to the clerk of court and later filing a formal answer without raising the defense); *In re Howell*, 161 N.C. App. 650 (2003).

## C. Out-of-State Parents in TPR Cases

A court's exercise of personal jurisdiction over a nonresident generally requires both notice and that the individual either have minimum contacts with the state or submit to the court's jurisdiction. *See International Shoe Co. v. Washington*, 326 U.S. 310 (1945). North Carolina has never required that a parent have minimum contacts with the state in order for a court in the state to act in a custody action involving that parent's child. *See Harris v. Harris*, 104 N.C. App. 574 (1991). The UCCJEA states that personal jurisdiction is not necessary or sufficient to enable a court to make a child custody determination (G.S. 50A-201(c)), and the Juvenile Code requires only that the parent be served properly. Under North Carolina case law, however, in some termination of parental rights cases the court may act only if the nonresident respondent has minimum contacts with the state or submits to the court's jurisdiction. The appellate courts have not addressed this conflicting intersection of statutory and case law.

**1. Juvenile Code requires only service.** G.S. 7B-1101 was amended in 2007 to provide that the court has jurisdiction to terminate a parent's rights, without regard to the parent's state of residence, if

- the court finds that it would have jurisdiction to make an initial custody determination or to modify a custody order under the UCCJEA, and
- the nonresident parent was served with process pursuant to G.S. 7B-1106, which requires the issuance and service of a summons upon the filing of a petition to terminate parental rights.

**2. Appellate cases require minimum contacts in some situations.** In contrast to the statutory criteria for jurisdiction, above, the court of appeals has held that a court in this state may terminate the rights of an out-of-state parent of a legitimate child (or of an illegitimate child if that parent is involved with the child) only if the parent (i) has minimum contacts with North Carolina, (ii) submits to the court's jurisdiction (*see supra* § 3.4.B), or (iii) is served while physically present in the state (*see infra* § 3.4.C.3).

Although termination proceedings are *in rem*, to satisfy due process a nonresident parent must have minimum contacts with the state before a court here may terminate the parent's rights. *In re Finnican*, 104 N.C. App. 157 (1991), *overruled in part on other grounds by Bryson v. Sullivan*, 330 N.C. 644 (1992); *In re Trueman*, 99 N.C. App. 579 (1990). Where the nonresident parent had no contacts with North Carolina and made no appearance in the action, the termination order was void and could be set aside at any time under Rule 60(b)(4) of the Rules of Civil Procedure. *In re Finnican*, 104 N.C. App. 157. However, minimum contacts

are not required in the case of a nonresident father of a child born out of wedlock if the father has failed to establish paternity, legitimate the child, or provide substantial financial support or care to the child and mother. *In re Williams*, 149 N.C. App. 951 (2002); *In re Dixon*, 112 N.C. App. 248 (1993).

Because these holdings are based on the Due Process Clause of the Fourteenth Amendment, it is unlikely that the 2007 statutory amendment described above or the UCCJEA provision described below, both of which came after these cases were decided, effected any change in the rule established by case law.

The nonresident parent may raise the defense of lack of personal jurisdiction in an answer, response, or motion as provided in Rule 12(b)(2) of the Rules of Civil Procedure.

**3. Service on respondent temporarily in state.** Personal service of process on an out-of-state respondent who is temporarily in the state will confer personal jurisdiction without regard to any other contacts with the state. *See Burnham v. Superior Court*, 495 U.S. 604 (1990) (holding that due process does not bar the exercise of personal jurisdiction over a nonresident defendant based on personal service while temporarily in the state).

**4. Other states.** Courts in some states have held that minimum contacts are never required in termination of parental rights proceedings, on the basis that these cases fall within the "status" exception recognized by the U.S. Supreme Court in *Shaffer v. Heitner*, 433 U.S. 186 (1977). *See, e.g.*, *In re R.W. and N.W.*, 39 A.3d 682 (Vermont 2011); *In re Termination of Parental Rights to Thomas J.R.*, 663 N.W.2d 734 (Wis. 2003); *S.B. v. State*, 61 P.3d 6 (Alaska 2002).

