

The Role of Fault in Alimony

Long ago and far away, title and control of all of a woman's property vested in her husband upon marriage. In exchange, the husband became responsible for support of the wife for the remainder of her life. The support obligation continued even through divorce, unless the bad conduct of the wife was the reason for the divorce.

This is the common law foundation linking misconduct –fault – to alimony. Over time, the law came to require that any woman seeking alimony first prove that her husband's conduct rather than her own was the cause of the marital breakup.

NC Law Before 1995

For many years, North Carolina law reflected this common law principle. Any dependent spouse seeking alimony – whether the husband or the wife – was required to first prove marital fault on the part of the supporting spouse before the court could consider financial need for support. And, even if the supporting spouse was at fault, an act of adultery by the dependent spouse, whether before or after separation, completely barred the adulterer from receiving support.

The present alimony statutes were enacted in 1995 and the new legislation significantly diminished the role of fault in favor of more focus on economic need. However, fault – now referred to as marital misconduct, [GS 50-16.1A\(3\)](#) – remains very relevant in the support determination generally and is still determinative in specific circumstances.

Postseparation Support (PSS)

While [GS 50-16.2A\(c\)](#) provides that a dependent spouse is entitled to postseparation support (temporary alimony) if the court determines that the resources of the dependent spouse are not adequate to meet his or her reasonable needs and the supporting spouse has the ability to pay, this entitlement may be dependent upon the court's consideration of marital misconduct. The statute states:

...[T]he judge shall consider marital misconduct by the dependent spouse occurring prior to or on the date of separation in deciding whether to award postseparation support.... When the judge considers these acts by the dependent spouse, the judge shall also consider any marital misconduct by the supporting spouse in deciding whether to award postseparation support and in deciding the amount of postseparation support.

[GS 50-16.2A\(d\)](#).

This language indicates at least four things about fault and PSS:

- The court must consider allegations of marital misconduct on the part of the dependent spouse;
- The court cannot consider allegations of misconduct of the supporting spouse unless the court first considers misconduct by the dependent spouse;
- All marital misconduct is equal under the law in PSS proceedings, meaning adultery (called 'illicit sexual behavior') is not necessarily worse than any other misconduct; and
- While the court must consider allegations of marital misconduct, the impact of marital misconduct on the PSS award is within the discretion of the judge.

While there is no absolute bar to PSS, the court of appeals has held that it is within the trial court's discretion to deny PSS solely because of marital misconduct. *Sorey v. Sorey*, 757 SE2d 518 (NC App, 2014).

GS 50-16.3A(d) allows a jury to determine whether a party committed marital misconduct when that issue is raised in the context of a claim for alimony, but a jury has no role in the PSS process. *Wells v. Wells*, 132 NC App 401 (1999)(noting that PSS can be determined on affidavits alone). A conclusion that a spouse committed marital misconduct in a PSS order is not binding on the court in the alimony trial because PSS is a temporary order. *Wells*.

Alimony

According to the court of appeals, the 1995 amendments replaced a "fault-based approach" with a "needs-based approach" to alimony. Under the needs-based approach, except for the rules regarding illicit sexual behavior, marital misconduct is only one of many factors considered when determining whether alimony should be awarded and when determining the amount and duration of an alimony award. *Alvarez v. Alvarez*, 134 NC App 321 (1999). The weight attributed to marital misconduct generally is completely within the discretion of the trial judge. *Romulus v. Romulus*, 215 NC App 495 (2011).

When Fault Controls

The significant exception to the "needs-based approach" to alimony is the impact of one specific type of marital misconduct; illicit sexual behavior. The statute defines illicit sexual behavior as:

"acts of sexual or deviate sexual intercourse, deviate sexual acts, or sexual acts defined in G.S. 14-27.1(4), voluntarily engaged in by a spouse with someone other than the other spouse".

GS 50-16.1A(3)(a). See also *Romulus* (in addition to sexual intercourse, illicit sexual behavior includes sexual acts defined in GS 14-27.1(4); penetration of vagina by a finger was an act of illicit sexual behavior).

