

Child Custody

AN OVERVIEW OF CHILD CUSTODY ISSUES AND
PROCEDURES AS THEY RELATE TO CASES INVOLVING
DOMESTIC VIOLENCE.

Presented by Katherine Fisher, Esq.
Material Contributions by Adam Vorhis, Esq.

The Van Winkle Law Firm
11 N. Market Street
Asheville, NC 28801
828-258-2991

Introduction



- ▶ Katherine Fisher focuses her practice currently on family law, divorce, and the trial of matters concerning marital/ matrimonial issues. Prior to joining The Van Winkle Law Firm, Katie was a partner at the firm of Moorefield & Fisher, P.A., and long, long ago, was a part of the domestic violence team at Western North Carolina's highly regarded private legal-aid firm, Pisgah Legal Services.
- ▶ Adam Vorhis is a new family law attorney with the Van Winkle Law Firm. He has been licensed in Florida since 2004 and he is Board Certified in Martial and Family Law in Florida since 2015. He was admitted to the North Carolina Bar in 2017.



50A vs. 50B Actions

What is 50A and 50B?

In short, Chapter 50A is applied to all custody actions in the State to determine if the court has jurisdiction over the parties to and subject matter of a child custody matter. Chapter 50B deals specifically with the issue of domestic violence, in which child custody may be a factor.

Chapter 50A- Uniform Child-Custody Jurisdiction and Enforcement Act

- Known among practitioners as the UCCJEA
- Uniform Act drafted by the National Conference of Commissioners on Uniform State Laws in 1997
- adopted by *nearly* all states, the District of Columbia and the U.S. Virgin Islands
- Primary purpose of the UCCJEA is to provide a uniform framework for the jurisdiction of child custody determinations across various states.

Trivia!

What State or Territory has not adopted the UCCJEA?

- A. Utah
- B. Florida
- C. Texas
- D. Guam
- E. Massachusetts
- F. Puerto Rico



Trivia!

What State or Territory has not adopted the UCCJEA?

- A. Utah
- B. Florida
- C. Texas
- D. Guam
- E. Massachusetts
- F. Puerto Rico



UCCJEA Considerations in DV Actions



- if custody of a child is at issue in a DV action, the UCCJEA will determine if the Court has jurisdiction over the child.
- note that jurisdiction cannot be waived or stipulated. Orders without jurisdiction will always be subject to collateral attack.

UCCJEA- No Prior Orders Re: Custody

The UCCJEA can become very complicated, but here are the basics:

If no prior orders regarding custody have been entered, the court can make an initial custody determination if North Carolina is the “Home State” of the child, meaning the child has lived in the state for the 6 months prior to the filing of the action, or if the court of the home state declines to exercise jurisdiction. See Sec. 50A-201, N.C. Statutes (2017).

Judicial Conference Ensues

"No really, you should take the block. I don't need it. Really, it's yours."

Whatever you do, don't take the block.



your  cards
someecards.com

UCCJEA- Out Of State Custody Order



In general, a NC court can't modify a custody order entered by another state. HOWEVER, If there is an existing order from another state, a NC court can modify that order and enter a new custody order if: "... the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse."

See Secs. 50A-203 and 204, N.C. Statutes (2017).

Time Limited Custody Orders

So you got your custody order in NC under 50A-204 (Emergency Jurisdiction), what about the home state? What now?



- Time is limited.

- Order must specify a time which the court considers “adequate” to obtain an order from the appropriate out of state court. The order expires at the time set or when a new order from the out of state court is obtained.

Ex-Parte Custody Orders in 50B Actions

Custody Orders Prior to a Hearing

-to enter an order for custody prior to a hearing on the allegations of a DV petition, the court must find “the child is exposed to a substantial risk of physical or emotional injury or sexual abuse.”

Sec. 50B-2(C)(2), N.C. Statutes (2017).

If the court makes the above findings, it can:

Ex-Parte Custody Orders in 50B Actions

1. Order the Defendant to stay away from a minor child,
2. return a minor child to, or not remove a minor child from, the physical care of a parent or person in loco parentis,

But, the court must also find the “order is in the best interest of the minor child and is necessary for the safety of the minor child.”

