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Standing: Who Can and Can't File for Child Custody

By Amy A. Edwards

The ability to file a legitimate lawsuit for child custody is extremely limited. A person must have "standing" to file, which "relates . . . to the right of the party to have the court adjudicate a particular dispute."^[1] You must have some vested interest in something before you can even ask the court to rule on the controversy.

Which Parents Can File?

Parents automatically have standing to file for custody against each other because they both have equal constitutional right to the care and custody of their child. They have equal rights to their child unless there is a court order or they have a custody agreement. However, our statutes forbid anyone who is convicted of the following crimes, and which resulted in the conception of the minor child, from filing a child custody claim: first-degree forcible rape, second-degree forcible rape, statutory rape of a child by an adult or first-degree statutory rape. [2]

Which Non-Parents Can File?

When non-parents have custody, they are usually family-members because they are likely to see the child regularly, care for the child or have a strong bond with the child. It has little to do with which relative asks for custody. Instead, it has everything to do with the behavior of the parents. A non-parent only has standing to file for custody in the event that both parents are unfit or have taken actions that are inconsistent with their constitutional right to the care and custody of their child. This standard is the same as any non-parent. This even applies to grandparents who cannot sue for custody merely by virtue of their status as grandparents, although they may seek visitation in limited circumstances.

Who Else Has Standing to File?

Proving that the parents are unfit or that they have acted inconsistently with their rights is a huge hurdle. Constitutional rights protect parents who are merely adequate, or parents who don't do a good job of parenting. But if the non-parent proves the parents are unfit or behaved inconsistently with their rights, our statutes set out a very broad list of potential custodians: "Any . . . other person, . . . claiming the right to custody . . . may institute a . . . proceeding for the custody of such child. . ." [2]

But the non-parent cannot be a stranger to the child. He or she must have a relationship with the child that's in the nature of a parent and child. These aren't just magic words. To have standing, that non-parent must truly prove why the relationship is in the nature of parent and child, that they have bonded with the child. The statute also authorizes an "agency, organization or institution" to seek custody when authorized by law. This includes the NC Department of Social Services/Child Protective Services. [2]

[1] Bunch v. Britton, 802 S.E.2d 462 (2017).

[2] NC Gen. Stat. §50-13.1.



Life or Death Decisions: Healthcare Powers of Attorney

By Amy A. Edwards

Using a Healthcare Power of Attorney (HCPOA), you may designate an agent to make medical decisions for you if you are unable to do so. You must be legally competent to sign the HCPOA, but it remains in effect even if you later become legally incompetent.

When is the HCPOA Triggered?

The HCPOA becomes effective when an adult "lacks sufficient understanding or capacity to make or communicate decisions relating to [his or her] health care." [1] You can choose the physician(s) that you trust to determine whether you are unable to make or communicate your healthcare decisions.

The Agent's Authority

Your Health Care Agent makes decisions based on what you direct in your HCPOA. The default is to allow your agent to make any and all medical decisions for you. But it is your job to set any limits, restrictions, requirements or special conditions. Like any fiduciary, a trusted person given the ability to act on someone's behalf, the agent must act in good faith when carrying out your instructions.

Setting Limits in Your HCPOA

- *General Health Care Decisions.* Choose whether your agent has access to your medical records, can hire and fire medical providers, and the right to place you in, or release you from, a hospital or other facility, such as assisted living or nursing home.
- *Mental Health Care.* Authorize or prevent certain mental health treatment, such as psychoactive medications or shock treatment. Consider whether the agent can admit you to, or keep you in, a mental health facility, and if so, your preferred

facility. The state can always keep you in a facility based on civil commitment laws, for example danger to yourself or others.

- *Life Prolonging Measures.* This is your right to a natural death. [2] Choose whether to allow or withhold life prolonging measures, such as a mechanical ventilator, artificial nutrition (*i.e.*, feeding tube) or artificial hydration. Most people want "reasonable steps to keep me as clean, comfortable, and free of pain as possible so that my dignity is maintained, even though this care may hasten my death." You can say that some/no life prolonging measures will be given in the following situations, described in that statute:

An incurable or irreversible condition that will result in your death within a relatively short period of time; or

You become unconscious and, to a high degree of medical certainty, will never regain consciousness; or

You suffer from advanced dementia or any other condition resulting in the substantial loss of cognitive ability and that loss, to a high degree of medical certainty, is not reversible.

