

January 1993

## Post-Separation Failure to Support a Dependent Spouse as a Sole Ground for Alimony Despite the Absence of Marital Misconduct Before Separation - *Brown v. Brown*

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### Recommended Citation

Elizabeth N. Rich, *Post-Separation Failure to Support a Dependent Spouse as a Sole Ground for Alimony Despite the Absence of Marital Misconduct Before Separation - Brown v. Brown*, 15 CAMPBELL L. REV. 333 (1993).

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POST-SEPARATION FAILURE TO SUPPORT A  
DEPENDENT SPOUSE AS A SOLE GROUND FOR  
ALIMONY DESPITE THE ABSENCE OF MARITAL  
MISCONDUCT BEFORE SEPARATION — *Brown v.*  
*Brown.*

INTRODUCTION

Upon separation and institution of a divorce action, a spouse may also include an action for alimony.<sup>1</sup> In order to receive alimony after a final decree of divorce, the spouse attempting to receive alimony must plead and prove at least one of ten statutory grounds of marital misconduct committed by the other spouse.<sup>2</sup> These grounds are acts that must have caused or contributed to the breakdown of the marriage.<sup>3</sup>

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1. N.C. GEN. STAT. § 50-16.8(b) (1987).

2. N.C. GEN. STAT. § 50-16.2 (1987):

(1) The supporting spouse has committed adultery.

(2) There has been an involuntary separation of the spouses in consequence of a criminal act committed by the supporting spouse prior to the proceeding in which alimony is sought, and the spouses have lived separate and apart for one year, and the plaintiff or defendant in the proceeding has resided in this State for six months.

(3) The supporting spouse has engaged in an unnatural or abnormal sex act with a person of the same sex or of a different sex or with a beast.

(4) The supporting spouse abandons the dependent spouse. (5) The supporting spouse maliciously turns the dependent spouse out of doors.

(6) The supporting spouse by cruel or barbarous treatment endangers the life of the dependent spouse.

(7) The supporting spouse offers such indignities to the person of the dependent spouse as to render his or her condition intolerable and life burdensome.

(8) The supporting spouse is a spendthrift.

(9) The supporting spouse is an excessive user of alcohol or drugs so as to render the condition of the dependent spouse intolerable and the life of the dependent spouse burdensome.

(10) The supporting spouse willfully fails to provide the dependent spouse with necessary subsistence according to his or her means and condition so as to render the condition of the dependent spouse intolerable and the life of the dependent spouse burdensome.

3. See *Williams v. Williams*, 299 N.C. 174, 187-88, 261 S.E.2d 849, 858-59 (1980).

The North Carolina Court of Appeals, in *Brown v. Brown*,<sup>4</sup> attempted to broaden the scope of North Carolina General Statute 50-16.2, which lists the grounds for alimony, by holding that the willful failure of the supporting spouse to provide support after the parties separate, but before any action for alimony has commenced, is included in the language of the statute as a ground for permanent alimony.<sup>5</sup> The court made two errors in its opinion. First, it incorrectly relied on the rationale that post-separation adultery is a ground for alimony in deciding that post-separation failure to support a spouse may also be a ground for alimony.<sup>6</sup> Second, the court failed to consider the detrimental effects such an interpretation of the statute will have on future actions for alimony. This Note explores the developments in the policy behind awarding alimony, analyzes the rationale behind the court of appeals' decision in light of these developments, and concludes that future actions for alimony may be upheld where the supporting spouse is not responsible for the dissolution of the marriage, a result inconsistent with the direction that the policy behind awarding alimony has taken in recent years.

