

# SEPARATION AND DIVORCE

## **We are having serious marital problems.**

**What should we do?** When a husband and wife face serious marital problems, they often have difficult legal questions that must be answered. This brochure offers some suggestions and general rules of North Carolina law.

**Can this marriage be saved?** Divorce should always be a last resort. The couple should first try to resolve their differences with the help of a neutral third party such as a minister or a marriage counselor. If you are not able to resolve marital problems, CONSULT A LAWYER before you or your spouse leaves the marital home.

**Can we use the same lawyer?** No. Lawyers are bound by the Rules of Professional Conduct which prohibit representing both sides in an adversarial – or potentially adversarial – situation.

**Can we be separated and continue to live in the same house?** No. In order to be separated, the husband and wife must reside at different residences.

**Do we have to sign papers in order to be officially separated?** No. You are legally separated as soon as you begin living separate and apart with the intention for the separation to be permanent. Although the law does not require a couple to sign paperwork when they separate, you should consider drafting a separation agreement if you decide to live apart.

**What is a separation agreement?** A separation agreement is a written contract between a husband and wife. Subjects such as child custody and support, property division, spousal support, and possession of the marital residence may be agreed upon in a formal separation agreement. A lawyer should always be retained to prepare a separation agreement and supervise the signing (or to review an agreement prepared by the other spouse's attorney). Never sign a contract without understanding the meaning and the legal impact of each provision.

## **What if my spouse refuses to sign the separation agreement?**

There is no law requiring a couple to sign a separation agreement. If your spouse will agree to participate, you might consider employing a certified family law mediator to help you negotiate an agreement that both husband and wife would be willing to sign.

## **What if my spouse does not abide by the terms of the separation agreement?**

A separation agreement can be enforced by a court order. To obtain a court order, the spouse seeking to enforce the agreement must file a lawsuit against the other spouse and ask the court to find that the other spouse breached the agreement and order him/her to specifically perform his/her duties under the contract. Consult a lawyer if you need to enforce a separation agreement (or if you are the defendant in a lawsuit seeking to enforce a separation agreement).

**What if we are unable to reach an agreement?** If the husband and wife are unable to resolve all issues with a separation agreement, then a court order may be necessary.

**How do we get a court order?** Before a court can have jurisdiction (authority) to enter an order, one spouse must file a complaint initiating a lawsuit against the other spouse. Once a lawsuit has been opened, the court can resolve issues such as child custody and support, visitation, short term spousal support, alimony, and property division.

## **Can all property items be divided by the court?**

No. For example, property acquired by either spouse before the marriage or by gift or inheritance during the marriage is generally considered to be separate property and exempt from division.

**Is the property always divided equally?** No. Although the law presumes that the marital property and debt should be split evenly between the spouses, the court may award a larger share of the property to one spouse under certain circumstances.

**Does the court consider adultery when it makes a decision regarding division of property?** No. Adultery on the part of either spouse is generally not relevant to the issue of property division.

**What factors does the court consider before dividing the property?** The court must consider the following factors when dividing property:

- Income, liabilities, and property of each party;
- Support obligations from a former marriage;
- Length of marriage, age, and health of both parties;
- Custodial parent's need to keep the marital home;
- Expectation of pension, retirement or other deferred compensation;
- Contribution toward marital property by the party not having title;
- Contribution made by one spouse towards the education or career potential of the other spouse;
- Contribution to an increase in value of separate property;
- Liquid or non-liquid character of assets;
- Difficulty of evaluating the value of a particular asset and the desirability of retaining such asset intact and free from any claim by the other spouse;
- Tax consequences;
- Acts of either spouse to maintain, preserve, develop or expand; or to waste, neglect, devalue or convert property during the period after separation and before distribution; &
- Any other factor the court finds to be relevant.

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**Is there any way to avoid a court ordered division of property?** Yes. If the husband and wife can agree, they can divide the property as they see fit. Their decision regarding division of property must be included in a properly executed separation agreement that is signed by both parties with both signatures properly notarized.

**How does the court determine alimony?**

Post-separation support and alimony can be granted by the court when there is a need for spousal support. The party requesting support must actually be dependant on the other spouse for support or substantially in need of such support. The other spouse must be the supporting spouse; that is, the one able to pay such support.

Post-separation support is temporary and lasts only until an alimony hearing or until the support is otherwise terminated.

There are two aspects to an alimony hearing:

- (1) The court decides the issue of whether one spouse is the "supporting spouse" and one is the "dependant spouse." There is no preference given by law to either men or women, and both husbands and wives may request alimony; and
- (2) If the spouse requesting alimony is found to be the dependant spouse and the other spouse found to be the supporting spouse, then the court determines how much alimony should be paid. The amount of alimony depends on the income and estates of the husband and wife; each spouse's reasonable needs; and the accustomed standard of living during the marriage.

**Does the court consider adultery when it makes a decision regarding alimony?** Yes. At a hearing regarding alimony, the court shall consider marital misconduct by the parties in deciding whether to award support. If the dependant spouse committed adultery before the date of separation and the other spouse can prove it, the dependant spouse is not entitled to alimony, even if he or she is otherwise entitled to support. If the supporting spouse committed adultery before the date of separation and the other spouse can prove it, he or she must be ordered to pay alimony. If both parties committed adultery before the date of separation, alimony is at the discretion of the court.

**What if my spouse is ordered to pay alimony and does not abide by the court order?** If a party ordered to pay refuses to do so, the intended recipient may ask the court for an order holding the other party in contempt of court. North Carolina law provides various remedies for failure to pay alimony.

**How do we get divorced?** One spouse or the other must have resided in North Carolina for at least six months and the parties must have been separated for at least one year with the separation intended to be permanent. When those two requirements have been met, either party may file for an absolute divorce.

**What if one spouse does not want a divorce?** So long as one party has resided in North Carolina for at least six months and so long as the parties have been separated for at least one year, the divorce will be granted.

**Is there any way to get divorced without being separated for a year?** No. There are only two grounds for divorce in North Carolina. A divorce based on one year's separation is most frequently used. The only other ground for divorce in North Carolina is a spouse's incurable insanity with a separation of three years.

**How do I go about filing for a divorce?** It is always wise to consult an attorney about a divorce, even though the divorce may appear to be simple and uncontested. Divorce cuts off the rights to alimony and equitable distribution. If you decide to represent yourself, ask the Clerk of Court in your county if there is a local procedure for pro se litigants to follow. Some counties in North Carolina have self help centers or pro se divorce kits available for a nominal fee.

**How do I find an attorney?** The North Carolina Advocates for Justice maintains a list of family law attorneys. Visit their website at <http://www.ncaj.com>.

The **North Carolina Advocates for Justice** is a nonprofit, nonpartisan association dedicated to protecting people's rights through community and professional legal education, championing individual rights, and protecting the safety of North Carolina families—in the home, in the workplace, and in the environment. This brochure is presented as a courtesy of NCAJ's Family Law Section.

If you have further questions about the information discussed in the brochure, you should consult an attorney. It is suggested that you write down all questions prior to meeting with an attorney to ensure that your questions are answered directly and promptly.