

**GUIDE**

**6**

## KING @ LAW'S DIVORCE GUIDE SERIES

Alimony, Postseparation Support, and Misconduct in NC



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## Chapter


# 1


# 1 Postseparation Support


*One spouse has to substantially depend on the other's income to pay reasonable expenses*

Postseparation support (PSS) is temporary alimony. It helps a financially dependent spouse pay for reasonable expenses while alimony litigation is ongoing. Most spouses that pursue an alimony claim in court will also make a claim for postseparation support. It can take a year or two to take an alimony claim to trial and homemakers often need more immediate financial assistance.

### TOPICS

 What It Is

 How to Qualify

 Procedure

To qualify for postseparation support:

- The spouse asking for support has to either be substantially (a) financially dependent on the other spouse or (b) in need of financial support.
- That spouse asking for support has to have reasonable expenses they cannot afford.
- The breadwinner spouse has to be able to afford to pay for those expenses.

- The spouse asking for support has to be innocent of any sexual acts that were (a) during the marriage (b) prior to separation and (c) outside the marriage. The sexual act(s) have to meet all three of these criteria to qualify.

In the postseparation support context, the amount of support is the amount that the financially-dependent spouse's reasonable expenses exceed their income.

What expenses are reasonable depends on the accustomed standard of living during the marriage, current income and income-earning abilities, debt, and legal obligations to support children or others.

## Procedural Issues

There are a few procedural issues to keep in mind when making a postseparation support claim.

When filing a claim, the motion or pleading asking for postseparation support has to allege facts that meet the above criteria. The motion or pleading also has to have a Verification attached. A Verification is a signed and notarized promise the facts alleged are true.

Most courts will require a Financial Affidavit based on the specific form that individual court uses. A financial affidavit lists your income and expenses. This affidavit is also signed and notarized.

Most courts require the Financial Affidavit either simultaneously with the motion or pleading, or within 10 days or so. The Financial Affidavit and supporting evidence are key to demonstrating whether one spouse's reasonable expenses exceed their income, and whether the other spouse can afford to pay.

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## 2 Qualifying for Alimony

*The criteria to qualify for alimony is slightly different than postseparation support*

**A**limony is temporary financial support. It's intended to subsidize a spouse's income as they transition into financial independence.

A spouse qualifies for alimony if they meet all of the following criteria:


- They are either substantially dependent on the other spouse for their maintenance and support or substantially in need of financial support.
- An alimony award is fair based on all of the facts and circumstances, including the 16 factors listed below.
- The spouse asking for alimony has not engaged in sexual acts that were (a) during the marriage, (b) prior to separation, and (c) outside the marriage  
(except that if both spouses cheated, whether to award alimony is up to the judge's discretion)
- The other spouse can afford to pay alimony


Qualifying for alimony is similar to postseparation support. However, the spouse asking for alimony does not need to prove their reasonable expenses exceed their income. Instead, the court will consider 16 factors to determine if alimony is fair. This change represents the difference between a temporary order for spousal support based on financial need


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### TOPICS

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 What It Is

 How to Qualify

 Shorthand Guide

to meet reasonable expenses and the full alimony trial that considers what's fair under all of the circumstances.

## A Shorthand Guide

Vague concepts like what someone can afford and whether a spouse is financially dependent are open to interpretation. This is part of why alimony is difficult to settle through negotiations. If you want a shorthand way to see if an alimony claim is viable, here are a few things to look for.

First, if one spouse earns at least 50% more income than the other, that's a good sign that the spouse with less income may be financially dependent on the one that earns more.

Second, if the breadwinner spouse earns at least \$70k or so per-year, that's a good sign that they can afford to pay alimony.

Third, if there is compelling evidence of cheating by the spouse asking for alimony, that can disqualify the claim.





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## Chapter

# 2

## 3 Amount and Duration

*A judge determines what they think is fair based on 16 factors*


The amount of alimony and number of monthly payments depends on 16 subjective factors.


