

# *Family Matters e-Newsletter*



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## News For December 2016

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## Why Can't We Use the Same Attorney If We Agree?

By Amy A. Edwards

This is a question I hear during consultations. The potential client may say they agree on everything and don't want to pay for a second attorney. Depending on the circumstances, there are at least two main reasons a family law attorney usually can't take a case for both parties. One reason is that representing both clients is a conflict of interest, or it creates the appearance of one. Another reason is that sifting through the case with an attorney uncovers a number of important issues that weren't discussed between the parties.

### What Is a Conflict of Interest?

A conflict of interest means divided loyalty. An attorney is required to zealously represent a client and act only in the best interest of that client. When that best interest of one party differs from, or conflicts with, the best interest of the other party, an attorney must choose which person to represent. Even taking on responsibilities that limit an attorney's ability to fully represent the client is a conflict. In most family law cases, one person's best case scenario is the other person's worst case scenario. For example, if one spouse is seeking alimony and the other spouse is trying to use legal defenses to avoid payment, there is a conflict of interest. The State Bar has strict rules about an attorney's ability to

represent more than one party so the lawyer's responsibility is only to one. Even when parties are in agreement about the outcome of the case and want a separation agreement, there are negotiations after the other spouse gets a copy of it to review. Your attorney cannot answer legal questions by the other spouse or give any legal advice to your spouse. Your ex should choose an attorney to advise him or her about the case.

## **What Else Matters Beyond the Agreement We Have?**

Clients tend to think that once they address child custody or support, the house they own, or the payment of certain bills, they are finished with the unpleasant task of legally wrapping up a separation. A client may be disappointed to discover there are numerous topics he or she did not discuss with their ex. Many clients don't stop to consider the tax implications of their settlement, whether the money they exchange will be taxed as income or as a tax deduction, and whether the division of retirement assets will be subject to taxes and IRS penalties instead of simply being treated as a tax-free exchange of marital property. A court order is usually required to divide retirement assets the proper way, to avoid detrimental tax consequences. Even if the parties agree concerning alimony, it must be addressed properly to get tax benefits (or to avoid tax burdens).

## **Lots of Details**

Clients look at the big picture of custody and visitation agreements. The devil is in the details. When they say they have already agreed to a custody schedule that gives each parent  $\frac{1}{2}$  of the Christmas, what does that mean? Do they mean December 24th and 25th every other year or did they assume the holiday was determined based on the school calendar, from the first day off until the day school starts? Does either parent intend to go out of town for Christmas and need to add specifics concerning the travel arrangements over state lines?

Other typical problem issues include an "agreed upon" amount of child support. Parents might have an agreement that one pays for daycare while the other pays for health insurance. That tends to be unrelated to the way the state determines child support. Is there an argument that a bonus or commission should be included as income? What about extra-curricular expenses, sports and the payment of medical expenses not paid by insurance? Will there be out-of-state travel expenses by one parent? Should child support be calculated based on a shared visitation schedule or the more typical visitation schedule? And yes, you pay your attorney to be a pessimist, which usually means making sure things are handled properly at the beginning of your case after your attorney gives you legal advice. The decisions will be yours to make, but don't assume you've reached an agreement until you know all the questions have been asked.

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 December 2016.

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## The Great Treasure Hunt: Hidden Income

By Amy A. Edwards

[Child support](#) and [alimony](#) cases are based on the incomes of the parties so it is important to leave no stone unturned, even if one of you has no income. North Carolina law usually counts all kinds of compensation as income, although there are some exceptions.

### What Are We Looking For?

Income is not defined by salary alone. Especially with large employers or self-employed individuals, there are "hidden" forms of compensation. There are two basic kinds of income in family law. Earned income is based on employment (salaries, wages, commissions, bonuses, dividends, severance pay, etc.) and unearned income includes everything else. Examples of unearned income include ownership or operation of a business, rents received from rental property, retirement or pensions, interest, trusts, annuities, capital gains, certain Social Security benefits, worker's compensation benefits, unemployment insurance

benefits, disability pay and insurance benefits, gifts, prizes and alimony or maintenance received from persons other than the parties to the instant action. (From the NC Child Support [Guidelines](#)).

