Family Matters e-Newsletter

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News For August/September 2017

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All About Adultery in North Carolina (Part 1 of 2)

By Amy A. Edwards

Merriam Webster defines adulterate as a verb, an act "to corrupt, debase, or make impure by the addition of a foreign or inferior substance or element." North Carolina alimony laws don't call it adultery. Instead, adultery as used in alimony cases is a form of marital misconduct called "illicit sexual behavior." The definition is "acts of sexual or deviate sexual intercourse, deviate sexual acts, or sexual acts defined in NC Gen. Stat. §14-27.20(4), voluntarily engaged in by a spouse with someone other than the other spouse." NC Gen. Stat. §50-16.3A.

People have argued about which acts between the spouse and third party meet the definition of illicit sexual behavior. In 2011, a wife unsuccessfully argued that her behavior didn't meet the standard of illicit sexual behavior because the man she had been with wasn't able to complete the act they had started but were unable to finish. *Romulus v. Romulus* (2011). The Romulus case gives an exhaustive list of definitions (starting on page 47) of various acts.

Adultery and Alimony

In North Carolina, divorce is a "no fault" process based on a full year of separation between a husband and wife. However, we strongly cling to fault in our alimony laws. For many reasons, alimony can be awarded based only on

finances, meaning incomes and reasonable living expenses. But if the supporting spouse commits adultery, he or she automatically has to pay alimony. The reverse is also true. The dependent spouse automatically loses alimony if he or she cheats. Other types of marital fault are only factors the judge must consider, and they don't demand a particular result as adultery does. If both spouses have cheated, the judge then denies or awards alimony in his or her discretion "after consideration of all of the circumstances." NC Gen. Stat. §50-16.3A.

How Do You Prove Adultery?

Adultery is almost always a circumstantial case. After all, most spouses aren't advertising their infidelity. It is rarely proven by direct evidence. Therefore, our law resorts to a standard called the "inclination and opportunity doctrine." *Owens v. Owens*, 28 NC App 713 (1976). This means the spouse alleging adultery must prove two things. First, was there an opportunity for the spouse and third party to be together in privacy? Second, if they had the opportunity to be together, were they inclined (likely) to have sex?

Like any other disputed fact, witnesses may testify about the opportunity, and/or whether the spouse and third party were inclined to cheat. Other evidence might include a secret credit card account statement reflecting hotel charges or discovered e-mails/texts between the lovers. Family law cases are bench trials, cases heard by a judge. One of the few exceptions to that rule is marital misconduct, including illicit sexual behavior. A jury can render a verdict on whether the spouse committed marital misconduct. NC Gen. Stat. §50-16.3A.

Uh Oh . . . Did You Condone It?

One defense to alimony is condonation. As the name suggests, it means all is forgiven . . . and it gives a bit of a clean slate to the cheating spouse. If the innocent spouse discovers an affair and continues to stay in the marriage, the law gives the cheating spouse a second chance. After the second chance is given, if the parties separate for some other reason later, the court can consider the affair in deciding how long alimony should be paid and in what amount. In other words, someone doesn't automatically win or lose an alimony case because of the affair.

How does the law define "staying in the marriage" and condoning the cheater? In short, the court assumes condonation has occurred if the spouses voluntarily have intercourse after knowing about the affair. *Malloy v. Malloy*, 33 NC App. 56 (1977). One side effect of condonation is that the spouse who would've automatically won the alimony case is essentially punished for trying to make the marriage work.

Amy A. Edwards is a family law attorney in Greenville, NC, certified by the NC State Bar Board of Legal Specialization as a Family Law Specialist, and is licensed only in NC. Laws change. This article is current as of September 2017. www.AmyEdwardsFamilyLaw.com

Order in the Court: The Nuts and Bolts of Court Orders

By Amy A. Edwards

In the world of family law, orders define rights as between spouses and former spouses, as well as between parents of children. Each state has a unique definition of a court order. This article applies only to family law cases in North Carolina.

How Do We Get Court Orders?

