

5. I am respectfully requesting that this court's temporary order granting Petitioner custody without a hearing be immediately vacated and that I be allowed to return to Georgia with [Name deleted for privacy]. The Appellate Division Fourth Department has repeatedly held that awarding temporary custody without conducting an evidentiary hearing constitutes reversible error. *See, Femia v. Femia*, 23A.D.3d 1073(4th Dept. 2005); *Van Etten v. Van Etten*, 207A.D.2d 92(4th Dept. 1994). For the court's convenience, copies of these cases are annexed hereto collectively as Exhibit B.

SPECIFIC RESPONSES TO THE MODIFICATION PETITION

6. As set forth more particularly in Paragraph 6 of Petitioner's modification petition, he claims a change in circumstances has occurred based upon the occurrence of four events:

1. My move to Georgia;
2. His claim that I was "kicked out" of my residence;
3. That [Name deleted for privacy] is now suicidal;
4. That [Name deleted for privacy] has not been schooled during this situation.

7. For the reasons set forth below, each of Petitioner's claims are wholly without merit. Consequently, the petition should be dismissed, this court's temporary order be vacated, and I be allowed to return to Georgia with [Name deleted for privacy].

8. As set forth in Paragraph 3 above, I did in fact notify Petitioner that [Name deleted for privacy] would be moving from Texas to Georgia prior to our departure. Given that all the visitation has taken place in New York, and that up until this year, I have been exclusively responsible for paying the costs associated with [Name deleted for privacy] traveling to New York, the move to Georgia is of little consequence to Petitioner.

9. [Name deleted for privacy] and I were never "kicked out" of our residence. My husband of seven years and I were experiencing marital difficulties and had an argument on December 2, 2005. At that time, we mutually agreed that a "cooling off" period would be mutually beneficial for the two of us. After contacting a friend, Benjamin Holland, I made arrangements to stay with him that evening. Since [Name deleted for privacy] was playing with a neighbor, my husband and I agreed that [Name deleted for privacy] would stay with him that night. As part of our decision to temporarily live apart, my husband and I specifically agreed that [Name deleted for privacy] would spend approximately equal time with each of us. We did in fact follow that procedure from 12/3/2005 until 12/18/2005 when [Name deleted for privacy] came to visit Petitioner for Christmas break.

10. When [Name deleted for privacy] was staying with me at Mr. Holland's address, he slept in a spare bedroom and I slept on the couch. At all times, [Name deleted for privacy] had more than enough food and clothes for a growing 10-year-old boy. When it was necessary, I frequently returned to the marital residence in order to procure personal items for [Name deleted for privacy], including clothes, toiletries, books, and games.

11. I am submitting in conjunction with this affidavit the affidavits of Steven Bevilacqua and Benjamin Holland, which confirm this factual situation, copies of which are annexed hereto as Exhibit C and Exhibit D respectively.

12. At no time prior to 12/18/2005 had [Name deleted for privacy] neither exhibited any signs, nor did he state to me that he was suicidal or even unhappy with the current living situation. In fact, my husband and I went to great lengths in order to insulate [Name deleted for privacy] as much as humanly possible from the disagreements we were having. I constantly emphasized with him that the separation was not due to [Name deleted for privacy]'s actions and that Steven and I were committed to staying together.

13. Since [Name deleted for privacy] was five years old, he has been homeschooled by me except for a three-month period when he was six years old when he attended public school. Petitioner has always been aware that [Name deleted for privacy] was being homeschooled rather than attending a traditional school. For the court's information, I graduated summa cum laude with a BA in Literary Arts from the University of Texas at Dallas. While I was temporarily residing with Mr. Holland, I continued our historical homeschooling regime on a consistent basis. Once again, Petitioner's claims that [Name deleted for privacy] was not being schooled are wholly without merit.

14. In his petition, Petitioner also claims that I have a "history" of kidnapping [Name deleted for privacy]. However, nothing could be further from the truth. In 1997 (not 1999 as Petitioner alleges), I left New York State with [Name deleted for privacy]. However, Petitioner and I had previously agreed that I could leave with [Name deleted for privacy]. Unfortunately, given the short return date of this application, I have not had an opportunity to review those files at this time.

15. Similarly, Petitioner's claims that he lacks a way of "tracking me down," are also baseless. He has been in possession of my cell phone number since July 2004 when I relocated to Georgia. Copies of some of the cell phone records that I could obtain on short notice are annexed hereto as Exhibit E.

16. For all these reasons, the modification petition must be dismissed and I should be allowed to return to Georgia with [Name deleted for privacy].

**IN THE ALTERNATIVE THIS COURT SHOULD DECLINE TO EXERCISE
JURISDICTION AND ALLOW THIS MATTER TO PROCEED IN THE STATE OF
GEORGIA**

17. Domestic Relations Law section 76-a(1)(a) this court has exclusive, continuing jurisdiction over this case until it:

"determines that neither the child, the child and one parent, nor the child and a person acting as a parent have a significant connection with the state and that substantial evidence is no longer available in

this state concerning the child's care, protection, training, and personal relationships.”

In this case, [Name deleted for privacy] and I have resided outside of New York since 1997. [Name deleted for privacy]'s only other contact with New York since that time has centered around his visitation with Petitioner. All evidence relating to [Name deleted for privacy]'s medical history, educational history, and social life in general are all found outside of New York. This would include, for example, all evidence relating to the issues set forth in the modification petition. In summary, [Name deleted for privacy] has been completely absent from New York except during the period where he is exercising visitation with his father. I respectfully submit this court should decline to exercise jurisdiction because [Name deleted for privacy]'s contact with New York has become so attenuated and because he lacks a significant connection to this state. Finally, all the evidence relating to the modification petition is located outside of New York State. *See, King v. King*, 15A.D. 3d 999 (4th Dept. 2005). A copy of this case is annexed hereto as Exhibit F.