### THE CASE

Janet Ruth Brown, the plaintiff, and Elbert Ferrell Brown, the defendant, separated on June 25, 1988.<sup>7</sup> At the time of the separation, Mr. Brown told his unemployed wife that he would support her until August 1988.<sup>8</sup> At this time, Mrs. Brown attempted to receive disability benefits for her support, but was unsuccessful.<sup>9</sup> After August of 1988, Mr. Brown stopped sending support.<sup>10</sup> Approximately three months later, on December 6, 1988, the court entered an order, pursuant to Mrs. Brown's September complaint, awarding her alimony *pendente lite*.<sup>11</sup> Mr. Brown then resumed his support payments.<sup>12</sup> Subsequently, on October 6, 1989, a judgment of

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4. 104 N.C. App. 547, 410 S.E.2d 223 (1991), *cert. denied*, 331 N.C. 383, 417 S.E.2d 789 (1992).

5. *Id.* at 550, 410 S.E.2d at 225.

6. *Id.*

7. *Id.* at 549, 410 S.E.2d at 225.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 548, 410 S.E.2d at 224.

12. Record at 57, *Brown* (88-CvD-2593).

absolute divorce was entered.<sup>13</sup> On November 28, 1990, a hearing on Mrs. Brown's permanent alimony claim was held.<sup>14</sup> The court gave the jury three questions to be answered as to what grounds existed, if any, to support Mrs. Brown's claim for alimony.<sup>15</sup> The jury found that Mr. Brown had neither abandoned nor offered indignities to Mrs. Brown, without provocation on her part.<sup>16</sup> However, the jury did find that Mr. Brown had willfully failed to provide Mrs. Brown "with necessary subsistence according to his means and conditions so as to render [her] condition intolerable and her life burdensome" based on the post-separation period during which Mr. Brown did not pay support to Mrs. Brown.<sup>17</sup> As a result of this finding, the court granted Mrs. Brown an award of permanent alimony.<sup>18</sup>

Mr. Brown appealed the judgment, arguing that the court should not have found in Mrs. Brown's favor because the jury, by finding that Mr. Brown did not abandon or offer indignities to Mrs. Brown *without provocation*, in effect found that Mr. Brown was not at fault for the breakup of the marriage.<sup>19</sup> He further asserted that his post-separation failure to support Mrs. Brown could not be a ground for alimony, as it was justified by her provoking the end of the marriage.<sup>20</sup>

The North Carolina Court of Appeals reviewed the evidence, and affirmed the trial court's decision,<sup>21</sup> partly based on the ration-

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13. *Brown*, 104 N.C. App. at 548, 410 S.E.2d at 224.

14. *Id.*

15. Record at 53. The questions presented to the jury were as follows:

(1) Did the defendant, Elbert Ferrell Brown, wilfully abandon the plaintiff, Janet Ruth Brown, without just cause or provocation?

ANSWER: NO.

(2) Did the defendant, Elbert Ferrell Brown, wilfully fail to provide the plaintiff, Janet Ruth Brown, with necessary subsistence according to the defendant's means and condition, so as to render the condition of the plaintiff intolerable and her life burdensome?

ANSWER: YES.

(3) Did the defendant, Elbert Ferrell Brown, without provocation, offer such indignities to the person of the plaintiff as to render her condition intolerable and life burdensome?

ANSWER: NO.

16. *Brown*, 104 N.C. App. at 548, 410 S.E.2d at 224.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 549, 410 S.E.2d at 225.

21. *Id.* at 550, 410 S.E.2d at 226.

ale in *Adams v. Adams*,<sup>22</sup> which held that adultery was a ground for permanent alimony regardless of whether the spouse committed it before or after separation.

### BACKGROUND

The North Carolina Legislature's policy objectives in enacting North Carolina's alimony statutes are difficult to discern. The confusion stems from the fact that there was no right to alimony upon divorce at common law.<sup>23</sup> The consensus of the common law courts was that upon the dissolution of the marriage, all rights and obligations of the marriage were terminated.<sup>24</sup> By the turn of the 19th century, alimony could be granted without divorce, based on the husband's duty to support his wife.<sup>25</sup> However, the parties were compelled to remain married in order for the wife to receive alimony. Eventually, this sentiment surrounding the husband's duty to support led to statutory allowance of alimony with divorce.<sup>26</sup> Recently, however, the right to such an allowance has been the subject of much debate. Views about the moral and legal rights and obligations of men and women are in a state of flux, with a strong trend towards equality of the sexes in all aspects of life; in marriage as well as business.<sup>27</sup>

In recognizing and supporting the equality of the parties in a marriage, North Carolina now bases the duty to support upon either spouse.<sup>28</sup> Also, North Carolina now has an equitable distribu-

22. 92 N.C. App. 274, 278, 374 S.E.2d 450, 452 (1988).

