

Family Matters e-Newsletter



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NEWS FOR JUNE 2015

In This Issue:

Too Close For Comfort: Legal Consequences of Incest

Social Media, the Legal System and Digital Footprints

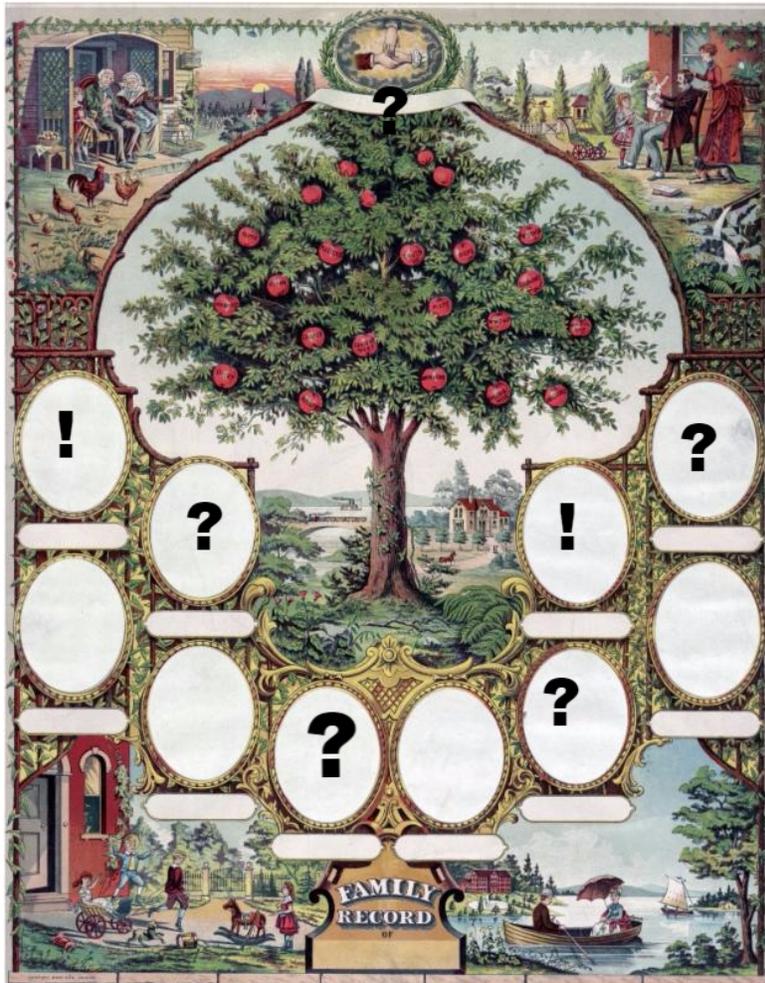
Broken Hearts & Legal Claims for Breach of the Promise to Marry

How Much Will My Case Cost?

See Past Issues from the Family Matters Archives

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Too Close for Comfort: Legal Consequences of Incest

By Amy A. Edwards

Criminal Law Consequences

As it must, the law addresses nearly everything, even the most unpleasant of things. The criminal law in North Carolina creates the definition of incest as the act of intercourse with a grandparent or grandchild, parent or child or stepchild or legally adopted child, brother or sister of the half or whole blood, or uncle, aunt, nephew, or niece. Incest is a felony, although no "child under the age of 16 is liable . . . if the other person is at least four years older when the incest occurred." NC Gen. Stat. §14-178.

Civil Law Consequences

In the event a pregnant minor seeks an abortion, she does not need parental consent if she has been raped or is a victim of "felonious incest." NC Gen. Stat. §90-21.8.

Similarly, victims of incest are given exceptions to the state law that prohibits state funds being used to perform abortions. NC Gen. Stat. §143C-6-5.5. A parent who seeks to file a name change for his or her child must have the consent of the parent. But, if the other parent is convicted of incest, his or her consent is not required. NC Gen. Stat. §101-2.