The first step in obtaining a court order is filing a lawsuit, which gives the court jurisdiction and the authority to sign a court order. Temporary orders are based on a short trial of only a few hours, on a date shortly after the case is filed. These hearings can be rushed and chaotic but they're only meant to give parties some structure until

the full trial takes place. Full trials give them the opportunity for the judge to hear testimony of the parties and their witnesses, and offer more thorough exhibits.

What Are the Mechanics?

After a trial, judges sometimes write their own orders. This is more likely to happen with temporary orders, such as temporary child custody. Other times, judges assign the task of writing an order to one of the attorneys. After a judge signs a written order and the clerk of court files it, it is an official order. Filing means the signed order goes to the clerk of court's office where the clerk stamps it. The special stamp shows the date and time that the order was placed in the court file, which includes all the paperwork filed in the case.

What's Included in a NC Court Order?

The first part of the order is called *Findings of Fact*, where the judge makes a legal ruling on the disputed or contested facts, such as whether a spouse committed adultery. Next, orders typically have *Conclusions of Law*. This is the "legaleze" part of the order, where the judge says (*i.e.*, concludes) what the law requires based on those particular facts. The actual Order is the part most people think of when they think of an order. For example, it awards custody and includes visitation schedule, sets an amount of child support or alimony, or says who keeps marital property.

Consent Orders

When a lawsuit has been filed and the parties decide to settle their case without a trial, the judge will sign what is called a *Consent Order*. That means the parties give the judge their consent to sign and enter the order. The reality of court can cause people to reconsider settling their cases just before a trial starts. Referred to as settling at the courthouse steps, it isn't unusual for the consent order to be hand written with pen and paper right then and there. The handwritten order is called a *Memorandum of Order*. It can be typed and improved upon after the hand-written order is entered,

but the handwritten order is immediately valid and enforceable once it is sign by the parties and the judge.

If the parties aren't settling at the courthouse steps, the judge might schedule a date for the parties to appear in court for 5 or 10 minutes to officially give him or her permission to sign the order without a trial. These orders are typed and finalized when signed.

Either way, the judges might ask the parties if they've read the order, if they understand what it requires each party to do, if they have discussed it with their attorneys, and if they are entering this order of their own free will. Another question judges ask is whether each party understands that the order is enforceable by the contempt powers of the court (as all orders are) which can include incarceration. After a few brief questions, the judge reviews and signs the order, and each party walks away with a copy of the official order.

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Holographic Will (a.k.a "Do It Yourself") Myths

By Jennifer J. Bell*

A holographic, or handwritten, will is a will written mostly or entirely in your own handwriting. Holographic wills do not require an attorney. Essentially they are free. Holographic wills seem like the way to go. They save you money, save you from hiring an attorney, and you can do it on your own time at your own dime. However, there are many myths that follow these types of wills.

Myth #1. Drafting my own Will is an inexpensive and easy way to ensure my wishes are carried out.

FALSE: Holographic wills always require approval from the state probate court.

FALSE: You may avoid estate planning legal fees during your lifetime but your heirs will incur high costs when they must hire an attorney to proceed with admitting the Will through probate court.

Myth#2. Holographic wills are always valid and enforceable.

FALSE: Holographic wills must be admitted into probate by the probate court, approval is always required.

Myth #3. If I change my mind I can just rewrite one.

FALSE: Holographic wills must be totally destroyed before they will not be viewed as potentially valid. Therefore if you have 2 or more holographic wills that differ when it comes to terms, your relatives could end up fighting over what your actual intentions were and you risk your desires being muted.

Myth #4. I can fill out a form online and keep it in my dresser for when my time comes.