The impact of illicit sexual behavior on alimony is as follows:

- If the court finds that the dependent spouse participated in an act of illicit sexual behavior, as defined in G.S. 50-16.1A(3)a., during the marriage and prior to or on the date of separation, the court shall not award alimony.
- If the court finds that the supporting spouse participated in an act of illicit sexual behavior, as defined in G.S. 50-16.1A(3)a., during the marriage and prior to or on the date of separation, then the court shall order that alimony be paid to a dependent spouse.
- If the court finds that the dependent and the supporting spouse each participated in an act of illicit sexual behavior during the marriage and prior to or on the date of separation, then alimony shall be denied or awarded in the discretion of the court after consideration of all of the circumstances. Any act of illicit sexual behavior by either party that has been condoned by the other party shall not be considered by the court.

GS 50-16.3A(a).

So an act of illicit sexual behavior committed before separation by a dependent spouse is a complete bar to alimony unless the supporting spouse also committed an act of illicit sexual behavior before the date of separation. This is true even if the supporting spouse committed other forms of marital misconduct. *See Romulus* (spouse barred from alimony due to one incident of illicit sexual behavior despite long history of domestic violence by supporting spouse).

On the other hand, the court must award alimony of some amount and duration if a supporting spouse committed an act of illicit sexual behavior before the date of separation and the dependent spouse did not. *See Fleming v. Fleming, unpublished, 765 SE2d 553 (NC App, Oct. 2014)* (trial court erred in denying alimony despite husband's illicit sexual behavior after concluding that needs of dependent spouse had been met by PSS award).

Cohabitation is a Defense to Alimony

N.C. Gen. Stat. 50-16.9(b) provides that “if a dependent spouse who is receiving postseparation support or alimony from a supporting spouse ... engages in cohabitation, the postseparation support or alimony shall terminate.” In *Setzler v. Setzler*, 781 SE2d 64 (NC App., 2015), the court stated that “the primary intent in making cohabitation grounds for termination of alimony was to evaluate the economic impact of a relationship on a dependent spouse and, consequently, avoid bad faith receipts of alimony;” bad faith meaning a dependent spouse avoiding remarriage for the sole purpose of continuing to receive alimony. So if the relationship is such that one would expect the parties to be married, the assumption is the only reason they are not married is the desire to avoid the termination of alimony. For more on defining cohabitation, see my earlier post [Alimony: Cohabitation is All About Money After All](#).

Cohabitation clearly terminates an award of support. What if the dependent spouse is cohabitating or has cohabitated at the time she or he is asking the court for an award of postseparation support or alimony? Is cohabitation a defense to the establishment of a support obligation? Does it matter whether the dependent spouse still is cohabitating at the time of the support request?

Williamson v. Williamson

The first case to address this issue was *Williamson v. Williamson*, 142 NC App 702 (2001). Plaintiff Mr. Williamson was ordered to pay PSS to defendant Ms. Williamson beginning December 3, 1996. The court conducted a hearing on defendant’s claim for alimony during June and July 1998. During that hearing, the trial court concluded defendant had been cohabitating since June 1995, before the PSS order was entered. The trial court ordered Mr. Williamson to pay support to Ms. Williamson from the date of separation until June 1995 when she began cohabitating and denied her request for alimony.

On appeal, defendant argued that the clear language of GS 50-16.9(b) indicates that while cohabitation will terminate an existing order of support, it is not a defense to an initial award of alimony. The court of appeals disagreed, stating:

“[h]ere, the defendant both received payments pursuant to a court order and engaged in cohabitation since 16 July 1995. The statute clearly and unequivocally states that where these circumstances exist, the support payments shall terminate.”

The court of appeals affirmed the trial court’s determination that “plaintiff was not obligated for alimony or postseparation support payments from the time defendant’s cohabitation began” and held that “[i]n cases in which a dependent spouse receives alimony or postseparation support pursuant to a judgment or court order, cohabitation or remarriage terminates that spouse’s right to receive payments.”

The opinion does not indicate whether Ms. Williamson continued to cohabit at the time of her request for alimony and also does not indicate that it would matter at all in the analysis if she no longer was in that relationship when she requested support. The court actually states that the fact “that the defendant began cohabiting prior to the postseparation or alimony award is not relevant.”

Orren v. Orren

Very recently, the court of appeals interpreted the *Williamson* case broadly and held that even in a case where no support is being paid pursuant to a court order, cohabitation is a defense to a dependent spouse’s request for alimony.

