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What Do All Those Child Custody Labels Really Mean in NC?

By Amy A. Edwards

In the [first part](#) of this article, we explored legal custody (decision-making custody). In this article, we focus on physical custody and visitation.

Physical Custody

Our state deems physical custody to mean "the physical care and supervision of a child." NC Gen. Stat. §50A-102(14). The NC Child Support Guidelines identify primary physical custody as the custody a parent has

when he or she spends 243 overnight visits per year with that child. The other parent has secondary physical custody because he or she has 122 or fewer overnights. In that case, child support is the same amount no matter what the custody schedule is. But if a parent has 123 or more overnight visits per year, a different calculation is used. Depending on the exact number of overnights per year, the child support obligation changes on a per-day basis.

Physical or Legal Custody?

The Guidelines are careful to note that primary physical custody is determined without regard to whether a parent has primary, shared, or joint legal custody (decision-making custody), which is the right to make significant long-term decisions, such as a child's religious training or the school a child will attend. Contrast that with physical custody, which involves the day-to-day decision-making such as what bed-time is best or how much time a child may spend using social media on a school night.

Visitation With a Child

Our state fails to clearly define visitation, stating that: Unless a contrary intent is clear, the word custody shall be deemed to include custody or visitation or both. The Court of Appeals wrote that "Visitation privileges are but a lesser degree of custody. Thus . . . the word custody . . . was intended to encompass visitation rights as well as general custody." NC Gen. Stat. § 50-13.2(b1)

But the statute specifies who *cannot* have visitation. If a person conceived a child by acts of various sexual assault laws, he is not entitled to visitation rights. On the other hand, grandparents may file a case visitation, not custody of any sort. However, they may seek visitation only if there is an on-going custody battle already pending in court. This avoids the significant stress and cost of litigation which could otherwise be inflicted upon the parents by a third party.

What About Technology?

Judges in North Carolina may award "electronic communication" with a parent. To allow a fluid and meaning as technology changes, the law

envisions "contact, other than face-to-face contact, facilitated by electronic means, such as by telephone, electronic mail, instant messaging, video teleconferencing, wired or wireless technologies by Internet, or other medium of communication." However, the statute is quick to add that these communications "may be used to supplement visitation . . . but . . . may not be used as a replacement or substitution for custody or visitation."

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 2018. www.AmyEdwardsFamilyLaw.com© 2018.



Is a 529 College Savings Plan a Gift to a Child or Marital Property?

By Amy A. Edwards

On August 7, 2018, the NC Court of Appeals addressed this question in *Berens v. Berens*. This was a case of first impression, meaning our courts have not yet made any decision on this subject. The Court defined 529 plans as "investment programs permit parents to set aside money for their children's college expenses under tax-favorable conditions." In the *Berens* case, the parents funded several 529 plans for their children while they were married and before they separated.

The First Trial: Marital Property

The lower court said that the funds in the plans that were marital property, and then awarded them to Mom as marital assets. She disagreed with that, and appealed the case, arguing that the money invested in the plans were gifts to each child, not marital property. And therefore, the court had no jurisdiction over the plans because they were not marital property. The Court of Appeals disagreed.

The Appeal: Marital Property

In this particular case, the Court of Appeals said the funds were not gifts to the children because they were all in Mom's name alone. Besides the intent to give the gift to someone, a gift is only a gift if it is actually given to someone. Here, Mom failed to give a gift because no child was a named owner. Had the plans been gifts, each child would've had "all right, title, and control over the property." Just because a 529 plan gives an owner a special tax benefit doesn't mean it changes ownership. Although each child was a beneficiary, the plans were still owned by Mom. Therefore, she had the ability to spend the funds in any way see saw fit.

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The Trial: A Chaotic Experience

By Amy A. Edwards

No matter how prepared you and your attorney are, the days before a trial are frantic and stressful. A good case can be like a work of art. At first glance, it might look great but when you stand back and tilt your head, there are always a few more minor adjustments to be made before it is seemingly perfect. But trials are not perfect. Instead, trials are organic.

How are Trials Organic?

Trials take on lives of their own. After the first hour or two in the courtroom, a rhythm usually develops, which can offer a little more comfort. Trials are never what you (or your attorney) expect. Perhaps they will be better or worse, but they rarely stick to the script. Human nature means life is fluid . . . and messy. Because life doesn't have a pause button, new events are constantly taking place right up to the day of the trial.

The Parties

No two trials are the same. They aren't made up by the same cast of characters or backdrop. Besides the fear of the unknown, the parties have the pressure of court staring them in the face. Stress and tempers can flare between the plaintiff and the defendant. Last-minute blow-ups between the parties and extended family members can impact the direction of the trial too. One or both of the attorneys might be completely unaware of some major problem that just unfolded on the day before court. The script is sometimes scrapped early in the trial because of the unexpected testimony of a witness or two. In that event, your attorney must improvise.

The Attorney

Approaching trial dates can cause people to reconsider whether they want to attempt settlement. It is common for clients and their attorneys to be in touch with the opposing side all through the late evening on the eve of court. While the attorneys are tending to last minute details of trial preparation, if their clients want to negotiate and settle the case, they might draft the settlement documents at the same time with the hope that their time has been well-spent and that the parties will sign it the next morning. Time is a luxury most attorneys don't have. We might have two or even three trials back to back, a problem over which we have little if any control. Interviewing witnesses and preparing them to testify too early means they're more likely to forget what they discussed with the attorney, so last-minute calls to witnesses are the norm.

Everyone Else

It is a good idea to have friends and/or family with you in court for moral support. They have the best intentions but sometimes they insert themselves between you and your attorney, interrupting your huddle and distracting us from communicating during a quick 5-minute break. A main pet peeve that judges have is "spectators" the reactions of those in the courtroom. The attorneys are facing the judge, so they can't see what happens behind them. Family law cases are intense. Loved ones sometimes roll their eyes, huff, shake their heads or cause disruption. Judges may stop the trial to tell the audience that such reactions are unacceptable. Further, they may be advised that if there is any further disruption, someone will be held in contempt of court.

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