**5. UCCJEA does not require personal jurisdiction.** The UCCJEA specifically states that "[p]hysical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination." G.S. 50A-201(c). However, this statement in the UCCJEA addresses subject matter jurisdiction and does not mean that parties to a custody action do not have to be served.

### D. Permanent Custodians and Guardians

The court has personal jurisdiction over a guardian or custodian who was not named in the petition (and therefore was not served with a summons) but gains party status pursuant to G.S. 401.1(c) or (d) by being named guardian or custodian of the child, if that custody or guardianship arrangement is the juvenile's permanent plan. G.S. 7B-200(b).

## 3.5 Venue

### A. Introduction

It is not unusual for more than one county to have some degree of involvement in a child protective services case. A need for an immediate petition may arise when the child is somewhere other than the child's county of residence. Families may relocate at some point

during the case. Placement with a relative or in a facility in another county may occur, or one DSS may be asked to handle another county's case due to a conflict of interest.

In almost all cases a petition alleging abuse, neglect, or dependency will be adjudicated in the county in which the petition is filed. However, there may be a need to transfer venue, and the circumstances under which the Juvenile Code permits transfer of venue depends on whether the transfer is pre- or post-adjudication.

Issues of venue should not be confused with jurisdiction. Where a petitioner in a private termination action filed the petition in the county where respondent was incarcerated, not the county in which she and the child resided, the issue was one of venue, not jurisdiction. *In re J.L.K.*, 165 N.C. App. 311 (2004). Challenges to venue, unlike challenges to subject matter jurisdiction, must be raised by the parties and can be waived. N.C. R. CIV. P. 12(h).

## B. Proper Venue

**1. Where to initiate action**. A petition for abuse, neglect, or dependency must be filed in the district where the child resides or is present. When a conflict of interest causes DSS to have an assessment conducted by another county's DSS, the DSS conducting the assessment may file a petition in either county. G.S. 7B-400. In termination cases, the child must reside or be found in the district or be in the legal or actual custody of DSS or a licensed child-placing agency in the district when the petition or motion is filed. G.S. 7B-1101. That requirement does not apply, however, if the court already has exclusive continuing jurisdiction under the UCCJEA. *In re H.L.A.D.*, 184 N.C. App. 381 (2007), *aff'd per curiam*, 362 N.C. 170 (2008).

**2. Defining "residence."** The Juvenile Code does not specifically define residence, but G.S. 153A-257(a), the statue determining legal residence for social service purposes, provides as follows:

- A minor has the legal residence of the parent or other relative with whom he or she resides. If the minor does not reside with a parent or relative and is not in a foster home, hospital, mental institution, nursing home, boarding home, educational institution, confinement facility, or similar institution or facility, he or she has the legal residence of the person with whom he or she resides. Any other minor has the legal residence of his or her mother or, if the mother's residence is not known, then the legal residence of his or her father, or, if the residence of neither parent is known, of the county in which he or she is found.
- A person has only one legal residence at a time, and a legal residence continues until the person acquires a new residence.
- The director of the Division of Social Services in the state DHHS is authorized to resolve disputes between counties regarding a child's legal residence in an abuse, neglect, or dependency case, for purposes of the provision of services. G.S. 153A-257(d).

Notwithstanding these provisions, the fact that a child is absent from home due to a protection plan or case management services will not affect proper venue if it becomes necessary to file a juvenile petition. G.S. 7B-400. Thus, if parents in County A agree to place their child with a

relative in County B as part of a protection plan, DSS in County A can file a petition in County A even though the child is residing with a relative in another county.

## C. Transfer of Venue in Abuse, Neglect, and Dependency Cases

**1. When transfer may occur.** Before adjudication, the court may grant a motion for change of venue for good cause; however, a change of venue does not affect the identity of the petitioner. G.S. 7B-400(c). The statute does not provide guidance regarding what might constitute good cause for a pre-adjudication change of venue, but it might exist when a petition is filed somewhere other than the county of the child's residence. When that occurs, the petitioner must provide a copy of the petition and any notices of hearing to the DSS director in the county of the juvenile's residence. G.S. 7B-402.

