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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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Rules of Engagement: Prenuptial Agreements

By Amy A. Edwards

An engagement is a happy occasion. In the excitement about their wedding, people sometimes overlook the fact that marriage

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Web Site of the Month

[NC Digital Collections](#)

This web site features Archive's Treasures, NC Family Records and historical North Carolina government publications.

Tip of the Month

[Recalls.gov](#)

Stay safe. Check this government web site to see what has been recalled, including food, medicine, cosmetics, vehicles and consumer goods.

Legal Term of the Month

automatically changes your legal rights. These rights include inheritance rights, marital asset and debt rights, and alimony. In legal terms, these rights and responsibilities are called [incidents of marriage](#), meaning the burdens or benefits of marriage.

What is a pre-nuptial agreement?

A pre-marital agreement, sometimes called a pre-nuptial agreement, is a contract between two unmarried individuals. It only becomes effective if there is a marriage. Otherwise, these contracts have no legal effect. Some people think it is unpleasant to discuss the subject of pre-marital agreements. But it is worse to wait, perhaps decades, to find out your gamble to roll the dice and see if you can avoid dealing with a pre-nup was unsuccessful? I tell clients a pre-marital agreement is like home owners insurance; you hope that you never need it, but after a fire (or in our case divorce/death) burns your house to the ground, you sure are glad you have it.

What topics does a pre-nup cover?

The statute^[1] clearly says "[t]he right of a child to support may not be adversely affected." Otherwise, couples are free to contract about [alimony](#), [property and debt](#), and even inheritance rights. These agreements are popular among people who have been married before, or people who have property, such as a home, when they get married. When people marry later in life, they usually want to protect their adult children in the event of their death or divorce.

A pre-nup can be as simple or complex as is necessary. These agreements are not usually boiler plate documents. Sometimes people merely want to clearly identify their separate property before they marry. Other times, someone may have substantial debts, such as huge ongoing medical bills, and want to shield the other person from them. A common circumstance is when a wealthy person (sometimes at the request of his or her parents) marrying a person of modest means.

Perjury

Perjury is an intentionally false statement under oath (the whole truth and nothing but the truth) made in a court proceeding or affidavit (notarized written document). Perjury is a felony, and helping someone else commit it is also a felony. [NC Gen. Stat. 14-209](#).

Legal Trivia

Did You Know?

If a marriage takes place after a female mis-represents pregnancy, the marriage may be voided (*i.e.*, annulled) upon request if the female does not give birth within *10 lunar months* of the separation. This applies only when they separated within 45 days of the marriage and remained separated for one year.

[NC Gen. Stat. 51-3](#)

Suggestions For Future Newsletter Topics

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Why have a pre-nup?

Protecting property (*i.e.*, their separate assets) is the most common reason for having a pre-nuptial agreement. Property you bring to the marriage may grow in value, such as retirement investments or a pension. Do you understand the impact of marriage is on these assets or debts? Most people don't realize it, but property may be mixed, meaning separate property someone brings to the marriage may become partly marital. No widow or widower wants to own property with their spouse, only to find out after his or her death, the property is now owned 50/50 with the adult children of the late husband or wife. This can be an unintended consequence of failing to properly plan events before marriage.

[Estate rights](#) may also be included in a pre-nup. If someone does not have a will, the [state will determine](#) who inherits the estate, and in what percentage. Having a will generally gives you the flexibility to name anyone you choose to inherit from, but without a prenuptial agreement, you cannot "disinherit" your spouse. Otherwise, without a pre-nuptial agreement, by law, a spouse cannot be ignored or left out. A pre-nup can set out the wishes of the parties in the event of their deaths, any way they choose.

Alimony is another reason pre-marital agreements can be useful. There is no formula or guideline for determining the proper award of alimony a dependent spouse will receive in North Carolina. However, parties may choose to do so in a pre-marital agreement. For example, the amount of alimony may be awarded based on the number of years they remain married.

One spouse may want to avoid alimony altogether, and the other may want to be sure it is specifically included. For example, if you are young and anticipate being a stay at home mother (or father), think about the financial impact that would have on you. After being out of the

workforce for what may be years, it may be difficult to get back into the workforce, especially if you separated suddenly, or your spouse leaves you. Every year a spouse is not employed outside the home is another year he or she is not contributing to their social security retirement. One spouse may be giving up a career to move frequently if the other spouse is in [the military](#) or has other employment that requires frequent relocation. Think of your life 20 or 25 years from now, when you don't necessarily have your whole life ahead of you.

The BIGGEST Mistake

The biggest mistake I see people make is making this decision to have a pre-marital agreement prepared largely as an afterthought. It seems some people spend more time choosing the flowers for the wedding ceremony than thinking about their rights and how they are impacted the day that wedding ceremony takes place. This type of contract will have a major impact on your life, not only if you divorce or die, but even for a spouse who wants to get a mortgage in his or her sole name, without the other spouse's signature, for instance. Several years ago, I represented a client who had entered into a pre-nuptial agreement from the early 1970s.

