Family Matters e-Newsletter

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NEWS FOR AUGUST 2015

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Businesses in NC Marital Property Division Cases

By Amy A. Edwards

In equitable distribution cases when the court divides marital property, a business ownership interest is an asset to be identified, classified, valued and distributed to (usually) one of them. Like any asset, it might be marital property or separate property and it may be distributed to either spouse if it is marital. The scope of this topic is very broad and cannot be fully addressed here. This article is a brief overview of the things experts, such as CPAs, might consider when performing a business valuation.

Business Entity: What is the Structure?

The way a business is organized impacts the value of it and the manner

in which the business is taxed. Sole proprietorships are businesses owned and operated by an individual, created without filing any formal paperwork. Other businesses are created formally by paperwork filed with the NC Secretary of State. LLCs (limited liability companies) are more suited to ownership by an individual or a few people, and they usually require less paperwork. Corporations (designated with "Inc.") are formal, and require special paperwork to be annually maintained, corporate officers to be elected and formal bylaws to be followed.

Why the Business Structure Matters

There is value added or subtracted from the value of a buiness based on many factors, including whether the business is publically traded or owned by a few people as a closely-held corporation (CHC). CHCs owners are often family members who sign buy-sell agreements that require the co-owners to give each other the first right of refusal if one chooses to sell his or her share of ownership. The ability of an owner to sell his or her ownership interest is key because market value is based on what a willing buyer would pay a willing seller. In CHCs for example, willing buyers might require that only a few people, such as family members or business partners, get the first right of refusal in the event a spouse wants to sell. This can reduce the value of the business. If the business owner is a licensed professional, such as a doctor or lawyer, who works alone as a solo practitioner, the value is limited because the value of the practice depends on that one person whose license isn't transferable. While a business or practice has a value, the actual professional license or business license that terminates on transfer is separate property. Businesses and any co-owners must be named as a party to the lawsuit for the court to have authority to order them to do things.

Factors That Impact Value

Name recognition of the business is known as "good will." For example, a local car dealership that has existed for 40 years has more name

recognition, and may be more valuable than, a brand new dealership. Consumers tend to more highly trust an established business. Tangible assets contribute to the value as well. Company assets might include equipment and office supplies, vehicles, bank and investment accounts, certain contractual rights, promissory notes and outstanding accounts payable to the company, inventory, and even real estate. Retained earnings are funds that remain in the business accounts, instead of being distributed or paid to the owner(s).This is critical when determining income for purposes of support to the other spouse, especially if it is unclear whether these funds are counted twice, once as business value and again as income. Company debts and expenses can include mortgages, lines or credit and business loans, insurance, state and federal taxes for the business and employees, payroll, retirement contributions for employees, health insurance, etc. Business value is also impacted by potential liability in the event the business is faced with litigation (personal injury, unemployment claims, malpractice, bankruptcy, etc.) or the likelihood of anticipated litigation.

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Untying the Knot: Alimony in Our State

By Amy A. Edwards

The law in North Carolina defines alimony as payment for the support and maintenance of a spouse or former spouse. A judge may order it in monthly payments, a lump sum and possibly by payment of certain expenses, such as health insurance. Temporary alimony is called post-separation support (PSS), which the court may award on a temporary basis at the early stage of a lawsuit, pending the alimony trial.

The Background & Controversy

The concept of alimony is somewhat controversial. Although men are free to seek alimony if they meet the legal requirements of dependency, it is overwhelmingly women who are financially dependent. Those who don't think alimony is necessary point to the changing role of women over recent decades. They argue alimony keeps financially dependent women in a dependent position, and discourages them from becoming

more financially independent. Proponents of alimony see it as a form of compensation to protect the spouse who, for a number of years, limited or forfeited a long-term earning capacity and the associated contributions necessary to grow a retirement. A spouse might make individual financial sacrifices in exchange for the betterment of the family unit, often when caring for the children. This allows the other spouse to devote his or her attention on a career, perhaps acquiring a degree, traveling or relocating on a regular basis, or creating and/or operating a small business.

