

Separation Agreements: Questions and Answers

Q. What is a Separation Agreement?

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

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.

Q. Who prepares a Separation Agreement?

A. It is best to have your own attorney prepare it for you. This should be a private attorney. A 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.

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 (land and the buildings on it), tangible personal property (cars, jewelry and furniture, for example) and intangible personal property (such as bank accounts, stocks and bonds, vested pensions and life insurance.)

Q. Does my spouse have to sign a Separation Agreement?

A. No. An "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.

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. Other states may have different provisions in their laws which might make divorce faster or easier if there is a separation agreement.

Q. Can our Separation Agreement settle who will get to claim 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 a child for more than half the year will get the dependency exemption.

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

A. Consider the following issues:

a. Should the exemption be "traded", instead of given, to the other parent--in exchange for an increase in child support? Even a small increase in support would help offset the tax increase that will be 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.

b. Should you alternate the exemption between parents? For example, the father could claim the exemption in even-numbered years (1990, 1992, 1994, 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.

c. Should you condition the transfer on the other parent's regular and full payment of 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.

Q. Can I get my spouse 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 court order. You may, however, sue your spouse for breach of contract if he violates the separation agreement.

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, your spouse promises to pay a bill and then breaks that promise, resulting in your having to pay, you can then sue your spouse for breach of contract for the amount of money you had to pay.

Q. Will a Separation Agreement stop my spouse from hassling me?

A. While separation agreements usually have a nonharassment 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 the 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 bothering each other, but it probably isn't a very effective remedy.

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.

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, the court has the power in North Carolina to modify the support terms (alimony or child support) based on a substantial change of circumstances. If the terms involve property division and the agreement has been incorporated, the court can only modify an executory promise (i.e., one that has not yet been completed, such as the transfer next year of a car title to a spouse), as opposed to a promise which has already been executed by the parties (such as the deed to the house that was signed over to a spouse at the same time as the execution of the separation agreement). The court can overturn a separation agreement if it was signed due to fraud, coercion, or lack of mental capacity. In most cases, however, this is a hard case to prove.

Q. Can we provide for college education of 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 college expenses in your separation agreement.

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

A. Here are some of that items that a good separation agreement will address:

- a. How long should the obligation last? 4 years? 4 1/2 years? Until the child attains age 23? Some termination point or date should be set.
- b. What costs will be covered? The usual ones are room and board, books, tuition and fees. Some parents also agree on a modest monthly allowance for spending money for the child.
- c. What are the expenditure 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 for in-state tuition 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 financing a college education.
- d. What other limits should be set? For example, some agreements state that the child must attend an accredited institution, in pursuit of a generally recognized undergraduate degree, on a full-time basis, while maintaining at least a "C" average.

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 food, shelter, transportation, clothing and other living expenses. It is not the same thing as child support. If the two of you have agreed on some measure of temporary or permanent 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 \$500.00 per month until he or she dies or until she remarries, or it could state that the wife shall pay the husband alimony of \$100.00 per month for a total of four years, at which time it will terminate forever. These are just examples - your attorney can advise you about the applicability of alimony in your particular case.

Q. Is Alimony tax-deductible?

A. If the agreement is drafted properly, alimony can be deductible for the payor and therefore taxable to the recipient. In order to be deductible by the payor, it must end at the recipient's death. It is also acceptable to make the alimony nontaxable to the recipient if it is nondeductible for the payor. This is a particularly important term and it should be spelled out clearly in the agreement how alimony payments will be treated for tax purposes.

Q. When does Alimony end?

A. Alimony usually ends at the death of either party or the remarriage of the payee/recipient (usually the wife). Sometimes clients have a provision added to the alimony terms in a separation agreement that alimony will also end at such time as the recipient starts living with an unrelated person of the opposite sex on a regular basis as if they were husband and wife.

Q. What should we do if we have agreed that no Alimony will be paid?

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

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 is only granted by the court if:

- a. You file a lawsuit requesting alimony;
- b. You are the innocent or injured spouse;
- c. You are financially dependent on the other party or in need of support from him/her;
- d. Your spouse is the supporting spouse; and
- e. You can prove that the other party has committed acts that constitute a ground for alimony, such as adultery, abandonment, cruel and barbarous treatment, personal indignities (or "mental cruelty"), malicious turning out-of-doors, drug or alcohol abuse, and so on. An absolute defense to alimony exists when the parties have waived alimony in a separation agreement, when a divorce has been granted before an alimony claim is filed, or when the dependent spouse has committed adultery.

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 \$300-500 per month are not uncommon, and some spouses who make a great deal of money could pay as much as \$1,000.00 per month or more. Amounts above this figure are relatively rare. 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 her spouse's income and his reasonable monthly expenses. Her 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.

Q. How should we divide our property in the Separation Agreement?

A. In North Carolina, there is a presumption that all property acquired during the marriage is divisible 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. The property that is divisible in North Carolina is called marital property. With certain exceptions, this is anything acquired during the marriage. The exceptions are separate property, that is, property which cannot be divided by the court and belongs to only one party as his or her exclusive property. Examples of separate property are:

- a. Pre-marriage property
- b. Gifts or inherited property
- c. Nonvested pension rights
- d. Business or professional licenses

Except for these items, everything else owned by either or both of the parties is marital property if it was acquired during the marriage. The title to the property - that is, whose name is on the deed or title - does not matter so long as it was acquired during the marriage and does not fit into one of the above exceptions.

Q. What about pensions and retirement benefits - Are they divisible?

A. Pensions and retirement rights can also be considered marital property. This type of property is often very valuable. It is an important aspect of equitable distribution. A pension can only be considered marital property and divided if it is "vested" that is, there is a guaranteed entitlement that cannot be cut off. Your legal assistance attorney can give you specific advice about when a military or civilian pension is vested. Often a spouse's pension is the most valuable asset of the entire marriage, and this should certainly be considered in doing a separation agreement. If there is to be no division, the agreement should say so. 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 in court as vague and unenforceable.

Q. How can a pension be divided?

A. 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 asset, such as the other spouse's pension or the marital residence. The second approach would postpone the division until whenever the employed spouse starts receiving pension payments, at which time the nonpensioned spouse would receive a share of each check equal to one-half (or some other percentage) of the portion accrued during the marriage divided by the entire number of years of pension service.

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

A. You should set out a schedule for 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 spouse and both of your names are on the obligation, but it allows you to ask the court to hold your spouse (and not you) accountable for the debt as set out in the agreement.

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 clothes dryer, it might seem fair that each should assume the debt payment for the items he or she is receiving.

Q. I want to make sure I can date after we our agreement is signed. Can I have my attorney put in a Dating Clause?

A. There is no such thing as a "dating clause" in separation agreements that allows adultery. Any sexual relations with a person who is not your spouse is adultery, and so no "dating clause" will serve to make legal something that is illegal. Most separation agreements do, however, 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.

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 (usually 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.

Q. Can a single attorney do the Separation Agreement for me and my spouse?

A. No single attorney can represent both Husband and Wife in a separation agreement. It is best to have two attorneys involved, one to advise each partner. In this way, the husband and the wife both know that they have received independent legal advice for their individual situation from a lawyer who does not have a conflict of interest in trying to represent two clients with different goals and needs.

Q. If i have other questions about Separation Agreement, what should I do?

A. Please consult a legal assistance or private attorney of your choice as soon as possible. Your lawyer can answer the many questions about separation agreements and help you to make a fair and intelligent decision about your choices, options and alternatives. Our legal assistance office stands ready, willing and able to help you in these matters.