As a family law attorney, I often receive somewhat frantic calls from a client who has waited until a few weeks or even days before the marriage to think about having a pre-marital agreement. It is a very bad idea to wait until the last minute to begin the process. Doing so tends to create a hurried and mediocre document, which doesn't include many details. A well drafted agreement that a client has plenty of time to review and ask questions about usually means people are free to enjoy the wedding without bickering about the terms of the agreement, in the midst of being distracted by hurried last minute wedding planning. Remember, it is your life and failing to properly plan what happens if you separate, divorce or your spouse dies can lead to disastrous consequences. It is much better to consider these things now instead of waiting until the worst case scenario occurs. You will have to deal with the worst case scenario either way. Some pre-nups are just as complicated as separation agreements, and can easily take weeks or longer to prepare and negotiate.

Can we share an attorney?

No. Because fiancés are in love and are sharing a joyous occasion, it is difficult to explain that the matters in the agreement create a conflict of interest. An attorney may only represent one person. Usually, what is in your best interest is not in the best interest of the other person, who may be losing assets or alimony in the process. A good attorney is not looking just at the current situation, but years or decades away. In fact, that is the very reason you are entering into a pre-marital agreement, to avoid arguments with each other and family members in the event of divorce or death. It is better for the other person to have his or her own attorney instead of going through the process without an attorney.

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Strange Bedfellows: Marital Fault in NC



By Amy A. Edwards

Although the role of marital fault has been narrowed a great deal over recent years, it is still quite alive and kicking. Fault is not a factor in the divorce itself, but it does come into play with other claims that are filed with the divorce. NC acts of marital fault are listed by statute, as well as case law, which includes cases decided by the state court of appeals level.

The deal-breaker in cases that consider marital fault is adultery but under certain exceptions, the spouse who commits fault may be given a clean slate so to speak. There are random defenses to these fault claims, but they are beyond the scope of this article. Based on my observations over the years, adultery is by far the most litigated fault ground. It is designated by statute as "illicit sexual behavior" and it "means acts of sexual or deviate sexual intercourse, deviate sexual acts, or sexual acts defined in [rape laws], voluntarily engaged in by a spouse with someone other than the other spouse." Adultery is rarely proven by a "smoking gun" complete with photos or videos, as we see on television. In real life, adultery is proven with different types of evidence, including testimony of witnesses. Alimony may be proven with a collection of evidence, taken as a whole, not just one item of evidence.

Other acts of marital fault include maliciously turning the other spouse outdoors, and treating him or her cruelly or barbarously endangering his or her life. Also considered marital fault is a spouse being an "excessive user of alcohol or drugs" when it makes the other person's life intolerable. Closely related to that ground is another bad behavior: "involuntary separation of the spouses in consequence of a criminal act committed." In other words, a spouse who is incarcerated. Although the law includes "reckless spending of the income of either party, or the destruction, waste, diversion, or concealment of assets," as marital fault, it can be difficult to show the other person's intent as it relates to their money management.

My personal favorite marital fault is "other such indignities to the person of the other as to render his or her condition intolerable and life

burdensome." This quaintly worded bad behavior requires more than a single time or two, which the law deems a "course of conduct." Our courts do not tell us exactly which bad behavior is included under this definition, preferring instead to consider it on a case by case basis. Many behaviors may qualify as marital fault. One North Carolina case 1 says behavior included in the term "indignities" includes "unmerited reproach, studied neglect, abusive language, and other manifestations of settled hate and estrangement." However, the law also tells us that indignities can consist of willful failure to provide necessary subsistence according to one's means and condition. Like the reckless spending fault, this one may be difficult to unravel because people manage their finances in many different ways.

In a nutshell, abandonment is a marital fault consisting of one spouse leaving the other spouse without justification. One creative attorney just made up a new fault ground in 1987, and named it "constructive" abandonment. It stuck, and the NC Court of Appeals has recognized it as a marital fault ground. Any time the law needs to prevent some injustice from happening, it may choose to essentially pretend a certain thing exists, and they say it is "constructive." As used here, constructive abandonment means that even if the spouses are both at home and no one physically abandoned the home, the court may choose to treat a spouse as abandoning the home anyway if their behavior was bad enough.

See: NC Gen. Stat. 52-B, NC Gen Stat. 50-7, NC Gen Stat. 50-16.1A, Evans v. Evans, 169 NC App 358 (2005), and Ellinwood v. Ellinwood, 88 N.C.App. 119 (1987)

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Abuse and Neglect Courts in North Carolina

By Amy A. Edwards

This is part three of a three part series on the child abuse, neglect, and dependency court system in North Carolina. These types of cases are heard in a special type of court sometimes called A/N/D Court (abuse, neglect and dependency). See [earlier newsletter articles](#) for information about child abuse and neglect. Dependency is a legal term that means a child lacks a parent or guardian, or that parent is missing, deceased, or otherwise unable to care for the child, and childcare arrangements have not been made. The best way to describe the A/N/D courts is to contrast them with traditional child custody or family courts. There are always exceptions to the rule, but below is a "big picture" and brief sketch of the typical cases.

