

Family Matters e-Newsletter



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NEWS FOR APRIL 2015

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Unborn Children: Custody, Visitation, Guardianship and Neglect

By Amy A. Edwards

Can You File for Custody of an Unborn Child?

Currently, the answer is no. The NC child custody statute says a case may be filed for a "minor child." [1] That term is defined elsewhere as "any person who has not reached the age of 18 years." [2] In effect, while pregnant, the mother has physical and legal custody by default. The only reference to an unborn child in our custody statute is when a convicted sex offender's actions lead to "conception" of the child, in which case he cannot make a claim for custody. [3] If the married parents of an unborn child divorce before the child is born, it will not "cause any child *in esse* or begotten of the body of the wife . . . to be treated as a child born out of wedlock." [4] The unborn child's legal status is protected. Paternity laws are no help to someone trying to assert parental rights before a child is born because they are "Civil Actions Regarding Children *Born Out of Wedlock*." [5]

Unborn Children and Adoption

NC adoption laws define a minor as "an individual under 18 years of age who is not an adult." When a pregnant woman places a child for adoption in NC, in certain cases, she may ask the court to rule on whether the father's consent to the adoption is necessary. This pre-birth ruling may be requested any time after six months have passed since conception. The mother, adoption agency or adoptive parents chosen by the mother may request this ruling on the father's right to consent to the adoption, but a father cannot. Unless he responds to legal notice about the matter, he must wait until after a child is delivered to exercise his parental rights.[6]

What About Child Abuse or Neglect?

Child Protective Services (CPS) laws "do not address abuse or neglect of the unborn child. The definition of a juvenile includes . . . children from birth to eighteen years." But, federal laws require CPS to investigate when there are reports of "children born with a positive toxicology for illegal substances." [7] CPS must also wait until a child is born before acting. Then, their duties to protect the child begin.

Unborn Victims of Crimes

The criminal law defines an unborn child as "a member of the species homo sapiens, at any stage of development, who is carried in the womb." [8] A statute addressing criminal abortions uses the Biblical phrase "quick with child" when describing the illegal procedures used when someone intentionally uses drugs or instruments to "destroy such child." [9] Doing so is a felony, as is intentionally acting with the intent to cause a woman to miscarry, or to injure or destroy the woman. [10] Concealing the "birth of [a] child . . . by secretly burying or otherwise disposing of a dead body of a newborn child is a felony." [11] But, the criminal law also creates an exception to these felonies for

abortions performed during the first 20 weeks of a woman's pregnancy. Those abortions are presently legal in NC, and are addressed by *A Woman's Right to Know Act*.^[12]

Unborn Children's Rights in Lawsuits

When there is a lawsuit that involves potential ownership or distribution of property, the court may appoint a guardian *ad litem* (GAL) to represent the unborn child. Examples of such lawsuits include cases about wills, trusts, or contracts. The child is served with the lawsuit when his or her GAL is served by sheriff, and the ruling on the case stands despite the fact that the child had not been born when the lawsuit was filed.

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 April 2015. www.GreenvilleLaw.us © 2015.

[1] NCGen. Stat. §50-13.1

[2] NC Gen. Stat. §48A-2

[3] NCGen. Stat. §50-13.1

[4] NC Gen. Stat. §50-11

[5] NC Gen. Stat. §49

[6] NC Gen. Stat. §48-2-206

[7] Online Manual of NC Dept. of Health and Human Services, Div. of Social Services.

[8] NC Gen. Stat. §14-23.1

[9] NC Gen. Stat. §14-44

[10] NC Gen. Stat. §14-44

[11] NC Gen. Stat. §14-46

[12] NC Gen. Stat. 90-21.80



Financial Fault in North Carolina Property Division

By Amy A. Edwards

Traditional marital fault, such as abandonment or adultery, does not matter when the judge divides marital assets in North Carolina. Generally speaking, equitable distribution of marital property is strictly a math calculation, similar to a business transaction. There is a very strong policy for the courts to divide the marital estate equally unless there is some special reason why the marital assets are not equally divided.

Although marital fault does not apply in property cases, the court may consider financial fault. Sometimes, the same behavior that is considered marital fault is also coincidentally the same behavior that constitutes financial fault. Some of the special reasons (called factors) the judge can consider when deciding whether to divide marital property unequally based on financial fault include:

(1.) Acts to maintain, preserve, develop, or expand marital property.

