

Virginia State Bar Informational Brochures

DIVORCE IN VIRGINIA

Prepared by the Family Law Section

Part of the Family Law Series of Resources

• *Children and Divorce* • *Divorce in Virginia* • *Financial Issues in Divorce* • *Marriage in Virginia* • *Spare the Child* brochure and video

Divorce in Virginia

Divorce not only involves ending the legal connection as spouses, but also involves resolving issues of property rights and other financial matters such as support. And, if there are minor children, issues of custody and visitation must be resolved. All of these can raise complex legal problems, even when the parties want to be amicable.

The Family Law Section of the Virginia State Bar prepared this brochure to provide the public with basic answers to some of the fundamental legal questions concerning separation and divorce in Virginia. We hope this information will help people understand what can occur in this area of the law.

1. What Are the Grounds for Divorce?

Virginia law recognizes two types of divorce: divorce from bed and board (a mensa et thoro) and a divorce from the bond of matrimony (a vinculo matrimonii). A divorce from bed and board is a partial or qualified divorce under which the parties are legally separated from each other but are not permitted to remarry. A divorce from the bond of matrimony is a complete and absolute divorce. Any person granted a divorce from bed and board may ask the court to “merge” the decree into a divorce from the bond of matrimony after at least one year has passed from the date the parties originally separated. The law requires that “grounds” (valid reasons for divorce prescribed by law) for divorce exist and be proven to the court even if the parties agree that their marriage should end. These grounds are briefly described below.

Divorce from Bed and Board

a. Willful desertion or abandonment

Desertion or abandonment requires both the breaking off of cohabitation and an intent to desert in the mind of the offender. A mere separation by mutual consent will not be considered desertion. Further, if one spouse leaves because the other has committed acts that legally amount to cruelty, then the spouse who leaves is not guilty of desertion. In fact, the spouse who leaves may be awarded a divorce on the grounds of cruelty or “constructive desertion.”

If desertion grounds exist, a suit for a divorce from bed and

board may be filed with the court immediately after the desertion or abandonment occurs. If the desertion continues for more than one year from the date the parties originally separated, then the desertion is sufficient to constitute a ground for divorce from the bond of matrimony.

b. Cruelty and reasonable apprehension of bodily harm

To obtain a divorce based on cruelty, a spouse must prove that the other spouse has acted in such a way as to cause bodily harm and to render the spouses living together unsafe. Mental cruelty alone is not normally a ground for divorce in Virginia. Rude words alone will not suffice. However, if the conduct is so severe that it affects and endangers the mental or physical health of the divorce-seeking spouse, it may be sufficient to establish grounds for divorce.

Cruelty constitutes the basis for a divorce from bed and board and can be filed immediately after the parties separate. After one year has elapsed from the time the act(s) of cruelty were committed, grounds will exist for a divorce from the bond of matrimony.

Divorce from the Bond of Matrimony

a. Separation divorce — the “No Fault” divorce

While grounds for divorce traditionally implied misconduct by one or the other spouse, modern divorce laws do not require “fault” grounds for a divorce to be granted. A “no fault” divorce from the bond of matrimony may be awarded upon a showing that for more than one year one of the

parties intended to dissolve the marital relationship permanently and the parties have continuously lived separate and apart, without any cohabitation. If the parties have entered into a separation agreement and there are no minor children, the required time period is reduced from one year to six months.

Although separation provides a “faultless” ground for divorce, fault may still be an issue when spousal support (alimony) is being sought or can be a factor in determining the division of marital property. Further, a judge is free to award a divorce on fault grounds even though “no fault” separation grounds exist; conversely, a judge is free to award a “no fault” divorce even if fault grounds exist.

b. Adultery, sodomy, or buggery

A divorce from the bond of matrimony or final divorce may also be granted based on adultery. Proving adultery is very difficult. The evidence must be strict, satisfactory, and conclusive that the other spouse did, in fact, engage in physical sexual relations with another person. While there must be some corroboration of the testimony of a spouse to prove adultery, “eyewitness” testimony as to the adulterous acts is not required. In fact, most cases of adultery are proven without eyewitness testimony by using other evidence of the circumstances involved. Sodomy is a sexual act, other than vaginal intercourse, such as oral or anal sex. Buggery is bestiality or a sexual act against nature. The standard of proof for these grounds is the same as that for adultery. Suspicion or speculation is not enough.

