

# Family Matters e-Newsletter



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## NEWS FOR NOVEMBER 2015

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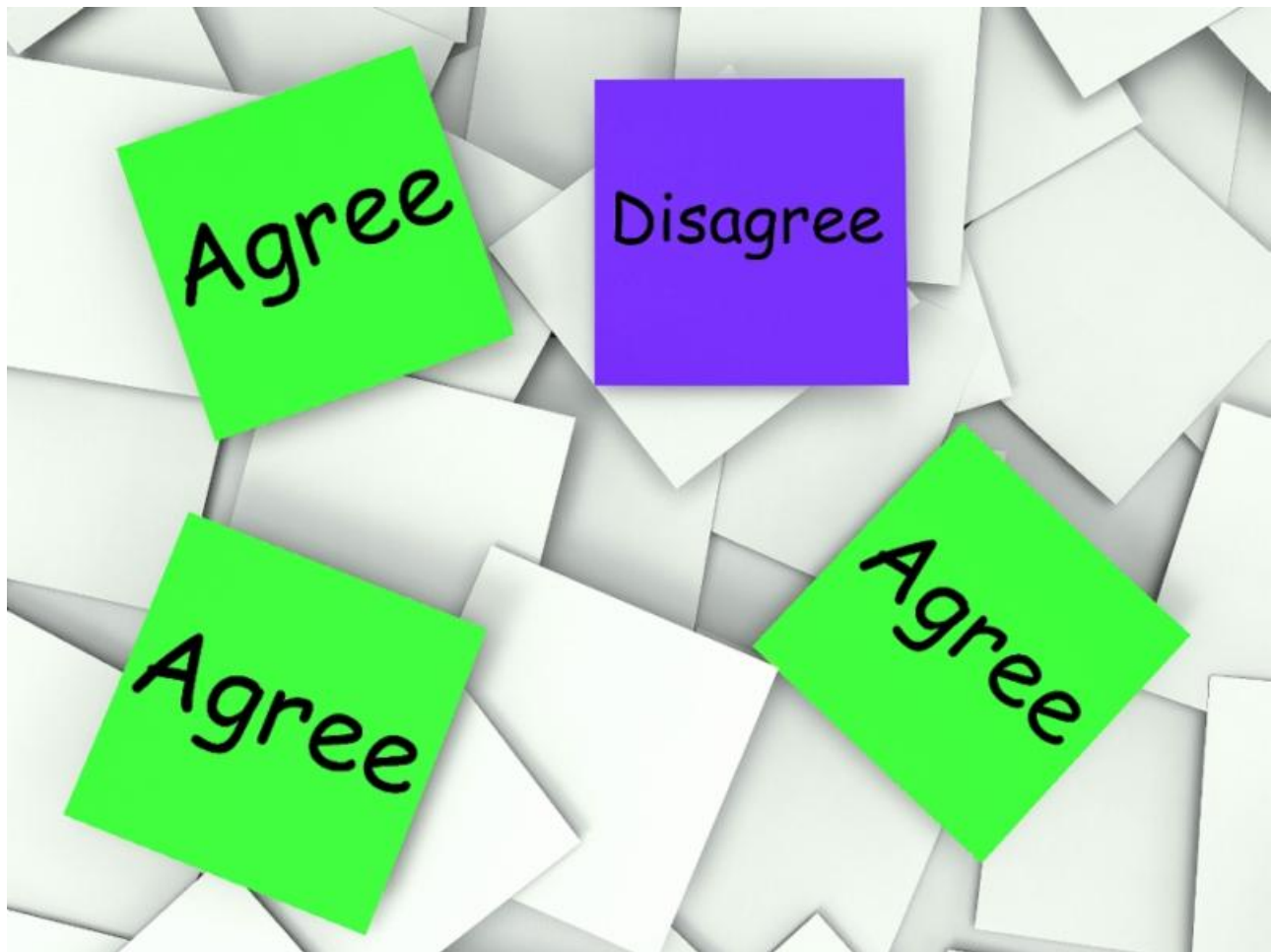
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## Who Has the Final Say, the Client or the Lawyer?

By Amy A. Edwards

When there is a difference of opinion between an attorney and a client, there are not always black and white answers. But the NC State Bar has rules that specify the appropriate course of action in response to some of the most common ethical dilemmas. This article is about North Carolina family law matters.

## **Clients Decide: Objectives and the Process**

A lawyer must abide by a client's objectives of representation. Client goals must be respected, so long as those goals are legal (and ethically sound). For example, the client may choose whether to file a lawsuit for paternity testing. Another decision reserved by the client is the process to be used in moving forward with the case. The lawyer may advise a client to litigate a case, which means filing a lawsuit. However, the client might decide when to do that, or whether to pursue mediation instead. The client is entitled to decide what to do in response to an offer. Clients may accept or reject an offer, ignore it or make a counter-offer. The lawyer must take all offers of settlement to the client, even if the lawyer does not believe the offer is a good one.

