



# **Divorce, Spousal Support and Division of Marital Property and Debts**

## **What are the reasons for a divorce?**

In Virginia, you can get a divorce for six reasons. Two reasons don't need a waiting period:

- Adultery, sodomy or buggery. These are very difficult to prove, and cannot be used as grounds for divorce if you continue to live with your spouse after the act is committed.
- Your spouse's conviction of a felony and sentence to more than one year in prison. This can only be used as grounds for divorce if you do not live with your spouse after they are released.

Four reasons need a waiting period of one year:

- Physical cruelty. There is no mental cruelty divorce in Virginia.
- Desertion. This means your spouse left without a good reason.
- Constructive desertion. This means your spouse forced you to leave.
- An uncontested "no fault" divorce based on one year's separation.

A limited exception to the one year "no fault" divorce allows a divorce after six months separation. Under this exception, you must have no minor children of the marriage. You also must have a signed separation agreement.

Virginia also has a procedure called a "Divorce from Bed and Board," which means the parties remain legally married but all their other rights including spousal support, custody and child

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support, and equitable distribution of property are settled. The grounds for this type of divorce are:

- Cruelty;
- Reasonable apprehension of bodily harm; or
- Willful desertion or abandonment.

Most of the time this type of proceeding is filed when one party wants to initiate a divorce proceeding and has grounds other than adultery but the parties have not been separated for a year yet.

The client must file the divorce proceeding and ask for an *A Mensa* divorce but state that once the year separation period has passed they will then ask for a divorce from the bonds of matrimony (final divorce). This allows the plaintiff to file the case before the year separation and seek temporary orders of the court such as temporary support and custody but the final decree dissolving the marriage is generally not entered until after the year separation.

### **Who can file for a divorce in Virginia?**

To file for a divorce you or your spouse must live in Virginia for at least six months before the divorce is filed.

A divorce is filed in the Circuit Court, usually in the county or city in which you and your spouse last lived together, or where the defendant currently lives. The defendant is the person against whom the divorce is filed. If the divorce requires an order of publication because the defendant cannot be located, then the divorce may be filed in the county or city where the plaintiff (the person requesting the divorce) currently lives.

### **What can a divorce decide?**

A divorce can decide many issues about the marriage, including:

- Child custody.
- Child visitation.
- Child support.
- Spousal support (alimony).
- Protective order.
- Equitable distribution (fair division) of marital property and debts.

If you and your spouse do not own any property together, then all of these issues, except for the divorce, also can be heard and decided in the Juvenile and Domestic Relations (J&DR) Court. You do not have to have representation to settle these matters in J&DR Court.

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## What property rights are created by the marriage?

There are three potential types of property rights involved in a marriage:

- **Marital property** is any property acquired during the marriage, either separately or jointly, and before the date of separation.
- **Separate property** is any property acquired by either party before the marriage, after the separation, through inheritance or gifts from someone other than the spouse, and property purchased with funds that were separate property.
- **Hybrid property**, part marital and part separate property, is property that was originally separate property until both parties actively increased the value of the property. An example of this is a home, which one party owned before the marriage and in which both parties lived and improved during the marriage, either through maintaining, decorating, remodeling, or simply helping to pay the mortgage and associated bills of the home.

Virginia requires equitable distribution of marital property, which means the court is not required to divide the property equally, but based on various factors, such as how much each spouse contributed to the home, business or marriage. A judge may order distribution of property either by awarding a monetary amount that one spouse would have to pay to the other for their interest in the marital property, or by requiring that the property be sold and the proceeds divided.

Pensions and retirement plans may also be distributed as part of the divorce settlement; however, no party may receive more than one half of the amount of the other party's pension or retirement plan accumulated during the marriage.