The “guilty” spouse has a number of defenses to the charge of adultery, sodomy, or buggery. If the adulterous spouse can successfully establish any one of these defenses, then a divorce will not be awarded on these grounds. Much like the detailed facts necessitated to prove adultery, defenses to the allegation of adultery are fact-driven and difficult to prove.

c. Conviction of a felony

If a spouse has been convicted of a felony, sentenced to confinement for more than one year, and is in fact confined, then the other party has grounds for a divorce from the bond of matrimony if he or she did not resume cohabitation with the guilty spouse after knowledge of the confinement.

Annulments

Unlike a divorce which dissolves a valid marriage, an annulment is a legal decree that a marriage is void. Annulments are granted only in limited circumstances, such as a marriage entered because of fraud, duress, or coercion. Legal annulment cannot be granted merely because the marriage is of short duration or for religious reasons.

2. How Are Property and Debt Divided At Divorce?

Virginia statutes now provide for the equitable distribution of the marital property between the parties at the conclusion of the divorce. Marital property consists of all jointly titled property, as well as all other property, other than separate property, acquired by either or both of the parties from the date of the marriage through the final separation. Separate property is property owned by one party prior to the marriage, property acquired after the parties have separated, or property inherited by one party or gifted to one party by someone other than the spouse. Where marital property and separate property are mixed together or where the value of separate property is increased through the active efforts of either party during the marriage, then such property may be classified as marital property or as hybrid property—part marital and part separate.

In equitably dividing the marital estate, the courts may order a monetary award from one party to the other, divide an account or other asset between the parties, order the real property or other asset sold and then divide the proceeds of sale between the parties, or transfer jointly titled marital property to one of the parties. Under Virginia’s system of equitable distribution, the court is not required to divide the marital property equally between the parties. Instead, the court will consider various factors listed in the equitable distribution statute, including the relative positive and negative monetary and non-monetary contributions of each of the parties to the well-being of the family and to the acquisition and care of the marital property. Pensions and retirement plans that were accumulated during the marriage also are subject to division by the court as part of its equitable distribution award. However, by statute, neither party can receive more than one-half of the amount of the other party’s pension or retirement plan that accumulated during the marriage unless the parties agree.

3. When Is Spousal Support Awarded?

Spousal support is not awarded to punish a “guilty” spouse. Rather, it is provided to lessen the financial impact of divorce on the party who is less financially independent. The amount awarded for support depends upon such factors as the respective ages of the parties, assets and earning potential of the parties, and the duration of the marriage. The court may award spousal support in periodic payments and/or in a lump sum. Periodic payments can be awarded for a set number of years or an indefinite time period. Spousal support ordered by the court is subject to modification in the future upon a substantive or “material” change in the

circumstances of either party.

In lieu of a spousal support award at the time of divorce, either of the parties may seek a “reservation” of the right to seek spousal support in the future. This reservation will generally last for one half of the length of the marriage.

4. Who Receives Custody of the Children?

In divorce cases involving minor children, the custody and visitation or “parenting time” schedules with the children is often the most controversial issue between the parties. In determining the custody of minor children, the court is guided by one standard: the best interests of the child. The court may award “joint legal custody” where both parents have a role in making decisions for the child, or “sole legal custody” where one parent is ultimately responsible for making decisions in the child’s best interests. Custody will not be given to a parent as a reward or deprived from a parent as a punishment. Rather, custody will be awarded to the parent who is most adaptable to the task of caring for the child, and who is able to control and direct the child. Further, custody may be changed if there is a material change in circumstances after the date of the divorce.

In addition to determining the legal custody, the court also will determine the physical custody of the child or children if the parents cannot agree upon the schedule. In almost every case, each parent will have scheduled visitation or parenting time with the child, and it is only in very rare circumstances when a parent is denied any access to his or her child or required to have supervised visitation. The court may award primary physical custody to one parent or shared physical custody between the parents. Often the court will fashion a physical custody schedule that has the child residing primarily with one parent during the school year.