23. ROBERT E. LEE, NORTH CAROLINA FAMILY LAW § 140 (4th ed. 1980).

24. *Id.* See also *Stanley v. Stanley*, 226 N.C. 129, 37 S.E. 2d 118 (1946); *Feldman v. Feldman* 236 N.C. 731, 73 S.E.2d 865 (1953).

25. LEE, *supra* note 23, at § 140. For cases upholding a husband's duty to support, see *Bowen v. Daugherty*, 168 N.C. 242, 84 S.E. 265 (1915); *State v. Lucas*, 242 N.C. 84, 86 S.E.2d 770 (1955); *Perry v. Jolly*, 259 N.C. 305, 130 S.E.2d 654 (1963); *Jones v. Jones*, 261 N.C. 612, 135 S.E.2d 554 (1964).

26. N.C. GEN. STAT. §§ 50-16 to -16.10 (1967).

27. LEE, *supra* note 23 ("Recently, courts and legislatures have mixed futuristic ideas with historical notions. Growing antipathy to the whole concept of alimony is easy to detect. Looking to married women's property acts and improved employment opportunities for women, courts have attacked alimony as a 'free bread ticket for life.' Traditional judicial chivalry *vis-a-vis* the ("innocent") divorcing wife is being replaced with attitudes that, at least in some cases, are not free of vindictiveness. Invoking 'women's lib' as a *fait accompli*, some courts have denied any alimony. . . A basic change in attitudes toward alimony is in the making.") (quoting HARRY D. KRAUSE, FAMILY LAW IN A NUTSHELL § 28.2 (1977)).

28. *North Carolina Baptist Hosps. v. Harris*, 319 N.C. 347, 354 S.E.2d 471

tion statute to provide equal division of the couple's property.<sup>29</sup> In the alimony context, neither spouse is deemed to presumptively owe the other an absolute duty to support. Economic dependence must be proven before alimony will be granted.<sup>30</sup> This is true in both temporary and permanent alimony actions.<sup>31</sup>

#### A. Temporary Alimony

Temporary alimony, or alimony *pendente lite*, may be awarded to a dependent spouse while an action is pending for absolute divorce, alimony without divorce, and other actions.<sup>32</sup> There are few requirements for the dependent spouse to meet in an action for temporary alimony.<sup>33</sup> The key requirement is an assertion of dependence which must only *appear* to the judge to be meritorious.<sup>34</sup> The ultimate determination of the spouse's entitlement to alimony and alimony *pendente lite* will be made with the final determination of the original action. If the court then finds that the dependant spouse was not entitled to the alimony *pendente lite*, the support must be repaid.<sup>35</sup>

The purpose of awarding this type of alimony in such haste is to enable a dependent spouse to meet his or her personal needs, and meet the other spouse on equal footing in the divorce proceedings.<sup>36</sup> There may also be an urgency to the application if the de-

(1987).

29. N.C. GEN. STAT. § 50-20 (1987).

30. N.C. GEN. STAT. § 50-16.1 (1987):

(3) "Dependent spouse" means a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse. (4) "Supporting spouse" means a spouse, whether husband or wife upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support.

However, dependence is a relative term. See, e.g., *Phillips v. Phillips*, 83 N.C. App. 228, 349 S.E.2d 397 (1986) (finding the wife to be a dependent spouse despite the fact that her income exceeded that of her husband).