## What is spousal support and when is spousal support awarded?

Spousal support is not designed to reimburse funds to one of the parties nor is it designed to punish a spouse. Spousal support, also known as alimony, is an amount of monetary support paid to the more financially dependent spouse and is based on a number of factors, including:

- How long you've been married,
- How much money each person has contributed to the marriage,
- Other than money, what has each person contributed to the marriage,
- Whether either person gave up money by getting married,
- The debts, needs, income and resources of you and your spouse,
- The standard of living of your marriage,
- Your ages and your physical and mental conditions,

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- The earning ability, skills, education and work history of you and your spouse,
- How much each of you helped the other during the marriage.

A court has broad discretion in determining whether a spouse should receive support. Virginia law does not provide a set formula for determining the amount of spousal support that courts can apply uniformly to each and every spousal support case. However, if one spouse files a motion for *pendente lite* support (pending litigation), there is a presumptive amount:

- IF the parties have minor children, the amount is presumed to be the difference between 28% of the Payor spouse's monthly gross income and 58% of the Payee spouse's monthly gross income.
- IF no minor children, then the difference between 30% of Payor spouse's monthly gross income and 50% of Payee spouse's monthly gross. (E.g., say that Payor earns \$3000 a month and Payee earns \$1500. 30% of Payor's income would be \$900; 50% of Payee's would be \$750. The PRESUMPTIVE spousal support would be \$150 a month).

In deciding whether to award spousal support, a court must consider the circumstances and factors that contributed to the dissolution of the marriage, including adultery and the other grounds for divorce.

- If the court finds that a party committed adultery, which caused the marriage to end, he or she may be barred from receiving spousal support. Adultery is a bar to permanent spousal support except when special findings are made.
- If denial of spousal support "would constitute a manifest injustice, based on the parties' respective degrees of fault during the marriage and the relative economic circumstances of the parties," a spouse who committed adultery could get spousal support anyway.

Parties can also enter into agreements that provide for different combinations of spousal support, various payment methods, and longer or shorter durations of support. Parties may even agree that neither party will ever have to provide spousal support to the other.

## **Are there different types of spousal support?**

Yes. There are three types of spousal support:

- Periodic payments for an undefined duration, also known as permanent spousal support which is paid at designated intervals, such as monthly.
- Periodic payments for a defined duration, which is also referred to as "rehabilitative spousal support". This support also has set payment intervals, but has a designated end date.

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- A lump sum award that is due when the court awards it. It can be paid at once or in installments, but the total amount is known.

A court can make an award based on one of these three types of support, or a combination of two or more of these types.

## **How can I get spousal support?**

You may petition for spousal support one of two ways:

1. You can file a petition in J&DR Court for spousal support. To do this, you use the same procedure as you do to get child support. An attorney is not required to petition for spousal support, or;
2. When filing for divorce, you can ask the Circuit Court to award you spousal support in the divorce.

## **Can I get an award of spousal support after I am divorced?**

If spousal support was not sought in the divorce, it cannot be sought after the divorce is granted. However, in the final decree of divorce, the divorce court can grant a “reservation” of the right to seek spousal support in the future. This reservation generally lasts half the length of the marriage. Once granted, the length of the reservation cannot be changed.

## **Can a court change an order for spousal support after it is made?**

A court generally can increase, decrease, or terminate the amount or duration of spousal support if a party can show a **change in circumstances**. A court, however, may not modify spousal support that was part of an agreement unless the agreement says there can be a future modification.

## **What can make an order of permanent spousal support end?**

Unless the parties have otherwise agreed by a contract or provision in the court order, spousal support will end when either of the following things occurs:

- The death of either party, or,
- The marriage of the party receiving support.

The court will also terminate support if the spouse receiving support has been habitually living or cohabiting with another person in a relationship analogous to marriage for one year or more commencing on or after July 1, 1997. Support can continue under this circumstance if the party receiving support can show that termination of support would be unconscionable.

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## **What are the tax consequences of spousal support?**

Generally, spousal support is deductible to the payor and taxable to the payee for federal and state income tax purposes.