You can marry your first cousin and share the same grandparents. On the other hand, a marriage between family members are "nearer of kin than first cousins, or between double first cousins . . . shall be void." NC Gen. Stat. §51-3. A good definition of double first cousins is from a blog writer* who defines it as follows:

"Double first cousins' arise when two siblings of one family reproduce with two siblings of another family. The resulting children are related to each other through both parents' families. Double first cousins share both sets of grandparents in common and have double the degree of consanguinity of ordinary first cousins. Genetically, they are as related as half-siblings."

What About Child Custody?

It appears our state has no specific statutes or appellate cases that create any special rules for determining who shall be awarded child custody when the child is born of an incestuous relationship. But none are really necessary because the court always has the power to address all custody cases. Child Protective Services also has the right to file a lawsuit for children who are abused or neglected. In all cases, if a child is born as a result of the rape, the man who committed the rape cannot file a claim for child visitation or custody. NC Gen. Stat. §50-13.1.

Legal Status of Parents

Biological parents have a constitutional right to the care and custody of their children. Anyone else seeking custody must first prove the parents are unfit or that they have taken some action that is not consistent with their constitutional rights. When intercourse is by consent with another adult, I wonder if the parents' constitutional status changes when there is incest. In other words, if a man is both a biological father and uncle, does he still have his constitutional right to custody of the child because he is a father? Or can a third party just file for custody without having to prove he is unfit because he is merely an uncle? Right now, we don't have the answers.

* See a diagram and post from "hbd chick" at this blog:
<https://hbdchick.wordpress.com/2011/07/07/double-first-cousin-marriage>



The legal system is frequently slow to accept change, a problem that is more challenging when something is as "new" as social media.

After all, Facebook has only been around for a few years. Even when cases about it are appealed, it can take years to be heard and possibly even sent back to the trial courts for new hearings.

This area of the law is rapidly forming but it is not yet uniform or even predictable in the majority of our state courts.

Social Media, the Legal System and Digital Footprints

By Amy A. Edwards

What Do Attorneys Look For?

We're looking for anything that helps us prove our case, in social media, texts, photos, videos, smart phone records, e-mails, lap tops, and anything else in electronic format. They can indicate someone's location, what they have written (posts, etc.), and the date and time something was communicated. Finding photos that have been taken, and with whom, can be quite helpful.

Following the Footprints: How Do Attorneys Find It?

The short answer is that we can seek court orders that permit computer professionals to reach private information if we do not have legal access to the data. Other times, people have public social media accounts, posts or web sites that are freely available to be

printed. People publicly post photos of themselves that are truly shocking. Even when data has been deleted, the right computer expert can probably find it. Attorneys can also subpoena the actual device and associated records from the owner of the data so an expert can access it. Cooperation by some communications companies (cell phone provider, for example) can be less than helpful when it comes to assisting with records.

The Civil Discovery Process

Another way to access information is through the civil discovery process. With it, an attorney can require a party to the lawsuit to provide certain records, data and/or the actual device/computer, among other things. The court may enter an order that requires certain electronic information to be provided, or an order that protects the information from being accessed. The North Carolina rules for civil discovery refer to "electronically stored information" which includes "reasonably accessible metadata that will enable the discovering party to have the ability to access such information as the date sent, date received, author, and recipients." See Rule 26 of the NC Rules of Civil Procedure. There are exceptions that involve a judge ruling on whether additional types of metadata should be made available to the other party. The judge also has the authority to award attorney's fees that are generated because of the request or the refusal to provide information as requested.

How Do Civil (Non-Criminal) Courts Treat It?

This is the unpredictable part of the equation. I'm going to use the term "data" to include all of the meanings in the paragraphs above. As with any other evidence, a court must find the data to be relevant. All the juicy things you find may be fantastic, but if the judge does not see the value of plodding through it based on the relevance to the particular case at hand, the data is excluded as evidence. It must also comply with the NC Evidence Code. An example would be data protected by attorney client privilege, such as an e-mail from the other party to his or her attorney.