31. N.C. GEN. STAT. § 50-16.2 to -16.3 (1987).

32. N.C. GEN. STAT. § 50-16.3 (1987).

33. N.C. GEN. STAT. § 50-16.3(a) (1987).

34. N.C. GEN. STAT. § 50-16.3(a)(1) (1987). See also *LEE*, *supra* note 23, at § 138.

35. N.C. GEN. STAT. § 50-16.11 (1987).

36. *Brady v. Brady*, 273 N.C. 299, 160 S.E.2d 13 (1968); *Fogartie v. Fogartie*, 236 N.C. 188, 72 S.E.2d 226 (1952); *Black v. Black*, 30 N.C. App. 403, 226 S.E.2d 858, *cert. denied and appeal dismissed*, 290 N.C. 775, 229 S.E.2d 31 (1976).

pendent spouse has relied solely on the supporting spouse for necessities. Thus, an application for alimony *pendente lite* may be made immediately upon commencement of the original action to ensure the dependent spouse of subsistence throughout the proceedings.<sup>37</sup>

### B. Permanent Alimony

In addition to being based on economic dependence, permanent alimony is based on fault.<sup>38</sup> One of ten enumerated grounds, all based on marital misconduct, must be asserted and proved in order for alimony to be granted.<sup>39</sup> These same grounds may also be asserted as affirmative defenses to a claim for alimony, and, if successful, may reduce the amount of alimony or preclude the dependent spouse from receiving permanent alimony altogether.<sup>40</sup>

One purpose behind basing permanent alimony awards on fault stems from the notion that a supporting spouse whose marriage has ended through no fault of his or her own, should not bear the burden of supporting the one who caused or contributed to the dissolution of the marriage.<sup>41</sup> Following this logic, the North Carolina courts have generally only considered misconduct that took place while the parties were living together as husband and wife. Thus, the misconduct must have contributed to the pre-separation breakdown of their marital relations.<sup>42</sup>

37. N.C. GEN. STAT. § 50-16.8(g) (1987).

38. *Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980); *Stickel v. Stickel*, 58 N.C. App. 645, 294 S.E.2d 321 (1982). See also N.C. GEN. STAT. § 50-16.5(b) to -16.6 (1987). For a general discussion opposing fault bases in the divorce and alimony context in North Carolina, see Patricia H. Marschall, *Proposed Reforms in North Carolina Divorce Law*, 8 N.C. CENT. L.J. 35 (1976). For a proposed reformed statute that creates nonfault-based grounds for alimony, see Barbara Heggie, *Alimony Reform for North Carolina*, 18 N.C. CENT. L.J. 87, 96 (1989).

39. N.C. GEN. STAT. § 50-16.2 (1987).

40. N.C. GEN. STAT. §§ 50-16.5(b) to -16.6 (1987).

41. *Parker v. Parker*, 261 N.C. 176, 134 S.E.2d 174 (1964); *Caddell v. Caddell*, 236 N.C. 686, 73 S.E.2d 923 (1953); *Reece v. Reece*, 232 N.C. 95, 59 S.E.2d 363 (1950); *Pearce v. Pearce*, 225 N.C. 571, 35 S.E.2d 636 (1945); *Skamarak v. Skamarak*, 81 N.C. App. 125, 343 S.E.2d 559 (1986); *Puett v. Puett*, 75 N.C. App. 554, 331 S.E.2d 287 (1985); *Cavendish v. Cavendish*, 38 N.C. App. 577, 248 S.E.2d 340 (1978); *Self v. Self*, 37 N.C. App. 199, 245 S.E.2d 541 (1978). But see *Lemons v. Lemons* 22 N.C. App. 303, 206 S.E.2d 327 (1974) (“[a]limony is not awarded as a punishment for a broken marriage. . .”).

