

Abatement, also known as the prior pending action doctrine, does not apply when the prior action is pending in another state

If wife filed a complaint requesting child support, alimony, and property distribution in Watauga County and a few weeks later, while wife's claims remained pending in Watauga County, husband filed a complaint requesting property distribution in Hyde County, the common law doctrine of abatement would allow wife to ask the court in Hyde County to dismiss husband's complaint. Abatement, also called the prior pending action doctrine, provides that:

"[w]hen a prior action is pending between the same parties, affecting the same subject matter in a court within the State or the federal court having like jurisdiction, the subsequent action is wholly unnecessary and therefore, in the interest of judicial economy, should be subject to a plea of abatement."

State of N.C. Department of Health and Human Services v. Armstrong, 203 NC App 116 (2010)(quoting *State ex rel. Onslow County v. Mercer*, 128 NC App 371, 375 (1998)). See also *Weaver v. Early*, 325 NC 535 (1989).

However, abatement applies only when both actions are filed in the same state. *Acorn v. Jones Knitting Corp.*, 12 NC App 266 (1971).

So, in the example above, if wife's claims were pending in another state, such as Ohio, and husband's claims were filed in North Carolina, the North Carolina court will have much more discretion to determine whether husband should be allowed to proceed with his claims even though he filed after wife filed in Ohio.

[G.S. 1-75.12: Stay of proceeding to permit trial in a foreign jurisdiction](#)

When the prior pending action is in another state, [G.S. 1-75.12\(a\)](#) grants the trial court the discretion to determine whether the action filed in North Carolina should be allowed to proceed. That statute provides:

"If, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State, the judge on motion of any party may enter an order to stay further proceedings in the action in this State. A moving party under this subsection must stipulate his consent to suit in another jurisdiction found by the judge to provide a convenient, reasonable and fair place of trial."

It is this statute, rather than the common law doctrine of abatement, that provides the analysis for determining whether the claims proceed simultaneously or whether the North Carolina claim is

stayed pending the outcome of the action in the other state. See *American Motors Ins., Co. v. Avnet, Inc.*, 98 NC App 385 (1990), *Home Indemnity v. Hoechst-Celanese Corp.*, 99 NC App 322 (1990), and *Motor Inn Management, Inc. v. Irvin-Fuller Development Co., Inc.*, 46 NC App 707 (1980).

[Muter v. Muter, 203 NC App 129 \(2010\)](#)

Lynn and John Muter were married in Ohio in 1983 and had two children. The family moved to North Carolina in 1998, but wife (Lynn) and the children returned to Ohio later that same year. In October 2007, wife filed a complaint seeking divorce, spousal support, property distribution, child custody and child support in the State of Ohio. After the Ohio court entered a temporary order for spousal support, child support and child custody, husband moved to stay the Ohio action and to set aside the temporary support orders but both requests were denied by the Ohio court.

Husband also filed a complaint in North Carolina requesting absolute divorce and property distribution and asking that the North Carolina court determine spousal support. Wife filed a motion to dismiss for lack of personal and subject matter jurisdiction and she requested that the court stay the North Carolina proceeding until the resolution of the claims pending in Ohio. The North Carolina court denied wife's motion for a stay. The North Carolina court then heard and granted husband's request for absolute divorce. The Ohio court thereafter dismissed all of wife's claims pending in that state on the basis that the absolute divorce had been granted in North Carolina.

Wife appealed the decision of the North Carolina court, arguing that the trial court erred in refusing her request to stay the North Carolina action. The court of appeals affirmed the trial court, holding that if a trial court considers the relevant factors, the appellate court will defer to the trial court's determination of whether a stay should be granted.

Factors to determine whether stay is required to avoid “substantial injustice”

The court in *Muter* stated that pursuant to [G.S. 1-75.12](#), “[t]he essential question for the trial court is whether allowing the matter to continue in North Carolina would work a substantial injustice on the moving party.” In making this determination, a trial court may consider the following factors:

(1) the nature of the case, (2) the convenience of the witnesses, (3) the availability of compulsory process to produce witnesses, (4) the relative ease of access to sources of proof, (5) the applicable law, (6) the burden of litigating matters not of local concern, (7) the desirability of litigating matters of local concern in local courts, (8) convenience and access to another forum, (9) choice of forum by plaintiff, and (10) all other practical considerations.

Muter, 203 NC App at 132.

The court of appeals held that the trial court considered each of the suggested factors and listed

the following findings of fact in the trial court order as examples:

“31. Nature of the Case: This action involves the application for equitable distribution and spousal support, as pleaded by both parties.

32.Applicable Law: North Carolina law applies as to all aspects of this action.

33. Convenience of Witnesses: Those who may testify as to the date of separation and the assets which may be subject to equitable distribution will be predominantly from North Carolina.

34. Process to Compel Witness Attendance: North Carolina law is well suited [sic] to compel attendance of in-state witnesses, and to obtain the testimony of out-of-state witnesses.

35. Ease of Access to Sources of Proof: Because almost all of the assets, both personal and real property, which may be subject to equitable distribution are located in North Carolina, North Carolina offers the easiest access to sources of proof.”

Muter, 203 NC App at 133.

The burden is on the party requesting the stay

The court in *Muter* pointed out that the burden is on the party requesting the stay to prove that proceeding in North Carolina would work a substantial injustice. The court held that it is not the job of the trial court to determine “the most convenient or ideal venue for resolving the matter but only to determine whether [the moving party] proved that proceeding in North Carolina would work a substantial injustice on her.” *Muter*, 203 NC App at 134.