If the person who posted the data is not in court to testify, it might be hearsay and not admitted as evidence on that ground. The data must be authentic, meaning the person seeking to admit the evidence must prove who wrote it. Federal law may be implicated if someone accesses certain e-mails of their ex. If audio is captured, the federal wiretap laws might also apply. Wiretap laws created criminal and civil penalties that can include a \$10,000 per incident fine. In court, when someone fails to produce data the other party is entitled to, the court can create an "adverse inference," which means the court will assume the version of events alleged by the party who requested the data is the correct version of events.

Although our state's [business courts](#), which are specialized courts only in a few counties, have created a thorough method for judges to use when deciding whether to allow data as evidence. It remains to be seen whether their rulings (which are not binding on other courts) will adopt their approach or not. See the case here:

[*Analog Devices, Inc. v. Christopher Michalski, Kiran Karnik and Maxim Integrated Products, Inc.*](#)

2006 NCBC 14 (2006).

More Questions But Fewer Answers

These topics are but a few of the largely unanswered questions when we try to figure out what the court should do when ruling on the admissibility of data:

- Rights of third party owners (*i.e.*, work cell or desktop, or a relative using a data family plan).
- Violation of wiretap laws, invasion of privacy, etc.
- Access to protected medical records contained in the computer or device, for example, your searches on the *WebMD* site.
- Rights of third parties (potential witnesses) who communicated with someone privately, such as your friend's comments made only to you, with an expectation of privacy.
- Passwords and concerns about identity theft by various people who access it during the court process. Examples: banking, credit card orders, employment records, privileged communications: Attorney client? Therapist/patient?
- Access to cookies on the computer from controversial sites (dating web sites) or even illegal web sites.
- How do you exclude data from the search when the court allows access to some things but not others?
- If the actual device is produced, such as your cell phone, what if data is erased or altered?
- What if the party seeking the data causes liability to you? What if he or she accesses your email account and slanders someone using your email address, or visits obscene sites of minors?

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 June 2015.

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Broken Hearts & Legal Claims for the Breach of the Promise to Marry

By Amy A. Edwards

When you think of weddings, you probably don't think of lawsuits. You think of the gown, dresses and tuxedos, flowers, band, the venue, photographer, food and caterers, the honeymoon and a host of other things related to the event. When an engagement falls through and money has been spent, there may be financial relief available by a claim of breach of the promise to marry (BOTP). These cases are rare, and in our state, they go at least as far back as 1805, and as recently as 2012. See *Gaskill v. Dixon*, 3 NC 350 (1805) and *Dellinger v. Barnes*, 159 NC 462 (2012).

These claims came to the colonies from England, and were very popular here for some time. Originally, women had much to lose when there was a broken engagement, such as the loss of a certain position in society, and anticipated future support. When society valued young brides, becoming an "old maid" while waiting to be married could have a significant financial

consequence. As the role of women changed, claims for BOTP became controversial. Many states have abolished BOTP claims but North Carolina still recognizes them.