Abuse, Neglect and Dependency Courts

Background

The public policy of our state law is to preserve families, by doing what is necessary to assist families and make efforts to get the children back into their homes with their parents. Sadly, based on my experience, abuse, neglect or dependency cases are often a result of parents struggling with substance abuse. The consequences of substance can be severe, including incarceration, unemployment, homelessness, and other conditions that hinder parents in their efforts to regain custody of their children after their child was taken from them.

Who Are the Players?

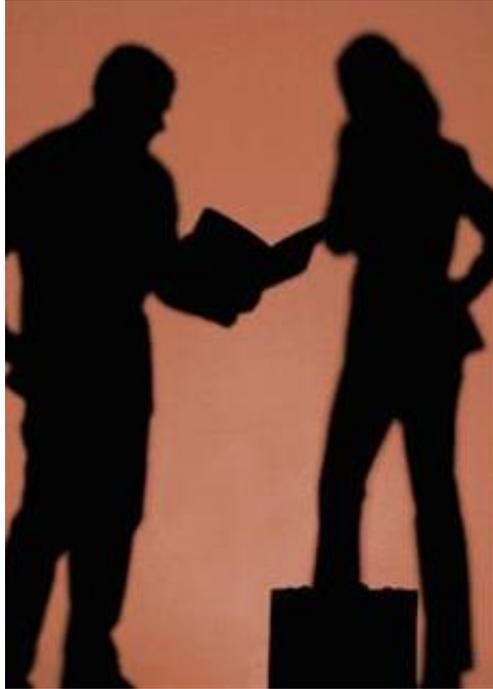
After Child Protective Services screens a report of child abuse, neglect of dependency, and determines it is necessary, they will file a petition asking the court to intervene and enter court orders concerning the child or children. In A/N/D court, there are at least three "parties" who have an active role in the case. Parents are parties, and they usually have separate attorneys, appointed by the court to protect their constitutional rights as parents. The Department of Social Services is also a party to the case, and also has an attorney who represents it, as well as the social workers who are key witnesses. A [Guardian Ad Litem](#) volunteer visits with the child, and is also represented by an attorney in court, who advocates exclusively for the child. If a child is in foster care, the foster parents become important witnesses and will sometimes hire an attorney to represent them if they have decided to seek custody and/or adoption of the child.

The A/N/D Court System

In A/N/D cases, there are parents and third parties, so the burden of proof is much higher (clear and convincing evidence of petition allegations, which is a high standard just beneath reasonable doubt). A/N/D courts are different from the courts that rule in juvenile delinquency cases. The A/N/D court may also award guardianship, in addition to child custody. When Social Services is awarded custody, they have the right to determine "placement" of the child, such as foster care, group homes, next of kin, etc. Relatives of the child are preferred, but are sometimes unable to care for the child, or they have a criminal or [Child Protective Services](#) history. The court files in A/N/D cases are permanently sealed in order to protect the child, much like adoption records.

A/N/D cases have a myriad of deadlines and hearings to navigate for at least a year, reviewing the circumstances in court hearings as time passes. There must be an "ajudication" determining the facts of what happened, a "disposition hearing" to order parents to take certain actions, and many periodic hearings to monitor the case. If parents can't correct the problems, the court will eventually rule on whether adoption is the best alternative, or awarding child custody or guardianship to a non-parents. Social Services tends to remain involved with the families on a long term basis. Because the system is overloaded, and there can be fewer social workers than needed,

visitation between a parent and child can be minimal, especially when supervised visitation is required. It is not unusual to arrange for supervised visitation for an hour or two a few days each month.



Child Custody Courts: A Whole Different Ballpark

Who Are the Players?

In child custody court, there are two parties, the parents. Because there are usually no third parties, their constitutional rights are presumed to be equal and therefore, there is no need to appoint attorneys to represent them because they aren't fighting the state (*i.e.*, the Department of Social Services). Their constitutional rights are equal, and they have a lower standard of proof (*i.e.*, preponderance of the evidence, which is "more likely than not"). Although social workers can testify in child custody cases, it isn't automatic. Parents will call random witnesses, depending on what is disputed. Perhaps teachers, family members or neighbors who know the child at issue will testify. In these cases, child custody [mediation](#) is mandatory.

The Custody Court System

Child custody cases have a court file that is public, meaning anyone, including the child at some future date, has the right to review all the allegations made, court orders and anything else of record. In these cases, there is usually one child custody trial and (hopefully) everyone goes their separate ways unless there is some future change in circumstances. This court is less about following children and more about getting a ruling and a child custody order, between two parents. The goal for each parent is to be awarded as much time with the child as

possible. Both parents will have time with the child, but the question is how much each gets. There is not necessarily a "common goal" to preserve the family. In fact, instead of parents fighting the state and Child Protective Services, they usually fight each other, sometimes degenerating into mud-slinging during their custody battle. Custody cases make their way to the court system when married parents divorce, or a breakup between the child's biological parents.

Guardian *ad litem* volunteers are needed. If you feel volunteering to act as a guardian *ad litem* for a child is right for you, [read more](#) about how you can apply.

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Amy A. Edwards

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