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Putting Humpty Dumpty Together Again: Breach of Contract

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# **The Live-in Girlfriend's Income & Expenses in Alimony Cases**

By Amy A. Edwards

Unlike child support, North Carolina does not use any Guidelines or formula when deciding what amount alimony should be. Instead, the judge decides whether the low-earning spouse is entitled to alimony, and if so, whether the higher-earning spouse can afford to pay it. All of these decisions are made in the discretion of the judge. If you lined up ten judges to hear the same alimony case, you would very likely have ten different rulings. This is not only frustrating for the parties, but also for attorneys who don't have the benefit of a crystal ball.

## **What's the Deal with Alimony?**

By state law, the judge must decide what each person's income is, and what each person's reasonable living expenses are. The judge reviews a budget prepared by each party called a financial affidavit, about which each party testifies under oath. The financially dependent spouse must prove more reasonable living expenses than income, which is a financial shortfall. The supporting spouse tries to show enough expenses to avoid showing left-over money. In other words, the lower-earning spouse wants to show a deficit, and the higher-earning spouse wants to avoid having a surplus of money, which could be used for paying alimony.

The expenses each party asserts are frequently quite different from those that a judge decides are reasonable. For example, a spouse who earns \$26,000 per year will likely have a hard time justifying a \$700 per month vehicle payment as a reasonable living expense. Courts often expect both parties to tighten their belts after a separation. The judge in that example might think the vehicle could be sold or traded in exchange for a vehicle with a \$300 per month payment. In that event, the judge would credit that spouse with \$300 as a reasonable vehicle payment.

## **Why Do I Say the Girlfriend?**

Although alimony is payable to husbands or wives, the disparity of incomes almost always means the wife is the dependent spouse in

Eastern North Carolina. Usually, the wife seeks alimony, and the husband tries to defend against paying it, or at least tries to lower the amount of it. Based on this assumption, the wife loses alimony if she resides with a boyfriend or remarries. On the other hand, as a supporting spouse, the bare fact that the husband resides with a girlfriend and/or remarries is not important. Because in our part of the state, it is almost always a husband paying alimony, so we are usually dealing with a live-in girlfriend but the law applies to either spouse.

## **How Does a Girlfriend Impact Alimony?**

The circumstances in each case are unique, and each case is based on the finances of the parties. However, in looking at the big picture, there are two main ways that courts can address the live-in-girlfriend in alimony cases. These two methods apply both when the court first rules on alimony, and at any future times if either party files a motion to change the amount of alimony. First, the court can reduce the amount of "reasonable" expenses he can otherwise claim. This frees up the money that he has at his disposal, which can be applied to alimony. Second, the court can impute income, which means the court can say that he earns more than what he actually earns or says he earns. In the normal case, courts must decide what the actual income is. But imputing income to someone is serious business. Judges can't impute income to a spouse unless he is artificially lowering his income in bad faith, either to avoid paying alimony or to pay less alimony than what he should be paying.

## **What Happens in Real Life?**

The court can't lower expenses based on the girlfriend and impute income to him. The court must use only one of these methods, not both. These two consequences were spelled out in a recent case.\* His reasonable expenses for the mortgage, homeowner's insurance, water/trash, cable, laundry/dry cleaning, groceries and eating out totaled \$2,832 per month. Because the husband resided with his girlfriend, the court cut his expenses in half, allowing him to claim only \$1,416 per month as reasonable living expenses. The reason for this is that the girlfriend shared in creating those expenses, such as eating out or buying groceries. Therefore, she should be expected to chip-in for her share of those expenses. But the court didn't stop there, adding (imputing

income) an extra \$1,416 per month into his income for what the girlfriend should have been paying to him for her share of the living expenses. The Court of Appeals ruled that the court had improperly used both remedies instead of choosing only one.

\* *Walton v. Walton*, North Carolina Court of Appeals published December 18, 2018.

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## **Putting Humpty Dumpty Together Again: Breach of Contract**

By Amy A. Edwards

When they separate after being in a relationship, people who are or were married usually resolve their disputes one of two ways, by obtaining a court order or by a contract usually but not always called a separation agreement.

## **Breach of Contract**

Failure to do what was promised in a contract is a violation of it, which is called a breach of contract. This article assumes a valid contract has actually been made, and it doesn't look at what defenses someone might have if he or she is sued for breach of contract. If you enter into a contract, you are legally obligated to perform accordingly. Contracts are usually enforced by money damages. Like Humpty Dumpty, the court tries to make the innocent party "whole" again, restored to the position they were in before the other person breached the contract. The law gives the person a legal remedy, they are then finished with the matter, and both are off to live happily ever after.

## **No Adequate Remedy at Law**

Now consider the person in a family law situation. If you are entitled to child support but your ex won't pay, a legal remedy to enforce the contract would mean that each month after no payment is made, you would sue your ex, have a trial to get a judge to make a ruling, and execute on a judgment for money owed. Needless to say, this legal remedy would be repetitive, expensive and time-consuming. The entire point of child support is to make sure the child is given shelter, food, transportation, etc. Going to court every month would give a completely opposite result. This means the law is not adequate, and should be substituted with what is called equity.

## **Remedy at Equity**

Family law is one of the rare times when the court has the ability to rely on equity, which is based on justice and what is right and wrong, instead of relying just on a written statute. The distinction between the law and equity is also noticeable when you see it used as an attorney *at law*. Property claims for marital property are courts at equity because the judge must divide marital property equally "unless the court determines that an equal division is not equitable." NC Gen. Stat. §50-20. In fact, the division of marital property is called equitable distribution. In several matters related to family law, a judge's discretion is used, based on what is just and fair.

