

Family Matters e-Newsletter



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NEWS FOR MAY 2015

In This Issue:

Things Aren't Always What They Seem: Fraud in North Carolina

Surrogacy in North Carolina: What Can You Expect?

Domestic Violence Cases & Rights of Gun Owners

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Things Aren't Always What They Seem: Fraud in North Carolina

By Amy A. Edwards

There are numerous types of fraud, both civil and criminal. This article focuses on civil fraud in North Carolina.

Legal Definition of Fraud

- (1) *False representation* or concealment of a material fact that is
- (2) Reasonably *calculated* to deceive (*i.e.*, inviting you to rely on it), and
- (3) That is made with *intent* to deceive someone, and
- (4) That does deceive someone, and
- (5) That results in *damage* to the injured party.

What Does All That Mean?

When a person says something to someone, or conceals something from someone, it must be about a *material* fact in order to be fraud. In legal terms, a *material fact* means the misrepresentation must be something

important enough for two people to reach an agreement about, or for the victim to take some other action of consequence based on it. The act must be intentional and done in a knowingly (*i.e.*, calculated) deceptive manner, inviting the other person to rely on it. Furthermore, the person who is the victim of a fraud must actually be deceived. In other words, if someone figures out the misrepresentation before taking action upon it, there is no fraud in a civil case, although there might be criminal consequences if an *attempted fraud* took place. Another requirement to prove fraud is that the victim has some damage (*i.e.*, a bad result). Damages in legal terms means the victim has lost money, his or her rights were violated, or he or she suffered some other loss for which he or she should receive financial compensation.

Types of Fraud

There are two types of fraud in civil cases, actual fraud and constructive fraud. Actual fraud is the most common type of fraud. It occurs when there is no legal duty owed to the victim, who could be a stranger for example. Constructive fraud occurs when the person committing the fraud has some legal duty to the victim. In those cases, the victim has a special relationship with the person who committed the fraud, and has to prove fewer things. Constructive fraud means the law constructs (*i.e.*, pretends there are already) two of the five requirements necessary to prove fraud, making it much easier to prove fraud.

Special Relationships (Easier to Prove Fraud)

Proving constructive fraud only requires three things because there is a special relationship, called a *fiduciary relationship*, between the people. This includes many types of special relationships, such as husband and wife, doctor and patient, or someone acting for another person by means of a signed power of attorney. In these cases, the act must be reasonably calculated to deceive the other person, and actually deceive him or her, resulting in damage.

See Forbis v. Neal, 361 N.C. 519 (2007).

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 May 2015. www.AmyEdwardsFamilyLaw.com © 2015.



Surrogacy in North Carolina: What Can You Expect?

By Amy A. Edwards

What is Surrogacy?

According to www.Merriam-Webster.com, surrogacy is "the practice by which a woman (called a surrogate mother) becomes pregnant and gives birth to a baby in order to give it to someone who cannot have children." In some cases, the woman who gives birth to an infant is the biological mother of the child because she substitutes her egg for that of a woman who desires a child. In other cases, she is not the biological mother

because a man and woman have each used their own genetic material to create the child she carries. Sometimes the donors of the genetic material are anonymous. Parties who attempt surrogacy in our state can expect uncertainty or risk when it comes to the law.

Surrogacy in North Carolina

Our state has no laws about surrogacy, although some other states do. None of our appellate cases address the matter. Therefore, family law attorneys prepare contracts that try to make the surrogacy process as legally secure as possible, hoping to withstand future legal challenges. There may also be some type of contract, acknowledgement, or consent to various procedures that one or more of the parties might sign at medical facilities. To date, none of these signed documents have not been ruled upon by our Court of Appeals. There is no decision on whether medical ethics require or prevent a doctor to perform the procedure. Worse yet, there are no uniform or standard surrogacy documents or methods used in this state, although there are state-wide experts in the matter.

Old Laws on the Books

In some areas of the state the judges feel more sympathetic to the cause than others, broadly interpreting old laws for new circumstances. The closest law we have is a one sentence statute from 1971, NC Gen. Stat. §49A-1. It says any child "born as the result of . . . artificial insemination shall be considered . . . the same as a naturally conceived legitimate child of the husband and wife requesting and consenting in writing to the use of such technique." This applies to insemination by means other than sexual intercourse. However, it doesn't apply to surrogacy. It only applies to two married people who agree in writing to use their own genetic material to conceive a child who is carried by the wife. The child is then considered to be a legitimate child born of the marriage. It does not apply to children born out of wedlock or spouses who fail to consent in writing. Now that the federal courts have ruled same sex marriages are

valid in our state, it remains to be seen whether the terms husband and wife are even legally adequate, or if the statute must be modified to recognize more generic titles, such as spouse and spouse.