Who Can File an Alimony Claim?

In our state, the law allows either spouse to ask for alimony if that person meets the other requirements. The most important requirement is financial dependency by one spouse, who is financially supported on the other. There must be a significant difference in their earned incomes, and/or unearned incomes such as investment dividends. If the spouses have the same level of income, there is no supporting spouse or dependent spouse, both of which are mandatory for the court to award alimony.

How is It Calculated?

North Carolina judges have a great deal of discretion when ruling on the amount of alimony to be paid, and how long it must be paid. There are no guidelines for alimony, as there are in child support cases. For each party, the judge reviews a financial affidavit, which is essentially a budget that includes living expenses and debts. From that, the court will decide the fairest way to address alimony, taking into account the needs of both parties. Judges are required to consider any evidence of marital misconduct, if either party offers it. Other considerations judges must consider include the ages and the physical, mental, and emotional conditions of the parties, as well as the length of the marriage, and any contribution of a spouse as homemaker. Alimony has specific tax consequences to be considered. Another important consideration is the standard of living the couple established during the marriage.

When Does Alimony End?

The court sometimes directs alimony to be paid for a specific time period. If a spouse is in school earning a degree, or is only a few years away from drawing retirement, judges might tie the alimony award to coincide with these events. It is likely a judge will order permanent alimony if the parties have been married for over twenty years. There are several grounds that can terminate alimony sooner than what the judge orders. When the recipient of alimony remarries, alimony ends. Odd as it sounds, alimony ends when either party dies. This means the estate of the deceased spouse has no ongoing alimony obligation, nor can the estate of the deceased spouse be entitled to it. Alimony will also be terminated if the court finds that the alimony recipient lives with a romantic interest (*i.e.*, cohabits). The law defines "cohabitation" as "the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations." NC Gen. Stat. §50-16.9.

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New Law:

Rights of the Terminally Ill to Try Experimental Treatment

By Amy A. Edwards

The Legislature has created North Carolina Session Law 2015-137, a new article to be added to Chapter 90 of the General Statutes, which becomes effective October 1, 2015. It is known as "The Right to Try Act." The purpose of the law is to authorize access to, and the use of, experimental treatments for patients with terminal illnesses. The government certainly has a strong interest in protecting patients from unsafe medical treatment (medications, biologicals, procedures, devices, etc.). However, when a patient has exhausted the traditional FDA approved treatment, this law allows him or her to take a risk that the experimental treatment is better than the inevitable result of terminal illness. A key feature of the law addresses the hesitation on the part of medical professionals and treatment manufacturers. They might

otherwise be afraid to try these treatments for fear of being sued by patients or their next of kin if the treatment is unsuccessful or causes harm to the patient. With the close interaction with, and guidance of, the treating physician, this law facilitates the decision of patients to explore all options.

Who is Eligible to Use Experimental Treatment?

In order to meet the eligibility requirements, someone must have an illness that is terminal. The new law defines *terminal illness* as a progressive disease or medical or surgical condition that:
(i) entails significant functional impairment, and
(ii) is not considered by a treating physician to be reversible even with available FDA approved treatments, and
(iii) will soon result in death without life-sustaining procedures.

The treating physician plays a pivotal role, and must certify that the terminally ill person meets the other eligibility requirements. The treating physician and patient must confirm they have considered the options approved by the U.S. Food and Drug Administration (FDA); The treating physician has recommended experimental treatment (the investigational drug, biological product, or device); and the patient has given a detailed informed consent in writing. The informed consent is extensive and includes the potentially best and worst outcomes resulting from use of the treatment.

Third Parties

No manufacturer can be required to provide experimental treatment, and manufacturers may choose to provide that treatment either for free or for a price. If a patient dies after receiving experimental treatment, his or her heirs are not responsible for any outstanding debt related to the treatment, including any out-of-pocket costs when the deceased person did not have health insurance. When a manufacturer has made a good-faith effort to comply with this law, and has exercised reasonable care in

doing so, there is no legal right for individuals to sue the manufacturer for any harm to the patient that results from the experimental treatment.