## **Lawyers Decide: Ethics**

The attorney must take immediate action if directed to do things that violate the mandatory NC Rules of Professional Conduct or the law, even if it is against the client's wishes. An attorney cannot commit fraud or help a client to commit fraud, or any illegal action. The Rules do not allow frivolous lawsuits, even if a client demands it. Each time a lawyer signs a document, it is a certification that the attorney has read the document and that it is factually correct to the best of his or her knowledge. It also means the case is not filed "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Rule 11 of the Rules of Civil Procedure. A lawyer cannot advise a client to violate the law or a court order. He or she may advise the client about the consequences of doing so.

## **What if We Don't Agree?**

In most cases, clients are free to make their own decisions, even if the lawyer has advised against it. However, if there is a strong enough difference of opinion with serious consequences, an attorney may choose to terminate the attorney-client relationship. If there is a pending lawsuit, the attorney may choose to file a motion to be relieved as the attorney. The reverse of this is also true, a client may choose to terminate the attorney-client relationship.

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 November 2015.

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## Separate Property in a Nutshell

By Amy A. Edwards

NC Gen. Stat. §50-20 defines marital property and separate property for purposes of [equitable distribution](#), the division of marital assets in North Carolina. Marital property is generally

property either of you acquire during the time you are married and live together, so long as the property exists when you separate. There are certain distinctions concerning assets and debts during the time period after spouses separate. A case can become quite complex because there are also assets that can be mixed, being partly marital and partly separate. If debts for an asset were paid with marital money, for example, the asset might be mixed in nature. This article focuses on assets that are purely separate property.

## **Legal Definitions**

Separate property is property you acquired before you got married. This applies not only to personal property, such as a vehicles, but real property as well. If you can prove an asset was one you inherited, it will be your separate property. A gift to you alone, not to you as husband and wife, is separate property as long as the gift is not from your spouse. In a peculiar twist, the statute says if your husband or wife gives you a gift while you are married and living together, that gift is marital property and not your separate property, with one exception. If your spouse says the gift is your separate property when the gift is given, it will be. Professional licenses and business licenses that cannot be transferred are separate property. For example, a law license or medical license is separate property.

## **Do-It-Yourself Definitions**

Sometimes called a pre-nup or [pre-nuptial agreement](#), a valid signed pre-marital agreement can be used to substitute an agreed-upon definition of separate property that is different from the definition used in the statute. Such an agreement can define

separate property by title, meaning the spouse who bought an asset in his or her sole name while married and living together owns it as separate property. Similarly, people can agree who keeps what in a separation agreement, which is also a contract.

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## Should You Settle or Let the Judge Decide?

By Amy A. Edwards

There are a number of ways to address child custody and support,

alimony, and/or equitable distribution (division of marital property). Each case is different but there are some similarities. Reaching an out of court settlement has the benefit of flexibility, allowing you to choose an arrangement you can live with instead of risking what a judge may decide. Compromise is a result of giving up some things to be sure you get certain other things. Privacy is also a benefit, keeping your personal matters out of the courtroom. Settlement by negotiation, [mediation](#) or [collaborative family law](#) is frequently quicker and less expensive.

However, settlement may not be in your best interest. An emergency may require immediate attention and a court order. No matter how badly one person may want to settle, the other may be completely unreasonable. Other times, the court's ruling prevents a party from being taken advantage of where there is a significant power imbalance and/or [domestic violence](#). On the other hand, going to court usually takes a long time, and involves "busy work" that can be costly. The stress and emotional toll of court cannot be overlooked, not only on the parties but on the whole family in some cases. Your attorney is the best person to guide you through the maze, based on your goals and expectations.

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## **Doing the Right Thing: It's Mandatory Reporting Abuse of Disabled Adults**

By Amy A. Edwards

While many people are aware of the duty to report suspected [child abuse](#), which applies to anyone who has reason to believe it has occurred, many do not realize there is also a legal duty in North Carolina to report suspected abuse of disabled adults. A report should be made to [Adult Protective Services](#) through the [local](#) office of the NC Department of Social Services.

### **What is a Disabled Adult?**

The legal definition of a disabled adult is one who cannot perform "essential services" for himself or herself due to his or her physical or mental incapacity, and has no able, responsible, and willing



person who will meet those needs. "Essential services" are things such as medical care, hygiene, food, clothing, adequately heated and ventilated shelter, and protection from health and safety hazards. These essential services also include protection from physical mistreatment or exploitation. Exploitation is "the illegal or improper use of a disabled adult or his resources for another's profit or advantage."\* Know the [signs of abuse](#).

## **What About the Elderly?**

A disabled adult is not legally defined by age, although the elderly often meet that standard. There is a legal duty for financial institutions to report to the authorities if they suspect a disabled adult or senior citizen is the victim or target of financial exploitation. There are also several criminal statutes that apply to the abuse, neglect and exploitation of elder adults. NC Gen. Stat. §14-32.3.

## **What Happens After the Report?**

As long as the report is made in good faith, the reporter will not be held liable. If the report is substantiated and the state intervenes, the adult may qualify for protective services, meaning those services that are necessary to protect the disabled adult from abuse, neglect, or exploitation. Protective services may be provided not only by the government, but also by private organizations or individuals necessary to protect the disabled adult. There are [resources](#), including those for caretakers.

\* Articles 6 and 6A of NC Gen. Stat. §108A, Protection of the Abused, Neglected, or Exploited Disabled Adult Act.

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