In *Orren v. Orren*, NC App (May 16, 2017), defendant Ms. Orren requested postseparation support and alimony as well as equitable distribution. No PSS order was entered. Following entry of the equitable distribution judgment, the trial court held a hearing on Ms. Orren’s alimony claim. Following the hearing, the trial court wrote and signed an alimony order granting alimony but the written document was not filed. Three years later, after the trial court was informed that the alimony order had not been entered, the trial court determined that evidence should be reopened on the issue of alimony. Mr. Orren attempted to introduce evidence of wife’s cohabitation, but the trial court refused to admit the evidence, stating on the record that “cohabitation is not a defense to an alimony claim.”

After entry of the alimony order, Mr. Orren appealed. The court of appeals agreed with his contention that the trial court “acted under a misapprehension of the law” when it denied his request to introduce evidence of defendant’s cohabitation.

Ms. Orren argued that GS 50-16.9(b) states only that when a “spouse *who is receiving* postseparation support or alimony ... engages in cohabitation, the postseparation support or alimony shall terminate,” and the court of appeals acknowledged the precise language of the statute stating “[t]hus, the statute addresses situations in which postseparation support or alimony already has been ordered before cohabitation begins.”

Nevertheless, the court in *Orren* held that the opinion in *Williamson* clearly and broadly holds that cohabitation is “a defense to an initial action for alimony.” In addition, the court in *Orren* indicated that it would not make sense to allow alimony to go forward following cohabitation because the award “would immediately be subject to termination based on cohabitation.” The *Orren* court concluded that “[s]imply put, ...cohabitation may be asserted as a defense to an initial alimony claim.”

So once cohabitation occurs, all support obligation terminates forever?

Like *Williamson*, the court in *Orren* does not indicate whether the dependent spouse continued to

cohabitante at the time the trial court considered her request for alimony. Also like *Williamson*, the court in *Orren* indicates that it does not matter. In stating that cohabitation would automatically terminate any order of alimony entered, the court seems to say clearly that cohabitation at any point in time will terminate a supporting spouse's obligation to pay support forever, regardless of whether the dependent spouse continues to cohabitante at the time of the request for support or not.

Alimony: Cohabitation is All About Money After All

North Carolina law long has provided that court-ordered alimony terminates upon the death of either the supporting or dependent spouse and upon the remarriage of the dependent spouse. Since 1995, the law provides that even if the dependent spouse does not remarry, alimony also will terminate if the receiver engages in cohabitation. Our appellate courts have struggled to provide clear guidance regarding how to determine when a relationship amounts to cohabitation. Last December, in Setzler v. Setzler, 781 SE2d 64 (NC App., 2015), the court of appeals told us that the primary purpose of the cohabitation rule is to discourage “bad faith” decisions not to remarry and provided the clearest statement to date that cohabitation is proven by showing a relationship that provides economic benefits to the dependent spouse similar to those that would be provided by marriage.

Cohabitation

GS 50-16.9(b) provides defines cohabitation as:

The act of two adults dwelling together continuously and habitually in a private heterosexual relationship, even if the relationship is not solemnized by marriage, or a private homosexual relationship. Cohabitation is evidence by the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations.

In *Craddock v. Craddock*, 188 NC App 806 (2008), the court of appeals explained the cohabitation statute by quoting Professor Suzanne Reynolds:

The statute reflects several of the goals of the “live-in lover statutes,” terminating alimony in relationships that probably have an economic impact, preventing a recipient from avoiding in bad faith the termination that would occur at remarriage, but not the goal of imposing some kind of sexual fidelity on the recipient as the condition of continued alimony. The first sentence reflects the goal of terminating alimony in a relationship that probably has an economic impact. “Continuous and habitual” connotes a relationship of some duration and suggests that the relationship must be exclusive and monogamous as well. All of these factors increase the likelihood that the relationship has an economic impact on the recipient spouse.

2 Suzanne Reynolds, *Lee's North Carolina Family Law* § 9.85, at 493-94 (5th ed.1999).

A few years later in *Smallwood v. Smallwood*, 742 SE2d 814 (NC App., 2013), the court again stressed the need to find that a relationship has a financial impact on the receiving spouse to support the conclusion that cohabitation has occurred. In affirming the trial court’s conclusion that the former wife was not cohabitating with her boyfriend even though the boyfriend slept at her

house five to seven nights each week, the court of appeals said:

While the court did determine that plaintiff and [her boyfriend] have engaged in some domestic activities, it did not find an assumption of marital rights and duties extending beyond those found in an intimate friendship—such as, for example, joint financial obligations, sharing of a home, combining of finances, pooling of resources, or consistent merging of families.

