



Amy Edwards
Family Law
313 W. 2nd Street
Greenville • NC



252.758.3430

www.AmyEdwardsFamilyLaw.com

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In This Issue:

What Do All Those Child Custody Labels Really Mean in NC?

My Ex Is Using the Attorney That I'm Paying For!

21 Divorce Experts All Share Their #1 Tip (Ms. Edwards is #16)

Clients and Attorneys Going in Different Directions: Marital Fault or Bad Behavior by the Other Parent



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Archives



What Do All Those Child Custody Labels Really Mean in NC?

By Amy A. Edwards

*Joint and sole physical custody,
legal custody, split custody and visitation*

Where Do We Start?

This is 1 of 2 articles. This article focuses on legal custody.

Parents will fight tooth and nail about what kind of custody each of them should have. They are extremely concerned about the term custody. There are many parenting labels including visitation, joint custody, sole custody, physical custody and legal custody. Our state statute doesn't help much. In fact, it probably creates more confusion. NC Gen. Stat. §50-13.1(a) states: Unless a contrary intent is clear, the word "custody" shall be deemed to include custody or visitation or both." However, our case law and the NC Child Support Guidelines do give us more details about those labels. I've tried to avoid legalese, but some of it is inevitable.

Our Changing Values

Unlike some states, our state law doesn't start by assuming that any particular type of custody will exist. But a few years ago, it came just shy of it when the state policy was written to promote "child-centered parenting . . . and encourage . . . court practices that reflect the active and ongoing participation of both parents in the child's life and contact with both parents when such is in the child's best interest..." NC Gen. Stat. §50-13.01. This was significant because it wasn't too many years ago that courts almost automatically gave moms custody of young children. The now debunked law of traditional custody, called the Tender Years Doctrine, assumed young children of tender years should be with their mothers if at all possible. Now, if either parent requests joint custody, the court is legally obligated to consider it. NC Gen. Stat. §50-13.2(a).

Legal Custody (Parenting Decisions)

Legal custody is decision-making custody, the right to make significant long-term decisions that impact a child's life and welfare, such as a child's education, health, medical care, discipline, and religious training, to name a few. Contrast that with physical custody, the day-to-day decision-making such as what bed-time is best or how long a child may spend on social media on a school night. There are three types of legal custody.

Joint Legal Custody

The trend these days is to award joint legal custody to parents, meaning that both parents equally share the decision-making. Ironically, when parents share joint custody, neither parent can veto the other, so neither parent really has any more rights to make a decision than the other. But, the system of checks and balances provides some incentive for decent behavior. If one parent acts badly or makes poor decisions, he or she may have to account for it on the witness stand at some future date if the other parent files a motion for the court to intervene and have a judge decide what must be done about the disagreement.

Sole Legal Custody

On occasion, a judge will award sole legal custody to one parent. If the dispute is about which school a child should attend, for example, the parent with sole legal custody makes the final decision. However, judges usually expect the parent with sole legal custody to discuss the controversy with the other parent. But if they still can't agree, he or she makes the decision. Until a child reaches the age of 18, either parent has the right to file motions asking the court to address any serious dispute, which usually is done by a motion to modify the custody order.

"Split" Joint Legal Custody

In unique cases, the court has the authority to award split joint legal custody. Although both parents can share important decisions, split custody reduces one parent's decision-making about one specific subject. For example, a parent with joint legal custody might be excluded from decisions about whether counseling is appropriate, and if so, who will provide counseling services. In that event, one party would have primary legal custody, and the other would have secondary legal custody.

See *Diehl v. Diehl*, 630 S.E. 2d 25 (2006) and *Hall v. Hall*, 188 N.C. App. 527 (2008).

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We're Excited to Share This Article

(Ms. Edwards is #16)



My Ex Is Using the Attorney That I'm Paying For!

By Amy A. Edwards

After forking out a lot of money to hire an attorney to handle this case, why is she wasting time talking with my ex?

The Attorney Client Relationship

Clients can be resentful that their attorney is wasting time dealing with the *pro se* person. In most family law cases, each person has an attorney. When the other person is *pro se*, Latin for representing himself or herself, lawyers aren't working for the *pro se* person and charging you for it as clients sometimes think. That is prohibited. An attorney may represent only one person in a family law case, such as a divorce or child custody case. Failure to do that is usually a conflict of interest. That means what is good for one person might be a bad thing for the other person. For

example, if one spouse gets alimony that's a good thing for him or her, but it might be a bad thing for the other spouse. The lawyer has to choose one person or the other as a client.

What's Different?

If your ex had an attorney, your attorney would have to talk with the other about settlement, discovery (documents, etc.), trial matters, and logistics of court events such as depositions. In other words, your attorney would still be taking time to talk with the other attorney. It doesn't always take more time than it would to negotiate with an attorney. In fact, some people without attorneys are anxious to get down to business instead of posturing the way other attorneys will because they want to avoid court.

