

STATE OF NORTH CAROLINA
COUNTY OF WAKE

FILED

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IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
08 CVD 22018

WAKE COUNTY, C.S.C.

LINDA L. FISHER &
MEREDITH LYNN FISHER,
Plaintiffs,

v.

JASON LYNN YOUNG,
Defendant.

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**MOTION TO DISMISS OR REMOVE
FOR IMPROPER VENUE**

NOW COMES Defendant, Jason Lynn Young, by and through his undersigned counsel, pursuant to N.C. Gen. Stat. §§ 1-83(2) and 50-13.5(f) and Rule 12(b)(3) of the North Carolina Rules of Civil Procedure, and hereby respectfully moves this Honorable Court to dismiss Plaintiffs' Child Custody Complaint and Motion for Psychological Evaluation of Defendant for improper venue or in the alternative change the venue of this action from Wake County, North Carolina to Transylvania County, North Carolina. In support of this Motion, Defendant shows unto the Court the following:

1. On December 17, 2008, Plaintiffs filed their Child Custody Complaint to commence this action.
2. Defendant's minor child, Cassidy Elizabeth Young, born March 29, 2004, is the subject child of Plaintiffs' claim for custody.
3. Plaintiff Linda L. Fisher is not the minor child's parent. Plaintiff Linda L. Fisher is a resident of New York.
4. Plaintiff Meredith Fisher is not the minor child's parent. Plaintiff Meredith Fisher is a resident of Wake County, North Carolina.
5. The minor child resides in Transylvania County, North Carolina with Defendant. The minor child has resided in Transylvania County since December of 2007. From November 3, 2006 until December of 2007, the minor child resided with Defendant in Henderson County, approximately twenty miles from Transylvania County. The minor child has not resided in Wake County, North Carolina since November 3, 2006.
6. "Venue is regulated by statute, not by the common law." 1 G. Gray Wilson, NORTH CAROLINA CIVIL PROCEDURE § 12-6 (3d ed. 2007).

7. N.C. Gen. Stat. § 1-83(1) provides that the court may change the place of trial “when the county designated for that purpose is not the proper one.” “While the statute states that the court ‘may’ change venue, this has been held to be mandatory under subsection (1)...Where removal is proper as a matter of right, the court is without discretion and must transfer the cause.” 1 G. Gray Wilson, NORTH CAROLINA CIVIL PROCEDURE § 12-6 (3d ed. 2007).

8. N.C. Gen. Stat. § 50-13.5 provides the following, in pertinent part:

(f) Venue. -- An action or proceeding in the courts of this State for custody and support of a minor child may be maintained in the county where the child resides or is physically present or in a county where a parent resides, except as hereinafter provided.

9. The statutes are clear. Wake County, North Carolina is not a proper venue for this action. The only counties where a child custody action may be maintained in North Carolina are the counties where the minor child resides, where the minor child is physically present or where a parent of the minor child resides.

10. Venue is proper in Transylvania County, North Carolina, where the minor child and her father, Defendant, reside. A change of venue is mandatory in this case.

11. Additionally, N.C. Gen. Stat. § 1-83 provides the following, in pertinent part:

The court may change the place of trial in the following cases:

...

(2) When the convenience of the witnesses and the ends of justice would be promoted by the change.

12. Venue change pursuant to § 1-83(2) is within the court’s discretion.

13. Defendant and the minor child have not resided in Wake County in approximately 25 months.

14. Witnesses with firsthand knowledge of the minor child’s care and well-being are located in Transylvania and Henderson Counties, including Defendant’s mother, stepfather, sister, brother-in-law, the child’s psychologist, dance instructor, preschool teachers, Sunday school teachers, church members, other family members, and friends.

15. In the interest of justice and for the convenience of Defendant and the witnesses who may testify in this case and for the welfare of the minor child venue should be changed from Wake County, North Carolina to Transylvania County, North Carolina if the Court denies Defendant’s Motion to Dismiss for Improper Venue.

16. "In determining the correct venue for a given case, the court is limited to the allegations in the complaint..." 1 G. Gray Wilson, NORTH CAROLINA CIVIL PROCEDURE § 12-6 (3d ed. 2007).

17. The location of the parties is not at issue.

WHEREFORE, Defendant prays the Court as follows:

1. That the Court dismiss Plaintiffs' Child Custody Complaint and Motion for Psychological Evaluation;

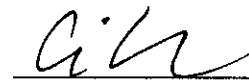
2. In the alternative, that the Court change venue of this action from Wake County, North Carolina to Transylvania County, North Carolina; and

3. That the Court grant Defendant such other and further relief as may be just and proper.

This the 14th day of January, 2009.

THARRINGTON SMITH, LLP

By:



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CERTIFICATE OF SERVICE

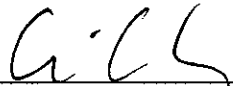
This is to certify that a copy of the foregoing Motion to Dismiss or Remove for Improper Venue was duly served this date on Plaintiffs by forwarding a copy thereof enclosed in a postage-paid envelope, deposited in the United States Mail, addressed to Plaintiffs' attorneys of record as follows:

Mr. Michael F. Schilawski
Ms. Katie H. King
Wake Family Law Group
4350 Lassiter at North Hills Avenue, STE 360
Raleigh, North Carolina 27609

This the 14th day of January, 2009.

THARRINGTON SMITH, LLP

By: _____


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