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### News For May 2017

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## The History of Moms and Child Custody Laws in NC

By Amy A. Edwards

The subject of whether moms have some advantage in child custody cases is a much-debated topic among family law attorneys, as well as the parents who later become clients in child custody battles. The U.S. Census Bureau records indicate that only about 17% (1 in 6) of the custodial parents are fathers.<sup>[1]</sup> Why does that happen? There isn't a simple answer. But a brief history of the child custody laws in North Carolina gives us a context, telling us how we got here in the first place.

### Where It All Began: Tender Years Doctrine

Imported from England, our courts used what was called the "Tender Years Doctrine" in child custody cases. It was a built-in default rule called a legal presumption, meaning the mother was always presumed to be the most appropriate parent to have custody unless there was a reason justifying otherwise. The NC Supreme Court in 1973<sup>[2]</sup> defined it as follows:

"It is universally recognized that the mother is the natural custodian of her young. . . . If she is a fit and proper person to have the custody of the children, other things being equal, the mother should be given their custody, in order, that the children . . . may have the advantage and benefit of a mother's love and devotion for which there is no substitute. A mother's care and influence is regarded as particularly important for children of tender age and girls of even more mature years."

### Marital Status

Marital status between the parents did (and still does) matter. Historically, an unmarried mother had exclusive sole custody, including whether to place a child for adoption. If an unmarried mother decided to place the child for adoption, the father generally had no rights because there was no "legal father." Although that is *not* currently the law in adoption cases, there are still significant differences between the rights and obligations of married fathers and unmarried fathers. Current adoption laws for unmarried fathers remain controversial among those in the legal profession. An excellent discussion of this topic is found in *Rosero v. Blake*.<sup>[3]</sup>

## Where Did the Tender Years Doctrine Lead?

In 1977, the state abolished the Tender Years Doctrine by statute.<sup>[4]</sup> Instead of defining custody as a right exercised by one parent over another, the new statute required judges to rule based strictly on what is in the best interest of a child. This removed the default rule favoring mothers, and it holds true today. However, as recently as 2006, the NC Court of Appeals overturned a lower court ruling because the following language in a court order was deemed to be the Tender Years Doctrine: "the Court takes judicial, personal notice of the natural bond that develops between infants and a mother, especially when the mother breast-feeds the infant."<sup>[5]</sup>

## Where Are We Now?

The "best interest of the child" law remains. It currently states that "there is no presumption as to who will . . . better promote the interest and welfare of the child." It also requires the court to consider joint custody if either parent requests it.<sup>[6]</sup> In 2015, the North Carolina Legislature added a brand new statute to the existing ones, *An Act to Promote the Encouragement of Parenting Time with Children by Both Parents*.<sup>[7]</sup> Although it isn't very specific, it clarifies the state policy and ideals and values to which judges should aspire in our state. The first ideal is to: "Encourage . . . court practices that reflect the active and ongoing participation of both parents in the child's life and contact with both parents . . ." The other ideal is to encourage "both parents to share equitably in the rights and responsibilities of raising their child . . ."

[1] [Custodial Mothers and Fathers and Their Child Support: 2013](#), By Timothy Grall. Current Population Reports. U.S. Dep't of Commerce Economics and Statistics Admin. U.S. Census Bureau.

[2] *Spence v. Durham*, 283 NC 671 (1973) citing Nelson, *Divorce and Annulment*.

[3] [Rosero v. Blake](#), 357 NC 193 (2003).

[4] [N.C. Gen. Stat. §50-13.2](#)

[5] [Greer v. Greer](#), 175 N.C. App. 464 (2006).

[6] N.C. Gen. Stat. §50-13.2

[7] [N.C. Gen. Stat. §50-13.01](#)



## **The Life Span of a "Typical" Case in Pitt County**

By Amy A. Edwards

Although the term "typical case" is a misnomer, there are certain goals to be met as you wind your way through the local court process. I say goals because the judge has the discretion to adjust the times as may be necessary in each unique case. Life is messy and court is messier, sometimes not fitting into a specific timeline. We're fortunate to have an official Family Court in Pitt County,

staffed with three individuals. They keep the process moving along, by means of local court rules, the development of certain standardized forms to use in routine administrative matters and expedited communication with the judges concerning the most efficient way to handle issues that crop up as the case moves forward. The court expects the case to be resolved within a year if possible.

### **Phase One: File the Lawsuit**

A family law case is filed at the courthouse by a Complaint, followed by an Answer and Counterclaims in response, and other filings. This process of putting the court and the other party on notice of what relief each party seeks can take up to 6 months after the case is filed. In the meantime, the court might hold hearings on temporary (until the case is finished) child custody, child support or alimony within 2 months after the case is filed. The parties might also choose to use discovery, which might require a deposition, paperwork to be exchanged, or written answers to specific questions by the other party. Discovery by one or both parties can easily take 2-3 months. The party who files for equitable distribution, the division of marital assets, first must complete a very detailed listing of assets and debts called an EDIA, and the other party then files his or her version. This process takes at least 4 months.

### **Phase Two: Negotiation and Mediation**

Although clients usually know what property and debt there is, and the income of each party, the attorneys don't really know until he or she reviews the actual evidence (the tax returns, pay statements, self-employment, etc.). Once the attorneys have a general idea of the scope of the marital estate and what the actual disputes are, they can each then decide the best strategy to use. Another fundamental task is to figure out whether the parties already agree on certain matters, such as listing the residence for sale and dividing the proceeds.

