Child Custody: We Can't "Change Venue" to Another State; Determining NC is an inconvenient forum

**This is a post from October 28, 2016 that I decided to post again, with a couple of appellate case updates, due to the frequency with which I receive questions about this procedure.

I received a call once from a clerk of court asking what she should do with a voluminous court file received in the mail from a court in another state. It was a large box containing all of the pleadings, motions, reports and other filings for a custody case that had been litigated in another state for several years, accompanied by a court order signed by a judge in that other state "transferring venue" of the case to North Carolina, citing as authority that state's version of the Uniform Child Custody and Jurisdiction Act (the "UCCJEA").

Does the UCCJEA allow a judge to transfer a custody case to another state? When that clerk received the file and the order from the other state, is the North Carolina court required to act in the custody proceeding?

The answer to both of those question is no. Nothing in the UCCJEA or any other law allows a judge in one state to transfer a custody case to another state. However, we all tend to use the words 'change venue' when we are talking about GS 50A-207. That is the provision in North Carolina's version of the UCCJEA that allows a court to decline to exercise jurisdiction when it determines that North Carolina is an 'inconvenient forum' in which to litigate a pending custody issue and that another state is a more appropriate forum. A determination by a court with jurisdiction that it is an inconvenient forum has the effect of granting a basis for exercising jurisdiction to another state that would not otherwise have jurisdiction to act. *See for example,* GS 50A-201(a)(3)(North Carolina has jurisdiction to make an initial custody determination, even when it is not home state, if a court with jurisdiction determines NC is the more appropriate forum).

Similarly, GS 50A-208 also allows a court to decline to exercise jurisdiction when the court has jurisdiction due to the "unjustifiable conduct" of one party. That section will be the subject of a future blog post.

As my call from the clerk indicates, our lack of care in accurately describing the authority granted in GS 50A-207 can result in confusion and annoyance, especially to court personnel who receive the physical court files. But significant legal errors also can occur. For example, I received another call regarding a situation where a court believed that because it was transferring venue of the custody matter, it also was required to transfer all of the other issues pending in the case to the other state. This resulted in the court attempting to send claims for equitable distribution, child support and alimony to another state along with the custody matter because all of the claims had been filed in

the same action.

What does GS 50A-207 actually authorize a court to do?

A court with jurisdiction to make a child custody determination "may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances, and that a court of another state is a more appropriate forum." GS 50A-207. A court may consider declining jurisdiction pursuant to GS 50A-207 when requested by a party or on the court's own motion, or when requested by the court of another State. GS 50A-207(a).

If the court declines to exercise jurisdiction, GS 50A-207(c) states that the court "*shall stay the proceeding* upon the condition that a child-custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper." (italics added).

The Official Comment to GS 50A-207 explains:

"[T]he court may not simply dismiss the action. To do so would leave the case in limbo. Rather the court shall stay the case and direct the parties to file in the State that has been found to be the more convenient forum. The court is also authorized to impose any other conditions it considers appropriate. This might include the issuance of temporary custody orders during the time necessary to commence a proceeding in the designated State, dismissing the case if the custody proceeding is not commenced in the other State or resuming jurisdiction if a court of the other State refuses to take the case."

See also In the Matter of M.M., 230 NC App 225 (2013) (the "shall" in GS 50A-207 means the stay is the mandatory procedure when the court determines NC is an inconvenient forum; dismissal of the case is inappropriate).

When is North Carolina an inconvenient forum?

North Carolina is an inconvenient forum when the court rules that North Carolina is an inconvenient forum and determines that another State is a more appropriate forum. GS 50A-207(b) sets forth the factors the court is required to consider to make these determinations. That statute requires that the court consider "all relevant factors", specifically including the following:

(1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

(2) The length of time the child has resided outside this State;

(3) The distance between the court in this State and the court in the state that would assume

jurisdiction;

(4) The relative financial circumstances of the parties;

(5) Any agreement of the parties as to which state should assume jurisdiction;

(6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(8) The familiarity of the court of each state with the facts and issues in the pending litigation.

In order to support a determination that North Carolina is an inconvenient forum, the court must make sufficient findings of fact regarding these statutory factors. *In the Matter of M.M.*, 230 NC App 225 (2013). *See also* *Halili v. Ramnishta*, 848 S.E.2d 542 (September 1, 2020)(these statutory factors do not include the requirement that the trial court conclude litigation in another state would be in the best interest of the child).

While the court must have evidence upon which to base these findings of fact, the North Carolina Court of Appeals has held that the trial court can rely on evidence presented in the form of affidavits or verified motions to support the required findings of fact. Harter v. Eggeston, 847 S.E.2d 444 (Aug. 4, 2020).

The Official Comment to GS 50A-207 reminds us that when making this decision, the court "may communicate, in accordance with [GS 50A-110], with a court in another State and exchange information pertinent to the assumption of jurisdiction by either court."

Can a court determine NC is an inconvenient forum when there is no custody claim pending?

What if, after a custody trial is conducted in North Carolina and the court enters a custody order, one party files a motion asking that the court determine North Carolina is an inconvenient forum for any future custody issue that may arise, such as a motion to modify? Can a court determine North Carolina is an inconvenient forum outside of the context of a pending custody issue?

Our appellate courts have not answered this specific question, and GS 50A-207(a) states that the court may decline to exercise jurisdiction "at any time" it determines North Carolina is an inconvenient forum. *See also* *Halili v. Ramnishta*, 848 S.E.2d 542 (September 1, 2020)(the trial court can consider post-filing occurrences to determine that another state is a more convenient forum because the court can make this determination at any time during a pending custody action).

However, GS 50A-207 indicates that a decision about the most appropriate forum should be made only in the context of a pending request for a custody determination. The Official Comment to the statute states that the purpose of the statute is to authorize the court "to decide that another state is in a better position to make *the* custody determination*,* taking into consideration the relative circumstances of the parties." It seems obvious the drafters mean the circumstances of the parties at the time the custody determination is to be made. Similarly, several of the factors the court must consider specifically reference a pending issue; for example, (6) "the nature and location of evidence needed to resolve *the pending issue*," (7) the ability of the court of each state to *decide the issue* expeditiously," and "the familiarity if the court of each state with the facts and issues in the *pending litigation*."

Anyone familiar with custody litigation knows that it is impossible to anticipate what the circumstances of the parties will be by the time they need to return to court. The decision about the appropriate forum for litigation needs to made based upon consideration of the facts at the time the court is being asked to act.