

SEPARATION AGREEMENT SURVIVAL GUIDE

The purpose of this handout is to assist you in answering questions that you may have regarding separation agreements. It is, of course, impossible to answer all of your questions in a short brochure such as this, so we want to encourage you to ask other questions of your lawyer at the appropriate time. Feel free to take this handout with you so that you may refer to these answers from time to time and have a better idea of how your case is being handled.

1. Q. Do I have to have a separation agreement?

A. No law requires a separating couple to execute a separation agreement, but it is a wise idea if there are debts, children, support claims or property involved and the parties want to settle these matters in writing. Oral promises between spouses are worthless and unenforceable.

2. Q. What is a separation agreement?

A. A separation agreement is a contract between a husband and wife in which they resolve such matters as property division, debts, custody and support when they separate from each other.

3. Q. Who prepares a separation agreement?

A. It is best to have your own attorney prepare it for you. The separation agreement is not valid in North Carolina unless both parties have signed and their signatures are notarized. Never try to prepare such a complex and important document yourself - this is a job for a specialist.

4. Q. Can we divide our property in a separation agreement?

A. Yes. A couple that is separating can agree on a division of property in their separation agreement, and that agreement will be binding on them. The property to be divided consists of real property (such as land and the buildings on it), tangible property (cars, jewelry and furniture for example) and intangible personal property (such as bank accounts, stocks and bonds, vested pensions and life insurance).

5. Q. Is my spouse required to sign a separation agreement?

A. No. "Agreement" means that both parties sign voluntarily. You cannot compel your spouse to sign a separation agreement or to agree to the terms you wish to impose on him or her in the agreement.

6. Q. Does a separation agreement help me to get a divorce?

A. A separation agreement is not "proof" that you have been living separate and apart from your spouse. It does not make divorce in North Carolina easier or more difficult to obtain.

7. Q. Can our separation agreement settle who claims the tax exemption for our children?

A. Yes. The 1984 Tax Reform Act allows the parties to agree as to who can claim the children as exemptions for income tax purposes. Without a written agreement, the parent who has physical custody of the child for more than half the year will get the dependency exemption.

8. Q. What are the factors I should consider in transferring the exemption?

A. Consider these issues:

- Should the dependency exemption be traded, instead of given, to the noncustodial parent in exchange for an increase in child support? Even a small increase in child support would help offset the tax increase paid by the custodial parent, and the other parent can better afford such an increase due to the taxes he or she saves by claiming the exemption on federal and state tax returns.
- Should you alternate the tax exemption between parents? For example, the father could claim the exemption in even-numbered years (1996, 1998, and so on) and the mother could do so in odd-numbered years. Or the father could claim one child and the mother could claim the other. Such alternation would lessen the impact of higher taxes on the custodial parent.
- Should you condition the transfer on the noncustodial parent's regular and full payment of child support? Instead of transferring the exemption permanently without regard to payment of child support on time, some custodial parents agree to transfer of the dependency exemption only if the other parent is current (not in arrears) on child support payments by December 31 of each year.

9. Q. Can I get my husband for contempt of court if he breaks the promises in the separation agreement?

A. No. Contempt of court is the failure to obey a court order without legal justification. It is not contempt of court to violate a separation agreement unless the agreement has been made a part of a court order. You may, however, sue your spouse for breach of contract if he

or she violates the separation agreement.

10. Q. *Will a separation agreement free me from paying debts for which I have signed along with my spouse?*

A. No. A separation agreement is a contract between spouses. It cannot bind third parties (such as banks or finance companies) that have not signed it. If, however, one spouse promises to pay a bill and then breaks that promise resulting in your having to pay, you can sue your spouse for breach of contract for the amount of money you had to pay.

11. Q. *Will a separation agreement stop my spouse from hassling me?*

A. While separation agreements usually have a nonharrasment clause in them, you should understand that no piece of paper - be it agreement or court order - is going to stop a person from doing something he or she wants to do. If the problem is one of physical violence, a court order would be better than a separation agreement and could be used to punish the wrongdoer if he or she violated the order. If there is only an agreement, a lawsuit for breach of contract is one possible remedy for breaking the promise of not hassling each other.

12. Q. *Is a court bound by what we put in the separation agreement about our children?*

A. No. The terms you include for child support, custody and visitation can always be modified by the court in the best interest of the children. In the absence of proof to the contrary, however, there is a presumption that the terms concerning the children in your agreement are fair, reasonable and necessary for the best interest and welfare of the children.

13. Q. *Can the court modify the terms we include in a separation agreement concerning ourselves?*

A. Unlike the terms concerning children, which are always modifiable by the court, the terms that pertain to adults cannot be modified by the court except in very limited circumstances. For example, if the separation agreement has been incorporated into a court decree, then the court has the power in North Carolina to modify the alimony terms based on a substantial change of circumstances. If the terms involve property division and the agreement has been incorporated, the court can only modify it if it is executory in nature (i.e., it has not yet been completed, such as the transfer next year of a car title to a spouse), as opposed to those items which are already executed by the parties (such as the deed to the house that was signed over to a spouse at the same time as the separation agreement was signed). The court can overturn a separation agreement if it was signed due to fraud, coercion,

ignorance or lack of mental capacity. In most cases, however, this is difficult to prove.