42. See generally *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976) (uphold-

Before *Brown v. Brown*, post-separation willful failure to support had never been asserted as the sole ground for alimony. Other grounds for alimony had been asserted based solely on conduct that took place after the parties separated.<sup>43</sup> However, only post-separation adultery had been successfully pleaded as a ground for permanent alimony.<sup>44</sup> In *Adams v. Adams* the court justified its finding of post-separation adultery as a sufficient ground for alimony by asserting the state's interest in the marriage of its citizens, and the encouragement of reconciliation until the last possible moment.<sup>45</sup> On the other hand, other cases have concluded that post-separation events involving abandonment, constructive abandonment and offering indignities to a spouse may not be considered as grounds for alimony.<sup>46</sup> The reasons behind these findings are that they are not probative of the issues surrounding whether a spouse was at fault in ending the marriage, because acts that take place after the parties have separated, when animosity may have developed between the parties, are not indicative of *marital* conduct.

#### ANALYSIS

The issue in *Brown*, according to the North Carolina Court of Appeals, was whether post-separation failure to support a depen-

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ing an award of permanent alimony based on a finding of "specified marital misconduct"); *Panhorst v. Panhorst*, 277 N.C. 664, 178 S.E.2d 387 (1971) (abandonment is a ground for alimony if there is no pre-separation misconduct that would justify the spouse's departure from the marriage); *Brady v. Brady*, 273 N.C. 299, 160 S.E.2d 13 (1968) (finding that acts that caused the wife to *consequently* leave home are sufficient grounds for alimony); *McDowell v. McDowell*, 243 N.C. 286, 90 S.E.2d 544 (1955) (wife was compelled to leave by husband's failure to provide for her medical expenses during the marriage); *Rayfield v. Rayfield*, 242 N.C. 691, 89 S.E.2d 399 (1955) (willful failure to support upon abandonment constitutes grounds for alimony); *Ellinwood v. Ellinwood*, 88 N.C. App. 119, 362 S.E.2d 584 (1987) (constructive abandonment may not be based on evidence of action after the parties have separated); *Fogleman v. Fogleman*, 41 N.C. App. 597, 255 S.E.2d 269 (1979) (finding that post-separation conduct was not probative of the issues of abandonment or the offering of indignities).

43. *Adams v. Adams*, 92 N.C. App. 274, 374 S.E.2d 450 (1988); *Ellinwood v. Ellinwood*, 88 N.C. App. 119, 362 S.E.2d 584 (1987); *Fogleman v. Fogleman*, 41 N.C. App. 597, 255 S.E.2d 269 (1979).

44. *Adams*, 92 N.C. App. at 279, 374 S.E.2d at 453.

45. *Id.* at 278, 374 S.E.2d at 452.

46. *Ellinwood*, 88 N.C. App. at 123, 362 S.E.2d at 587; *Fogleman*, 41 N.C. App. at 598, 255 S.E.2d at 270.



dent spouse constitutes a ground for alimony under Section 50-16.2(10) of the North Carolina General Statutes.<sup>47</sup> The court broadened the scope of this statute by deciding that absent a valid separation agreement waiving alimony,<sup>48</sup> post-separation failure to support a dependent spouse is a sufficient independent ground for alimony.<sup>49</sup> This construction of the statute is not supported by current legislative intent. First, by construing the North Carolina alimony statutes *in pari materia*, it is clear that a supporting spouse's fault or lack thereof is a key factor in determining an award or denial of alimony.<sup>50</sup> Second, similar post-separation conduct has been excluded from consideration in determining grounds for alimony. Finally, the state's interests against adultery that apply to upholding the sanctity of marriage are not comparable in a failure to provide support context.

*A. North Carolina Statutes 50-16.1 Through 50-16-10 Are to Be Construed in Pari Materia*

The courts have held that the statutes pertaining to alimony are to be construed *in pari materia*.<sup>51</sup> Applying the statutes together, it is clear that a spouse who brings the marriage to an end by his or her own provocation should not be entitled to alimony, or, at least, should be awarded less alimony than ordinarily would be allowed if she or he had not contributed to the breakdown of the marriage.<sup>52</sup> The *Brown* decision did not address this important factor, and failed to acknowledge that the jury's findings supported an inference of provocation, if not fault, on Mrs. Brown's part. Her provocation of Mr. Brown's departure from the marriage tends to negate her allegations of his fault in the breakdown of the marriage. His subsequent failure to support her should be justified,

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47. *Brown v. Brown*, 104 N.C. App. 547, 548, 410 S.E.2d 223, 225 (1991).

