

CLIENT INFORMATION LETTER #34

ALIMONY

1. Q. *Is alimony allowed in North Carolina?*

A. Yes. A new law was passed effective October 1, 1995, and it substantially rewrites all the law about alimony in North Carolina. In this state court-ordered spousal support is based primarily on need. This handout will cover court orders for the two kinds of spousal support that exist under state law -- postseparation support and alimony. Provisions for spousal support may also be set out in a separation agreement. These provisions in agreements are covered in a separate handout.

2. Q. *Is the court ever required to order postseparation support?*

A. Yes. Postseparation support [or PSS] must be ordered for a dependent spouse whenever the court finds that... * her (or his) financial resources aren't enough to meet her reasonable monthly needs and personal living expenses; and

* the supporting spouse has the ability to pay.

3. Q. *What criteria does the court have to consider in determining these two issues?*

A. There are several, including the financial needs of the parties, their accustomed standard of living, the current employment income (and other earnings) of the parties, their earning abilities, their debts, their reasonable living expenses and each party's legal support obligations -- for each other, for a former spouse, for their minor children and for other minor children of only one of the parties.

4. Q. *Can my husband stop me from getting PSS by proving that I've committed adultery?*

A. Adultery by the dependent spouse isn't a bar to PSS, but the judge is allowed to consider any marital misconduct by her (or him) in deciding whether to allow PSS and how much to award.

5. Q. *What is marital misconduct?*

A. This is a new term that replaces the old "fault grounds" that used to be required for alimony in this state. Marital fault includes abandonment (both actual and "constructive"), cruel and barbarous treatment endangering a spouse's life, malicious turning out-of-doors, alcohol/drug abuse, "personal indignities" that render one's life burdensome and intolerable, reckless

spending or waste of assets, willful failure to support, and illicit sexual behavior.

6. Q. *What in the world is illicit sexual behavior? It sounds like the title of a bad novel!*

A. Illicit sexual behavior [or ISB, for short] is any sexual misconduct, including adultery as well as any form of intercourse with a person not your spouse, whether heterosexual or homosexual.

7. Q. *When does marital misconduct have to occur?*

A. The new statute makes it clear that this misconduct must occur at or before the date of separation of the parties; post-separation misconduct is not allowed as evidence except to corroborate, or help prove, pre-separation marital misconduct.

8. Q. *If my wife is guilty of marital misconduct, is that where the case stops?*

A. No. Whenever there is evidence of marital misconduct by the dependent spouse -- the wife, in this case -- the judge must also consider any marital misconduct by the supporting spouse. Thus the conduct (or, in this case, "misconduct") of both parties will be subject to scrutiny if the supporting spouse attempt to point out the flaws or faults of the dependent spouse.

9. Q. *When does PSS end? Does it go on forever?*

A. PSS terminates at the earlier of...

- the date set by the court for termination, if any;
- the date of death of either party;
- the occurrence of the remarriage or cohabitation (see discussion below) of the dependent spouse; or
- the date on which alimony (see discussion below) is allowed or denied.

10. Q. *What about alimony, does that still exist?*

A. Oh, yes -- alimony is still "alive and well" in North Carolina. The approach to alimony, however, is somewhat different from that involved in postseparation support.

11. Q. *Must "fault" be shown to obtain an award of alimony?*

A. No. The new statutes deleted the "fault requirement"; under the new law, alimony is to be granted if...

- the claimant (or party requesting alimony) is the dependent spouse;

- the other party is the supporting spouse; and
- an award of alimony is equitable under the circumstances after considering numerous factors set out in the statute.

12. Q. What are these factors that the court must consider?

A. There are 15 of them. They include such items as...

- The marital misconduct (see discussion above) of either spouse;
- The earnings, unearned income (dividends, interest, rent, etc.), earning capacities and needs of the parties;
- The length of the marriage, the standard of living of the parties during the marriage, and their respective contributions as homemaker;
- The ages and the physical, mental and emotional conditions of the spouses;
- How each party has contributed to each other's education and increased earning power;
- The impact of either parent being custodian of a minor child;
- Each party's education and the time needed to educate or train a spouse to become self-sufficient;
- The assets and debts of each party, whether separate or marital;
- The tax impact of alimony (see discussion below); and
- Any other economic factor that the court finds proper for consideration.

13. Q. What if a party is found to have committed adultery. Does that have any impact on the alimony case?

A. Yes. The statute covers three possible scenarios regarding illicit sexual behavior [ISB], the new term that includes, but is broader than, adultery:

- If the dependent spouse only is found to have committed ISB, then no alimony can be awarded and the case is over;
- If only the supporting spouse has committed an act of ISB, then the court must award alimony to the dependent spouse; and
- If both parties have committed ISB, then the court has the discretion to grant or deny alimony based on all the circumstances.

As stated earlier in the question on marital misconduct in general, any act of ISB must occur at or before the date of separation of the parties; post-separation ISB may only be used as corroborating evidence to prove ISB occurring at or before separation.

14. Q. How can alimony be paid?

A. The law give the judge the power to order alimony on a periodic basis -- which is usually the case, i.e., in a monthly sum paid directly to the claimant or paid through the Clerk of Superior Court. It can also be paid in a lump sum, such as "the sum of \$5,000 due on October 1 of this year" or even "the sum of \$5,000, due in monthly installments of \$500 each for ten months." Alimony can be paid indefinitely or for a specific period of time, such as "for the next 24 months." The judge has these options for PSS also.

