

**TAKE-1**  
**DIVORCE, ALIMONY and PROPERTY**  
**DIVISION**

**XVIII AIRBORNE CORPS LEGAL ASSISTANCE OFFICE**



## **DIVORCE, ALIMONY, AND PROPERTY DIVISION**

### **1. Q. CAN A MILITARY ATTORNEY OBTAIN A DIVORCE IN NORTH CAROLINA FOR ME?**

A. No. You will need to obtain a private attorney to file for divorce and get a judgment of divorce in North Carolina. While the state laws do not specifically require that you have an attorney, it is sometimes very difficult to get the judge to grant you a divorce if you are not represented by a civilian lawyer when you go to court.

### **2. Q. WHO PAYS FOR MY LAWYER?**

A. As a general rule, you must retain and pay for your own attorney in a divorce case. There is no law that requires a judge to order your spouse to pay your lawyer's fees in a divorce action in North Carolina.

### **3. Q. WHAT IF MY SPOUSE WON'T GIVE ME A DIVORCE?**

A. The judge is the person who grants a divorce, not your spouse. Once you have filed the divorce complaint at the courthouse, your attorney will serve a copy of the summons and complaint on your spouse, by sheriff or by certified mail. If no answer is filed within thirty days after service, you will probably be granted a divorce by default. If your spouse contests the divorce action by filing an answer denying one or more of the statements in your complaint, a hearing will be set during which the two of you can testify and the judge can decide what the truth is.

### **4. Q. IS MY DIVORCE FINAL WHEN THE JUDGE SIGNS THE JUDGMENT?**

A. Yes. You are then legally divorced. There is no waiting period after entry of judgment.

### **5. Q. CAN I RESUME THE USE OF MY MAIDEN NAME AT THE TIME OF DIVORCE?**

A. Yes. You may ask for the right to resume your maiden name in the divorce papers your lawyer files for you. This is routinely granted by the judge. Even if you do not ask for your maiden name back at the time of the divorce, you can file for resumption of your maiden name after the divorce is granted.

### **6. Q. CAN I USE "MENTAL CRUELTY" OR ADULTERY AS A GROUND FOR DIVORCE HERE?**

A. No. In North Carolina the only ground for divorce that is ever used is separation for over one year. The other ground, three years' incurable insanity, is almost never used. Most divorces granted on separation grounds are uncontested. This is essentially a "no-fault" divorce with no proof necessary as to who left whom or what reason was involved.

**7. Q. IF MY HOME IS ANOTHER STATE, BUT I AM STATIONED IN NORTH CAROLINA, CAN I FILE FOR DIVORCE IN THIS STATE?**

A. North Carolina law states that you may file divorce here if you are a true legal resident of North Carolina and have been living here for at least six (6) months prior to the date of filing. If your spouse is a legal resident of North Carolina and resides here you may also file here for divorce. You may want to find out whether you can file for divorce in your home state (other than North Carolina), and for this you should see a legal assistance attorney. He or she can discuss with you the laws of your home state as to procedures for divorce, hiring an attorney, grounds, cost of filing and other issues.

**8. Q. DO I HAVE TO HAVE A "LEGAL SEPARATION" TO GET A DIVORCE HERE, OR DO I HAVE TO "FILE FOR SEPARATION" IN NORTH CAROLINA?**

A. All you need to do to obtain a divorce in North Carolina is live separate and apart from your spouse for more than one year with the intention that the separation be permanent. You do not need to show the judge a copy of a separation agreement, since such a document doesn't necessarily prove that you have indeed separated from your spouse. There is no such thing as "filing for separation" in North Carolina, although there are certain cases in which a judge can grant a "divorce from bed and board," or judge-approved separation, which allows you to live separate and apart from your partner.

**9. Q. CAN THE JUDGE IN NORTH CAROLINA ORDER A PROPERTY DIVISION AT THE TIME OF DIVORCE?**

A. After the divorce has been granted, the judge can divide the marital property of the couple if the court has been requested by either or both of them to do so. The court would not have the power to divide the marital property if neither party asked the court to do so before the divorce judgment was entered or if the parties had already executed a separation agreement that fairly divided their property.

**10. Q. IS THERE SOME PROPERTY THAT THE JUDGE CANNOT DIVIDE?**

A. The judge in North Carolina cannot divide separate property and there are several kinds of separate property. Property acquired by either party before the marriage cannot be divided. Neither can property acquired by either party by gift or by inheritance, even if it is later traded or exchanged for another item. Business and professional licenses are also separate property. For more on pensions and retirement rights, see our TAKE-1 handout on that subject.

**11. Q. HOW WILL THE JUDGE DIVIDE OUR PROPERTY?**

A. There is a strong presumption in North Carolina law that the fairest split would be an even division of all the marital property, regardless of who has title to the property, who paid for it, and so on. Under certain circumstances, however, the judge might decide that a fifty-fifty split is not fair to one or both of the parties. The statutes have a list of factors that the judge may then use to determine an unequal division of property between the couple. The judge will consider

such matters as: monetary and homemaker contributions to the marriage by each party; tax consequences of an unequal division; efforts of a spouse to preserve and increase the value of marital property; attempts by a spouse to squander, waste or dissipate assets; the health of each party; and the financial situation of each spouse.

**12. Q. CAN I GET THE JUDGE TO ORDER MY SPOUSE TO PAY MY ATTORNEY'S FEES IN A PROPERTY DIVISION CASE?**

A. The courts in North Carolina can't award attorney's fees in most property division cases. You will have to retain and pay for your own attorney to represent you, and you may also have to pay for an accountant or an appraiser if expert witness testimony is necessary in your case. You can, however, ask the court to allow you an "advance" or interim allocation of marital property pending a final hearing, and this could be used by you to pay the above fees.

**13. Q. WILL I HAVE TO PAY ALIMONY TO MY WIFE?**

A. It depends. The courts in North Carolina allow for the payment of two kinds of spousal support -- alimony and postseparation support. Postseparation support will be ordered if 1) your wife is the **dependent spouse**; 2) you are the **supporting spouse**; and 3) her financial resources aren't enough to meet her reasonable monthly needs and personal living expenses. Alimony will be ordered if 1) your wife is the **dependent spouse**; 2) you are the **supporting spouse**; and 3) an award of alimony is equitable under the circumstances after considering numerous **factors** set out in the statute. These factors include such matters as marital fault before the separation, the incomes and needs of the parties, the length of the marriage, the physical, mental and emotional conditions of the parties, the property and debts of the parties, the tax impact of alimony and any other relevant economic factor.

**14. Q. WHAT IF MY WIFE 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 terms 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.

Illicit sexual behavior is not a defense against the payment of postseparation support.

**15. 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.

**16. 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.

**17. 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.

**18. 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.

**19. 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 of the dependent spouse.

**20. 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.

**21. Q. WHAT IF I HAVE OTHER QUESTIONS?**

A. Please set up an appointment to see one of our legal assistance attorneys. They are here to help you.