Because the factors are subjective, alimony verdicts vary substantially from one court or judge to the next. In fact, the 16<sup>th</sup> factor is any fact the judge thinks is relevant. This type of law is often called a “totality of the circumstances test”. It gives the judge broad discretion to do whatever they think is fair under the circumstances.

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### STEPS

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 Review the Factors

 Review the Shorthand

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### The Factors

Below are all 16 factors a court uses to determine the amount and duration of alimony payments. One step in preparing for an alimony hearing is go through all 16 factors, determine which ones are most relevant to you, and what evidence you have for them.

The following are the 16 factors exactly as they appear in the statute:

1. The marital misconduct of either of the spouses. Nothing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation;
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2. The relative earnings and earning capacities of the spouses;
  3. The ages and the physical, mental, and emotional conditions of the spouses;
  4. The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;
  5. The duration of the marriage;
  6. The contribution by one spouse to the education, training, or increased earning power of the other spouse;
  7. The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child;
  8. The standard of living of the spouses established during the marriage;
  9. The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs;
  10. The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;
  11. The property brought to the marriage by either spouse;
  12. The contribution of a spouse as homemaker;
  13. The relative needs of the spouses;
  14. The federal, State, and local tax ramifications of the alimony award;
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15. Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper.
16. The fact that income received by either party was previously considered by the court in determining the value of a marital or divisible asset in an equitable distribution of the parties' marital or divisible property.

## Shorthand

Many of the above factors may be very important in some divorces and irrelevant in others. However, a few of the factors stand out and are relevant in most situations.

Factor 2 and 5 in the statute is how the income of the spouses compare and the duration of the marriage. A good rule of thumb is to target alimony that is between 20-40% the gap in income between the spouses for about half the duration of the marriage.

Factors 6, 7, and 12 refer to how one spouse contributed to the career of the other. For example, if one spouse served as a homemaker or took care of the children, while the other spouse was able to focus on their career. Another example is if one spouse gave up on going to college in order to fund their spouse's college education.

Factor 8 is the standard of living the spouses enjoyed during the marriage. In some cases, alimony payments vastly surpass what a person needs to survive, if the standard of living during the marriage was high.

Factors 9, 10, and 13 touch on the alimony recipient's needs based on their debts, the income needed for food and shelter, or the time needed to go back to college. Sometimes, an alimony award will be for the amount and duration needed for someone to get a college degree.

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## Earning Capacity, Not Actual

Often, the spouse asking for financial support has not been in the workforce for a long time. They may have grown accustomed to relying on their spouse's income. In fact, the whole point of alimony is that one spouse has developed a reliance on the other.

However, the alimony recipient is expected to promptly and aggressively seek employment. Alimony is intended to supplement income, not replace it. If the alimony or postseparation support recipient doesn't get a job prior to the first hearing, the judge may determine payments based on what the judge believes is their capacity to earn, rather than their actual income of \$0.

In most cases, a financially dependent spouse has to move swiftly towards financial independence.

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## 4 Marital Misconduct

*Marital misconduct can have substantial implications on an alimony claim*

**M**arital misconduct does not refer to misconduct as a general word in the English language. Rather, it refers specifically to those nine things defined as misconduct [by statute](#).

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### MISCONDUCT

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♥ Cheating

🚶 Abandonment

⋯ Other

Cheating during the marriage can completely extinguish an alimony claim. However, other marital misconduct can be a factor in whether alimony is fair under the circumstances, and how much should be paid. Marital misconduct can include things like hiding assets, locking a spouse out of the house, or publicly degrading them.

In most cases, the alimony claim is where misconduct comes in. However, there are separate lawsuits related to misconduct as well.

### Cheating

The most common act of misconduct is sexual acts with someone besides the other spouse. Emotional cheating doesn't count. Generally, cheating will involve the genitals of one person making contact with any orifice of the other.

The sexual act must occur during the marriage and before separation, without the consent of the other spouse. Separation refers to the day one

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spouse moved out of the marital home intending to permanently end the relationship/cohabitation.

Evidence from after separation can be used to infer cheating before separation. For example, if one spouse moves in with a serious boyfriend/girlfriend weeks after separating from their spouse, a judge may believe this infers the relationship began prior to the separation date.