15. Q. *When does alimony end?*

A. Alimony ends at the earlier of...

- the date set by the court for termination, if any;
- the date of death of either party; or
- the occurrence of the remarriage or cohabitation (see discussion below) of the dependent spouse.

16. Q. *What is cohabitation?*

A. The law defines cohabitation as two adults living together continuously in a private heterosexual or homosexual relationship.

17. Q. *Are there any other ways to stop alimony?*

A. There are two legal acts that will bar the award of alimony (or PSS) in the first place. One is the granting of a judgment of absolute divorce with no claim pending for alimony. One of the effects of absolute divorce is to bar a claim for alimony if it has not been asserted in a pleading before the divorce is granted. The second bar is found when there has been a waiver of alimony in an agreement of the parties. A separation agreement can contain a waiver of alimony, and so can an antenuptial agreement. When a party gives up a right to alimony, she or he may not thereafter go back and retrieve the lost support right.

18. Q. *What is a dependent spouse?*

A. A dependent spouse is one who is actually and substantially dependent upon the other spouse for support or who is actually in need of support from the other spouse.

19. Q. *What is a supporting spouse?*

A. The supporting spouse is one who is actually capable of providing support for the alimony claimant. If there is no "surplus" left when the reasonable needs of the defendant are subtracted from his net monthly income, then it is arguable that he is not the "supporting spouse." Be careful with this sort of logic, however, since most alimony defendants will claim poverty and

proclaim loudly their inability to provide spousal support. It is up to the judge to make a determination of the amount of the defendant's reasonable monthly needs so that the court can then find out how much money is "left over" to be used as alimony or PSS.

20. Q. *Are there any "alimony guidelines"? How is the amount of alimony determined?*

- A. The amount of alimony is up to the judge. Although in some cases there may be an award of limited-term alimony, a more likely approach by the judge, however, would be to grant an open-ended award of alimony, reviewable by the court upon a motion alleging grounds for modification, namely, a substantial change of circumstances since the date of the original court order. Unlike the area of child support, there are no clear guidelines as to the amount of alimony. The award is completely in the discretion of the court, subject to the "factors" listed above for alimony.

As a practical matter the judge will usually attempt to find out what the unmet needs of the claimant are. This is the difference to her reasonable monthly needs and expenses and her net monthly income, if any. This amounts to the amount "deficit" which must be filled in order to support her properly.

Next the judge will attempt to find out what the "excess income" of the defendant is. If this exists, it becomes the "surplus" which is applied against the "deficit" in order to support the claimant properly. The judge will often take the deficit of the plaintiff (or the surplus of the defendant) and convert it into the amount of alimony to be paid in a case, although this ignores the tax consequences of alimony set forth below.

21. Q. *Must taxes also be considered in deciding the amount of alimony?*

- A. Yes. Alimony is taxable to the payee and deductible by the payor. This is an important factor to remember when calculating alimony in negotiations. If Mrs. Smith needs, for example, \$1000 per month to meet the "financial deficit" she is experiencing, then she may need about \$1500 of taxable alimony in order to net out \$1000 of post-tax support. By the same token, if Mr. Smith is able to pay \$1000 per month in alimony based on his income and reasonable monthly needs, this is \$1000 after taxes, and the real amount of alimony he should be able to afford might very well be about \$1500 with the tax break he gets by deducting this amount from his income. This hypothetical assumes the parties are in a 28% federal tax bracket and paying about 7% state taxes, which is the rate in North Carolina. In other words, a deductible sum of \$1500 per month will equal approximately \$1000 per month after taxes for one in these tax brackets, which is the correct way to figure alimony amounts.

22. Q. *Are there any other tax considerations in claiming a deduction for*

alimony?

- A. Under the IRS Code there are several mandatory provisions that are required for alimony to be taxable to the payee and deductible by the payor. The obligation must be in writing is one such requirement -- and, of course, a court order passes this test. In addition, it is required that payments end at the payee's death. These are also requirements of state law. Finally, tax filing status is important also. Alimony is only deductible for the payor, and taxable to the payee, if the parties file separate returns. It cannot be deducted on a joint tax return.

23. Q. *What is the procedure in a spousal support case?*

- A. There is no single "best" way to proceed, but a common approach would be to file a complaint for postseparation support and alimony and to schedule promptly a hearing on the claim for PSS (since that is solely before the judge). At a later time, the court would hear the claim for alimony, perhaps after the divorce of the parties or after their equitable distribution case had been decided. In an alimony case, either party can request a jury to determine the marital misconduct issues, but that it all the jury does -- the judge makes the determinations of dependent and supporting spouse, assesses the factors and decides the amount of alimony.

24. Q. *Is any other relief available?*

- A. Yes. As part of an alimony or PSS award, the court may also:
- Award attorney's fees from the defendant to the claimant. Such fees are sometimes paid in a lump sum and sometimes in installments.
 - Grant exclusive possession of real or personal property (or title to personal property) to the claimant. This means, for example, that the court can grant to Mrs. Smith the use and possession of the Ford station wagon or, for that matter, the use and possession of the marital residence, exclusive of Mr. Smith. This amounts to an eviction order against the defendant, forcing him to leave the house.
 - Make provision for medical expenses. This typically includes medical insurance coverage and the responsibility for payment of uncovered health care expenses, either in part or fully.

Comments, suggestions or questions are always welcome. Is there some way we can improve this handout? Are there questions that you have which are unanswered? Please let us know -- we're here to help you.