Bird v. Bird

But when the Supreme Court was presented with the opportunity to define cohabitation, it did not mention anything at all about the importance of finding that the relationship has a financial impact, raising a question about whether the Supreme Court shares the Court of Appeal's view of the purpose of the statute. In *Bird v. Bird*, 363 NC 774 (2009), the court reversed the trial court decision to grant summary judgment in favor of dependent wife after concluding she was not cohabitating. The Supreme Court held that because there was conflicting evidence about whether the couple maintained separate residences, the trial court was required to consider the subjective intent of the couple regarding whether they intended to cohabit. The court did not say the financial nature of the relationship was not important; it simply made no mention of that issue being significant.

Setzler

The Court of Appeals made it clear in Setzler that *Bird* does not change the focus of the analysis from that set out by in *Craddock* and *Smallwood*. In Setzler, the trial court denied former husband's motion to terminate alimony based on cohabitation after concluding that while wife and her boyfriend spent almost every night together, they did not assume those rights and responsibilities usually manifested by married people. The two maintained separate houses and neither kept clothes or personal items at the house of the other. The man did regularly pay living expenses and other bills of the wife, but wife repaid him entirely when she received her property settlement from husband.

The court of appeals affirmed the trial court decision. Significantly, the court of appeals stated that “the primary intent in making cohabitation grounds for termination of alimony was to evaluate the economic impact of a relationship on a dependent spouse and, consequently, avoid bad faith receipts of alimony;” bad faith meaning a dependent spouse avoiding remarriage for the sole purpose of continuing to receive alimony. So if the relationship is such that one would expect the parties to be married, the assumption is the only reason they are not married is the desire to avoid the termination of alimony.

The court held that there are two prongs to the definition of cohabitation found in GS 50-16.9(b). First the trial court must determine there is “a dwelling together continuously and habitually.” According to the court, this first prong reflects the goals of “live-in-lover statutes” discussed by Professor Reynolds in the quote above. The statute is not intended to allow a court to terminate

alimony simply because a recipient engages in a sexual relationship but recognizes that a continuous, habitual, monogamous and exclusive relationship usually results in an economic impact on the dependent spouse. In Setzler, the trial court concluded that wife and the man did dwell together continuously and habitually, had a monogamous and exclusive relationship, and the relationship had a financial impact on wife because man paid for all of their expenses when they traveled, had dinner out or cooked for both of them at home.

However, the second prong of the statutory definition requires that the court find that the couple “voluntarily assumes those marital rights, duties, and obligations usually manifested by married people” based upon the totality of the circumstances. In this case, the trial court supported its conclusion that the parties did not meet this prong with findings that the two maintained separate residences, did not combine their finances, did not maintain each other’s homes, and did not refer to themselves as married. While the regular payment of living expenses by one for the other would support a conclusion that this prong exists, the payments do not establish this type of relationship if they are loans only, as they were in this case.

Alimony: the court can order security for the future payment of an award but probably not by life insurance

As with child support, spousal support orders are most often enforced by contempt after a supporting spouse has failed to comply with the order. [G.S. 50-16.7\(j\)](#) (postseparation support and alimony are enforceable by civil and criminal contempt). However, [G.S. 50-16.7](#) sets out other mechanisms that can be used as an alternative or in conjunction with contempt to enforce support orders when an obligor fails to pay. That statute also sets out several mechanisms for securing the future payment of an alimony award at the time the court orders that support be paid. Several of those mechanisms are authorized by [G.S. 50-16.7\(b\)](#), which states broadly that

“The court may require the supporting spouse to secure the payment of alimony or postseparation support so ordered by means of a bond, mortgage, or deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property.”

The court of appeals recently addressed a trial court order that attempted to secure the future payment of an award by ordering the party responsible for paying alimony to maintain life insurance payable to the alimony recipient in the event of the payor’s death. In [Wadworth v. Wadsworth, 868 S.E.2d 636 \(N.C. App. Dec. 21, 2021\)](#), the appellate court vacated the trial court’s order, and the reasoning of the court indicates that life insurance may never be an appropriate means of securing the future payment of spousal support.