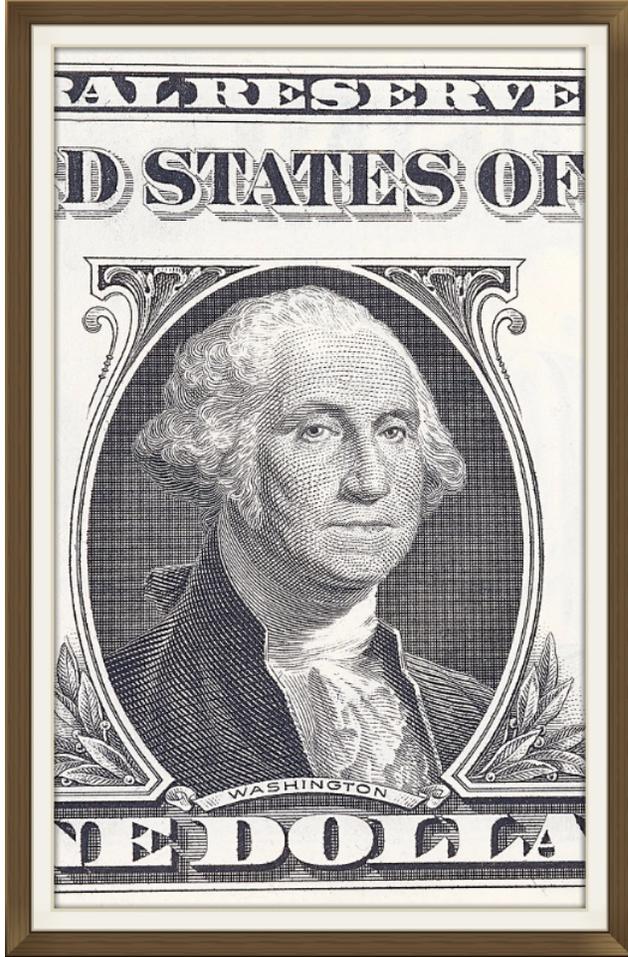
BOTP cases are based on contract law. As such, an agreement requires one person to make an offer, and another to accept it. The promise may be verbal or implied, such as the bended knee and wearing the ring. Some describe these cases as a hybrid of both contract law and torts. A tort is a civil wrong (not criminal).

In these cases, the promise is based on wrongful conduct related to a personal/legal relationship.

Any contract is void when someone who entered into it fraudulently or while under duress. The parties must be able to marry at the time the promise is made. For example, being separated from a spouse (spouse #1) but not yet divorced means there can be no valid contract to marry spouse #2. See *Hutchins v. Day*, 269 N.C. 607 (1967). Another defense to BOTP is venereal disease, at least until it is cured. BOTP cases may only be filed within three years of the time the promise is broken. N.C. Gen. Stat. 1-52(1). The person sued for BOTP may also use the defense of chastity (*i.e.*, refraining from sexual intercourse with a third party).

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How Much Will My Case Cost?



Rightly so, this topic is of major importance any time someone wants to separate from their spouse, deal with child custody and support, or otherwise have legal representation in a family law matter.

By Amy A. Edwards

Billing Rates

Each attorney sets his or her own billing rates and manner of payment. The experience, skill, specific practice area (such as an attorney who practices one area of the law) and the complexity of a particular case are considered factors in setting the rate an attorney charges. Each state has specific regulations concerning fees charged by attorneys. In our state, for example, only attorneys who have been through what amounts to a mini-bar exam in their type of practice, as well as a peer review process, may designate themselves as specialists in the type of law.

The Types of Fees That Are Paid

Flat fees are generally charged for things that are straight-forward and uncontested, such as the divorce itself. Often, the flat fee includes things such as filing fees paid to the court and the cost to serve the opposing party by sheriff. Flat fees usually involve things that can be completed in a relatively short time.

Unfortunately, the cases that are filed aside from the divorce itself are less straightforward and are often contested. These include child custody and support, alimony and equitable distribution. The funds provided to the attorney are held in trust until the attorney bills your account. When the funds are gone, the attorney requests additional payment. When someone hires me, for example, the advance I require to begin working on the case is an estimate, based in part on the time I expect to spend on the case. I also consider the attorney who is representing the opposing party, and whether that attorney tends to focus on the bottom line or dispute anything and everything. It takes longer to negotiate about six disputed matters than two.

Litigation Costs

There are certain tasks that may be required in any given case, regardless of whether you want them or you are defending against them, all of which cost clients.

If a case involves a deposition (testimony in a law office with a court reporter) or other civil discovery (written answers to questions and producing documents), the cost will further increase.

When cases cannot be resolved in mandatory mediation, it takes significant attorney time to prepare for court, especially in property division cases when there are lots of assets and/or debts to be divided. There is an opportunity to seek attorney's fees in certain cases but judges may choose whether to order them, and if so, in what amount they must be paid. Attorneys can sometimes keep costs down by having a paralegal or assistant manage the routine things, such as preparing motions and taking phone calls when appropriate. The billing rate for the staff person is lower than what you are billed for the attorney.

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