-in addition to the above, the court may also “include a specific schedule of time and location of exchange of the minor child, supervision by a third party or supervised visitation center, and any other conditions that will ensure both the well-being of the minor child and the aggrieved party”

Custody Orders in 50B Actions After Hearing

Custody after a hearing:

- court must find that an act of domestic violence occurred (50B-3)

- Can award custody pursuant to 50B-3(a1).

- States the court “may award *temporary* custody of minor children and establish *temporary* visitation rights as follows...”

“the court shall base its decision on the best interest of the minor child with particular consideration given to the safety of the minor child.”



Enumerated Custody Factors

50B-3(a1) is one of the few places in NC law where the Court has a specific list of factors which it must consider when determining the best interest of the minor child.

The Court, after finding an act of domestic violence, “Shall Consider...”



Mandatory Factors:

- a. Whether the minor child was exposed to a substantial risk of physical or emotional injury or sexual abuse.
- b. Whether the minor child was present during acts of domestic violence.
- c. Whether a weapon was used or threatened to be used during any act of domestic violence.
- d. Whether a party caused or attempted to cause serious bodily injury to the aggrieved party or the minor child.
- e. Whether a party placed the aggrieved party or the minor child in reasonable fear of imminent serious bodily injury.
- f. Whether a party caused an aggrieved party to engage involuntarily in sexual relations by force, threat, or duress.
- g. Whether there is a pattern of abuse against an aggrieved party or the minor child.
- h. Whether a party has abused or endangered the minor child during visitation.
- i. Whether a party has used visitation as an opportunity to abuse or harass the aggrieved party.
- j. Whether a party has improperly concealed or detained the minor child.
- k. Whether a party has otherwise acted in a manner that is not in the best interest of the minor child

50B Custody Orders- Temporary

Orders Under 50B are *Temporary*

“A temporary custody order entered pursuant to this Chapter shall be without prejudice and shall be for a fixed period of time not to exceed one year.

Nothing in this section shall be construed to affect the right of the parties to a de novo hearing under Chapter 50 of the General Statutes. Any subsequent custody order entered under Chapter 50 of the General Statutes supersedes a temporary order issued pursuant to this Chapter”

But then there's Doyle

See, Doyle v. Doyle, 176 N.C. App. 547 (2006).

The custody order pursuant to Chapter 50B is temporary, entered without Prejudice and does not preclude a de novo hearing under Chapter 50...

BUT

“Collateral estoppel binds the parties & Precludes the trial court from making Contrary findings of fact regarding [prior] acts of domestic violence...”



Temporary Order- What now?

So you have your temporary custody order. What now?



Transferring to Family Court & Family Court Procedures

If an action for custody is filed while the DV case is pending, local rules allow the cases to be consolidated:

“When Family Court staff become aware of multiple Family Court cases pending that involve the same parties and the same or similar issues, the Family Court Administrator or Case Coordinator, in conjunction with the assigned Family Court Judge, shall determine whether to consolidate any or all of these cases, and shall inform the parties and counsel of the determination and of any resulting Court date changes by written notice.”

Rule 4.5 of the Local Family Court Domestic Rules.

Filing a Custody Action pursuant to Chapter 50A - The Basics

Filing a Custody action

- Must file a complaint with the clerk
- Must have AOC Cover Sheet (Form AOC-CV-750)
- Must include UCCJEA information, which as to be verified or in an affidavit (Form AOC-CV-609 is suggested).
- Must file Local Forms 1 and 12 (dealing with scheduling)
- Custody cases will be governed by Rule 8 of the Local Family Court Domestic Rules.

Emergency Temporary Custody



Emergency Temporary Custody

- an emergency action can be filed, even if the Plaintiff is not a victim of domestic violence;
- must be written and verified pleading, which sets forth sufficient facts (remember 50A-204);
- can include affidavits of third parties;
- assigned to the judge on rotation, or, if none, it can be heard by any available district judge.

Rule 8C.2, Local Family Law Rules.

Ex -Parte Orders For Custody

- order can be entered ex-parte only if:

- the child is exposed to a substantial risk of bodily injury or sexual abuse;or

- there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts; or

- as otherwise allowable by law

If an ex-parte order is obtained, a hearing shall be set within 10 days.

Hearings on Custody- Notice

For custody hearings:

- must give actual and reasonable notice, unless:
 - notice of the application for such order is likely to result in the very harm sought to be prevented if the respondent is given prior notice of complainant's efforts to obtain judicial relief; or
 - all reasonable means calculated to give the notice required were used but were unsuccessful.