## **How can I enforce a spousal support order?**

If the other party is not paying after a court order has been established, then spousal support may be enforced one of two ways:

- By filing an application with the Division of Child Support Enforcement ONLY if the spousal support was ordered as part of a child support order, or,
- By filing a Motion for Show Cause in the same court that ordered spousal support. Both parties will be summoned to court and the responsible party will have to explain why they have not been paying support. At that time you may request a garnishment of the responsible party's wages.

## **What is a Property Settlement Agreement?**

Rather than having the court rule upon the issues in the case, a Property Settlement Agreement may be drawn up between the parties. The Agreement is a voluntary contract that states each party's rights, duties and obligations. The Agreement may divide property and marital debts, establish spousal support, custody, child support and who will be responsible for the attorney's fees. These Agreements generally must be drawn up by an attorney to ensure they are fair, legally enforceable contracts.

Before signing any agreement drafted by your spouse's attorney, it would be in your best interests to have an attorney review the document so you can be certain that you understand what you are signing.

A Property Settlement Agreement will be enforced by the court once it is in writing, signed, sworn to by both parties, and properly notarized. Oral agreements may also be enforceable, but the terms are very difficult to prove in court.

## **What are the steps to get a divorce?**

Generally, there are five steps in a divorce:

First, divorce papers are filed with the court. These papers are called a Complaint. The court also issues a Summons.

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Second, the divorce papers are served (legally delivered) on the defendant. This may be done three different ways:

- Given to the defendant in person, usually by a Deputy Sheriff.
- Given to a member of the defendant's household, usually by a Deputy Sheriff. The household member must be 16 or older. The person serving the papers must explain what they are.
- Posted on the defendant's front door and mailed to the defendant by first class mail. Divorce papers also may be served by mail, if the defendant will sign for and accept them. If, after diligent effort by the plaintiff, the defendant can't be found, the papers can be served by publishing in the newspaper. (A diligent effort to find the defendant's actual residence may include contacting the defendant's relatives, friends, co-workers, employer, or others with whom the defendant is associated.) Publishing in the newspaper can cost anywhere from \$150.00 to around \$600.
  - If the judge decides the plaintiff is low income (indigent), after filling out a fee waiver form called an *In Forma Pauperis* (IFP), the plaintiff will not have to pay a publication fee. In that case, the requirement of publishing in the newspaper is waived. Instead, the notice is posted at the courthouse entrance and the clerk will mail a copy to the last known address of the defendant.
  - If the defendant is out of the state of Virginia and the parties never lived together as husband and wife in Virginia, there is a choice between publication service and personal service out of state if there is a valid out of state address for the defendant. If the judge does not grant IFP status, the out of state personal service will generally be less expensive than publication. If the judge grants IFP status, then the plaintiff may want to opt for publication by posting and mailing to last known address because there will be no fee.
  - If the defendant is out of the state of Virginia and the plaintiff has a valid address and the parties did live together as husband and wife in Virginia at some point in the marriage, the plaintiff will need to come up with the costs to personally serve the defendant out of state. That cost is determined by the sheriff's department where the defendant lives.

Third, if the case is uncontested, evidence is taken by a deposition, usually in a lawyer's office. The deposition is recorded and typed or printed out. Sometimes evidence is taken before the judge in an oral hearing. (In some circuits, such as the Suffolk area, depositions are not used and evidence is taken in Circuit Court.) If the divorce is contested, depositions are not used as they are in uncontested divorces, and evidence will generally be taken in court. *In some limited kinds of divorce cases, affidavits can be used instead of depositions or oral testimony in court. An affidavit is a written statement that is signed by the person making the statement, and that person's signature is notarized. See below for further explanation.*

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Fourth, the deposition, a proposed Final Decree of Divorce, and other papers are sent to the judge for review.

Fifth, if everything is in order, the judge signs the Final Decree of Divorce.

