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FAMILY LAW

Family Matters

e-Newsletter

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Welcome to another issue of *Family Matters* e-Newsletter. This monthly divorce e-Newsletter is brought to you by Amy Edwards Family Law and Divorce Magazine. We hope you will find the information and articles useful. If you wish to be removed from our mailing list, please reply with the subject "Remove" or use the unsubscribe feature at the end of this e-mail. Visit us online at www.greenvillelaw.us For past issues of *Family Matters* visit [our archives](#).

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Life and Death and . . . Family Law: The People

By Amy A. Edwards

Why Write About this?

Law Firm History

Take a moment to read our law [firm history](#).

Web Site of the Month

[Project Gutenberg](#)

This site offers 45,000 free e-books for kindle, for download or for books you can read online.

Tip of the Month

Your Wallet

Photocopy the contents of your wallet, front and back, so you will remember what accounts you must cancel or freeze, as well as what you need to have replaced.

Legal Term of the Month

Tort

When someone behaves wrongly, the bad act is broken down into one of two types. The

Admittedly, death is an odd subject for a family law article. But everyone must eventually face death, whether it is their own, a loved one, or that of their estranged spouse or a former spouse. In family law, it is no different. As it must, the law accounts for these contingencies. Although most people don't think that much about it, just like a marriage, a death impacts many family rights and obligations. While family laws address death, it is an area of the law that intersects with inheritance laws. This article focuses on the North Carolina family law perspective.



Marital Status

Upon the death of a spouse, the legal status of the surviving spouse automatically becomes widow or widower. This is a legal status used to determine all kinds of rights, including certain retirement benefits, [social security](#), real property (depending on how the deed is drafted), and even the right to obtain sensitive documents from the North Carolina [Vital Records](#). Those who are widows or widowers also receive certain [military benefits](#), such as being eligible for interment at a State veterans cemetery, payment of a death gratuity and the right to access otherwise restricted military discharge records. NC Gen. Stat. §65-43.1 and NC Gen. Stat. §47-113.2.

A widow also has the right to apply to the clerk of court to resume the use of her maiden name, the name of a prior deceased husband, or of a previously divorced husband in the case of a widow. A widower also has the right to apply to the clerk to resume the use of his premarriage surname. NC Gen. Stat. §101-8. Widows or widowers may have the right to file certain lawsuits, such as wrongful death, including loss of consortium, or emotional distress, against a third party based upon the death of the other spouse.

first is when the state designates actions as crimes, for which people may be punished by the state, including incarceration. The second type, known as a tort, occurs when individuals or companies may sue another person for bad behavior that is not criminal, seeking money.

Legal Trivia

Did You Know?

In NC, if your spouse suffers from "incurable insanity," you must be separated for at least three years instead of one year before you may file for divorce. NC Gen. Stat. § 50-5.1

Suggestions For Future Newsletter Topics

Is there a topic you would like to see featured in a future newsletter?

Click Reply and send us an e-mail with your suggestion.

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[City of Greenville](#)

[Pitt County](#)

[Pitt County Schools](#)

[State of NC](#)

[Collaborative Divorce Assn of Eastern Carolina](#)

[Social Security Admin.](#)

[Research Family Law](#)

[Our Firm Web Site](#)

[Pitt County Courthouse](#)

Family Matters Archive



Remains

Perhaps the most fundamental issue of all is who has the authority to dispose of someone's remains. An adult has the right to "authorize the type, place, and method of disposition of the individual's own dead body" by funeral or cremation contract, a healthcare power of attorney, a written will or other statement signed by the individual and witnessed by two persons who are at least 18 years old. Service members and certain federal employees may appoint the "person authorized to direct disposition" by using a Department of Defense [DD Form 93](#). If the deceased person did not use any of the above methods to express his or her desire related to the funeral and disposal of his or her remains, the surviving spouse "may authorize the type, method, place, and disposition of the decedent's body."

NC Gen. Stat. 130A-420. This assumes no contract such as a prenuptial agreement or [separation agreement](#) has been executed that provides otherwise. There are special rules for [Native American](#) remains determined to be antiquities.

Parents and Children

When a parent passes away, the surviving parent is automatically the sole custodian of the child unless there are extraordinary circumstances, such as when a court has terminated the rights of that parent. Children are usually entitled to [social security](#) benefits as a result of the death of that parent. If a married person wants to adopt a child, North Carolina requires both spouses to sign the adoption petition. If an adoption petition has been filed before the death of one of them, the court may still enter an adoption decree listing the deceased party as a parent, essentially allowing him or her to adopt the child after death. The adopted child is then legally treated as the natural born child of the deceased party for the purpose of inheritance. NC Gen. Stat. §48-2-204.