State Statutes on Custody - Standing

Section 50-13.1

-Any person or entity claiming the right to custody of the minor child can file a petition.



Custody- Mediation Required

- Any contested custody issue must be set for mediation unless waived by the court. Court may waive for the following reasons:
 - a showing of undue hardship to a party;
 - an agreement between the parties for voluntary mediation, subject to court approval;
 - allegations of abuse or neglect of the minor child;
 - allegations of alcoholism, drug abuse, or domestic violence between the parents in common; or
 - allegations of severe psychological, psychiatric, or emotional problems
- a showing by either party that a party resides more than 50 miles from the court

Best Interest of the Child

What does it
mean?



Best Interest of the Child

“The welfare of the child is the paramount consideration in custody matters.”

See Nearly Every Case, Ever, 123 N.C. 456 (1966 to now).



Trivia!

Under the prior common law, custody was generally granted to the _____.

- A. The Mother
- B. The Father
- C. Both Parents, Jointly
- D. The Most “Fit” Parent
- E. The Wealthier Party



Trivia!

Under the prior common law, custody was generally granted to the _____.

- A. The Mother
- B. The Father
- C. Both Parents, Jointly
- D. The Most “Fit” Parent
- E. The Wealthier Party

See Brooks v. Brooks, 12 N.C. App. 626 (1971).



Best Interest

Section 50-13.2, N.C. Statutes (2017) States:

An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child.

Best Interests

Section 50-13.2, N.C. Statutes (2017) (continued)

In making the determination, the court shall consider all relevant factors including:

- acts of domestic violence between the parties,
- the safety of the child, and
- the safety of either party from domestic violence by the other party.

An order for custody must include written findings of fact that reflect the consideration of each of these factors and that support the determination of what is in the best interest of the child...