## Family Law: Specific Performance

If the court doesn't use a legal remedy and financial damages in a case, what does it use? The answer at equity is *specific performance*, which means the court orders the person to do what he or she is specifically obligated to do by the contract. A family law contract may involve obligations besides paying money. It might require one person to sign a deed, return family photos to the other spouse by a certain deadline, file joint tax returns or name someone as a beneficiary of life insurance. Money doesn't fix those types of problems, which are examples of a promise to act or perform in a certain way.

In these instances, a judge will enter a decree of specific performance, ordering the other party to perform in the specific way he or she agreed to do. Before the judge will order specific performance, you must prove that you have not violated the agreement, and that the other party still has the ability to perform as promised. If he or she only has the ability to partially perform as promised, the judge will order partial performance. This makes more sense when you consider a non-family law case. If an actor who breaks a contract to star in a movie, for example, the actor is not forced to go to the set and perform as he or she agreed to do in the contract. Instead, the actor must suffer the penalty of paying money damages.

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## **The (Very Brief) History of Women, Separation and Necessaries**

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Did you ever wonder why "they might come after me" if the bill collector can't find your ex? It is because North Carolina uses the doctrine of necessaries. When you hear about a duty of support, you think of alimony but that applies only between spouses. But when a third-party, such as a doctor or hospital, provides necessary services to a spouse, that third-party has the right to seek payment from the other spouse in certain circumstances, based on the doctrine of necessaries. This arises in both services (medical and non-medical) and goods but necessaries are frequently disputed in the context of medical care. Those services are usually expensive enough to merit the time and cost of litigating them in court. The general rule is that a third-party who provides medical services that were necessary for health and well-being of the husband or wife may seek payment from the other spouse. [FN1]

### **The Exception to the Rule: Separation and Notice**

North Carolina recognizes a quirky exception to the general rule. If you

and your spouse are separated when he or she receives the medical care *and the provider has actual notice that you are separated*, you have a defense. <sup>[FN1]</sup> In other words, current law says that just being separated isn't legally adequate to get you off the hook for your spouse's medical bill. The third-party provider must be put on notice that you are separated. As you might imagine, most people won't go to the hospital and elect to mention that their spouse shouldn't be liable for payment of the bill. People can avoid being at the mercy of the law by making their own agreement. Usually, separation agreements address this by agreeing that the person who receives care must reimburse the other spouse if he or she is forced to pay it.

### **Early Law: Wife's Expenses**

The colonies brought with them British law, which at the time said that unless the wife left her husband for an unjustified reason, he was responsible for her necessary expenses, *i.e.*, her necessaries. Technically, if a husband failed to provide for her, a wife was legally entitled to obtain what was necessary, at which time he would owe the provider of goods or services on her behalf. This assumes she was in a position to enforce those rights. But unlike a single woman, upon marriage, a wife had virtually no independent legal existence. In one 1858 North Carolina case described below, the Court noted that ". . . the legal existence of the wife is merged in that of the husband, so that she is incapable of making a contract, . . . to bind either herself or her husband." <sup>[FN 2]</sup> While the couple lived together, the wife could be considered an agent of her husband.

### **Early Law: What if They Were Separated?**

A wife's agency status ended if she left her husband. In most circumstances, the law looked unkindly on wives who made the decision to leave their husbands. The element of fault determined whether a wife had good cause to leave her husband. If she had a good reason to leave him, the husband would be responsible for the wife's necessary expenses. If she did not have a valid reason to leave him, the person or business providing her with necessary goods or services in violation of his rights faced legal liability from the husband. He could sue someone for assisting her in carrying out her unjustified effort to leave him. In the 1858 case, a doctor sued the husband for payment of his medical services, and the NC

Supreme Court cited an 1849 case in setting out the rule at that time:

If a wife leaves the "bed and board" of the husband without good cause . . . even in respect to the food, clothing, or shelter necessary for her existence, he is entitled to an action and may recover [financial] damages against any person who . . . supplies her with necessaries. . . This rule . . . may seem harsh, [but it] is based upon the ground that it is wrong to harbor the wife by doing any act which will make it more easy for her to continue in the violation of her conjugal duties. [FN2]

## **To This Day: Non-Molestation Clauses**

The husband's conjugal rights to his wife explains why most separation agreements include a clause that says neither party shall molest or bother the other, nor attempt to compel the other to cohabit or live with him or her. These non-molestation clauses stem from a time when men were entitled to their wives' conjugal rights and could physically go and "repossess" their wives. These non-molestation clauses still exist because lawyers tend to leave historic language in agreements. If an attorney updates a document to remove historic language, it raises suspicion and the other attorney wonders why the "standard language" has been removed. Although the non-molestation clauses remain common, the state courts officially applied the doctrine of necessaries to both husbands and wives in 1987. [FN 3]

FN1 *Forsyth Memorial Hosp., Inc. v. Chisholm*, 342 N.C. 616 (1996).

FN2 *Pool v. Everton*, 50 N.C. 241 (1858), citing *Barbee v. Armstead*, 32 N.C. 530 (1849).

FN3 *N.C. Baptist Hosp., Inc. v. Harris*, 319 N.C. 347 (1987).

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