When a custody case is filed, parents are automatically required to participate in child custody mediation. If they are successful, parents

can expect the court to finalize any custody agreement within 2 to 5 months after the case is filed. Our local court rules also require the parties to use financial mediation for all other matters, such as alimony and equitable distribution, before they are given a trial date. The goal is to complete mediation within 7 months.

### **Phase Three: Launch Sequence Activated**

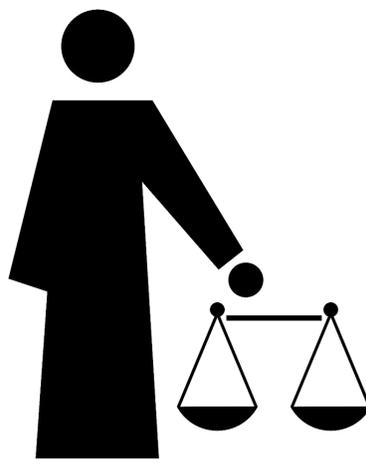
If there is no agreement after mediation, the cost begins to skyrocket because court is the only option unless the parties choose to use arbitration. There is lots of expensive "busywork" and trial preparation that must take place.

For example, in equitable distribution cases, within 7 months after the case is filed, the attorneys for the parties prepare a "cheat sheet" for the judge called a pre-trial order. Clients sign it. For lack of a better description, it means they agree to disagree. In other words, they are telling the judge in writing which things they want the judge to decide. It also includes stipulations, which are written agreements. They might agree that an asset is marital asset but not agree who keeps it. Other disputes can involve whether the asset or debt exists, whether it is marital or separate, what the value should be, and who keeps it or if it is a debt, who is responsible for payment of it.

For both alimony and equitable distribution cases, trials should take place 9 months after the lawsuit is filed, and the order should be signed by the judge and entered within 12 months. The court expects child custody cases to be finalized by a judge's ruling within 6 months.

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## Arbitration: Family Law's Best Kept Secret (Part 1 of 2)

By Amy A. Edwards

Court is slow, public, costly and often hostile. There are many reasons that litigation is rarely a Plan A, especially in family law cases. There are too few judges, and too many cases. The trend in recent years is for the over-burdened court system to encourage people to try alternatives, such as arbitration. It isn't at all unusual for a case to take at least a year or more. The NC Family Law Arbitration Act states "It is the policy of this State to . . . provide for arbitration as an efficient and speedy means of resolving these disputes . . ." [1] This article is part 1 of 2 on the topic of arbitration.

### What Is Family Law Arbitration?

Arbitration is one form of alternative dispute resolution (ADR), meaning it is an alternative to the traditional process of court to settle disputes. ADR can be used only if both parties agree to use it. Unlike other types of ADR such as mediation or collaborative family law, when parties ultimately decide whether to settle their case, those who choose arbitration hire a third party who makes the decision for them as a judge would. Courts enforce written agreements to arbitrate if a party tries to back out of it. If a lawsuit is already underway, parties can still agree to use arbitration. In contrast to a trial in the courtroom, parties who choose arbitration usually hold the proceedings in an office of one of the attorneys.

### What Issues Can You Arbitrate?

All "issues arising from a marital separation or divorce, except for the divorce itself" can be submitted to an arbitrator. [1] This includes alimony, child custody and support, and equitable distribution of marital property. Even though the arbitrator can rule on custody and child support, the court always has the final say if a parent later files a motion with the court. Disputes about changing child support or alimony can also be arbitrated. In fact, future spouses can even agree

to participate in family law arbitration *before* they get married except for child custody and support and the divorce itself.<sup>[2]</sup> The divorce in our state requires only a one year separation and it is extremely rare for that to be contested. Technically, it requires a lawsuit even if it is uncontested.

## Arbitrators

Arbitrators are typically chosen by both parties, but if necessary, the court will appoint one if the parties can't agree on who should arbitrate. The usual custom is to select the arbitrator certified by the North Carolina chapter of the AAML<sup>[3]</sup>. The parties usually share the cost of the arbitrator but they are free to choose another arrangement. Although they aren't judges, arbitrators have the authority to make a ruling on a case, as does a judge. They can swear in witnesses and issue subpoenas to witnesses but they can't hold someone in contempt of court for disobeying a court order, nor can they send someone to jail. The court reserves the ultimate authority to oversee those matters or the task of imposing sanctions (often financial penalties) if parties refuse to provide documents or fail to comply with other duties in a lawsuit.

## What Is the End Result?

The arbitrator's written decision is called an award. The court "confirms" an award made by the arbitrator, making it an official order of the court, enforced as any other court order. Or, if the parties agree to keep everything private, the award can be fashioned as a contract, which doesn't get filed in public court records. Another feature of arbitration is the finality of it. Although the parties can agree to allow an award to be appealed, they can also agree to do binding arbitration, which means they agree the award is final and cannot be appealed.

[1] [NC Gen. Stat. §50-41](#)

[2] [NC Gen. Stat. §50-42](#)

[3] American Academy of Matrimonial Lawyers

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 May/June 2017. [www.AmyEdwardsFamilyLaw.com](http://www.AmyEdwardsFamilyLaw.com) © 2017.

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Amy A. Edwards

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