Licensing boards cannot revoke, fail to renew, suspend, or take other disciplinary action against healthcare providers when the only basis for doing so is that the provider recommends experimental treatment. Although State employees, officials or agents may counsel a patient as needed based on reasonable medical standards, they are prohibited from attempting to block an eligible patient's access to experimental treatment.

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Home Sweet Home? Can My Child Choose Where to Live?

By Amy Edwards

Parents of teens or pre-teens often ask if their kids can "tell the judge" where he or she wants to live, and with which parent. Like many things in family law, there is simple no yes or no answer. Judges ultimately decide what they will or will not allow when it involves a witness who is a minor. If a child is allowed to testify or meet with the judge privately, he or she can express an opinion. Just as it is with testimony from parents, however, the judge can do whatever is deemed to be in the child's best interest regardless of anyone's testimony. No one can dictate to the court what the ruling will be.

What Age Are Kids Allowed to Testify?

Technically, there is not a specific age a child is allowed to testify. The closer a child is to the age of 18, the more weight a judge gives to the child's desires. Judges usually give testimony by a minor who is old enough to drive and/or work part-time more weight than that of pre-teens. The issue is complicated when younger children want to testify. The law asks whether the child is of suitable age, maturity and discretion. One case* quotes a legal digest as follows:

The nearer the child approaches the age of 14, the greater is the weight which should be given to the child's custodial preference. As to when the child is mature and intelligent enough to formulate a rational judgment concerning its welfare . . . no specific age is set by law . . . but the question depends on the mental capacity, or the mental development, or the intelligence of each child in question.

Children's Testimony: Playing With Fire

A child who is allowed to testify must do so on the witness stand in open court, although parents can consent the child may talk to the judge in chambers, which is the judge's office. Judges who take testimony from a

minor are on the lookout for indications the child was coached, rewarded for testimony or was otherwise manipulated. Demanding your child testify can backfire, especially if he or she is cross examined. A child might not testify truthfully, or might embellish the story. Children may simply be incorrect in telling the judge about events, especially when they have butterflies in their stomachs. Parents can agree whether the attorneys are allowed to be present when the judge talk with the child in chambers. Judges may choose whether to share the child's communication with the parents and/or the attorneys. In fact, I've been in several cases where the judge told the child he or she would not share what they talked about in chambers with anyone. That can make it difficult to explain or "correct" the child's comments in your closing argument.

The Ethics of Calling Your Child as a Witness

Parents should carefully consider the consequences of a decision to have a child testify. If an adult is nervous or stressed about testifying in court, imagine how much more stressful it probably is for the child. The fallout from this event inevitably includes tension or even fear about the reactions of both parents when he or she goes home, especially if the parents inadvertently grill them about what they said in chambers or when they testified. Kids may have to become politicians after the trial in an effort to mitigate the damage they feel they've caused. If there are siblings, add another layer to the interaction at home, especially if the sibling shares a different opinion.

Although the parents decide they no longer love each other, a child does not have that luxury. The child loves both parents even if the bond may be closer with one parent. Many kids already feel some guilt about the breakup between the parents. Their burden is probably increased because they could very easily assume responsibility for the judge's ruling. Do you want your child to be "interviewed" by the other attorney in preparation for the trial? The other attorney in a custody case I litigated tried to absolutely demolish a 15 year old boy in cross examination, causing him to breakdown in the presence of the whole courtroom full of

relatives. The attorney was viscous and the court was reluctant to stop it. About ten years later, I still wonder about the impact that has had on him. I suspect he will always remember that day for the rest of his life, as I know I will.

* *Mintz v. Mintz*, 64 N.C. App. 338 (1983).

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Sincerely,

Amy A. Edwards