48. N.C. GEN. STAT. § 50-16.6(b) (1987).

49. *Brown*, 104 N.C. App. at 458, 410 S.E.2d at 225.

50. See *supra* notes 38, 41 and accompanying text.

51. *Rowe v. Rowe*, 305 N.C. 177, 287 S.E.2d 840 (1982); *Broughton v. Broughton*, 58 N.C. App. 778, 294 S.E.2d 772, *petition denied*, 307 N.C. 269, 299 S.E.2d 214 (1982).

52. N.C. GEN. STAT. §§ 50-16.2, 50-16.5 to -16.6. N.C. GEN. STAT. § 50-16.5(b) states in material part, ". . .the fact that the dependent spouse has committed an act or acts which would be grounds for alimony if such spouse were the supporting spouse shall be grounds for disallowance of alimony or reduction in the amount of alimony when pleaded in defense by the supporting spouse," (emphasis added). See also *supra* note 41.

due to his lack of fault in the separation. Each question posed to the jury asked whether the misconduct was justified, *except* the question pertaining to his failure to provide support.<sup>53</sup> Since the statutes, considered together, compel a finding that the grounds asserted in order to receive alimony should only be acts that are not provoked or justified, then that finding should apply to each enumerated ground, including a failure to support.<sup>54</sup> Mr. Brown's failure to support his wife after she provoked him to leave is justified by her provocation.<sup>55</sup>

In addition to considering provocation issues in determining the grounds for alimony, the statute offers measures that a spouse may take to insure that the other spouse, who owes him or her a duty to provide support, will continue to provide that support after the separation. This remedy takes the form of alimony *pendente lite*.<sup>56</sup> Upon Mr. Brown's leaving, Mrs. Brown had the right to apply for such relief. In fact, she did apply for, and was granted alimony *pendente lite*.<sup>57</sup> This relief is the remedy allowed to a dependent spouse who may have a right to alimony. By allowing willful failure to support as a ground for alimony *after separation*, the court dispensed with the need for alimony *pendente lite* actions.<sup>58</sup> The practical effect of such a decision allows a potentially dependent spouse to conveniently fail to apply for alimony *pendente lite* and subsequently plead "willful failure to provide support" in order to receive permanent alimony after final judgment of absolute divorce. This result clearly obstructs the intent of

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53. *Brown*, 104 N.C. App. at 548, 410 S.E.2d at 224.

54. Some grounds may not be justifiable. *See, e.g.*, N.C. GEN. STAT. § 50-16.2(2), (6). *See also supra* note 2 (text of N.C. GEN. STAT. § 50-16.2).

55. In deciding whether adequate grounds existed to award alimony, the court in *Pearce* stated, "At no time does she allege that plaintiff's conduct was without adequate provocation on her part. This averment is essential. Its omission is fatal." *Pearce v. Pearce*, 225 N.C. 571, 572, 35 S.E.2d 636, 637, (1945). *See generally* *Skamarak v. Skamarak*, 81 N.C. App. 125, 343 S.E.2d 559 (1986) (alimony may be barred by showing both spouses have committed grounds for alimony); *Puett v. Puett*, 75 N.C. App. 554, 331 S.E.2d 287 (1985) ("[a spouse] must not have provoked the 'indignities' of which he complains"); *Caddell v. Caddell*, 236 N.C. 686, 73 S.E.2d 923 (1953) (wife had the burden of proving that the separation was wrongful in order to receive alimony). For cases denying alimony to dependent spouses who abandoned the marriage see *Parker v. Parker*, 261 N.C. 176, 134 S.E.2d 174 (1964); *Reece v. Reece*, 232 N.C. 95, 59 S.E.2d 363 (1950).

56. N.C. GEN. STAT. § 50-16.3 (1987).

57. *Brown*, 104 N.C. App. at 548, 410 S.E.2d at 224.

