DIVORCE AND FAMILY LAW IN VIRGINIA

By

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General Advice

Knowing your legal rights is often crucial to protecting your rights, and we hope this guide will provide you with general information about divorce and family law in Virginia, including the procedures used, the special terminology used, and information about support, custody, property and other issues that often arise. The information supplied in this guide, while as accurate as possible, is general in nature, and does not replace the advice and counseling of a qualified and experienced attorney. A complete guide to Virginia divorce and family law would easily be thousands of pages long. Your case almost certainly will involve facts and issues specific to you, and the general information in this guide may not be applicable to your situation. This guide is not legal advice, and we recommend that you consult a family law attorney as soon as it becomes apparent that you or your spouse is considering separation or divorce.

Separation

In Virginia, it is not necessary to obtain a court order or sign a legal document to be separated. Instead, if you stop living together as a married couple, and one of you has the clear intention to make the separation permanent, you are separated. Of course, the decision to stop living together as a married couple is a very difficult one, and there are many legal and practical issues to consider. Some of those are discussed later in this guide.

In some circumstances, it may be possible to be separated even though you and your spouse are residing in the same home. Convincing a judge, however, can be very difficult, and usually requires careful planning and preparation.

Obtaining a Virginia Divorce

While a couple is free to negotiate and reach an agreement outside of court, to obtain the actual divorce, a divorce complaint must be filed with the court, and the judge must sign a legal document called a final order.

A complaint for divorce may only be filed in Virginia if at least one spouse has resided in and maintained a domicile in Virginia for the six months before the couple is eligible to file a divorce action. Residency and domicile can be very complex, but for most people, if they maintain a household in Virginia, they most likely meet this requirement.

<u>When can the divorce complaint be filed?</u>

A divorce complaint may not be filed until "grounds" for the divorce exist. There are two types of grounds: "no-fault" grounds and "fault" grounds.

No-fault grounds. Even if neither spouse is guilty of fault (see below), a complaint for divorce may be filed after six months of separation (if there are no minor children **and** there is a written agreement settling all issues) or after twelve months of separation (if there are minor children). To be "separated" the parties need to have lived "separate and apart without any cohabitation and without interruption for one year" and at least one spouse intended at the time the separation began that it be permanent. If the spouses live in separate residences, they are almost certainly

separated. If the spouses live in the same household, and one of them argues that there is no separation, it can be very difficult to convince a judge that the couple is truly separated. If neither spouse contests the separation, however, the court is unlikely to raise the issue.

Fault grounds. A complaint for divorce may be filed immediately by a spouse if the other spouse is guilty of "fault". Even though a complaint for divorce based on fault may be filed immediately, the divorce case can still take a long time to finish. The reason is simply that the spouse accused of fault will likely want to challenge the accusation. Courts are crowded, and it often take many months (if not more than a year) to obtain a trial date to decide the issue.

A spouse is guilty of "fault" if he or she has committed adultery, sodomy or buggery outside of the marriage, has been convicted of a felony with at least one year of imprisonment, or is guilty of cruelty, willful desertion or abandonment. Adultery is legally defined as intercourse with someone to whom you are not married. Sodomy refers to the Virginia statute prohibiting "crimes against nature". This statute makes sexual activities other than intercourse, including one commonly engaged in by couples, illegal. Desertion and abandonment occur when a spouse leaves the relationship without a legitimate reason. What constitutes a legitimate reason is the subject of much litigation, but in general, a spouse is not free to leave the relationship in the absence of abuse, cruelty, or other significant conduct. Cruelty is often defined as an act of physical violence, but in some extreme cases, judges have found cruelty in the absence of physical violence.

Simply filing a complaint for divorce on fault grounds is not the end of the story. The party making the allegation must prove that the other spouse actually committed fault. In addition, if both spouses are found to be guilty of fault, the two faults cancel one another, and the court may not allow a divorce to be obtained on fault grounds. Fault may not be the basis for a divorce if the court finds that the fault was "condoned" (legally forgiven). Marital fault is condoned if, after the date when the fault was discovered, the spouses voluntarily continue to cohabit. In addition, adultery, sodomy or buggery cannot be used as grounds for a divorce if those acts occurred more than five years before the suit for divorce is filed.

<u>Can a spouse prevent a divorce</u>? If one spouse proves a ground for divorce - for example a one-year separation - the divorce can be granted even if the other spouse does not wish the divorce to happen.

How to Resolve the Issues

There are dozens of issues that must be resolved in a divorce. These include how to divide property, who will get custody of the children, will there be spousal support, who pays the credit cards, etc.

In very general terms, there are two ways to resolve these issues: first, the parties can reach an out-of-court settlement and have it written up as an agreement, or, second, the parties can go to court and let a judge resolve the issues.