### **Does someone have to come with me to the depositions?**

Yes. You need to bring one witness who can back up, or support, everything you say. This person can be a friend, neighbor, or relative (other than your spouse), as long as the person is 18 or older and knows the basic facts about your marriage and separation.

### **When can I use an affidavit instead of a deposition or oral testimony in court?**

You can present your evidence to the court by use of affidavits only if the grounds for the divorce are separation for one year, or six months if there are no children and you have a written separation agreement. **In addition**, one of the following must be true:

- You and your spouse have resolved all issues connected to the divorce in a written settlement agreement; **or**
- There are no issues to be decided other than the grounds of divorce; **or**
- Your spouse was personally served with the divorce Complaint, and has failed to respond in any way.

### **What must be in my affidavit, if I'm able to use that method of presenting my evidence?**

You actually need **two affidavits**: one by you, and one by a witness who can support what you are saying.

Your affidavit, as one of the parties to the divorce, must:

- Affirm the statements in your divorce Complaint are true, including that the parties are over the age of 18 and are legally competent.
- Affirm that neither party is incarcerated.
- Verify the military status of your spouse. If your spouse is in the military, you need to be able to state that they have filed an answer to the Complaint, or waived their rights under the Servicemember's Civil Relief Act.
- Affirm that at least one of you has been a resident in Virginia for at least six months.
- Affirm that you have lived separate and apart for one year continuously with the intent to remain separate and apart permanently (or six months if there are no children and you have a written separation agreement).
- Affirm your desire to get a divorce.

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- State whether there were children born or adopted of the marriage, and affirm that the wife is not known to be pregnant.

In addition to your own affidavit, you need to submit to the court an affidavit from a witness who can support what you've said. Your witness's affidavit must:

- Verify that they are over 18 years old and are legally competent.
- Verify that neither you nor your spouse is incarcerated.
- Verify that the statements in your divorce Complaint are true.
- Verify that you or your spouse has been a resident of Virginia for at least six months.
- Verify whether there were any children born or adopted of the marriage, and that the wife is not known to be pregnant.
- Verify, from the witness's personal knowledge, that you and your spouse have not lived together since the date of separation you listed in the Complaint, and that it's been your intention since that date to remain separate and apart permanently.

### **Does my spouse have to sign for me to get a divorce?**

No. As long as the divorce papers have been properly filed and served (legally delivered) to your spouse, the divorce can be granted. Your spouse doesn't have to sign anything for you to get a divorce.

### **Can my spouse prevent me from getting a divorce?**

Your spouse cannot prevent you from getting a divorce in the state of Virginia. Your spouse can, however, delay the divorce by disputing the grounds for the divorce, property issues, custody, child support, alimony, or marital debts. If these things are disputed, you may need a hearing in front of the Circuit Court judge, where the judge will settle everything and finalize the divorce. If there is nothing to dispute, or if everything has already been settled, then your divorce can be finalized without having to go to court.

### **What do divorce papers from Circuit Court say?**

The divorce papers that will be served on you as the defendant will not give you a date, time, or place of a court hearing. Instead, the papers say you have 21 days after getting them to file a written answer with the Circuit Court. The Answer must respond to each numbered paragraph of the Complaint. The Answer must admit or deny each numbered paragraph. Although you can file your own Answer in Circuit Court, you probably will need a lawyer to help with the case. Procedures in Circuit Court are complicated.

If an Answer is not filed within the 21 day limit, then the divorce will be considered uncontested and will be entered before the judge as it is written. If you do not do anything, you will be

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waiving any rights to spousal support and property distribution. This may be a **permanent** waiver. You may not be able to ever ask for either of these rights later.