58. *See supra* notes 35-36 and accompanying text (discussion of the purposes of alimony *pendente lite*).

both alimony *pendente lite* and permanent alimony.<sup>59</sup>

*B. Similar Post-Separation Conduct Not Allowed as A Ground for Alimony*

Abandonment and constructive abandonment have both been found to only relate to acts committed while the parties are living together.<sup>60</sup> Reasons supporting these findings are based on common sense. In alleging abandonment, a spouse must show that the other spouse left him or her without consent, without intention of renewing the relationship, and without adequate provocation.<sup>61</sup> Abandonment is the separation, and therefore conduct after separation cannot constitute abandonment. There cannot be separation after the separation. Furthermore, the reasons for denying post-separation grounds for alimony as to abandonment also apply to constructive abandonment. In constructive abandonment, one spouse may effectively separate himself or herself from the other without leaving the marital home.<sup>62</sup> This type of abandonment may be evidenced by other misconduct, such as offering indignities to the other spouse, or a willful failure to support the other spouse while living together.<sup>63</sup>

Reasons similar to those in abandonment cases support the exclusion of conduct which evidences an offer of indignities to the spouse after separation. When a married couple separates, it is often a stressful time filled with emotional turmoil and hostility. To allow the "offering of indignities"<sup>64</sup> to be a ground for alimony after the separation would be tantamount to allowing the separation itself, with nothing more, to be a ground for alimony. Parties may separate for the same reasons that they may offer indignities to each other after the separation. If some occurrence causes the separation, that particular act may also cause the couple to offer indignities to each other in the aftermath of the event. This is not a ground for alimony. The indignities alleged must be a proximate

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59. See *supra* notes 35-46 and accompanying text (discussion of the purposes of permanent alimony).

60. *Ellinwood v. Ellinwood*, 88 N.C. App. 119, 362 S.E.2d 584 (1987); *Fogleman v. Fogleman* 41 N.C. App. 597, 255 S.E.2d 269 (1979).

61. *Panhorst v. Panhorst*, 277 N.C. 664, 668-69, 178 S.E.2d 387, 391 (1971).

62. *Id.* at 671, 178 S.E.2d at 392.

63. *Id.*

64. *Presson v. Presson*, 12 N.C. App. 109, 182 S.E.2d 614 (1971) (the term has not been defined, and what constitutes "indignities" is determined on a case-by-case basis).

cause of the separation,<sup>65</sup> not a product of it.

Based on both the rationale for denying alimony in the post-separation constructive abandonment context as well as the rationale for denying alimony in the post-separation offer of indignities context, post-separation willful failure to support a dependent spouse should not be a ground for alimony. First, willful failure to support a spouse relates closely to constructive abandonment. In fact, failure to support can be an element of constructive abandonment.<sup>66</sup> Thus, it would defeat the effect of denying post-separation abandonment as a ground for alimony if the spouse could merely plead the elements of post-separation abandonment in substitution. Second, willful failure to support after separation may be the product of a justified reason to separate, as made apparent by the jury's findings in *Brown*.<sup>67</sup> If the provocation to leave compels the spouse to stop providing the support, it is the provocation that is the proximate cause of both the marital breakdown and the failure to support. Thus, the cessation of support should not subsequently be construed as marital fault in order to justify an award of alimony.

### C. *Misapplication of The Adams Rationale*

The court relied on the rationale in *Adams v. Adams*<sup>68</sup> to justify its finding that post-separation failure to support a dependent spouse is a ground for alimony.<sup>69</sup> The *Adams* court found that post-separation adultery is a ground for alimony<sup>70</sup>. However, the rationale which supports post-separation adultery as a ground for alimony does not apply to post-separation failure to support.

First, the *Adams* court's reasons for allowing post-separation adultery to be a ground for alimony included the state's interest in the sanctity of marriage and the continued hope for reconciliation until the marriage legally terminates.<sup>71</sup> Although these are valid in-

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65. *Fogleman*, 41 N.C. App. at 598, 255 S.E.2d at 270.