<u>Resolving the issues through agreement</u>. If a divorcing couple can settle issues of property, money and children by agreement, there will be no need to go to court. Rather, the agreement is

put into writing and submitted, at the appropriate time, along with some other paperwork, to the court. If the paperwork is acceptable to the judge, the divorce will be granted. These written agreements are often called separation agreements, martial agreements, property settlement agreements or PSAs.

Of course, a couple first has to reach an agreement. There are many methods used by divorcing spouses to try to reach an agreement.

Some couples are able to discuss their issues and reach an agreement on their own. Of course, these homemade agreements often cause more problems than they solve because they are incomplete or don't use the right legal terminology.

Many couples hire lawyers to help them negotiate. One spouse's lawyer will, after discussing the issues at length with his or her client, write up a proposal and send it to the other spouse's lawyer. That lawyer will then discuss the proposal with his or her client and send back a counterproposal. This process continues until, hopefully, a final agreement is reached. At that point, the agreement is put into final form and signed. Negotiating in this way is a very common way for couples to reach a settlement.

Another form of negotiation sometimes used is called collaborative law (or sometimes the collaborative approach or collaborative divorce). The spouses and their lawyers all sign a written agreement that provides, among other things, that nothing revealed in the process can be used later in court, each party must disclose all relevant information, and, most importantly, if a settlement cannot be reached using the collaborative process, each spouse must hire another lawyer. The concept is that a spouse may be more inclined to negotiate in a respectful manner and reach an agreement if the penalty for failing to do so will be the high cost of retaining another lawyer. Of course, the downside to the approach is that a spouse of limited financial means may agree to a bad deal because he/she can't afford to say no and be forced to hire another lawyer.

A couple can try to resolve their issues through mediation without lawyers. In this type of mediation, the couple would meet with a third party (who is often, but does not have to be a lawyer). Mediators are not like judges – that is, mediators do not make decisions, or force the couple to settle. Rather, the mediator offers suggestions and encourages the couple to reach a settlement. In my experience, in a divorce case that involves property or financial issues, mediation is not the most appropriate method of resolving disputes. The reason is simply that there are very complicated legal, tax and other financial considerations that neither the couple nor the mediator fully understand. As a result, even if one of my clients reaches a tentative agreement in mediation, I often cannot recommend that he or she signs the agreement or I have to make significant changes.

A more productive type of mediation directly involves lawyers. In this type of mediation, a mediator with knowledge and experience in divorce cases (preferably a retired judge or a prominent divorce lawyer), the two spouses and each spouse's lawyer all meet. After some introductory remarks by the mediator, each spouse and his/her lawyer go into a separate room. The mediator then goes back and forth between the two groups offering suggestions, making

recommendations, etc. Because the mediator has a lot of experience in divorce cases, his or her recommendations carry a lot of weight. These types of mediations often take a full day or even several days. Nevertheless, they are often successful. Of course, because both the lawyers and the mediator are paid by the hour, these types of mediation sessions can be very expensive.

Finally, a couple can attempt to resolve their issues through arbitration. Arbitration is very similar to court. Instead of a judge, there is an arbitrator. Like court, each side presents evidence, offers testimony, etc. At the end, the arbitrator makes a decision. Unlike court, however, the arbitrator must be paid for his/her time, and the arbitrator's decision cannot be appealed. Probably for these reasons, I have never seen arbitration used in a Virginia divorce case.

Resolving the Issues in Court

If the spouses are unable to resolve their issues through settlement negotiations, or if it is clear from the outset that settlement negotiations would not be beneficial, the issues can be resolved by a court. A divorce where the court is asked to resolve the issues is called a "contested" case.

The complaint. To begin a contested divorce case, a spouse must file a complaint for divorce with a circuit court. The complaint must allege "grounds" for the divorce, which as I mentioned above, can either be no-fault grounds or fault grounds. The complaint must then be delivered to the other spouse (the legal term is "served"). The complaint may be delivered by a sheriff, by a person over the age of 18 (other than the spouse suing for divorce), or, in some instances the other spouse can "accept" service. This simply means he or she signs a document acknowledging receipt of the complaint. If the other spouse lives in another state or cannot be found, it may be difficult to serve the complaint.

The answer. The other spouse has 21 days to "answer" the complaint. The answer admits or denies the allegations that are contained in the complaint. The other spouse may also file his or her own divorce complaint – this is called a counterclaim. The counterclaim must be filed with the court at the same time as the answer (that is, within 21 days of the service of the complaint). The other spouse may also file a legal pleading called a demurrer. A demurrer is a legal pleading used to challenge the ability of a spouse to file for divorce. Until the court determines whether the demurrer is valid, which takes place at a court hearing, many aspects of the case cannot proceed.