### **The Evidence: Tax Records**

Courts first look at tax returns, which hold important clues about income. Most people know the [W-2 statements](#) include wages, tips and compensation as shown in box 1, which are taxed. But not everyone realizes box 3 of a W-2 statement reflects the social security wages, including income that isn't taxed. If the amount of social security wages is larger, it should be used. Why? Because the larger amount includes tax deferred benefits. The most common example is an employee's choice to make contributions to a 401(k) plan. Otherwise, several thousand dollars of income is easily missed. If someone has a [1099 tax statement](#), it means there is "miscellaneous income" such as money paid to that person for services as an independent contractor. A 1099-R statement is issued when a person collects retirement from pensions, annuities, retirement or profit-sharing plans, IRAs, insurance contracts, etc. Social security is shown on a SSA-1099 tax statement, which might be missed because sometimes it is taxed, and sometimes not. All of these tax statements, not just the tax returns themselves, indicate income for purposes of child support or alimony.

### **The Evidence: Pay Statements**

While tax returns and tax statements give us a good starting point, they don't tell the whole story. Certain benefits are disguised because they are voluntarily payroll "deducted" from someone's pay. However, many of those deductions represent compensation the employee chooses to divert, so they are really income. This is because they are tax-free, tax-exempt or pre-tax benefits, so they won't appear on the W-2 statement at all. One common example of a pre-tax payroll-deducted benefit is an employee's payment for health, vision, and/or dental insurance. Those payments are made by the employee from his or her pay but because they are not taxed, they generally won't be included on the W-2. Tax-exempt benefits include military disability payments and most military allowances, such as BAH and BAS, which usually aren't even shown on the tax return. This is why it is a good idea to get the final pay statement or other statement that shows all compensation, taxed or not taxed, as of December 31st.

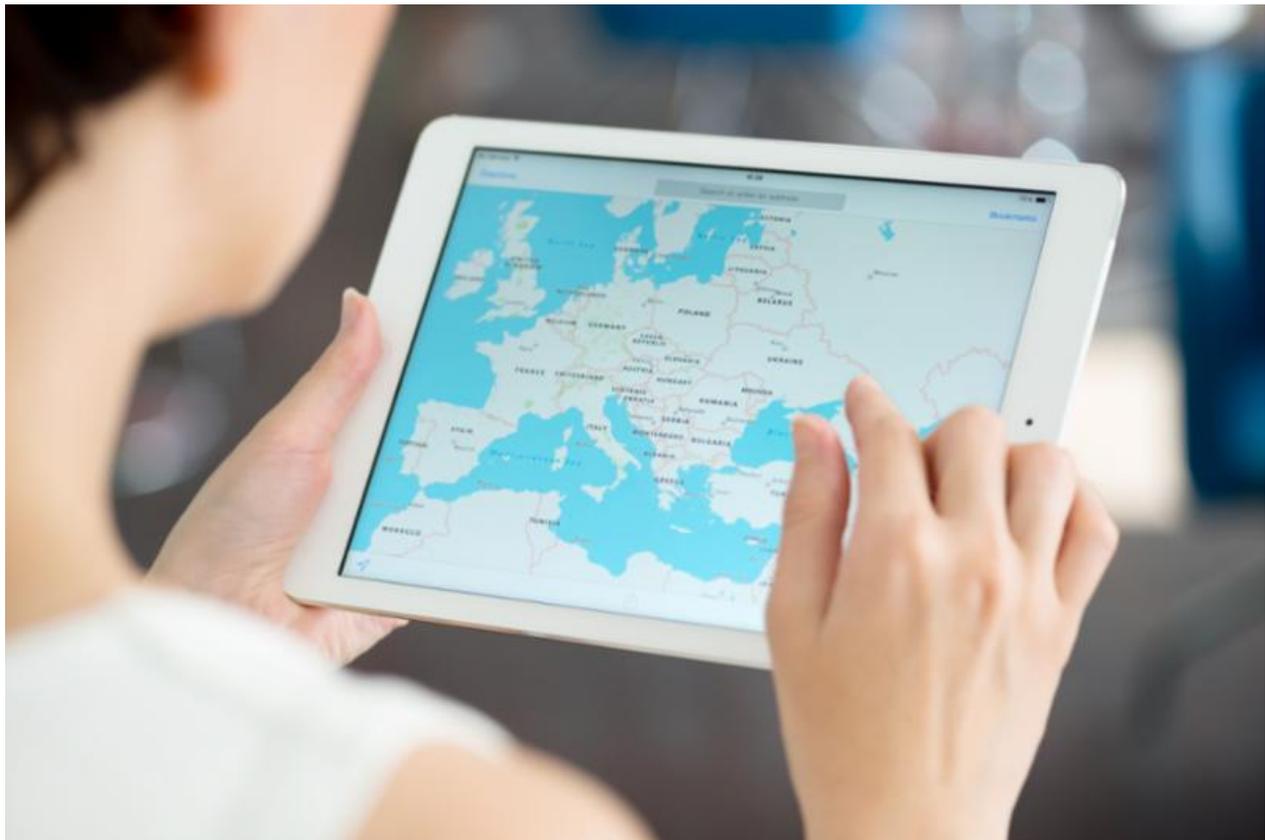
### **The Evidence: Self-Employment Business Expenses**