The Law and Equality

The law requires everyone to be treated in the same way, regardless of whether they have an attorney or not. The same deadlines, rules, laws and other requirements apply to both sides. In the eyes of the law, people shouldn't be penalized if they cannot afford an attorney. But the judge is still bound by the law. Judges have to walk a fine line in these cases. Attorneys also have to be very careful when communicating with a *pro se* person. We certainly can't give them legal advice but sometimes we do explain the reasons why the offer we are making on behalf of our client is a good one. Depending on the circumstances, the attorney will tell the *pro se* person that he or she should talk with an attorney.

Same Rules as Everyone Else But . . .

Attorneys have specific things they need to prove in court, based on what the law requires in each situation. But in court, judges sometimes give *pro se* people a little leeway when they testify and present their side of the case because if they were held to a strict standard they probably wouldn't be able to say much at all.

More often than not, the *pro se* person usually just wants the judge to hear what they want and why they want it. In a democracy, it is important for all citizens to have the right to their day in court. It's

especially important for parents who are in child custody cases to be heard because the judge must award child custody to one or both parents based on what the judge believes is in the child's best interest, regardless of whether the parent is represented by an attorney.

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Clients and Attorneys Going in Different Directions: Marital Fault or Bad Behavior by the Other Parent

By Amy A. Edwards



Clients have to deal with turmoil at the beginning of a case. But the attorney has to set aside what is right and wrong at the beginning of a case to start building a solid foundation first.

In the Beginning . . .

By the time someone talks with an attorney about a divorce or a custody case, it is safe to say that it isn't because something great just happened. Most people are struggling to make sense of what has just happened to them, or what finally became the last straw. Clients are devastated, shocked, angry, traumatized and anxious to vent about how the other person has betrayed and hurt them. Each case is unique but this article is a general response to a common question that clients ask me: Why are we worrying about this [insert something that's tedious and dull] when I can prove my ex did [insert something that's awful and life-changing].

What's Your Attorney Doing?

Meanwhile, after you have bared your soul to the attorney and handed a check or credit card to the receptionist, the attorney and his or her staff members are doing lots of busy-work. All they appear to be doing is wasting time, filing court paperwork, gathering tons of financial records, drafting financial affidavits

(budgets for court), listing details of property and debts, and perhaps doing discovery and then mediation. Clients quickly become disappointed and frustrated once they discover that fault and bad behavior won't usually be addressed in depth until after all of that is completed, and then a trial. Unfortunately, it can easily take a year after you start the court process for a judge to make the final ruling on your case.

What Are Your Attorney's Priorities?

It might seem like your attorney isn't really listening to what's important to you, or that his or her goals appear to be at odds with yours. This legal process is backwards in the sense that clients have to deal with serious emotional turmoil and upheaval at the beginning of a case, but your attorney must work with an eye towards the end of a case. This means that the attorney might have to set aside what's right and wrong at the beginning of a case to start building a foundation for the case before reaching those matters. One of the hardest lessons I learned upon my arrival at law school was that courts don't dole out justice. In fact, they *usually* don't focus on justice. Instead, courts apply the law to the facts of each case. The law must be your attorney's priority.

Attorneys have a duty and obligation to take a step back and look at the situation objectively, the way a judge would, to tailor your case to what a (neutral) judge expects to hear from us about key issues. Approaching your case based on our feelings would be dangerous for your attorney. Instead, we try to analyze the situation while staying cool, calm and collected. In fact, a good attorney might be saving you time and money by negotiating a settlement on who keeps what property/debts, or what the children's visitation schedule will be instead of beginning with fault and who is right or wrong.

What Are Your Priorities?

I've had clients who want to be vindicated by showing that the other person has been unfaithful, wasted money, was abusive, or done any number of other bad behaviors. Expressing their feelings in a trial can be a cathartic and liberating experience. Or, if justification and retaliation are the goal, fault might be a priority to you. But if so, you should decide how much money, time and energy are you willing to devote to it. Is it worth the emotional toll it can take? Perhaps it is.

Another goal might be making a smooth transition to the next chapter of your life or the value to your children of being through with the case without a trial. Being reasonable and/or taking the high road is difficult, especially when the other person was unfair, mean and hateful to you. Sometimes people assert marital fault or bad behavior of the other parent at the start of the case but after months or a year or two, the healing process begins and they decide it no longer fits their

needs. You might be motivated based on the dollars and cents of your case. What would it be worth if you could reach an agreement and wash your hands of the entire mess? Your money might be better spent on counseling, where a trained professional is trained to help you move towards the next phase of your life.

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