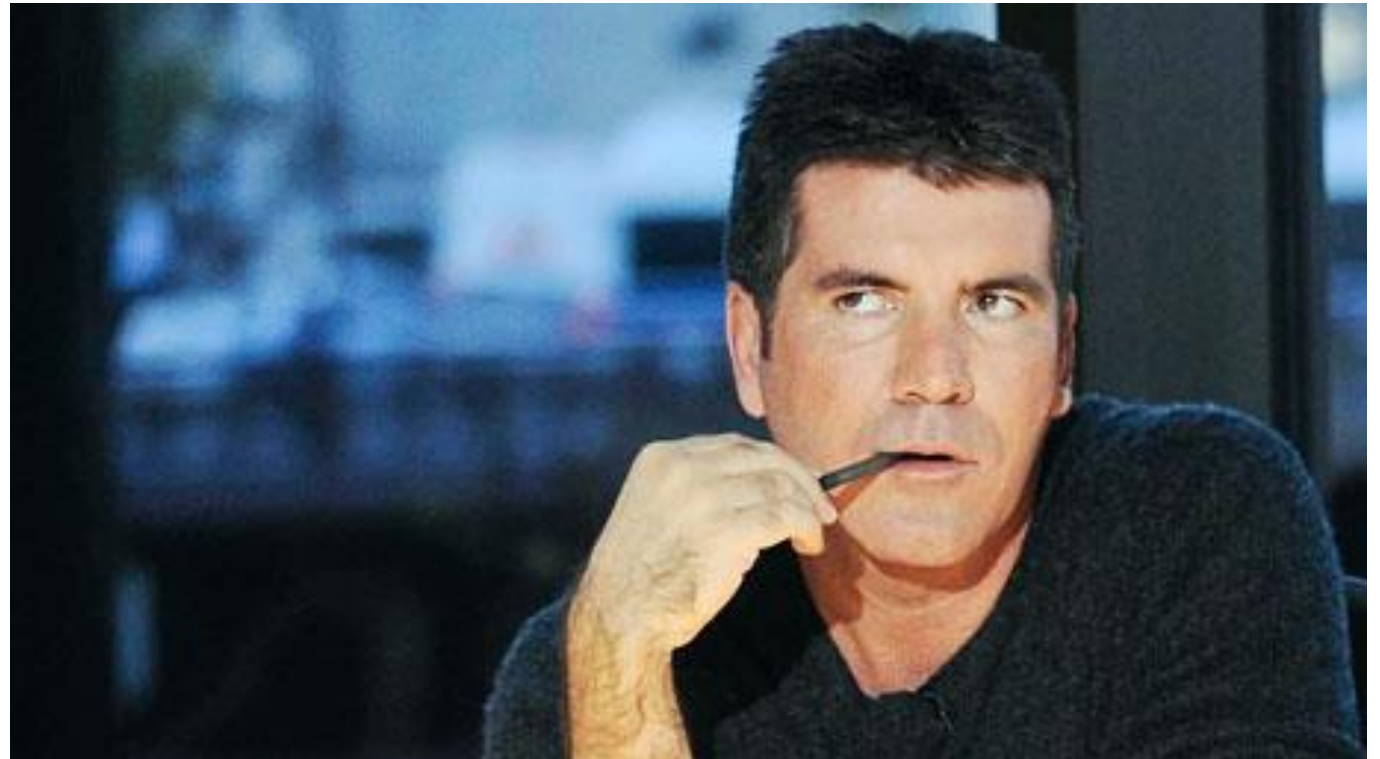
Best Interests - Visitation

Section 50-13.2, N.C. Statutes (2017) (continued)

...Any order for custody shall include such terms, including visitation, as will best promote the interest and welfare of the child. If the court finds that domestic violence has occurred, the court shall enter such orders that best protect the children and party who were the victims of domestic violence, in accordance with the provisions of G.S. 50B-3(a1)(1), (2), and (3).

Judicial Discretion

In custody matters,
judges have a huge
amount of discretion.



Judicial Discretion



"While this guiding principle [best interest] is clear, decision in particular cases is often difficult and necessarily a wide discretion is vested in the trial judge. He has the opportunity to see the parties in person and to hear the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion." Greer v. Greer, 167 S.E.2d 782, 783 (1969).

DSS Involvement & Subpoenaing DSS Records



“We’re from the government, and we’re here to help!” - unnamed DSS attorney, prior to severe loss of sense of humor.

What can you obtain or ascertain without the subpoena?

- ▶ Records, correspondence, notes, forms in your clients possession or in possession of the opposing party (discovery, subpoena).
- ▶ Recollections of your client and collaterals, or of the opposing party (deposition).
- ▶ Social worker, case manager...but be prepared for
 - ▶ Plusses and minuses of a helpful informant.
 - ▶ Information is great.
 - ▶ Gossip and perpetuation of bias is not great.
- ▶ THE COURT WILL WANT TO CONSIDER ANY AND ALL INFORMATION RELEVANT TO THE DETERMINATION OF THE BEST INTERESTS OF THE CHILD.



Issuing the Subpoena to DSS

ASSUMING DSS HAS INFORMATION RELEVANT TO THE BEST INTERESTS OF THE CHILD,

- ▶ Can issue subpoena pursuant to Civil Procedure Rule 45 for the production of records and/or the appearance of the caseworker(s).
- ▶ CALL DSS ATTORNEY AND LET THEM KNOW IT'S COMING.
- ▶ Per _____, case records concerning a minor child are confidential and protected, and the Department WILL produce a written objection, motion to quash or motion to modify the subpoena.
- ▶ Common local practice: Family Court judges will typically allow for the production of records so long as the records remain under seal, only to be reviewed by the attorneys and then by the judge if introduced as relevant evidence.

Caseworker Testimony

- ▶ The caseworker(s) can be directed to appear and testify, but may require the judge to order them to answer the attorney's questions.
 - ▶ Confidential, but relevant.
- ▶ Things to consider before trusting the human witness:
 - ▶ Experience in position?
 - ▶ Familiarity with and adherence to protocol?
 - ▶ Pattern of bias over a number of years and cases?
 - ▶ ANY social or familial relationship to the case before the court?



So that's
pretty
much it...

Contact Information

► **Katherine Fisher**

kfisher@vwlawfirm.com

828/258-2991

► **Adam Vorhis**

avorhis@vwlawfirm.com

828/258-2991

► **HELPMATE**

helpmateonline.org

828/254-2968 (non-emergency)

► **Trish Colley** (50B Court Admin)

patricia.h.colley@nccourts.org

► **Anne Elliott** (Family Court Admin)

anne.h.elliott@nccourts.org