



TRIANGLE SMART
DIVORCE®

18 FAQs

About

North Carolina

Divorce



18 FAQs About North Carolina Divorce

If you are considering separation or a divorce, you may not know where or how to start, or even if a divorce is the right answer for you. To help you navigate this unfamiliar (and sometimes overwhelming) landscape, here are the answers to 18 of the most frequently asked questions we receive from clients during their initial consults with us.

1

Do we really have to be separated for a year before we can get divorced?

Yes, to file for divorce in North Carolina, you must have lived separate and apart for one year, and one of you must have resided in North Carolina for at least six months prior to filing for divorce. In North Carolina, you must live in separate homes to be considered as living separate. Sleeping in separate beds and refraining from sexual contact does not meet the state's definition of "separate and apart."

2

What if my spouse will not leave the house?

This is a difficult answer that depends on several circumstances, and, of course, the easiest way to become separated is for one of you to voluntarily move out of the marital home. However, we typically advise our clients not to move from the marital home without legal advice and a plan. If neither of you are willing to leave the home, then under a very few limited circumstances of significant bad acts by your spouse, you may be able to ask the Court for a "divorce from bed and board," which is a Court Order requiring the bad actor to leave the home in favor of the innocent spouse. Unfortunately, when the marriage has become that bad, both spouses can claim (often, rightfully) the other committed bad acts which can cause a claim for a divorce from bed and board to be denied.

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What if my spouse and I have separated but occasionally, we have stayed at each other's house and we may have had sex?

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Isolated incidents of sex between separated spouses does not stop the clock on the date of separation. However, if you resume your relationship, as determined by a totality of the circumstances, the date of separation will be determined by the date of your last separation.

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Do I need a Separation Agreement or Court Order to be “legally separated” from my spouse?

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No. Under North Carolina Law, there is no document that you need to be separated in the eyes of the law.





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Why is the date of separation important?

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In North Carolina, you must be separated for one full year before you are eligible to file an action for absolute divorce. Therefore, the date of separation determines what the earliest date is that you can file for absolute divorce. Additionally, all marital assets and debts must be valued as of your date of separation for purposes of equitable distribution. And support claims can be retroactive to the date of separation.

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Can my spouse and I use the same divorce attorney?

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Absolutely not. If you are in the process of separating or divorcing, you have competing interests with your spouse. That means that an attorney is prohibited by the North Carolina State Bar from representing both of you, including in the negotiation or preparation of a Separation Agreement. If your spouse presents you with a Separation Agreement or any other type of legal document, you should have your own attorney review it to ensure that you fully understand it and what impact it has on your future. You and your spouse can choose an attorney to serve as mediator in your case, but that mediator cannot draft the Separation Agreement for you either as that is in conflict with the mediator's role as a neutral.

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What issues do I need resolved before I file for divorce?

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The claim for divorce is only one claim that is triggered by your separation. These are the most common ones: child custody, child support, postseparation support/alimony, and equitable distribution (the division of assets and debts). These issues do not have to be resolved before the Court grants your divorce. They are separate legal issues that can be filed with the Court and heard by a Judge or resolved by agreement (private contract or Consent Order) at any time after separation. You do not have to wait the one-year period to deal with those claims. However, your legal claims for alimony and equitable distribution must be filed with the Court (not necessarily resolved) before the divorce is granted. Claims for child custody or child support can be filed at any time.

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How is child support determined?

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The North Carolina Child Support Guidelines provide a formula for determining the presumptive basic child support obligation for parties whose combined adjusted gross income does not exceed \$360,000 per year (\$30,000 per month). The guidelines are designed to consider certain relevant factors including work-related childcare expenses, health insurance paid on behalf of the children, and whether either parent is legally responsible for the support of other children. In cases where the parents' combined income exceeds \$360,000 per year, the parents can either reach an agreement on child support outside of Court, or the Court must conduct a hearing to determine child support based on the facts and circumstances of the case at hand. There are also circumstances other than high income in which a parent may request a deviation from the child support guidelines. One example of a reason to deviate may be when one parent pays 100% of the child support obligation and 100% of the insurance premium.