Factors considered by the court when awarding custody may include the age of the parent and child, the physical and mental condition of each parent and child, the relationship existing between each parent and each child, the needs of the child, and the role played by each parent in the upbringing and caring for the child. Another important factor to the court in determining custody is which parent will be the most likely to include and involve the other parent and ensure that both parties remain a crucial part of the child’s life. The court will consider the child’s wishes only if the child is of sufficient age, intelligence, and maturity to make such a decision, and most judges are reluctant to include a child in a court proceeding.

5. What Are the Child Support Obligations?

Each parent is expected to contribute to the support of the

minor child. Depending on each party’s income and other factors, there may be a child support payment owed by one parent to the other. The use of statutory child support guidelines provides an amount of child support that is presumed to be correct. Depending on the time-sharing schedule, the court may use a “shared custody” guideline (where both parents have more than 90 days per year with the child) or a “sole custody” guideline (where one parent has fewer than 90 days per year). Both guidelines consider the cost of work-related childcare and healthcare insurance premiums for the child. In a few circumstances, the court may deviate from these guidelines if appropriate to a particular, unusual set of facts.

Any award of child support is subject to change until all children of the marriage are emancipated. In Virginia, a child is emancipated when he or she reaches the age of eighteen (18) years or when he or she graduates high school, whichever first occurs. The child support amount may be increased or decreased if a material change occurs in the circumstances of either or both parents, or of the child.

The court may also require a party to maintain an existing life insurance policy to provide financial security for a child, and the court can order one party to execute all appropriate tax forms or waivers to grant to the other party the right to take the income tax dependency exemption and any credits resulting from such exemption for any tax year or future years for federal and state income tax purposes.

6. What Is a Property Settlement Agreement?

Rather than having the court rule upon all these issues in a case, parties have the option of reaching a voluntary agreement resolving them. A Settlement Agreement is a written contract between the parties that sets forth their rights, duties, and obligations that arise out of their separation and divorce. The agreement may include such things as the division of property – assets and debts, spousal support, payment of attorney’s fees, custody and visitation of children, and child support as applicable to the circumstances of the parties. Such agreements are encouraged since they more amicably settle the rights of each spouse. An attorney’s skill and experience can be especially helpful in negotiating and drafting a fair, just, and reasonable Settlement Agreement. The court will enforce valid agreements once they have been incorporated into an order. Oral agreements dividing marital property may be enforceable, but only if they meet certain strict requirements and parties are discouraged from relying on them.

7. What Are the Court Procedures?

Controversies over property, custody, child support, and spousal support are heard by a judge of a circuit court in the jurisdiction in which the parties last resided together or other agreed upon jurisdiction. In some cases, such as when no grounds for divorce yet exist, matters relating to custody, child support, and possibly spousal support may be heard in a juvenile and domestic relations district court, independent of the suit for divorce.

Once all outstanding issues between the parties have been resolved through agreement of the parties or the court following a trial, certain legal pleadings and other documents must be filed with the court and evidence supporting the grounds of divorce must be submitted to the court before a final decree or order of divorce is entered. Getting the necessary language of these documents correct can be tricky.

8. Are Attorneys Necessary? Who Pays the Fee?

Although an attorney is technically not required in a divorce proceeding, each spouse should obtain separate legal counsel. The same attorney cannot represent both sides in a divorce case because there is inherently a conflict of interest.

A party who employs an attorney should discuss with the attorney his or her fees and make satisfactory arrangements to pay them. Quite often, a lawyer will require an initial payment made prior to the attorney starting work, called a retainer.

Depending on the circumstances, one spouse may be called upon to pay or contribute to the attorney fees and court costs incurred by the other. Whether either party must pay all or a portion of the other party's attorney fees if the parties are unable to agree is determined by the court.

Conclusion

Emotional tensions in an unhappy marriage that is ending in separation and divorce can make it difficult for the average couple to deal coolly and objectively with the legal matters that must be resolved. An attorney, equipped with a specialized knowledge of the law in divorce, custody, and related issues can help a client be fully aware of his or her rights and obligations in this complex field of law.

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