

# Divorce in Virginia

prepared  
by the Family Law Section of the  
VIRGINIA STATE BAR

Given the increase in marital breakdown in our society, almost everyone has been or could be affected in some way by a separation or divorce. Dissolving a marriage often involves property rights and financial matters and can raise complicated legal problems, especially when children are involved.

The Family Law Section of the Virginia State Bar prepared this pamphlet to provide the public with basic answers to some of the fundamental questions concerning divorce and separation under the laws of the Commonwealth of Virginia. It is our hope that this information will assist individuals in understanding some of the complications that often arise in this area of the law so that potential pitfalls may be prevented, minimized, or solved through a lawyer's counsel and services.

## 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 a husband and wife 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 must exist and be proven to the court even if the husband and wife agree that a 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 by either spouse. 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 ground 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 separation. 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**

Cruelty authorizing divorce requires acts that tend to cause bodily harm and render the spouses' living together unsafe. Mental cruelty alone is not normally a ground for divorce in Virginia. However, if the conduct is such 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 the husband and wife both intended to and have continuously lived separate and apart without any cohabitation. If the husband and wife have entered into a Property Settlement or Separation Agreement and there are no minor children, the 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. Further, a judge is free

to award a divorce on fault grounds even though “no fault” separation grounds exist.

### **b. Adultery, sodomy, or buggery**

Proving adultery is very fact-specific. The evidence must be strict, satisfactory and conclusive that the other spouse did in fact engage in 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 intercourse, such as oral or anal sex. To be grounds for divorce, it must be committed with someone outside the marriage. Buggery is bestiality or a sexual act against nature. The standard of proof for these grounds is the same as that for adultery.

The “guilty” spouse has a number of “defenses” to the charge of adultery, sodomy or buggery. If the guilty spouse can successfully establish any one of these defenses, then a divorce will not be awarded on these grounds.

Defenses include:

**Condonation.** The innocent spouse has “condoned” or legally forgiven the offending behavior by voluntarily cohabiting with the guilty spouse after learning of the adultery, sodomy or buggery.

**Procurement/Connivance.** The innocent spouse has actively encouraged or facilitated the other spouse in committing the adultery, sodomy or buggery.

**Recrimination.** Proof that the accusing spouse is also guilty of one of the “fault” grounds for divorce.

**Time Barred.** If the adultery, sodomy or buggery occurred more than five years before bringing of the suit for divorce, then a divorce will not be granted on these grounds.

### **c. Conviction of a felony**

If the husband or wife 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 as long as he or she does 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. In addition, an annulment proceeding can resolve some of the same issues that would be the subject of a divorce proceeding, such as child custody, support and alimony. Annulments are granted only in limited circumstances such as a marriage entered into because of fraud, duress or coercion. An annulment cannot be granted merely because the marriage is of short duration, and annulments are normally not granted for “religious” reasons.

## **2. What property rights are created by marriage and 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 time of the final separation. “Separate property” is property owned by one party prior to the marriage, property acquired after the parties have separated, inherited property and/or gifts to one party from a third person. 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 “part marital and part separate” property.

In equitably dividing the marital estate, the courts may order monetary awards to one of the parties, divide the property, order the property sold 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 on an equal basis. Instead, the court will consider various factors listed in the Virginia equitable distribution statute, including the relative 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, when determining how to divide the marital assets. Pensions and retirement plans that were accumulated during the course of the marriage are also 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.

### **3. When is Spousal Support Awarded?**

Given the increasing changes to both the law and society, this area of divorce law is in the process of great change. Under recent changes in the Virginia law, the fault of a spouse in causing a divorce may no longer be a complete bar to obtaining spousal support. However, the court will consider the cause of separation as a factor in determining whether or not to award spousal support.

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 and history of the marriage. The court may award spousal support in periodic payments and/or in a lump. Periodic payments could be awarded for either a set number of years or an indefinite period of time.

Spousal support does not have to be awarded when the divorce is granted. Instead, 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?**

This is the crucial issue in most divorces. In determining the custody of minor (under eighteen) children, the court is guided by one standard—the best interest 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 marital change in circumstances after the date of the divorce.

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, the role played by each parent in the upbringing and caring for the child, the home where the child will live and the child's wishes if the child is of sufficient age, intelligence, and maturity to make such a decision.

Another important factor to the court in establishing most custody arrangements is which parent will be the most likely to see to it that the non-custodial parent

remains a strong part of the child or children's lives. Often the court will fashion living arrangements such that the child, at least during the school year, will reside primarily with one parent. The other parent will receive visitation with the child. Visitation rights will normally be set by the court if the parents cannot voluntarily agree upon satisfactory arrangements.

## **5. What are the Child Support Obligations?**

Normally the party receiving visitation will be called upon to contribute to the support of the minor child. This could be an obligation of the mother, the father, or both, if a third person has custody of the child. The court is guided by the needs of the child and the ability of the supporting parent or parents to pay. The use of the state child support guidelines provides an amount of child support that is presumed to be correct, but the court may deviate from these guidelines in appropriate circumstances. The award is subject to change so long as the obligation to support remains. The child support amount may be increased or decreased if a material change occurs in the circumstances of either or both of the parents or of the child. Non-custodial parents who have their children for more than 90 days per year for visitation have their child support calculated using a different formula that is likely to make the support lower. The court may also require a party to maintain an existing life insurance policy to provide financial security for a child in the event that the parent obligated to pay child support dies.

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

Rather than having the court rule upon the issues in the case, parties have the option of reaching a voluntary agreement resolving their concerns raised in the divorce. The court will enforce the agreement once it is in writing, signed, sworn to by both parties, and properly notarized. Oral agreements dividing the marital property may also be enforceable, but the terms of oral agreements are very difficult to prove to the court.

A Property 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 and may include such things as the division of their property, spousal support, attorney's fees, custody of their children, and child support. Such agreements are encouraged since they may amicably settle the rights of the husband and wife in the estate and property of the other. An attorney's skill and experience can be especially helpful in negotiating and drafting a fair, just, and reasonable Property Settlement Agreement for the parties and their children.

## 7. What are the Court Procedures?

Depending upon the practices in a given locality, evidence in a divorce case may be taken in the office of an attorney representing one of the parties, in the office of a commissioner appointed by the court to take the evidence, or in a courtroom before a judge. Controversies over custody, child support and spousal support are usually heard before a judge of a Circuit Court. In some cases, such as where no grounds for divorce yet exist, such matters may be heard in a Juvenile and Domestic Relations District Court, independent of the suit for divorce.

## 8. Are Attorneys Necessary? Who Pays the Fees?

Although an attorney is technically not required in a divorce proceeding, each spouse should obtain separate legal counsel if there are issues in the divorce that may be contested, property rights need to be determined, or the custody of the children is in dispute. The same attorney cannot represent both sides in a divorce case because there will be a conflict of interest.

A husband or wife 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 has to pay all or a portion of the other party's attorneys fees are a matter left to the discretion of the court.

## Conclusion

Emotional tensions in an unhappy marriage can make it difficult, if not impossible, for the average couple to deal coolly or objectively with divorce and separation. 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 own rights and obligations in this complex field of law.