- (2.) Acts to waste, neglect, devalue or convert the marital property.
- (3.) Any other factor the court decides is just and proper.

When one spouse wants more than 50% of the marital property, he or she has the burden of proving a special reason or factor applies. A spouse can argue the first two reasons listed above would apply when the other fails to maintain and repair a residence or other property, changing title of property to someone else trying to conceal it, or mismanagement of assets. Another situation falling into the category is a spouse hiding debts and the unintended consequences that impact the other spouse. Spouses may find out too late that the other must file bankruptcy on joint debts, leaving him or her holding the bag for those debts, or that there are lawsuits that could result in judgments that may be liens on the family home in some cases. Another situation allowing a judge to consider giving one spouse more than 50% of the marital estate is when one can't pay a marital debt and the other intentionally refuses to pay the marital debt, such as a mortgage, and perhaps choosing to let a home go into foreclosure rather than have it awarded to the other spouse.

The last reason above, labeled "any other factor," can be anything the judge determines is important after hearing evidence from both sides. This is a catchall for a party to ask the court to divide the marital assets unequally. Although it is not specifically listed by the statute, gambling away substantial marital savings could be an example of financial fault. One North Carolina Court of Appeals case* found financial fault when the wife removed truckloads of marital property from the marital home immediately before they split. Another case** found it when the husband was in a bigamous marriage and had a secret family. When someone spends substantial money buying a significant gift for the person with whom he or she is having affair can be financial fault, as well as marital fault.

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* *Walter v. Walter*, 149 N.C. App. 723 (2002).

** *Duruanyim v. Duruanyim*, 204 N.C. App. 210 (2010) Unpublished.

Finding Yourself: Unique Birth Certificate Dilemmas

By Amy A. Edwards

We don't think much about our birth certificates (BCs), until there's a problem. For security reasons, NC law says certified copies of BCs are only available from NC Vital Records for yourself and your family, but there are some exceptions. The Clerk of Court routinely acts as a judge in these matters. The vast majority of the time, the state where someone was born is the only state that has the right to issue or change the BC. This article only refers to North Carolina law.



Q: What If You Don't Know Who Your Parents Are?

A: If a person of unknown parentage was abandoned and doesn't know where or when he or she was born, the person may file a petition with court asking for an order that will settle the matter and require a BC to be issued. If there is not enough evidence to make a ruling on where and when someone was born, the order will state the person was born in the county of abandonment.

Q: What If No One Ever Registered Your BC?

A: When a BC hasn't been registered for over one year after the child's

birth, the court will enter what is called a "delayed birth certificate." With proper documentation, you may get a BC which be marked "delayed" showing when it was actually registered. If the request is rejected, the person has the right to an administrative hearing on the matter.

Q: What If You Were Born in the Car?

A: If a birth takes place in another state because the mother gave birth "on a moving conveyance," as long as the trip began in North Carolina, the place of the child's birth will be reflected as the North Carolina county from which the mother left at the beginning of the trip.

Q: Can You Change Your BC If You Change Your Sex?

A: If someone requests a modification to a BC in order to change the sex on the BC after having sex reassignment surgery, the BC will be changed based on a notarized statement from the physician who performed the surgery or from a physician who has examined the individual and can certify that the person has undergone surgery.

Q: Can You Change Your BC For Other Reasons?

A: The surname (*i.e.*, the last name) on the BC will be changed when the parents marry each other after the birth of the child and both agree to the change, or by court order. The court will change a BC when there is incorrect information on it, or when a parent's name must be added. When someone legally changes his or her name, that change will also be made. Changes are also made for reasons included elsewhere in this article. The original BC is sealed by the court.

Q: What If You Were Adopted/Born Outside the US?

A: If someone is adopted and lives in NC but was born outside the US, the clerk will prepare a *Certificate of Identification* for the individual as long as the adoption decree and certified BC are provided. The certificate

will contain the same information as a BC typically created when there is an adoption. People adopted outside the US and then "re-adopted" in the US, the certificate will reflect the country of birth is used instead of the state of birth.

Q: What If You Are the Parent of a Stillborn Child?

A: You are entitled to a certified copy of the birth registration called a *Certificate of Birth Resulting in Stillbirth*. If you named the baby, the certificate will reflect that name.

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See NC Gen. Stat. 130A-90 *et seq.*

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Amy A. Edwards

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