- *Matters of Death.* If you don't already have valid arrangements when you die, the agent can request an autopsy or even dispose of your remains (*i.e.*, cremated or buried). You may or may not want to donate any needed organs or parts, or to donate your body. See the [NC Donor Registry](#) for information about donating.

Adding Things to Your HCPOA

Add what's important to you. You can identify welcomed visitors at any facility where you might be. Naming a legal guardian to care for you if you are unable to do so might avoid litigation among family members about who should serve, and whether to require bond.

How Long is the HCPOA Effective?

It ends when you revoke it or die, unless you authorize him or her to do other tasks related to your final arrangements.

Why Should I Talk to an Attorney?

Sometimes people think that HCPOAs are merely forms but they don't necessarily understand all of the language and legalese they contain. People sometimes research these issues and

get information. But only an attorney can give you legal advice based on your particular circumstances, including what to do with the HCPOA after it is signed.

If you sign something that you don't understand, it could defeat the purpose of it in the first place. That could be devastating. These documents must be properly signed and witnessed in the correct manner. An attorney can also advise you about updating or revoking the HCPOA. If you have questions about the exact meaning of medical terms and options you have for treatment, talk with your doctor.

[1] NC Gen. Stat. §32A-20

[2] NC Gen. Stat. §90-321(c)



What is Marital Property in North Carolina?

By Amy A. Edwards

Before 1981, our state had traditional title ownership. This meant that the assets would be awarded to the person in whose name they were owned if a couple divorced. If the house or vehicle was in the husband's name, for example, the wife received no share of the value.

Reform: Equitable Distribution

Some states have what they call community property. Instead, we use a process known as Equitable Distribution to divide marital property. After a particularly harsh result in a 1979 case that demanded reform, an equitable distribution statute was created, NC Gen. Stat. §50-20. Title ownership was fairly straight forward, but the newer process has lots of grey area.

Instead of strictly using the law to simply look at the name on the deed or car title, the statute requires judges to divide property fairly (*i.e.*, equitably) between spouses.

When the court decides property is marital, it is distributed to one spouse or the other, even if his or her name is not on the title or other ownership title. Equity gives the judge discretion to award assets as he or she sees fit, so long as it is within the terms of the law. The law requires judges to divide marital property equally unless one uses his or her discretion to do otherwise when there are special reasons.

Marital Property Definition

Marital property includes land and personal property that is acquired by either or both spouses during the marriage but before they separate. It must also be owned at the time they separate. If it meets these requirements, the property is legally presumed to be marital. In other words, if a spouse wants to show that property is his or her separate property, he or she must prove it is separate property. To beat the legal assumption that it is marital property, he or she must prove the property was acquired before they married, after they separated, or acquired by a spouse by devise (property transferred by a will) or by descent (property inherited upon death).

What Counts as Property?

The current statute includes just about everything with a dollar sign on it, and a few things that don't have any real value, such as photo albums, or even a negative value such as an overdrawn bank account. Other examples you might not think of include cemetery property, frequent flyer miles, gambling or lottery winnings, pets. Traditional assets include retirement and investments, businesses, royalties, collections of any kind, furniture and household property, and jewelry, to name just a few. However, all professional licenses and business licenses which would terminate on transfer are automatically separate property.

When marital asset has a lien or debt against it, like a car note or loan, that court typically ties the debt to that particular asset. If you receive the car, you usually get it along with financial responsibility for the car note and the payments. But the court has the authority to assign it to the other spouse. The law has an odd provision about gifts one spouse gives the other while they are together. They are marital unless the gift giver specifically says he or she intends the gift to be separate property when the gift is given. As you might expect, that doesn't happen much, except maybe for married lawyers!

[Leatherman v. Leatherman](#), 297 N.C. 618 (1979).

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