Issues to Address

The legal status of "biological" parents and "legal" parents in surrogacy cases is unknown in North Carolina. Birth certificates automatically reflect the name of the woman who delivers the infant, and the name of her husband if she is married (or blank if she is unmarried and the father does not agree to be added). Currently, unless there is a lawsuit, it does not matter legally if the egg did not come from the surrogate. Nor is it relevant (at that point) that the man the surrogate is married to did not provide genetic material and is completely unrelated to the child. A contract should address that matter too. We do not have laws related to maternity testing, as we do for paternity testing. Legal custody of the child should also be addressed in the contract, as well as possible adoption if that applies.

Other Unanswered Questions

I also wonder what would happen if the surrogate mother changes her mind early in the pregnancy and decides to have an abortion. Another question is whether any or all of the parties can legally waive their respective rights, both to the creation and of the child and to child support. The state court also has the authority to determine that surrogacy itself is void because it is against public policy, but it is highly doubtful the courts would rule that way.

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Domestic Violence Cases & Rights of Gun Owners

By Amy A. Edwards

Domestic Violence Protective Orders

Gun owners have a constitutional right to bear arms. The Second Amendment says: A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed. This Constitutional right is not absolute, especially when it intersects with the rights of those who are protected by domestic violence orders.

If someone shares certain relationships with you, such as a spouse or former spouse, current or former household member, or as a parent of your child, he or she may ask the court to enter a domestic violence protective Order (DVPO). Grounds for a DVPO include intentionally causing or attempting to cause bodily injury, placing someone (or their family members or household) in fear of imminent serious bodily injury or

continued harassment that rises to such a level as to inflict substantial emotional distress, and various types of sexual assault. The DVPO may order someone to refrain from threatening, abusing, following or harassing the other person by telephone, visiting the home or workplace, or other means. The DVPO may prohibit someone from purchasing a firearm for a certain time period, even if the DVPO is entered on a temporary emergency basis without notice to the defendant until he or she is served with a copy of the emergency order.

Federal Law -- Are You Allowed to Request the Return of Your Guns?

A federal statute, 18 U.S.C. §922(g)(1-9), prohibits the following people from possessing, shipping, transporting, or receiving any firearm or ammunition: (1) a person convicted of a crime punishable by imprisonment exceeding one year; (2) a person who is a fugitive from justice; (3) a person who is an unlawful user of, or who is addicted to, a controlled substance; (4) a person who has been adjudicated as a mental defective or who has been admitted to a mental institution; (5) an alien who is unlawfully in the U.S. or who has been admitted to the U.S. under a nonimmigrant visa; (6) a person who has been discharged from the Armed Forces under dishonorable conditions; (7) a person who, having been a citizen of the U.S., renounces his citizenship; and particularly for our purposes:

(8) (*Note*: this next category is referring to a DVPO) a person subject to a court order that . . . restrains the person from harassing, stalking, or threatening an intimate partner or partner's child, and which order includes a finding that the person is a credible threat to such partner or partner's child, or by its terms prohibits the use, attempted use or threatened use of such force against such partner or partner's child; or

(9) a person who has been convicted of a misdemeanor *crime* of domestic violence. (*Note*: In NC, a DVPO is entered in a civil case, unless and until a DVPO is violated. In that event, the violation of it is a

crime).

NC State Law -- How Do You Get Your Guns Back?

Emergency temporary DVPOs require law enforcement to immediately seize guns and ammunition before the actual trial takes place. At the (non-emergency) trial, the judge may dismiss the request for the DVPO, or the judge may require the emergency temporary DVPO to remain in place for a specific time period, usually for one year. The federal restrictions on possessing, shipping, transporting, or receiving any firearm or ammunition apply to the state as well. It is the state law that spells out the method by which guns may be returned to the owner when the DVPO expires, assuming he or she is eligible under federal law. There are certain exceptions for defendants who are members of the armed forces and certain law enforcement officers.

Within 90 days of the date the DVPO expires (or 90 days after the order denying the other person's request for a one year DVPO), a gun owner has the right to file a *Motion For Return of Weapons Surrendered Under Domestic Violence Protective Order*, and must attach documents that prove the DVPO has expired (or that it was denied in the first place). The court will hold a hearing to decide whether the guns should be returned to the owner. If not, the court may order the guns to be kept by the Sheriff's Department for official use (or sold by the Sheriff's Department), or destroyed if there is no unique identification number or the gun is unsafe for use because of wear, damage, age, or modification. The judge may also order the guns be provided to the NC State Crime Laboratory's weapons reference library for official use by that agency, or to the NC Justice Academy for official use by that agency.

NC Gen. Stat. 14-269.1

NC Gen. Stat. 50B-3.1

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Amy A. Edwards

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