



# **SEPARATION AGREEMENT SURVIVAL GUIDE**



The information provided in this document is meant for the sole use of Active Duty service members, retirees, their families, and those individuals eligible for legal assistance. The information is general in nature and meant only to provide a brief overview of various legal matters. Rights and responsibilities vary widely according to the particular set of circumstances in each case. Laws can vary across states, services, and civilian jurisdictions and laws are changed from time to time. Do not rely upon the general restatements of background information presented here without discussing your specific situation with a legal professional.

## **1. 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.

## **2. 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.

## **3. WHO PREPARES A SEPARATION AGREEMENT?**

A. It is best to have your own attorney prepare it for you. 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. Although 60 miles from SJAFB, the legal office at Ft. Bragg assists in drafting separation agreements, they can be reached at (910) 396-6113.

## **4. CAN WE DIVIDE OUR PROPERTY IN A SEPARATION AGREEMENT?**

A. Yes. A couple 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, pensions and life insurance.)

## **5. 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.

## **6. 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.



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### **7. 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 on 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.

### **8. 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 (2018, 2020, 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.

### **9. 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.

### **10. 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.



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### **11. WILL A SEPARATION AGREEMENT STOP MY SPOUSE FROM HASSLING ME?**

A. While separation agreements usually have a “no harassment” 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.

### **12. 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. 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.

### **14. 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.

### **15. 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? 8 semesters? Until the child attains age 23? Some termination point or date should be set.



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- 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, or for travel to and from home, or for summer expenses.
- 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. Consider putting 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.
- e. What part of the college costs will each parent pay? Be sure to set some specific percent or amount so that it will be enforceable in court if you need help in the future. Clauses that provide for the other side to pay "a reasonable share of the child's college expenses" are worthless since they don't say exactly what the other parent has to pay and a judge is not going to guess what the parents meant by this language. When in doubt, **spell it out!** Even if you just divide the college costs 50-50 between both parents, it's still better than a vague and unenforceable clause.

### **16. 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 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.

### **17. 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.

### **18. WHEN DOES ALIMONY END?**

A. Alimony usually ends are 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



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alimony also will 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.

### **19. 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.

### **20. HOW DO I KNOW IF I AM ENTITLED TO ALIMONY?**

A. Your attorney who prepares the separation agreement will explain alimony and postseparation support to you.

### **22. 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 equally divisible. 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, or if the judge makes findings in the property division order that justify an unequal division. The property that is divisible in North Carolina is called marital property. With certain exceptions, this is anything acquired during the marriage and before the separation. 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. Business or professional licenses
- c. Gifts or inherited property

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.

### **23. 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. Since 1997, all pensions may be considered marital property and divided in this state, whether they are vested or unvested. 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 until the divorce 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, or it may result in a loss of any rights to pension division because they weren't preserved properly in the agreement. A court order containing specific language is necessary before DFAS will divide a military pension; consult an attorney knowledgeable about this area of law.



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### **24. 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.

### **25. 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 a separation agreement that allows adultery. Any sexual relations with a person who is not your spouse is adultery, so no "dating clause" will 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.

### **26. 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.

### **27. CAN A SINGLE ATTORNEY DO THE SEPARATION AGREEMENT FOR ME AND MY SPOUSE?**

A. No single attorney can represent both spouses in a separation agreement. It is best to have two attorneys involved, one to advise each partner. In this way, 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.

### **28. WHAT SHOULD I DO IF I HAVE OTHER QUESTIONS?**

A. Please consult a legal assistance attorney 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.

### **HELPFUL WEBSITES:**

North Carolina Legal Aid: <http://www.legalaidnc.org/>

North Carolina Courts—FAQs about Divorce in North Carolina:

<http://www.nccourts.org/Support/FAQs/FAQs.asp?Type=14&language=1>

Armed Forces Legal Assistance Website: <http://legalassistance.law.af.mil/>