66. *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407, (1976); *Panhorst v. Panhorst*, 277 N.C. at 671, 178 S.E.2d at 392; *Brady v. Brady*, 273 N.C. 299, 305, 160 S.E.2d 13, 17 (1968); *McDowell v. McDowell*, 243 N.C. 286, 287, 90 S.E.2d 544, 545 (1955); *Fogleman v. Fogleman*, 41 N.C. App. 597, 600, 255 S.E.2d 269, 271 (1979); *Garner v. Garner*, 10 N.C. App. 286, 287, 178 S.E.2d 94 (1970).

67. *Brown*, 104 N.C. App. at 548, 410 S.E.2d at 224.

68. *Adams v. Adams*, 92 N.C. App. 274, 374 S.E.2d 450 (1988).

69. *Brown*, 104 N.C. App. at 550, 410 S.E.2d at 225.

70. *Id.*

71. *Id.* at 278, 374 S.E.2d at 452.

terests, they do not apply to post-separation failure to support. If a spouse commits adultery during the separation period, but before the divorce, it will most likely have a detrimental effect on the possibility of the reconciliation. On the other hand, when a spouse decides to stop supporting the other as a result of their separation, such a detrimental effect on the possibility of reconciliation is not likely. In the instance of adultery, such conduct may contribute to the "finality of their break-up",<sup>72</sup> but in failing to support the dependent spouse after the parties separate, there is no such contribution. In the event of a reconciliation, a spouse who had failed to provide support can resume that support with the resumption of the marriage. Adultery, however, may not be so easily forgiven.

Second, while failure to support may be remedied by an application for alimony *pendente lite*,<sup>73</sup> no such preventative measures may be taken to compel a spouse to refrain from adulterous conduct. In the alimony context, if the court finds that the supporting spouse owes payments for a time period in which she or he did not provide support, it can compel the spouse to make retroactive payments to the dependent spouse.<sup>74</sup> There is no similar avenue through which a spouse may offer to redress the harm caused by adultery.

Finally, the court in *Adams* explicitly stated that "this case does not involve and we do not decide whether any of the other fault-based grounds in the post-separation context affects alimony."<sup>75</sup> This statement expresses the court of appeals' reluctance to broaden the scope of the statute and apply other grounds similarly. Due to the extreme religious, emotional, and moral beliefs inherent in marital sexual conduct, adultery is given special treatment in the divorce and alimony statutes.<sup>76</sup> It is often an exception to the other rules and should be considered the exception in post-separation grounds for alimony as well.

## CONCLUSION

The North Carolina Court of Appeals broadened the scope of acceptable grounds for alimony by including post-separation failure to support as such an acceptable ground. The decision in

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72. *Id.*

73. N.C. GEN. STAT. §§ 50-16.7 to -16.8 (1987).

74. *Id.*

75. *Adams*, 92 N.C. App. at 279, 374 S.E.2d at 452.

76. N.C. GEN. STAT. §§ 50-7, 50-16.2, 50-16.5 - 50-16.6 (1987).

*Brown* may result in courts now allowing any of the enumerated grounds upon which alimony can be granted to be sufficient whether it is pre- or post-separation. The implications behind the court's decision tend to veer away from the current justifications surrounding alimony awards. In the future, alimony may be awarded with less scrutiny afforded to the alleged grounds.

While the facts of *Brown* involved an unemployed housewife, easily identifiable as the dependent spouse, future cases may award alimony to dependent spouses who are not so easily labeled. In those cases where there is some question of whether the dependent spouse will be deemed as such by the court, and where there are no pre-separation grounds for alimony, this new rule may detrimentally affect the spouse who fails to recognize the potential consequences of post-separation failure to support. Likewise, the potentially dependent spouse may find an advantage in avoiding alimony *pendente lite*. Absent determinative legislative action or a North Carolina Supreme Court ruling on the issue, the *Brown* decision, in its attempt to clarify the scope and purpose of North Carolina's statutory grounds for alimony, has only added to the confusion.

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