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How is child custody determined under North Carolina Law?

Either by agreement or by having a Judge decide the custody. When parents cannot agree and a lawsuit is filed about custody and visitation, the parents must attend mandatory parenting classes and mediation. If the parents resolve custody at mediation, the Parenting Agreement is submitted for approval by a Judge and adopted as a Court Order. If the parties are unable to negotiate a custody agreement in mediation or outside of mediation, then the Court will decide for the parents. Sometimes, temporary custody will be decided on less than two hours of evidence, which is why we encourage our clients to resolve custody by agreement if possible. North Carolina Judges determine custody by applying the standard of “the best interests of the child.” Who knows that better? The parents or the Judge?

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What is the difference between “legal custody” and “physical custody”?

Legal custody refers to a parent’s right to make decisions on behalf of a child, including decisions about health, education, and religious upbringing. The parents may have joint legal custody in which they must jointly make major child-related decisions together, or one parent may be awarded sole legal custody which allows this parent alone to make major decisions on behalf of the child. Physical custody refers to where the child resides and how much time the child spends in the physical care of each parent.

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If the other parent does not pay child support, can I prevent him or her from seeing the child?

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No. Under North Carolina Law, child support and child custody are two separate legal issues. A parent's failure or refusal to pay child support is not a basis for the other parent to deny access to the child.

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Can I get (or will I have to pay) alimony?

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In North Carolina, alimony (and postseparation support) is determined by agreement of the spouses or by the Court, and it is not applicable in all cases. If the issue of spousal support is in the Court system, a Judge must find that one spouse is a "dependent spouse" and the other spouse is a "supporting spouse" who has the ability to pay alimony. The Judge will then consider the statutory factors and other relevant circumstances to determine whether an award of alimony is equitable.

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What does "equitable distribution" mean?

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North Carolina uses the term "equitable distribution" to describe the process of equitably dividing the net marital and divisible estate (assets and debts) between two spouses who have separated or are beginning the process of divorce.



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Do North Carolina Courts distribute marital and divisible property equally?

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There is a presumption that the net marital and divisible estate should be distributed equally between the spouses. However, equitably does not mean equal; it means fairly. As such, there are certain factors that the Court can consider in justifying an unequal division of marital property and debts. Additionally, if you and your spouse have agreed upon the division of your assets and debts, you may do so in a Separation Agreement and Property Settlement which does not need the Court's blessing or approval and which will remain private and not in the public record at the Courthouse.

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Is my spouse entitled to receive any of my retirement account or pension if we get divorced?

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Any portion of your retirement account or pension plan that was acquired during the marriage is presumed to be marital property which is subject to division between you and your spouse as part of the equitable distribution process.

Why do I have to supply my attorney with so much personal and financial information and documentation?

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Your attorney must have adequate information and documentation to support or defend legal claims asserted by you or your spouse and to investigate claims and allegations asserted by either of you. We understand that the volume of documents that are required in many cases can be overwhelming, particularly if you are not very well organized. However, these documents are needed to help the attorney work with you to determine a strategy and a roadmap for your situation.





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Do I have to go to Court?

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Not necessarily. If there are disputes that you cannot resolve through compromise and agreement, then you will have to go to Court. However, provided there are no disputed issues, then you may never have to go to the Courthouse, not even to get divorced.

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Do I have to have a lawyer?

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You can get divorced in North Carolina without hiring or even speaking to a lawyer. However, talking with an experienced divorce attorney before you begin the separation or divorce process is in your best interest. An attorney can listen to the facts of your situation and give you expert, practical advice about your legal rights and options. In our experience, DIY divorces do not always address all the claims a person might have and often what you save on the front end by handling it yourself, but failing to address all the issues, is much less than the expense on the backend to undo the DIY divorce, if it can be undone.