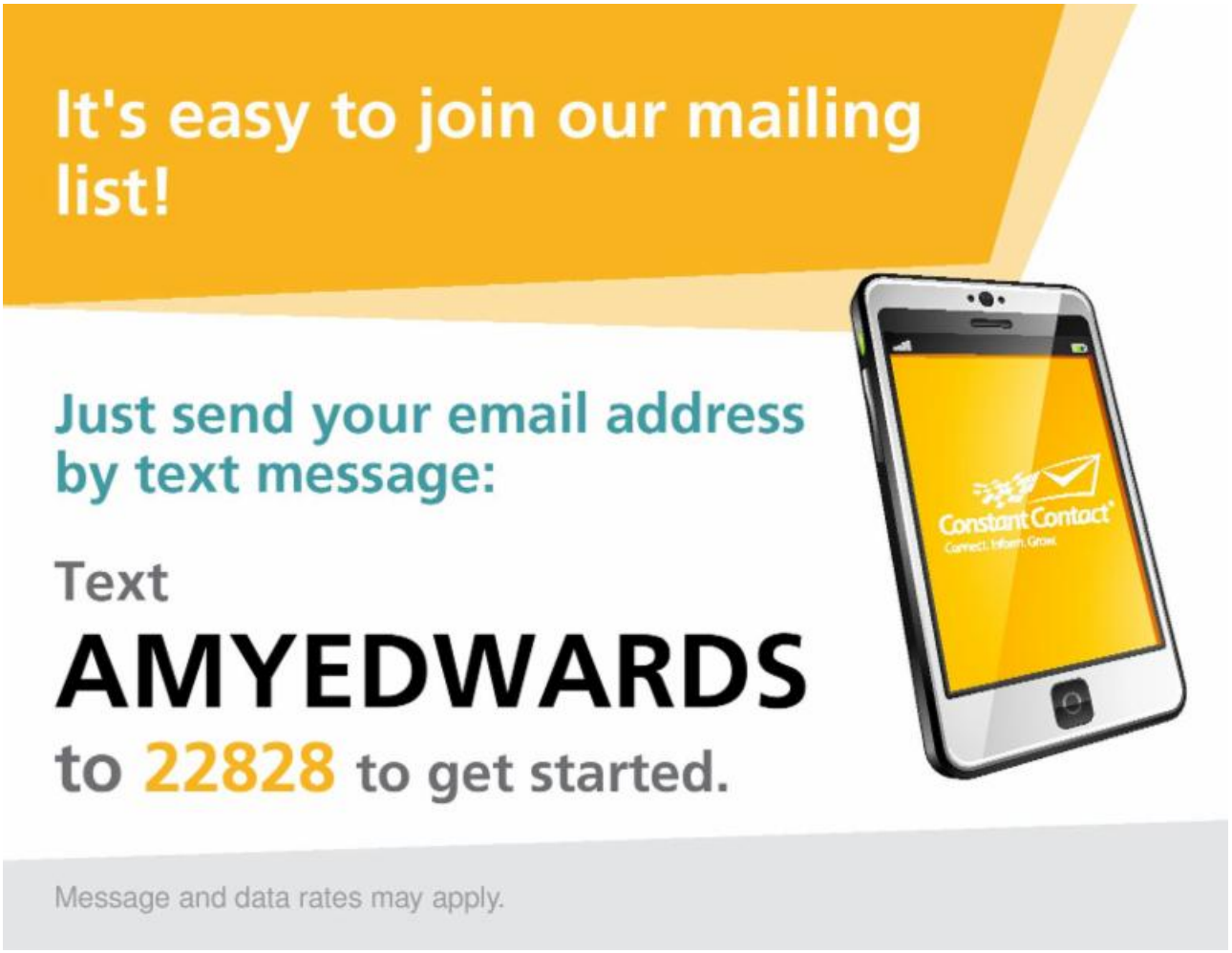
FALSE: Most states require a holographic will to be entirely in the handwriting of the deceased, as well as signed and dated.

Myth #5: If I write my own Will, I won't need an attorney.

FALSE: In order for a holographic will to be held valid, it must be approved by the state probate court. This approval stems from filed documents, which many non-attorney's do not have the requisite knowledge to do.

It is always better to be safe than sorry. A holographic will can end up costing thousands of dollars in attorney's fees as well as delay the distribution of the estate by many months, and even years! Having a valid, attorney drafted Will is most often cheaper and always quicker with administration of the estate. A family member can probate an attorney drafted will with no help from a lawyer.

Jennifer J. Bell has passed the 2017 bar exam and will be joining Amy Edwards Family Law as an associate attorney. She will be practicing elder law, estate planning and family law. This article is current as of September 2017.



Thank you for reading my newsletter.

Sincerely,
Amy A. Edwards