Mediation. Many judges will order both parties to take part in a mediation orientation session. Mediation orientation is not actual mediation, but rather an overview of the process and an initial inquiry whether mediation might be useful. A mediator will contact each spouse, explain the process, and determine whether both spouses wish to attempt mediation. Unless both spouses agree to attempt to attempt mediation, the court case will simply continue. There is no requirement that either spouse attempt mediation, and the choice to not attempt mediation will not be held against a spouse.

Pendente lite relief. At the time the initial pleadings are filed, or at a later time, either spouse can ask the court for *pendente lite* relief. *Pendente lite* relief is simply a way for the court to address issues on a temporary basis during the many months prior to the trial. For example, a spouse can

ask for temporary spousal support, for temporary custody of children, for payment of the mortgage and other debts until trial, etc. To obtain *pendente lite* relief, a party must ask for the relief in a pleading, and then a hearing with the judge must be scheduled. A *pendente lite* hearing is basically a short trial, with numerous witnesses, documents, evidence, and sometimes expert testimony. The *pendente lite* hearing usually takes anywhere from two hours to all day or more, depending on the complexity and number of issues to be decided.

Motions. During the many months leading up to trial, one spouse or the other may want to file various motions. Like a *pendente lite* motion, the court does not actually take action until a motion is filed and a hearing is held on the issue. Typical motions include motions to compel discovery (asking the court to force the other spouse or a third party to provide additional information), motions to continue hearings or trials to a later date, motions to quash discovery (asking the court for permission to not reveal certain information), motions for protective orders (asking the court to limit the use or disclosure of information), motions to seal (asking the court to prohibit the public from seeing parts of the file), and motions for an alternative valuation date (asking the court to use an earlier or later date to determine the value of an asset).

Experts. Many judges require the testimony of an expert on financial, medical or other issues. If a spouse does not employ an expert for these issues, the judge is likely to rule that the spouse did not provide the court with sufficient evidence. Experts are commonly used to show:

- the mental or physical health of a party.
- the value of real estate, businesses and other property.
- the origin of the money used to acquire property (known as "tracing").
- a spouse's earning capacity.

Expert testimony can be incredibly helpful in a case, but the cost can be very high. Because it often takes a great deal of time for an expert to review the situation and formulate his or her opinion, he or she should be retained early in the case.

Discovery. Discovery is a term that describes the numerous methods available to you and your spouse during the case to obtain information from one other and from third parties. In general, both you and your spouse have the right to require the other to answer a broad range of questions and produce an enormous amount of documents and other materials. If you have never been involved in a major court case before, you will likely be shocked by the amount of information you will need to produce. Even though discovery will be a burden to you, it is a normal and allowable part of every divorce case.

Discovery methods include:

- *Interrogatories*. Interrogatories are written questions on a broad range of topics that you or your spouse can be required to answer under oath. They have to be answered, in writing, within 21 days.
- *Request for Production of Documents and Things.* These are written demands for documents and evidence that you or your spouse can be required to respond to by producing the actual documents or evidence. For example, it is common in every divorce that each side must turn over several years of tax returns, credit card statements, bank

statements, emails, and other information. The requested documents must be delivered to the opposing attorney within 21 days.

- *Request to Inspect.* Each side in a divorce can require that the other side to make property and other items available to be inspected. For example, one spouse may be required to allow an attorney or expert into the marital residence to take photographs, inventory property, etc.
- *Requests for Admission.* Both you and your spouse have the right to require the other to either admit or deny in writing that certain facts are true.
- *Depositions*. Both you and your spouse have the right to require the other party and third parties (such as teachers, friends, doctors, etc.) to answer questions under oath in the presence of a court reporter.
- *Subpoena Duces Tecum.* Both you and your spouse can require third parties (such as banks, schools, friends, etc.) to turn over relevant documents and other evidence. In a divorce, it may be the case that medical and therapy records are relevant.

Pre-trial conference. Some judges require the attorneys and the parties to meet with the judge on one or two occasions in the months leading up to the trial. The purpose of these meetings is to discuss issues relevant to the case – for example, whether a settlement is possible, whether there are any outstanding discovery issues, etc.

Pre-trial filings and motions. In the months immediately before trial, each spouse will be required to file numerous documents with the court. These include a complete list of witnesses, a complete list of exhibits which may be used at the trial, a written designation identifying each expert who will testify and a complete description of the expert's opinion and the basis for that opinion, a copy of any report or opinion an expert has produced. One exhibit required by most judges is a detailed chart of all property and debt, including the date of acquisition, how the property or debt is titled, the legal classification of the property or debt, the current value of the property or debt, and how the property or debt should be divided. In addition, each spouse must file a written objection setting out the legal reasons why any witness or exhibit listed by the other spouse should not be admitted into evidence at trial. Some judges require each spouse to submit a detailed written explanation of the issues, facts and law involved in the case.