If [paternity](#) of a minor child is disputed after the death of a suspected biological father, in certain situations, the law permits biological testing of the child and the deceased man to determine whether he is the biological father. If the court rules that the deceased person is in fact the biological

parent, the court must "backdate" any decree of paternity to indicate paternity before the date of the death. NC Gen. Stat. §49-14.

Unborn Children

It is a crime after the twentieth week of a woman's pregnancy "to advise, procure or cause a miscarriage or abortion when the procedure is performed by a physician licensed to practice medicine . . ." unless "there is substantial risk that continuance of the pregnancy would threaten the life or gravely impair the health of the woman." See NC Gen. Stat. §14-45.1. It is a felony to conceal the birth of a child "by secretly burying or otherwise disposing of the dead body of a newborn a child "by secretly burying or otherwise disposing of the dead body of a newborn child." Anyone "aiding, counseling or abetting any other person in concealing the birth of a child . . . shall be guilty of a Class 1 misdemeanor. NC Gen. Stat. §14-46.

When there is what the law calls a "spontaneous fetal death," either parent may file an application requesting a "certificate of birth resulting in stillbirth." The certificate "shall not include any reference to the name of the stillborn child if" the death report doesn't list one, and one is not listed by the parents. Any such certificate "shall clearly indicate that it is not proof of a live birth." NC Gen. Stat. §130A-114.

A person who unlawfully causes the death of an unborn child is guilty of the separate offense of murder of an unborn child if that person willfully and maliciously takes some action with the intent to cause the death. Along with a few other situations, the crime is also committed if the person who causes the death is doing something "is inherently dangerous to human life and is done so recklessly and wantonly that it reflects disregard of life." NC Gen. Stat. §14-23.2

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Life and Death and Family Law: The Financial Matters

By Amy A. Edwards

Family Support

Death terminates all rights to alimony, and any the obligation to pay it. In North Carolina, a spouse cannot successfully sue the estate of his or her late husband or wife to seek alimony payments. However, the parties themselves can spell out exactly what they intend as it relates to the death of a party. Agreements of this nature can be pre-marital agreements, sometimes called [pre-nuptial agreements](#), separation agreements, or some other type of contractual agreement. People are also free to negotiate about beneficiary designated assets, such as life insurance, which will pay the beneficiary that has been designated in the event of death.

If the deceased spouse failed to abide by the terms of such a contract, such as failing to name the other party as the beneficiary of an investment account for example, the surviving spouse may sue the estate of the deceased spouse. Although past due [child support](#) is vested, meaning it cannot be increased or decreased once it is past due, North Carolina statutes terminate all future child support (for that child) upon the death of a child, or the death of the parent who is obligated to pay it. NC Gen. Stat. §50-13.10. The child of the deceased parent may qualify for [social security](#) death benefits or other benefits.



*Rights Change When a
Spouse is Separated*

Marital Assets and Debts

When parties have separated before a death, the widow or widower has the right to file a claim for the division of marital property and debt, called [equitable distribution](#), against the estate of the deceased. This is in direct contrast to alimony or child support rights, both of which terminate upon the death of either adult. A widow or widower may file a claim for equitable distribution within twelve months of the date of death if they were separated when the death occurred. Deeds are sometimes used to convey cemetery lots, and sometimes owned by entering into a contract, without a deed.

Fortunately, at least in Pitt County, lawsuits for equitable distribution of

marital property after the death of a spouse are not frequently litigated. But if they are, competing property rights of the deceased and the widow or widower are balanced with any provision in a last will and testament, the right to survivor benefits, life insurance and any real property.

Inheritance Laws and Lawsuits After Death

The executor (if male) or executrix (if female) of the estate for the deceased party is responsible for defending a lawsuit when claims are made against the estate. That person may also file lawsuits on behalf of the deceased, such as a claim for wrongful death, against someone who negligently caused the death. The negligent party may face a money judgment for [wrongful death](#), which includes loss of consortium described by the statute as the: "Services, protection, care and assistance" of the deceased, and "society, companionship, comfort, guidance, kindly offices and advice" of the deceased. NC Gen. Stat. §28A-18-2.

Note that the laws concerning inheritance with or without a Last Will and Testament are key in this situation, not just family law statutes concerning spouses. Inheritance laws set out rules about certain financial distributions to surviving spouses, and sometimes, the option to elect an allowance or homestead rights.

To make a very long and complex story short, after a spouse has been missing for at least five years, a judge may make a ruling on the ownership of his or her assets. Upon ruling on that matter, the surviving spouse and/or family members may then move forward essentially as the beneficiaries and owners of jointly owned property. NC Gen. Stat. §28C-11.

There is a "[slayer law](#)" in North Carolina. When the spouse (who will then be a widow or widower) murders his or her spouse, all spousal inheritance rights are lost. This also applies when a married couple has purchased real property after they marry, in both names, meaning that the surviving spouse will not automatically own it. NC Gen. Stat. § 31A-4.