Any time after adjudication, a court may transfer venue to another county (even if the petition could not have been filed there), but only after making numerous findings (see below) and communicating with the court in the other district. The court may transfer venue on its own motion or the motion of a party. G.S. 7B-900.1.

**2. Post-adjudication change of venue.**

**(a) Factors to be considered.** Before ordering that a case be transferred to another county in the post-adjudication phase of the case, the court must consider the following factors and any other relevant factors:

- the current residences of the juvenile and the parent, guardian, or custodian and the extent to which those residences have been and are likely to be stable;
- the reunification plan or other permanent plan for the juvenile and the likely effect of a change in venue on efforts to achieve permanence for the juvenile expeditiously;
- the nature and location of services and service providers necessary to achieve the reunification plan or other permanent plan for the juvenile;
- the impact upon the juvenile of the potential disruption of an existing therapeutic relationship;
- the nature and location of witnesses and evidence likely to be required in future hearings;
- the degree to which the transfer would cause inconvenience to one or more parties;
- any agreement of the parties as to which forum is most convenient; and
- the familiarity of the departments of social services, the courts, and the local offices of the guardian ad litem with the juvenile and the juvenile's family.

G.S. 7B-900.1(e).

**(b) Required findings.** After considering the factors above, the court may order transfer only if it finds that:

- the present forum is inconvenient,
- transfer is in the juvenile's best interest,

- the parties' rights will not be prejudiced by a change in venue, and
- the DSS directors in the two counties have communicated about the case and either:
  (i) the directors are in agreement with respect to each county's responsibility for providing financial support and services in the case, or
  (ii) the director of the Division of Social Services or his or her designee has made that determination pursuant to G.S. 153A-257(d).

G.S. 7B-900.1(b).

**(c) Communication between judges.** Before transferring a case to another district, the court is required to communicate with the chief district court judge or a judge presiding in juvenile court in that district and explain the reasons for the proposed transfer. G.S. 7B-900.1(d).

**(d) Objection by judge to transfer.** If the judge who is contacted about a proposed transfer makes a timely objection, either verbally or in writing, the court proposing the transfer may order the transfer only after making detailed findings of fact that support a conclusion that the juvenile's best interests require that the case be transferred. G.S. 7B-900.1(d).

**(e) Joinder or substitution and transfer of custody.** Any time the court transfers a case to a different county, the court is required to join or substitute as a party the DSS director in the county to which the case is being transferred and, if the juvenile is in the custody of DSS in the county where the action is pending, transfer custody to the DSS in the county to which the case is being transferred. These orders may be entered, however, only if the DSS director in the receiving county has been given notice and an opportunity to be heard or has waived the right to notice and a hearing. G.S. 7B-900.1(c).

**(f) Order and clerical procedure.** An order transferring a case must be entered within 30 days after the hearing on the question of transfer. The clerk is required to transmit to the other county a copy of the complete record of the case within three business days after entry of the transfer order. The clerk receiving the transferred case is required to promptly assign a file number, ensure that any necessary appointments of new attorneys or guardians ad litem are made, and calendar and give notice of the next court action required in the case. G.S. 7B-900.1(f), (g).

### 3. Practice tips.

- An order transferring venue should address whether and when any appointed counsel and guardian(s) ad litem are released.
- A phone call from the clerk in the first county to the clerk in the county to which the case is being transferred serves as both a courtesy and a way to ensure that the receiving county is aware of the actions that need to be taken when the file arrives.

## D. Transfer of Venue in TPR Cases

The Juvenile Code does not address transferring venue in termination of parental rights proceedings. Therefore, it seems likely that provisions applicable to civil cases generally would apply, allowing a change of venue when:

- the action is filed somewhere other than a county of proper venue;
- a change of venue would promote the convenience of witnesses and the ends of justice; or
- the judge has, at any time, been interested as a party or counsel.

G.S. 1-83.