

## WHEN A MARRIAGE FAILS

### **We are having some serious marital problems. What should we do?**

When a husband and wife face serious marital problems, they often have difficult legal and personal questions that must be answered. This brochure offers some suggestions and general rules of North Carolina law that can help a husband or wife answer legal questions. Begin by asking yourself the following:

1. CAN THE MARRIAGE BE SAVED? The couple should first decide if they can resolve their problems agreeably and maintain the marriage. They have several options to help them decide, such as:

- Discussing matters themselves in an honest and open manner, or
- Employing the services of a neutral third party to mediate and counsel—a professional mediator, a minister, psychiatrist, or even a trusted friend can often help.
- If mediation and outside help do not resolve the marriage's problems, CONSULT A LAWYER.

2. SHOULD WE LIVE APART? Separation agreements can be confusing, so it is best to consult a lawyer before either spouse leaves the marital home.

### **Some things to know about separation agreements.**

No law requires a couple to prepare and sign paperwork (such as a separation agreement) when they separate.

No separation document is needed in divorce court to prove that the couple has been separated. However, a husband and wife should seriously consider a separation agreement if they decide to live apart.

Oral promises at the time of separation (concerning the rights and duties of the couple) are hard to prove and impossible to enforce.

Subjects such as child custody and support, property division, spousal support (post-separation support and

alimony), possession of the marital residence, and tax matters should be written down and agreed upon (if agreement is possible) in a formal separation agreement prepared by a lawyer. This agreement is a contract between the husband and wife in which they set out their responsibilities for these difficult issues.

A separation agreement can be enforced by court order if one party breaks a promise in it. No one can force the husband or wife to sign such an agreement, however; and it is not contempt of court to violate a separation agreement that is not part of a court order. A lawyer should always be retained to prepare such an agreement and supervise its signing by the couple (or to review an agreement prepared by the other spouse's attorney).

### **Will we need a court order?**

Only if :

The couple cannot reach a settlement in a separation agreement; however, it is usually wise to have support and custody issues in a court order or in an incorporated separation agreement;

A spouse breaks one or more of the promises made in the agreement; or

There is an emergency situation, such as child-snatching or violence in the home.

### **What about court hearings?**

Special court hearings can be held to resolve specific issues, such as:

- Child custody, support, and visitation issues—when the care, control, and custody of a child are to be decided or the enforcement of visitation rights—that need to be resolved;
- A spouse or children who are victims of physical abuse;
- Child support, before or after divorce, for a parent who needs financial help in raising a child;

- Post-separation support (short-term support) or alimony (long-term support) for a spouse who is not able to support herself or himself; or
- Equitable distribution (property distribution).

### **How should we handle property division?**

Before, during, or after marriage the parties may by written agreement provide for distribution of marital property in a manner deemed by them to be equitable. The agreement shall be binding on the parties.

### **What if the action for divorce has already been filed?**

Either party may apply to the court for a division of marital property called "equitable distribution." Generally, all items of property acquired by the husband and wife during their marriage, unless received by gift or inheritance to one spouse, are considered marital property and are divided, including: real estate, cars, bank accounts, furniture, ownership interests in a business or professional practice, pension rights, and retirement plans, including military pensions.

A pending claim for equitable distribution must exist at the time of entry of divorce judgment or the right to pursue the claim is lost.

### **Can all property items be divided by a judge?**

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

### **Is the property always split evenly?**

The law presumes that the marital property should be split evenly between the parties on the net value of each item. However, under some circumstances, the court may award a larger share of the property to one spouse. For instance, a spouse may be awarded the house and car if she or he has custody of the minor children and needs this for their care.

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### What factors does the judge 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 marital home;
- Expectation of pension payments;
- Contributions both monetary and physical toward marital property's acquisition;
- Contribution of one toward other's education;
- Contribution toward increase in separate property;
- Liquid or non-liquid character of assets;
- Difficulty of evaluating business, etc.; and
- Tax consequences or any other factor relevant.

Once these factors are considered, a judge can enter an order that divides marital property before a divorce has been granted.

### Is there any way the couple can avoid a court ordered division of property?

Yes, by agreeing on a division of their own. These decisions can be made at any time after the initial separation and must be included in a properly executed separation agreement that is signed by the parties and correctly notarized.

### Does North Carolina have a law concerning domestic violence?

Yes. North Carolina has a domestic violence law that can be a powerful remedy for a victim who has suffered bodily injury or the threat of or attempt at serious bodily injury, or who has been harassed such to cause the individual substantial emotional distress. The judge has the power to immediately remove the offender from the home and can require the offender to provide and pay for suitable temporary housing for the victim. A restraining order can be issued, as well as orders for temporary custody, child support, and reasonable attorney's fees. After the initial emergency order, the case is set for a hearing within 10 days to resolve all issues of the case concerning domestic violence. A domestic violence

complaint can be filed without a lawyer's assistance at your county courthouse.

### How does the court determine spousal support and/or alimony?

Post-separation support and alimony can be granted by the court when one spouse is financially dependent upon the other spouse. The supporting spouse must have the ability to pay spousal support to the dependent spouse.

A hearing on post-separation support is held before a judge, and the support lasts only until an alimony hearing or until it is otherwise terminated. There are two aspects to an alimony hearing:

1. A judge decides the issue of whether one party is the "supporting spouse" and one is the "dependent spouse." Notice that there is no preference given by law to either men or women, and both husbands and wives may claim alimony.

2. If the above issue is resolved favorably for the spouse claiming alimony, the final issue is a determination of how much alimony should be paid. This depends on the income and estates of the husband and wife, each one's reasonable needs, and the accustomed standard of living of the dependent spouse.

At a hearing regarding alimony, the judge shall consider marital misconduct by the parties in deciding whether to award support. If the dependant spouse committed adultery before the couple separated and the other spouse can prove it, the dependant spouse is not entitled to support, even if he or she is eligible for it. However, if the supporting spouse has committed adultery, he or she must pay support. If both parties have been adulterous, support is at the discretion of the judge.

### When does alimony end?

Alimony ends upon the remarriage, or cohabitation with another as if married, of the person receiving it or upon the death of either the husband or the wife. Cohabitation also includes private homosexual relationships. Alimony may also be set for a certain time period.

### What if they don't pay?

If the party ordered to pay refuses to do so, the intended recipient must go to court for a contempt order. Garnishment of wages and other remedies for failure to pay alimony are allowed in North Carolina.

### What happens if we decide to get a divorce?

After the couple has been living apart for more than one year with the intention of living apart permanently, and either has lived in this state for the past six months, either one may file for divorce, serving a copy of the "complaint" on the other spouse by certified mail (return receipt requested) or through the county sheriff. The divorce is typically granted 45-60 days after filing of the complaint.

### It is always a wise idea to consult an attorney about a divorce, even though it may appear to be simple and "uncontested." Rights to alimony and equitable distribution may be cut off by divorce.

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The North Carolina Academy of Trial Lawyers 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 the Academy and your local attorney. We hope it will assist you in understanding child support and custody issues.

The Academy's public education programs work to improve our court system to bring fairness and justice to all citizens and to increase both understanding and appreciation of the American judicial system and the right to trial by jury.

If you have further questions about your special needs regarding child support and custody, 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.

This brochure was prepared by the Academy's Public Education Department. For additional information on the public education brochure series, please email [ncatl@ncatl.org](mailto:ncatl@ncatl.org).