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American Indians in North Carolina

By Amy A. Edwards

Background

The US Department of the Interior, through the [BIA \(Bureau of Indian Affairs\)](#) , "provides services directly or through contracts, grants, or compacts to 566 Federally recognized tribes with a service population of about 1.9 million



Indian Child Welfare Act: ICWA

The federal government passed a law known as [ICWA \(the Indian Child Welfare Act of 1978\)](#), 25 U.S.C. § 1902, to address cultural issues. When Indian children were taken from their Indian parents or custodians because of abuse or neglect, they were often placed with non-Indian foster care families or adopted by non-Indian parents. ICWA supersedes North Carolina (or any state) laws concerning foster care and adoption. It applies to adoption cases, as well as cases of alleged abuse or neglect.

Federal Recognition of Tribes

ICWA is only applicable if the parent or parents are members of a federally recognized tribes, or they are eligible to become members. Federal recognition means the tribe and US government have a working relationship between their governments. Surprisingly, only some tribes are [federally recognized](#). For instance, the [Lumbee Indian](#) tribe is not federally recognized. The only federally recognized Indian tribe in our state is the [Eastern Band of Cherokee Indians](#). North Carolina General Statute §71A-1 also designates residents in "Robeson, Richmond, and Sampson counties, who have heretofore been known as "Croatan Indians" or "Indians of Robeson County," together with their descendants, shall hereafter be known and designated as "Cherokee Indians of Robeson County."

What Does ICWA Do?

When the ICWA laws apply, the state or the parents hoping to adopt a child of Indian heritage must formally notify the applicable tribe. Officials of the child's tribe must receive formal notice of the case, at which point the tribe has the right to take jurisdiction of the case in [tribal court](#). Jurisdiction means the proper authority to accept a case, and to making a ruling in that case.

After receiving formal notice, the tribe may also choose to simply be named as a party to the case, allowing them to participate in the trial taking place in state court. In an emergency, the state may take emergency jurisdiction over a child until the tribe can take jurisdiction of the case. This is similar to the laws concerning two different states competing for a case. Our North

American Indian and Alaska Natives." The BIA is essentially our US government interacting with the Indian tribal governments. "There were 122,110 American Indians located in the state of North Carolina when the 2010 US Census was conducted" according to the [NC State Commission](#) of Indian Affairs, which also provides links to [NC Indian Tribe web sites](#).

Carolina courts only act on an emergency basis when there is a court order from another state.

If the case stays in a [North Carolina court](#), an expert must testify in court to explain American Indian customs, beliefs and society. Because so few Americans are familiar with Indian culture, the knowledge given to the judge by the expert is intended to help the judge guard against bias from lack of familiarity with the child's Indian background. The ICWA law also requires the state to make "active efforts" to strengthen the family by remedy or rehabilitation of Indian parent(s), even before the situation deteriorates into a problem requiring the state to remove the child. ICWA also provides that when a child needs to be placed in foster care, preferences shall be given to American Indian foster parents. Both the [US Supreme Court](#) and the [NC Court of Appeals](#) have heard ICWA cases recently.

Our state has had a long and unique relationship with the Cherokee. The current North Carolina Senate [Coat of Arms](#) features two Native Americans.



Family Law in North Carolina

In some respects, the Eastern Band of Cherokee has statutes that are fairly similar to ours. In fact, their family law statutes are numbered the same way so lawyers who are not Indians may more easily represent clients in those courts. See their family laws about marriage and divorce in Chapter 50 of the [Cherokee Code](#).

Likewise, our courts address the family law matters of Indians. For example, [NC General Statute 51 provides](#) the requirements for a valid marriage, including one that is created "in accordance with any mode of solemnization recognized by any religious denomination, or federally or State recognized Indian Nation or Tribe." Our state has a [domestic violence law](#) that makes it a crime to falsely tell a law enforcement agency there is a domestic violence protective order "entered pursuant to this Chapter or by the courts of another state or Indian tribe remains."

Our Department of Social Services collaborated with the [NC Commission](#) of Indian Affairs, and created forms for Child Welfare Services to use. For instance, [one form](#) is used to help social workers and other professionals

explore a child's Indian heritage. They also provide [state data](#) on Indian matters. While only one tribe is federally recognized by the federal government, our [state recognizes several](#) others.

Our state has dozens of laws that relate to Indians. We even have [ABC laws](#) that intersect with the Eastern Band of Cherokee Indians. North Carolina also has a statute giving [full faith and credit](#) to "a judgment, decree, or order signed by a judicial officer of the Eastern Band of Cherokee Indians and filed in the Cherokee Tribal Court." This means North Carolina will treat Cherokee court orders in the same way it treats North Carolina court orders.

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WHO GETS THE DOG?

Child Custody & Support • Marital Property Division
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Sincerely,

Amy A. Edwards

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