18. The court should also decline to exercise jurisdiction because New York is an inconvenient forum pursuant to Domestic Relations Law §76-f. That statute states:

“2. Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

- (a) whether domestic violence or mistreatment or abuse of a child or sibling has occurred and is likely to continue in the future and which state could best protect the parties and the child;
- (b) the length of time the child has resided outside this state;
- (c) the distance between the court in this state and the court in the state that would assume jurisdiction;
- (d) the relative financial circumstances of the parties;
- (e) any agreement of the parties as to which state should assume jurisdiction;
- (f) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

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

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

19. With respect to the enumerated factors set forth above, the court should consider the following:

A. As set forth above I vehemently deny Plaintiff’s claims that I have mistreated [Name deleted for privacy]. However, assuming this court finds any of those claims have merit, all evidence relating to my temporary departure from my residence are found in Georgia/Alabama. In addition, the Law Guardian can confirm that it is unlikely that such conduct will ever occur.

B. [Name deleted for privacy] has resided outside of New York State since 1997. To put it another way, [Name deleted for privacy] was just two years old when he left. He is now firmly established in the State of Georgia and his only contact with New York surrounds his visitation with his father. All evidence concerning the incidents set forth in the modification petition are found in the state of Georgia.

C. The approximate distance between Albion and Columbus, Georgia is 1,100 miles.

D. I am unaware of Petitioner’s financial circumstances. I am a self-employed transcriptionist. Last year I earned approximately \$23,000. It costs me approximately \$500 in airfare to make the January 17 court appearance. Luckily, I still have family in the area and I am able to avoid incurring hotel charges.

E. At the time Petitioner allowed me to relocate, we did agree that this court would continue to exercise jurisdiction with respect to any subsequent proceeding. I now submit that provision should be eliminated given the length of time which has elapsed since that agreement was reached coupled with the almost total lack of evidence as to our son’s care, protection, training, and personal relationships in the State of New York.

F. As set forth above, the evidence required to resolve this case is found almost exclusively in Georgia/Alabama. I would not anticipate that [Name deleted for privacy] would be required to testify at trial. However, a Law Guardian or the Georgia equivalent of same could obviously express [Name deleted for privacy]’s interests.

G. I am unable to state how expeditiously, either New York or Georgia could resolve this case. Likewise, I am not familiar with the procedures necessary to present evidence in the state of Georgia.

H. Although Petitioner and I have appeared before this court in the past, we have not done so for more than six years. I respectfully submit both courts are on equal footing with

respect to the issues as set forth in this petition. Specifically, both this court and Georgia are equally unfamiliar with the facts that gave rise to the petition.

I. Based upon these factors, I respectfully request this court to determine that it is an inconvenient forum and that it is more appropriate for this case to be adjudicated in the state of Georgia. Consequently, this proceeding should be stayed pending Petitioner's commencement of an analogous proceeding in the state of Georgia pursuant to Domestic Relations Law §76-f(3). Simultaneously, the court should vacate its order of sole custody for the reasons set forth above.

IN THE ALTERNATIVE THE TEMPORARY ORDER SHOULD BE MODIFIED SO THAT CUSTODY IS AGAIN AWARDED TO ME AND I WILL REMAIN IN NEW YORK PENDING THE ULTIMATE OUTCOME OF THIS CASE

20. In the alternative, if the court is unwilling to dismiss the petition outright at this time, then I am requesting that the temporary order be modified so that [Name deleted for privacy]'s residency is once again returned to me and that I will remain with him in the State of New York pending the final adjudication of this case. Alternatively, while I am in New York I am requesting that I be entitled to visitation with [Name deleted for privacy] for such periods as directed by the court.

21. I am extremely concerned with Petitioner's ability to care for [Name deleted for privacy] on a long-term basis. Currently, he resides in a trailer with his girlfriend, "Randiah" (sp). Other than having [Name deleted for privacy] during vacation periods, Petitioner has never been responsible for [Name deleted for privacy]'s day to day activities.

22. [Name deleted for privacy] has a prescription for some allergy medicine, which he takes on an as-needed basis. During this Christmas 2005 visitation, [Name deleted for privacy] informed me that when he was experiencing difficulties with his allergies, Petitioner's girlfriend suggested that he use her asthma inhaler rather than using his prescribed medicine. Apparently, Petitioner had no objection to this procedure.

PETITIONER NEEDS TO SIGN HIPAA-COMPLIANT RELEASES

23. Petitioner has historically been diagnosed clinically depressed since he was approximately age 16. Until recently, he has received Social Security Disability benefits as a result of this medical condition. As set forth more specifically in the first "ORDERED" paragraph on page 4 of the May 30, 2000 order, he was required to "participate in or follow any and all treatment recommendations made by his attending physician." On numerous occasions, Petitioner has exhibited erratic, confrontational, and abusive behavior directed towards me on the phone. I have never received any information confirming whether and to what extent Petitioner has been compliant in following through with his treatment recommendations, nor have I been informed what medication, if any, Petitioner has been taking. Under the circumstances, if this case is allowed to proceed, I am respectfully requesting this court to direct Petitioner to sign HIPAA-compliant releases allowing me access to his medical and psychological records.

WHEREFORE, I respectfully request the court to grant the relief requested in the annexed notice of motion.

Rachel Bevilacqua

Sworn to before me
On __ January 2006

Notary Public