14. Q. *Can we provide for college education for our children in a separation agreement?*

A. Although a North Carolina judge cannot order you to pay child support for your child in college, you may make provision for college expenses in a separation agreement and it will become a binding, enforceable contract which the court can require each of you to perform. Since college is less of a luxury and more of a necessity these days, it would be a good idea to consider whether you want to provide in writing for your child's/children's college education.

15. Q. *What points should we remember in deciding about college expenses?*

- A. Here are some of the items that a good separation agreement will address:
- How long should the obligation last? 4 years? 4 1/2 years? Until the child attains age 23? Some ending point should be set.
 - What costs will be covered? The usual ones are room and board, books, tuition and fees. Some parents also agree on a monthly allowance for spending money for the child.
 - What are the spending limits? Few parents want to agree to finance a college education for a child at any college or university. The cost of some private colleges and universities would bankrupt the average parent. It is reasonable to put a ceiling or "cap" on the college expenses, such as by specifying that the maximum shall be "the then-prevailing rate at N.C. State University" or some other nearby public institution. Such a provision is fair to everyone and does not force either parent to go broke paying for college.
 - What other limits do you want to set? For example, some agreements require that the child will be--
 - attending an accredited institution
 - in pursuit of a generally recognized undergraduate degree
 - on a full-time basis
 - while maintaining at least a "C" average.
 - How much should you pay? Be sure to set a specific amount or percentage for yourself and your spouse; don't just say, "a reasonable share." Should it be 50%? 2/3 of the cost? Be sure to spell it out specifically!

16. Q. *Should we provide for alimony in our separation agreement?*

A. Alimony is spousal support - it is money paid by one spouse to the other to help with support, maintenance and living expenses. It is not the same thing as child support. If the two of you have agreed on an amount of alimony, you should definitely put that in the separation agreement. Such a provision might state, for example, that the husband shall pay the wife alimony of \$1500 per month until he or she dies or until she remarries, or it could state that the wife shall pay the husband alimony of \$900 per month for a total of 60 months, at which time it will terminate forever. These are just examples - your attorney will advise you about the applicability of alimony in your particular case.

17. Q. *Is alimony tax-deductible?*

A. If the agreement is drafted properly, the alimony can be made to be deductible for the payor and therefore taxable to the payee. It is also acceptable to make the alimony nontaxable to the payee if it is nondeductible for the payor. This is a particularly important term and it should be spelled out clearly in the agreement how the alimony payments will be treated for tax purposes.

18. Q. *When does alimony end?*

A. The usual times alimony ends are at the death of the husband, the death of the wife or the remarriage of the recipient, or upon the recipient's cohabitation (i.e., living with an unrelated person of the opposite sex on a regular basis as if they were husband and wife). Some clients specify that alimony will end on a particular date or after a specified period of months or years. It is very important that your agreement set out specifically all of the terminating events for alimony that should apply.

19. Q. *What should we do if we have agreed that no alimony will be paid?*

A. It is always best to put such a term in the agreement. Don't just leave it out or let the agreement be silent on this issue. This waiver of alimony is such an important term that it should be clearly spelled out in the agreement so that there is no misunderstanding.

20. Q. *How do I know if I am entitled to alimony?*

A. Your attorney who prepares the separation agreement will explain alimony to you. In North Carolina, alimony may be granted by the court if:

- You file a lawsuit requesting alimony;
- You are financially dependent on the other party or in need of support from him/her;
- The other spouse is the supporting spouse, that is, he or she is able to provide reasonable spousal support to you; and

- An award of alimony is equitable (or "fair") under all the circumstances.

An absolute defense to an alimony case exists when the parties have waived alimony in a separation agreement, when a divorce has been granted before an alimony claim is asserted in court, or when the dependent spouse has committed adultery or some other form of illicit sexual behavior.

21. Q. *How much alimony should I get?*

- A. This question is impossible to answer. There are no guidelines for alimony in North Carolina, so there is no way of predicting what the court would have done to set an alimony award if the case had gone to court. Alimony awards of \$500-1000 per month are not uncommon, and some spouses who make a great deal of money could pay as much as \$4,000 per month or more in alimony. The best way to figure how much alimony a client needs is to calculate the difference between her reasonable monthly needs and her current net income, and then to compare this figure to the difference between the other party's net income and reasonable monthly expenses. Your gap is "unmet needs" and should be equivalent (under ideal circumstances) to the "extra" money he has left over from his paycheck after he pays for his own reasonable monthly expenses. Since these "gaps" seldom exist in reality and everyone is usually spending a lot more than he or she is making, it is often a question of haggling, discussion, bargaining and horse-trading as to how much alimony should be paid in any individual case. For a more detailed discussion of alimony, see our Client Information Letter on this subject.