### **Are there sometimes extra steps to get a divorce?**

If the defendant is incarcerated for conviction of a felony, under the age of 18, in a mental hospital, or legally not competent, another step is needed. The divorce can't be granted unless the Circuit Court appoints an attorney for the defendant. This attorney is called a guardian *ad litem*. This usually costs the plaintiff, the person filing the divorce, \$100.00 or more. If the defendant is jailed, the Court will pay for the guardian *ad litem* if all these things are true:

- The defendant was convicted and sentenced for more than one year because of a crime.
- The crime occurred after the date of the marriage for which the divorce is sought.
- The crime involved physical injury, sexual assault or sexual abuse against the spouse, child, or step-child.

### **When my spouse gets a divorce, do I need one also?**

No. When the divorce is final, both spouses are divorced even if only one of them asked for the divorce.

### **Can I file for a divorce without a lawyer?**

You may be able to do this, but it is not recommended. Divorce is difficult. You may lose your children, income, property, or other rights if you don't know the law. You probably will need a lawyer to file your divorce. There are no court forms to fill out to file for a divorce, therefore all petitions must be written in proper legal format. Procedures in the Circuit Court are complicated and the judge may refuse to hear your case if everything is not filed and worded properly.

Although there are websites and stores advertising kits for divorces, these forms often do not meet the court's requirements for proper legal format, which means you could spend quite a bit of money only to have your request for divorce rejected by the judge.

### **Who pays my attorney?**

If you cannot afford an attorney at the outset of the representation, and your spouse has much greater earnings or has control of most of the marital assets, the court may award temporary attorney fees and costs to be paid by your spouse. How much is awarded depends on many factors including the complexity of the case, the difference in incomes, and the assets available to pay fees.

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At the conclusion of the case either party may request the court to order the other party to pay attorney's fees and other litigation costs. There are no guidelines for determining the amount. The decision is solely up to the judge based on:

- The fault of either spouse in the divorce,
- The earning capacity of each spouse,
- The need for assistance with fees,
- The equitable distribution award that was made,
- How long the case took,
- Whether one party was particularly contentious,
- The length of the marriage, and
- The amount of the attorney fees and costs for the party requesting the award.

### **How long does a divorce take?**

If there are no problems, it usually takes at least three months from the time the divorce is filed until it is granted. If there are contested issues, a divorce can last much longer, sometimes for several years.

### **What is a legal separation?**

There is no such thing as a "legal separation" or "legal separation proceedings" in Virginia. Separation is simply not living together. You don't need any papers to live separate and apart from your spouse. The separation date is the date you and your spouse begin to live separate and apart with the intention of being separated.

### **I received a separation agreement from my spouse. Should I sign it?**

Before signing any agreement drafted by your spouse's attorney, it would be in your best interests to have an attorney review the document so you can be certain that you understand what you are signing.

You are not required to sign any separation papers; however, a Separation Agreement may be helpful in dividing property and establishing support or responsibility for marital debts at the beginning of the separation period. A Separation Agreement is a legally binding and enforceable contract, and should be drafted by an attorney to protect the parties' rights.

### **What is an annulment?**

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An annulment is a legal decree that a marriage is void. An annulment proceeding can be used to settle the same issues of custody, child support and alimony as a divorce. Annulments are only granted if:

- Either party was mentally or physically incompetent;
- Either party consented to the marriage under condition of fraud or duress;
- Either party was a felon or prostitute without the other's knowledge;
- Impotence;
- The wife was pregnant by another man without the husband's knowledge;
- The husband, without the knowledge of the wife, fathered a child born to another woman within 10 months of the marriage;
- Failure to have a marriage license or to have the marriage solemnized according to law;
- One of the parties was married to someone else at the time of this marriage;
- Incest: marriage prohibited between an ancestor and descendant; brother and sister, whether by blood or by adoption; between an uncle and a niece; or between an aunt and a nephew; or
- Either party was under the age of 18. (Persons who are 16 or 17 may marry with parental consent.)

The court will not grant an annulment of a voidable marriage if the spouses continue to live together after any of the above circumstances are discovered. You also cannot receive an annulment based on the fact that you and your spouse never engaged in sexual relations or were only married for a very short period of time, unless one of the above reasons exists.

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