

Family Matters e-Newsletter



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News For June 2016

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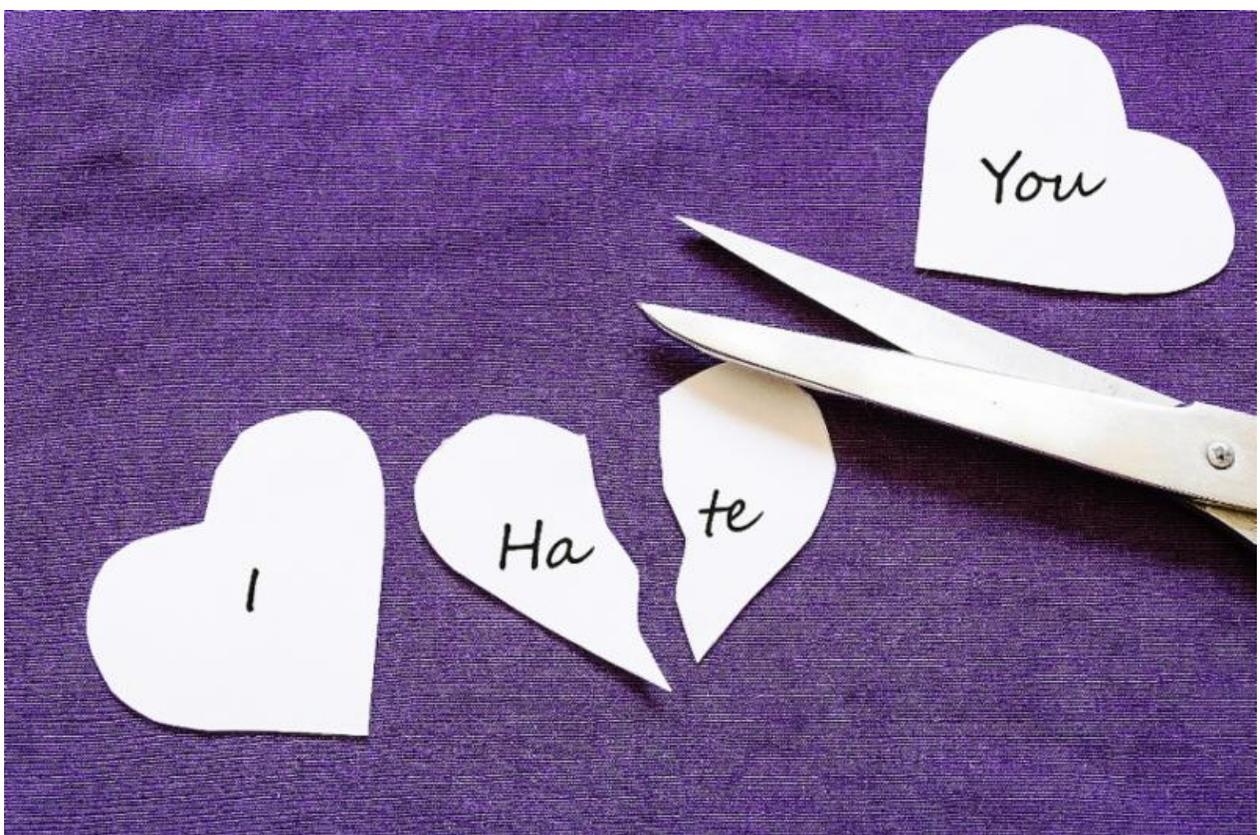
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A Dish Best Served Cold: Malicious Prosecution Cases in NC

By Amy A. Edwards

Technically, family law has no legal relationship to a claim for malicious prosecution. However, they can overlap because of the nature of divorce, the hard feelings, and sometimes a desire for revenge, festering over a long period of time. Malicious prosecution is a claim you might pursue if someone filed a lawsuit against you with malice, without a valid reason, and the case ended in your favor. This also applies when someone presses criminal charges against you or otherwise causes you to be wrongly charged with a crime. If the case was a civil case, you also have to prove you suffered special damages. Criminal law involves the state suing a defendant for violation of a law, a crime. Everything else is generally civil law, and the object of most civil suits is an award of money damages. A recent NC Court of Appeals case, *Fuhs v. Fuhs** spells out the requirements for filing a malicious prosecution civil case seeking

money damages:

There Was a Legal Proceeding Filed Against You

Malicious prosecution requires you to show a civil case was filed against you, or criminal charges were initiated (*i.e.*, prosecuted) against you. Examples include someone going to a magistrate to press charges against you, or someone calling law enforcement and wrongfully pressing criminal charges against you. Depending on the circumstances, someone's participation in criminal proceeding against you might be enough to meet this requirement.