22. Q. *How should we divide our property in the separation agreement?*

- A. In North Carolina, there is a strong presumption that all property acquired during the marriage is divided on a 50-50 or equal basis. This is presumed to be fair. Other divisions, such as 60-40 or 75-25 are certainly legal if the parties agree that the division is fair and equitable. And on rare occasions they are granted in court after a long and contested trial. In North Carolina, marital property, with certain exceptions, is anything acquired during the marriage. The exceptions are separate property, that is, property acquired by either party before their marriage or property acquired at anytime by give (from someone other than the spouse) or inheritance. The title to the property -- that is, whose name is on the deed or title -- is not the deciding factor in determining what is separate and what is marital property. Rather, when the asset was acquired (i.e., before or during marriage) and how it was acquired (i.e., by use of marital funds or separate funds, by gift or inheritances, etc.) is the important consideration.

23. Q. *What about the increase in marital property after the separation -- can that be divided?*

A. It depends. The "passive" appreciation or depreciation, such as market growth or loss, is a kind of property called "divisible property" that should be divided between the spouses. For example, if your money market account has earned interest or your house has increased in value simply due to the market and not because of the active efforts of either spouse since the separation, that passive change in value should be divided along with the marital property.

24. Q. *What about pensions and retirement benefits -- are they divisible?*

A. Pensions and retirement rights acquired during the marriage are marital property even if they are not vested. This type of property is often very valuable. Often, a spouse's pension rights is the most valuable asset of the entire marriage, and this should certainly be considered when doing a separation agreement. If there is to be no division, the agreement should so specify. If the decision on pension division is to be put off or deferred because there is no present agreement, that also should be stated clearly. Make sure your agreement is very specific and plain in this area as to your intent on dividing the pension -- a poorly worded agreement may be challenged as vague and unenforceable. The division of pension rights in a separation agreement can be done in two ways: a present-value offset, or a future percentage of payments. The former of these involves calculating the present value of the pension right now and setting it off (or trading it) against the value of another item, such as the other spouse's pension or the marital residence. The second of these approaches would postpone the division until whenever the employed spouse starts receiving the pension payments, at which time the nonpensioned spouse would receive a share of each check equal to one-half (or some other portion) of the portion acquired during the marriage. Most pension or retirement benefits require a court order, such as a Qualified Domestic Relations Order, to divide. This order can often be entered by consent. The division of retirement benefits can be complicated and your attorney can assist you with how to properly divide the benefits in your case.

25. Q. *Do we also divide our debts in the agreement?*

A. You should set out a list of who pays what debt in your separation agreement, including the creditor's name, account number, purpose of the debt, approximate balance and monthly payment amount. This will not stop the creditor from suing both of you if payments are not made by a spouse and both of your names are on the obligation, but it allows you to ask the court to hold your spouse accountable and to reimburse you for any payments you have had to make for the debt distributed to your spouse in the agreement.

26. Q. How should we divide our debts?

A. There is no "right" answer to this question. In one case, the husband may take on payment for all the debts because his is the sole source of income in the family or because he created the debts in the first place. In another case, the wife may take over certain debt payments for things she charged or purchased or for things that she is being given in the property division. For example, if the husband is getting the station wagon and the wife is getting the washer and dryer, they might decide that each should assume the debt payment for the items he or she is receiving. It is often wise to have the spouse with the greatest incentive for making sure the debt is paid be responsible for that debt. For example, the spouse driving a particular car would want to make sure the car loan for that car is paid promptly so the car does not get repossessed. Therefore, it makes sense for that spouse to have the responsibility for that debt in the separation agreement.

27. Q. I want to make sure I can "date" after we get the separation agreement signed. Can I have my attorney put in a "dating clause"?

A. It all depends on what you mean. If you mean the freedom to associate with anyone you wish to see, then it will be covered in the standard language found in your agreement. Most separation agreements contain a clause that allows each spouse to be left alone as if single and unmarried and forbids each spouse from harassing, molesting or interfering with the other. But if you mean sexual relations with another before you're divorced, don't even think about it! There is no such thing as a separation agreement "dating clause" that allows adultery. Any sexual relations with a person who is not your spouse is adultery in the eyes of the law, regardless of the words in a separation agreement. There can be serious criminal and civil consequences for these, and no "dating clause" will serve to make legal something that is illegal. It is best not to take any chances and refrain from sexual relations until after the divorce is final.

28. Q. Should we also provide for how we file for taxes in the agreement?

A. Yes. This is a very important provision which can save you and your spouse a lot of money in taxes if prepared properly. A good example would be a clause that required the parties to file jointly so long as they are eligible to do so (which is up until the year they are divorced) and to divide the refund or liability for taxes in a specified way, such as 50-50, or 75-25, depending on the incomes of the parties.

29. Q. Can a single attorney do the separation agreement for me and my spouse?

- A. It is best to have two attorneys involved, one to advise each spouse. In this way, the husband and the wife both know that they have received independent legal advice for their individual situations from lawyers who do not have a conflict of interest in trying to represent two clients with different goals and needs. The attorneys in our office will only prepare a separation agreement on behalf of one spouse and not for both parties.

29. Q. What if I have other questions?

- A. Please ask us. We're here to help you. If a question comes up in between office visits, just call us and we'll try to answer it for you.

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.