

POST-SEPARATION SUPPORT AND ALIMONY

Post-separation Support and Alimony both are forms of support awarded to a dependent spouse: (i) if the court find the spouse's income insufficient to maintain the living standard the spouse was accustomed to during the marriage; and, (ii) if certain other conditions described below as "marital misconduct," are determined to be present. In short, spousal support typically is available to a dependent spouse and, then, only if the other spouse commits some act(s) of marital misconduct – both conditions must be present.

Post-separation support and Alimony claims are usually addressed in separate hearings. Typically, post-separation support is temporary support ordered on an interim basis for a set period of time or until there is a final judgment awarding or denying alimony. Permanent alimony is typically awarded later in the case, after the court has ruled on claims to post-separation support and payment for the ongoing support and maintenance of a spouse, either by lump sum or on a continuing basis.

A "dependent spouse" is one who is substantially dependent on the income of the other spouse or who is substantially in need of support from the other spouse. For example, a spouse whose contribution to the marriage involved remaining at home to raise the parties' children, while the other spouse worked outside of the home, would typically be considered a "dependent spouse." Generally, a dependent spouse must have little or no outside income, or an income that is substantially less than that of the income-earning, working spouse in order to obtain post-separation support or alimony.

Alimony and post-separation support typically terminate at a time specified by the court, or by the agreement of the parties and usually upon the death of either spouse, upon the remarriage of the dependent spouse, or upon [cohabitation](#) [link to “pop-up” definition box] of the dependent spouse.

Procedures for Post-separation Support and Alimony

Post-separation Support (The First Hearing). The first hearing for post-separation support is usually held in conjunction with hearings on the issues of child support and child custody. At a hearing on post-separation support, a judge (without a jury) will hear the evidence and determine if one spouse is a dependent spouse, taking the following factors into account:

1. The financial needs of both parties;
2. Accustomed standard of living;
3. Present employment income and other recurring earnings of each spouse;
4. Earning abilities of both spouses;
5. Separate and marital debt obligations;
6. Necessary living expenses of both spouses;
7. Each spouse’s respective legal obligations to support any other person; and,
8. The Pre-separation marital misconduct of both spouses.

Marital Misconduct. At a hearing on post-separation support, as well as permanent alimony, the judge will consider marital misconduct of the dependent spouse as well as the supporting (the “paying”) spouse that occurred **prior to the physical separation** of the parties in deciding whether to award post-separation

support and in deciding the amount to award. The court takes the following grounds for marital misconduct into account:

1. Illicit sexual behavior;
 - a. Post-separation Support. If only the dependent spouse participated in illicit sexual behavior, then the post-separation support may be awarded to the dependent spouse on a temporary basis.
 - b. Alimony. If only the dependent spouse participated in illicit sexual behavior, alimony will be denied completely. If only the supporting spouse participated in illicit sexual behavior, alimony shall be paid. If both spouses participated in illicit sexual behavior, then alimony shall be denied or awarded at the discretion of the court. Both spouses have the right to a jury trial to determine whether either has committed illicit sexual behavior or any other act of marital misconduct. The judge will then determine whether to award alimony.
 - c. Condonation and Forgiveness. If you and your spouse resume the marital relationship or have sexual relations, a court may rule that this constitutes condonation or forgiveness of all prior illicit sexual behavior. You will not be permitted to use those acts as a factor against your spouse in support of or in defense of an alimony claim.
2. Causing an involuntary separation by a criminal act (i.e. other spouse is in prison);
3. Abandonment;

4. Maliciously turning a spouse out of doors (forcing him/her to leave);
5. Cruel and barbarous treatment endangering life;
6. Causing “indignities” that make an intolerable condition and burdensome life;
7. Reckless spending, or the destruction, waste, diversion, or concealment of assets;
8. Excessive use of drugs or alcohol; and,
9. Failing to provide necessary subsistence.

Amount and Duration of Alimony. The court will decide the amount of alimony that will be paid to the dependent spouse by the supporting spouse. In determining the amount, the court must receive a financial standing affidavit showing the monthly living expenses and income for each spouse. The following factors will be taken into consideration by the court when determining the amount and duration of alimony:

1. The marital misconduct of either spouse (discussed above);
2. The relative earnings and earning capacities of the spouses;
3. The ages and physical, mental, and emotional conditions of the spouses;
4. The amount and spouses of earned and unearned income of both spouses, including but not limited to earnings, dividends, and benefits such as medical, retirement, insurance, and social security;
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 serving as the custodian of a minor child;
8. The standard of living the spouses were accustomed to during the marriage;
9. The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the dependent spouse 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 a homemaker;
13. The relative needs of the spouses;
14. The federal, state, and local tax ramifications of the alimony award; and,
15. Any other factor(s) relating to the economic circumstances of the spouses that the court finds to be just and proper.

Proving Income and Expenses. In many cases both spouses will be required to accept a lesser standard of living because the income levels are insufficient to maintain the former standard of living in two separate households. If the court finds that the supporting spouse is deliberately depressing his or her income, an award may be based on capacity to earn. Whether you are a dependent or supporting spouse, justifying your expenses and, if necessary, contradicting your spouse's expenses, is very important for postseparation support and alimony cases and the law requires that both parties file "financial standing" affidavits with the court as a preface of hearing on any support issues. Preparing your **financial standing**

affidavit and supporting documentation is one of the most important parts of your case.

Modifying Post-separation Support or Alimony. Either spouse may make a motion to increase or decrease a post-separation support or alimony amount at any time based upon a change of circumstances. The law imposes particular requirements on proving changes in circumstances and typically this proof requires more than just a slight increase in one spouse's income over that of the other spouse. However, if alimony is being paid in accordance with, or under, a separation agreement, it may be designated as "non-modifiable" except in circumstances set forth in the agreement. Your attorney will play a crucial role in negotiating the terms of any separation agreement that addresses issues of spousal support.

Procedural Timing. Your case for post-separation support or alimony must be pending in the court prior to your [absolute divorce](#) or you will be barred from seeking those claims. A divorce will not automatically terminate a post-separation or alimony award already in place. The claim for alimony may be heard on the merits prior to or after the entry of a judgment for [equitable distribution](#). If alimony is awarded, the issues of amount and of whether a spouse is a dependent or supporting spouse may be reviewed by the court after the conclusion of the equitable distribution claim.

Taxation and Alimony and Post-separation Support: When the parties file separate tax returns and reside in separate households, alimony payments in cash to or for the benefit of the recipient spouse will be considered taxable income to the

dependent spouse and a deduction to the supporting spouse. The taxation of support payments is a complex analysis determined principally by Federal law under the provisions of the Internal Revenue Code. Should you desire another outcome please ask us about the technical rules that affect the taxability of support payments. At James Zisa Attorneys, our lawyers have advanced law degrees in Taxation and Estate Planning and we are pleased to offer comprehensive tax consultations to our clients in conjunction with our representations.