

Chapter 50 Child Custody Cases

Outline of Legal Analysis

First question always: Initial determination or modification?

- a. Initial only if no other custody order with regard to this child is in effect.

- b. Pending cases in other courts:
 - i. Custody cases are stayed while juvenile cases are pending. GS 7B-200(c).
 - ii. Pending case in another state, see GS 50A-206.
 - iii. Temporary custody in a 50B action is not considered a final custody determination and Chapter 50 case can go forward. See GS 50B-3(a1)(4).

If initial, see Part I below. If modification, go to Part II.

Part I. Initial Custody

1. Does NC have subject matter jurisdiction?
 - a. See GS Chapter 50A – Uniform Child Custody Jurisdiction and Enforcement Act
 - b. See Jurisdiction Flow Chart.
 - c. General rule: NC has subject matter jurisdiction for initial determination if NC is “home state”; meaning child lived in NC with parent or person acting as a parent for at least 6 months before the custody action was filed.

- d. If NC is not home state, see Jurisdiction Flow Chart.
 - e. If considering emergency jurisdiction, see GS 50A-204.
2. If no jurisdiction, case should be dismissed. Parties CANNOT consent to subject matter jurisdiction in child custody case.
3. Consider requests for ex parte and/or temporary orders
- a. Standard for all temporary orders is “as the circumstances of the case render appropriate.” GS 50-13.5
 - b. No limit on number of temporary orders in any single case
 - c. See discussion in Bench Book, Family Law Volume, p. 4-8 through 4-11.
 - d. No change in child’s living arrangements can be ordered ex parte without special factors. See GS 50-13.5(d)(3).
 - e. Temporary orders can convert to permanent orders if left in place too long. See Bench Book, Family Law Volume, p. 4-9 through 4-10.
4. Resolving case: Parent vs. Nonparent (If parent v. parent, or nonparent v. nonparent, proceed to #5 below)
- a. Parent has fundamental constitutional right to care, custody and control of child.
 - b. No best interest analysis can be applied by court until court concludes that:
 - i. Non-parent has “standing”, and
 - ii. Parent has waived his/her constitutional right to custody

- c. Applies to custody and visitation claims, but grandparent statutes creates some ambiguity.
 - d. See Family Law Bulletin on Third Party Custody. NOTE: Since publication of the Bulletin, the court of appeals has issued three opinions dealing with custody disputes between same sex couples. The court held that the same constitutional analysis applies regardless of the relationship between the parent and the nonparent. *See Mason v. Dwinell*, 660 S.E.2d 58 (N.C. App., May 6, 2008); *Estroff v. Chaterjee*, 660 S.E.2d 73 (N.C. App., May 6, 2008); *Heatzig v. Maclean*, 664 S.E.2d 347 (N.C. App., August 3, 2008).
 - e. See Bench Book, Family Law Volume, p. 4-29 through 4-39.
 - f. If parent lost constitutional protection, or if grandparent visitation statutes apply - proceed to #5 below re: resolving case.
5. Resolving case
- a. Apply best interest of the child analysis to determine appropriate parenting plan
 - b. No presumptions or preferences apply between parents
 - c. Must award some parenting time to both parents unless make special findings
 - d. If find domestic violence, must make finding about all factors listed in GS 50B-3(a1) about which evidence is presented. GS 50-13.2(b).
 - e. Must consider “joint custody” if requested by either party. GS 50-13.2(a).
 - f. Remember to describe parenting plan with detail – do not assume law supplies detail.
 - g. See lists of custody order provisions included in materials.

- h. See for consideration, Indian Parenting Guidelines and Texas Code Annotated containing statutorily mandated parenting guidelines.

II. Modification

1. Does NC have subject matter jurisdiction to modify?
 - a. See G.S. Chapter 50A, and Custody Jurisdiction Flow Chart.
 - b. If original order entered in another state, NC generally does not have jurisdiction if one party continues to live in that state – even if NC is now the “home state.” Parties CANNOT consent to jurisdiction.
 - c. If NC entered original order, still must find basis for jurisdiction to modify.
See GS 50A-202(b).
2. If no subject matter jurisdiction, case should be dismissed.
3. Consider request for ex parte and/or temporary order. See Part I, # 3 above.
4. No best interest analysis until moving party shows substantial change in circumstances since time original order was entered, AND shows that change has or will affect the welfare of the child.
5. No change or even tweek of original order without finding changed circumstances.

6. See Bench Book, Family Law Volume, beginning p. 4-39.

7. Relocation is not assumed to be a substantial change. Need to establish effect on child. See Bench Book, Family law Volume, p. 4-46 through 4-47.

8. Nonparent v. parent modification:
 - a. If original order was non-parent vs. parent, parent has no constitutional protection in modification proceeding.
 - b. If original order was parent v. parent, parent maintains constitutional right to custody. Nonparent must show standing and waiver of parental protection. See #4 in Part I.

9. After find substantial change, apply best interest analysis to determine appropriate parenting plan. See #5 in Part I above.

10. Change in circumstances does not require change in custody; change only if required by complete best interest analysis.

Part III. Enforcing Custody Orders

1. Generally use contempt. Follow GS Chapter 5A closely.

2. Need extra findings to incarcerate a parent for failure to comply with visitation.
3. See Bench Book, Family Law Volume, beginning p. 4-49.
4. Orders from other states are entitled to enforcement, but cannot modify unless NC has modification jurisdiction. See Part II, #1 above.
 - a. See GS 50A, Part 3
 - b. See AOC forms CV-606 through CV-668.
5. Think carefully before ordering law enforcement to pick-up children. See Bench Book, Family Law Volume, p. 4-51 through 4-52.