No Probable Cause

To prove a claim for malicious prosecution, you must show there was no probable cause to initiate legal proceedings against you. In other words, he or she didn't have a reasonable suspicion you were guilty (or at fault) based on the circumstances. If a civil case was wrongly filed against you, probable cause means he or she filed the case against you when a reasonable and prudent person under the circumstances would have realized there were no grounds for filing the case. Probable cause is *not* the same thing as reasonable doubt, which asks whether the defendant is guilty of a crime.

With Malice

When referring to malicious prosecution, the definition of malice doesn't refer to the anger or revenge that person might have towards you when the criminal charges are made, although that can certainly be part of the motive. Instead, the legal definition of malice as used here means the person who instituted the legal proceeding against you did so intentionally and wrongly, without a valid reason.

In Your Favor

A criminal case must be resolved in your favor, such as the District Attorney voluntarily dismissing the case against you. A civil case must also be resolved in your favor. The legal proceeding filed against you must be finished before you file a claim for malicious prosecution. Otherwise, you do not have a ruling in your favor made by a judge or jury.

Special Damages in Civil Cases

Only in civil cases, you must also prove there were special damages that interfered with your personal rights or your property before you can successfully file a claim for malicious prosecution. The damages must be more than an "injury to his reputation, embarrassment, loss of work and leisure time and that he has incurred expenses in defending the claim." They are special because they "wouldn't necessarily happen in similar situations." Examples: your wrongful confinement to a mental institution, your property is seized or someone prevents you from using your property in a certain way by wrongly getting a temporary restraining order or wrongfully freezing your assets.

* Quotes and cites: *Fuhs v. Fuhs*, 82 S.E.2d 385 (2016), *Newton v. McGowen*, 256 N.C. 421 (1962), *Stikeleather v. Willard*, 83 N.C. App. 50 (1986) and *Motsinger v. Sink*, 168 N.C. 548 (1915).

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 2016.

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The House of Cards: Parents and Substance Abuse

By Amy A. Edwards

Sometimes it is obvious when a parent is impaired. Other times you might suspect something is wrong but you don't have a mechanism to confirm it, especially when you don't live together. Without the assistance of the court, it can be difficult to monitor. Parents in denial about their substance abuse tend to create a facade that everything is fine, like a house of cards ready to collapse with the slightest breeze.

When the House of Cards Falls: What Can You Do by Agreement?

In this article the term "parent" includes anyone with visitation and/or custody rights, substance abuse is abbreviated as "SA" and the law is that of North Carolina. Occasionally, a parent gets a wake-up call after being served with a complaint or motion for child custody that recites the other parent's serious concerns about SA in a document, in black and white. If that parent recognizes he or she has a problem, it is possible to enter a court order by consent and without a trial, subject to approval by the judge.

Such an order can require the parent to go to a detox program, pain management center for addiction to pills and/or prescribed medications, counseling or other treatment. The order can condition visitation on

successful [random drug](#) or alcohol testing and/or confirmation from the treatment center or SA professional that the parent has kept all scheduled appointments. Supervised visitation can be ordered, depending on the availability of a willing third party to supervise or the availability of supervised visitation or exchange [facilities](#).

When the House of Cards Falls: What Can the Judge Do?

Judges have the authority to do whatever is required to protect a child, including emergency custody orders if there are grounds for doing so. Parents with SA usually leave some path of evidence, sometimes by conviction of crimes such as possession of a controlled substance or DWIs. Other times, a careless parent might do something as simple as failing to take a child to school on time, more than once. You can ask the court to enter an order requiring the parent to do the things discussed in the above paragraph. The court also has the ability to require the other parent to submit to a physical or mental examination. An example of this is an order requiring a parent to have a [substance abuse assessment](#). Results of an assessment can aid the court by setting out a baseline or starting point for the parent. After analyzing a parent's situation, the court is in a better position to make rulings that will give that parent structured goals to be met in order to visit with the child or children. The results of the assessment might offer insight to the court in deciding whether he or she can care for a child, and under what conditions.