The spouse alleging misconduct does not have to catch their spouse in the act. Circumstantial evidence is sufficient, so long as it proves the spouse “more likely than not” cheated. This is done by showing both opportunity and inclination. Mere speculation of cheating can backfire.

## Suing the Paramour

You cannot sue your spouse for cheating on you. Cheating is merely a factor in alimony. However, you can sue the paramour. The paramour is the person your spouse cheated with.

North Carolina is one of the few states that still allow these lawsuits. They are called “criminal conversation” and “alienation of affection.” Don’t let the ridiculous names of the claims confuse you. These claims have nothing to do with having a “conversation” that is “criminal.”

Criminal conversation refers to someone that sleeps with a married person without their spouse’s consent. Alienation of affection refers to someone that maliciously interferes with a marriage. The “malice” requirement is satisfied through sex with a married person.

Criminal conversation and alienation of affection are similar and are usually filed together. However, alienation of affection is a bit broader, because it can include malicious acts besides sex with a married person. For example, if someone plants evidence of cheating in order to manipulate the spouse to leave the marriage.

These claims are often asked about but rarely seriously pursued. It is not that difficult to prove a spouse cheated. It is very difficult to prove the

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paramour is the cause of a spouse losing affection, rather than the other way around. You can think of it this way:

The paramour caused -> spouse to lose affection = claim

The lost affection caused -> spouse to seek a paramour = no claim

In most cases, the cheating spouse will convincingly testify that they lost affection for their spouse prior to the cheating.

## Abandonment

Abandonment claims are also often asked about but rarely pursued. The formal criteria for an abandonment claim makes it sound very broad, as though the court will decide whether a spouse was justified in breaking up with their spouse.

However, abandonment involves special circumstances. For example, a common abandonment claim is when the sole breadwinner abandons the entire family, including children, without a means to buy groceries. Another situation would be if a spouse leaves right after their spouse is put in the hospital from a car crash.

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## 5 Other Claims


*Some claims that arise in a divorce are separate lawsuits not directly related to divorce*


Some legal claims that frequently arise in a divorce are lawsuits the spouse could have filed even if they weren't married. For example, any person that physically attacks another can be sued, whether or not the victim was married to them. A few of the most common ones are:

### OTHER CLAIMS

 Battery

 Assault

 Defamation

 Fiduciary Duty

- **Battery**, if one spouse intentionally and unreasonably touches the other, without their consent, causing physical or emotional damages.
- **Assault**, if one spouse threatens the other with a show of violence that puts that spouse in reasonable fear of imminent battery, resulting in physical or emotional damages.
- **Defamation**, if one spouse makes false and defamatory statements about the other that is not under an exception, such as statements made in court.
- **Breach of fiduciary duty**, if the spouses still share a fiduciary relationship as spouses and one spouse takes advantage of the other in a specific agreement.

These claims are civil claims that would be heard in civil court. Therefore, the standard of evidence is “more likely than not” as opposed to “beyond a reasonable doubt.” This is why you may often hear of cases that are “not guilty” in criminal court, but have an opposite verdict in civil court.

A breach of fiduciary duty can be an issue with separation agreements. During the marriage, the spouses have a fiduciary duty to look after the best interests of the other. When this fiduciary duty ends depends on the circumstances.

Once one spouse notifies the other that they have hired an attorney, not just to prepare documents but to advise them, that severs the fiduciary relationship between the spouses. That’s because hiring an attorney is seen as a clear indicator that you are looking after your own interests.

For most of these claims, the court can compensate a spouse for the physical/emotional/financial harm, but if the circumstances are especially egregious, the court can also award punitive damages. Punitive damages is where the court orders the guilty party to pay even more money, not to compensate the victim, but as punishment.

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**Chapter**

**5**

## **6 Negotiations and Litigation**

*Read our other guides for information on negotiations and litigation*

This guide provides a lot of information about the law, but not step-by-step instructions on how to negotiate or litigate an alimony claim. For that, you should read my guides on [negotiations](#) and litigation.

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