[Wadsworth](#)

The trial court entered a child support and alimony order requiring husband to pay alimony in the amount of \$1,900.00 a month for 20 years, prospective monthly child support, and an \$18,026.75 child support arrearage. The court also ordered husband to maintain a life insurance policy with a \$550,000.00 death benefit payable to the dependent spouse as “security for” the child support arrearage and for the alimony award. Husband appealed, arguing, among other things, that the trial court erred in ordering him to maintain the life insurance policy.

The court of appeals agreed with husband. The appellate court acknowledged that [GS 50-16.7\(b\)](#) allows the court to secure the payment of support but held that the life insurance ordered by the court in this case was not security within the meaning of the statute.

First, the court held that the order to maintain the life insurance policy violated the statutory requirement that the alimony obligation of husband terminate upon his death. As the life insurance would be paid only upon his death, the appellate court held that trial court order inappropriately required husband’s obligation to continue after his death.

As life insurance always is paid upon the death of the covered person, this part of the holding alone

indicates that, at least according to this panel of the court of appeals, life insurance cannot be used as security for an award of support.

Second, the court reasoned that the order was in error because the amount of the life insurance policy required was more than husband's total potential obligation for support and child support arrears. Assuming he survived the entire 20 years of the alimony award, the parties never reconciled, and the wife never remarried, husband would owe only a total of \$474,026.75 for that 20-year period, an amount much lower than the required \$550,000 coverage.

Finally, the court held that the life insurance policy was not security for the amount husband owed because the amount of the life insurance policy remained static throughout the 20-year term. If husband died, wife would receive \$550,000, regardless of how much husband had paid before his death. The court explained that should husband pay all he owes pursuant to the court order but die the day before his last alimony payment was due, wife would receive all he had paid plus an additional \$550,000 payment. The court of appeals referred to this as a "windfall" to wife, more than doubling the amount awarded to her by the trial court.

Other methods of securing the award

Income withholding and assignment of wages

[G.S. 50-16.7\(f\)](#) authorizes the court to secure the future payment of alimony by ordering income withholding, and [G.S. 50-16.7\(b\)](#) authorizes the court to order the payor to execute an assignment of wages, salary, or other income due or to become due. See *Faught v. Faught*, 67 N.C. App. 37, 312 S.E.2d 504, review denied, 311 N.C. 304, 317 S.E.2d 680 (1984)(proper for court to order a supporting spouse's military retirement pay assigned to a dependent spouse under 10 U.S.C. § 1408, the Uniform Services Former Spouses' Protection Act); and *Evans v. Evans*, 111 N.C. App. 792, 434 S.E.2d 856, review denied, 335 N.C. 554, 439 S.E.2d 144 (1993)(Employee Retirement Income Security Act (ERISA)(29 U.S.C. § 1056(d)(3)(A)) and Social Security Act anti-alienation provisions do not preclude assignment of retirement and Social Security benefits to a spouse as alimony); and 42 U.S.C. § 659(a)(allowing Social Security benefits to be subject to legal process for a claim of alimony).

Bonds and Trusts

As discussed above, [G.S. 50-16.7\(b\)](#) broadly authorizes the court to order a supporting spouse to "secure the payment of alimony or postseparation support so ordered by means of a bond, mortgage, or deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property." See *Parker v. Parker*, 13 N.C. App. 616, 186 S.E.2d 607 (1972) (noting in dicta that requiring a bond was an appropriate method of enforcing the alimony order where defendant resided out of state and had no attorney of record); and *Weaver v. Weaver*, 88 N.C. App. 634, 364 S.E.2d 706 (creation of trust consisting of the real and personal property of the

parties to secure payment of alimony and child support was proper exercise of discretion), review denied, 322 N.C. 330, 368 S.E.2d 875 (1988).

Liens against real property

A judgment for postseparation support or alimony can be made a lien against real property if the judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected. [G.S. 50-16.7\(i\)](#). Execution is available for the enforcement of the lien when support is not paid, and debtor's exemptions do not apply in the execution process. [G.S. 50-16.7\(k\)](#).