Alcohol Monitoring

A judge can award visitation rights on the condition that the parent abstains from consuming alcohol. In that event, if the parent consumes alcohol, his or her visitation is suspended. Now, judges have express authority from the family law statutes to require the parent to submit to "a continuous alcohol monitoring system . . . to verify compliance with this condition of custody or visitation." The device must be the type [approved](#) by the NC Division of Adult Correction. If the court enters an order requiring this, the judge must order the "monitoring provider to report any

violation of the order to the court." The provider is also obligated to notify both parents of the violation. NC Gen. Stat. §50-13.2(b2).

If Child Protective Services substantiates a report of abuse or neglect, it can file a petition for the court to enter an order placing the child in the custody of the Department of Social Services or foster care, if necessary.

Further Reading: [Narcotics Anonymous](#) and [Alcoholics Anonymous](#)

From www.DrugRehab.com: [Signs of Substance Abuse](#) and [Info for people fighting addiction](#)

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Not a Shield Nor a Sword: Daddy Went to Prison

In the case of [*In re: C.M.*](#), Claire is the little girl whose daddy went to prison. She was born in 2009 with drugs in her system but her dad wasn't there. He was incarcerated after being convicted of drug charges eight months earlier. By the time dad was released from prison, Claire was three years old. Dad filed motions for visitation, and later for increased visitation, which he eventually won. But by the time the case reached a conclusion, the judge awarded guardianship of his young daughter to her foster parents. Dad appealed and on May 3, 2016, the NC Court of Appeals ruled in his favor and reversed the order awarding guardianship to the foster parents. The lower court now has to have a new trial taking into account things it failed to do the first time.

Constitutional Rights & Protected Status

Parents have a constitutionally protected legal status as parents. They have the legal right to the care and custody of their children. But it isn't just about the rights of parents. It is a two way street. The law gives parents their special legal status with the expectation they will fulfill their responsibilities and duties as parents. Before awarding custody or guardianship of a child to a non-parent, the court must first rule the parent *did something* to lose his or her rights. Otherwise, the parent retains the special legal status as a parent. A court must make very specific rulings about what, exactly, that parent did to lose that status.

What the Judge Did

In the C.M. case, the trial judge ruled that dad "abrogated" his

rights as a parent because he wasn't there when Claire was born. Worse, his actions related to illegal drugs led to his arrest and incarceration were voluntary. The judge declared such a thing "cannot be excused." While many people might think this makes perfect sense, it is not *legally* valid. The Court of Appeals reversed the guardianship order because the mere fact that he was in prison for three years is not enough to automatically rule he should be stripped of his legal status as a parent. Court is not a gum ball machine. A judge must use judgment and discretion to rule on whether he has lived up to his expected parental duties.

What Else Matters?

The question to be addressed is what did Dad do or fail to do that would cause him to lose his protected status as a parent. What is the relationship like between Claire and her dad? What do they do together when he has visitation? How is the therapy progressing? Does she have her own bedroom? Does he call her regularly? More to the point, a social worker even testified there were no current concerns about the stability of dad's home.

If Dad loses his protected legal status when the new trial takes place, the judge will examine what is in the child's best interest, regardless of whether Dad is the parent. It is possible he could lose custody but still have visitation rights. If he keeps his legal status, the court must presume Dad has custody of the child. In that event, the court can put certain restrictions on his behavior, or require him to do certain things, as it does in any other custody case.

Past Incarceration Isn't a Shield or a Sword

Ultimately, the Court of Appeals tried to clarify what it means to be an incarcerated (or formerly incarcerated) parent. The parent can't use the fact that he was incarcerated as a sword, actively wielding it in an effort to get special consideration as a "victim" to make up for his inability to parent from a cell. Nor can he use it as a shield to hide behind as an excuse for the things he has or has not done as a parent. A court must judge him as a parent, not just as a former inmate.

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