The scope of this subject is too broad for this article but the general overview involves income disguised as business expenses. If these appear on the tax returns, most of the time they won't be detailed enough to properly identify them without further investigation. Loans from the business to the business owner can

be big-ticket forms of income even though they appear to be debts. Other "business expenses" include fringe benefits like free housing and company-payment of cell phones, health insurance, or credit cards. Some companies pay not only vehicle payments but gas and insurance. Typical travel expenses (or reimbursement of expenses) such as lodging, mileage and food also frequently masquerade as business expenses. While these expenses may be perfectly legitimate for IRS purposes, judges in family court will usually include them as income to the extent it is appropriate under the circumstances. The NC Child Support Guidelines count these benefits as income to the business owner by the company are considered income if they are significant and reduce personal living expenses.

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## How Do We Serve My Ex If I Can't Find My Ex?

By Amy A. Edwards

On occasion, I have had to serve the other party (the defendant) with a lawsuit for a divorce, child custody and support or other family law

matter but was unable to locate him or her. It is easy to lose track of an ex, particularly when they share no children. Perhaps defendants from other states or even different countries return there after they separate and fail to leave a forwarding address. Other times, military families or other families who frequently relocate might lose track of the other parent or spouse. Clients sometimes don't even know who the defendant is, let alone where the defendant resides. For example, in adoption cases, it is not uncommon for pregnant college students to have a single encounter with a complete stranger while intoxicated. This topic is complex and beyond the scope of this article. Instead, this is a general overview of a few related topics.

### **What's the Legal Issue Involved?**

To oversimplify it, service of process usually means the sheriff serves the defendant by handing him or her a copy of a summons and complaint, the lawsuit. Service of process is the defendant's Constitutional right to have due process of the law. It is serious business because a court order entered without proper jurisdiction is void and of no effect. When a client truly does not know where the defendant is, it becomes a time-consuming and expensive endeavor. The law requires [due diligence](#) when searching for a defendant. This makes sense when you consider that you don't expect to have a court order that requires you to do (or stop doing) things when you had no idea there was even a lawsuit.

If the defendant isn't located after diligent search efforts, the last resort is publishing a legal notice in the newspaper for three consecutive weeks. In that event, the publisher also executes a publisher's affidavit documenting the dates the legal notice was run. All the other search efforts must also be documented and later explained in affidavits and/or testimony in court when a judge rules on the issue of jurisdiction.

### **What Kind of Search is Required?**

There is no one-size-fits-all approach to searches because the search is based on the circumstances of the case. If the defendant cannot be served by the usual means including the sheriff and certified mail at

the last known address, the search begins. Parties must actively contact the defendant's former employer, family members, friends, and any other leads of which the client is aware. There are minimal searches the court generally expects, such as searching the public records. Examples of public records include the Register of Deeds, civil and criminal court filings, prison or incarceration records, social media and online directories, death records, trade licenses, Secretary of State for business owners, property tax records, military records, and the State Board of Elections records to name a few.

Sometimes, defendants duck service of process, meaning they make every effort to avoid being served. In extremely rare cases, those facts might justify a ruling by the judge that the defendant was served because he or she had actual notice of the lawsuit and then intentionally evaded service.

To be certain there is no possible way a court order could be jeopardized later because the defendant makes a later appearance claiming there was inadequate service, clients might choose to hire a private investigator or perform [background searches](#). While there is no clear standard of exactly what you must do, if you search for the defendant the way you would search to locate a long lost relative who died as a millionaire with no other relatives, the search will be ideal.

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Amy A. Edwards

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