Marshalling the evidence. In the month or two prior to trial, subpoenas need to be prepared and served on each witness who will testify at trial. I need to meet with our witnesses prior to trial to prepare them for the questions I will ask them, and also to prepare them for the questions the other spouse's lawyer are likely to ask them. I also meet with my client for many hours to prepare him or her for trial. I will also spend the weeks prior to trial preparing exhibit notebooks containing each document, photograph, bank statement, and other exhibit I intend to offer into evidence at trial. It is not uncommon for each lawyer to have hundreds of exhibits for a divorce trial.

Trial. A divorce trial usually takes one or two days. The process, in very general terms is as follows: First, all of the witnesses are sworn in by the clerk of the court. Then, all witnesses other than the spouses will typically be ordered to wait outside the courtroom. Next, each lawyer gives an opening statement to the court. The opening statement is a broad overview of the issues to be decided and the evidence that will be presented at trial. Next, the party who filed the initial

complaint (the Plaintiff) will present the court with exhibits and the testimony of witnesses. Each witness will be asked questions by both attorneys. Once the Plaintiff finishes presenting all of his or her evidence, the other party (the Defendant) will present the court with exhibits and the testimony of witnesses. Once the evidence and testimony has been presented, both attorneys give a closing argument to the judge. A closing argument summarizes all of the evidence, and explains to the judge how the case should be decided.

The divorce order. The judge may announce his or her ruling in person at the end of the trial. More commonly, however, the judge takes several weeks (or months) to review the evidence. At that point, he or she will either ask everyone to return to court to hear the judge's ruling in person, or the judge will send the lawyers a letter detailing his or her ruling. We call this letter a "letter opinion". Once the judge announces a ruling, either in person or through a letter, one of the lawyers puts the ruling into the form of a written order. If the lawyers don't agree that the written order accurately reflects the judge's ruling, another hearing may have to be scheduled for the judge to rule on the dispute. As a result, it is not uncommon for weeks or even months to go by between the date a judge announces a ruling, and the date a written order actually takes effect. Once the judge signs the written order, the divorce is final.

What Issues Must be Resolved?

In settlement negotiations or in court, the following is a list of some of the major issues that must be resolved, and some general comments to help you better understand these issues.

Property and Debt

What is property?

Property includes both real estate (homes, land, buildings) and personal property, such as cash, accounts, stock options, stock, pensions, 401(K)s, etc.

What property is the court able to address?

Only "marital" property and debt "of the parties" can be divided in a divorce. A divorce court doesn't have power over "separate" property and debt. Whether a piece of property or a debt is marital or separate is a very complicated question, and I have taught entire classes to other lawyers on the subject. In general, however, property or debt is usually marital if it was acquired during the marriage and before the last separation of the parties, regardless of whether the property is in the name of one spouse or both spouses. There are many exceptions to this general rule. In general, property or debt is separate if it was acquired before the marriage or after the last separation of the parties, or if it was acquired by gift (from someone other than a spouse), or if it was acquired through inheritance or in exchange for another item of separate property. Property can be separate even if it is titled in the other spouse's name or in the spouses' joint names. There are many exceptions to this general rule. With very few exceptions, a divorce court doesn't have any power over property that is titled to someone other than the spouses.

If an item of property is titled to both spouses, a judge can order that it be transferred to one spouse or that it be sold and the proceeds divided. If an item of property is titled only in the name of one spouse, a judge cannot order the transfer or sale of the property. However, a judge can make a monetary award to the spouse who is not on the title.

If evidence of the value of a item of property is not presented to the court, the court is likely to not make a ruling as to that item of property. If the property is titled in your name, this is a good result. If the property is titled to your spouse, however, this is a very bad result, because he or she will end up owning 100% of the property by default.

The court cannot order the division or transfer of property that no longer exists. For this reason, it may be advisable to grab as many assets as possible at the outset of your divorce case. Almost certainly, your spouse's lawyer will make that recommendation.

What is a reasonable division of property and debt?
In a divorce in Virginia, when a court divides property and debt, the division is supposed to be "equitable". Equitable simply means that the division should be fair in the judge's opinion. Although judges frequently divide property and debt in fairly equal shares, there is no rule that they do so, and in many cases property and debt is not divided equally.

In making the decision on how to divide and allocate property and debt, the court is required to consider the following factors:

1. The contributions, monetary and nonmonetary, of each party to the well-being of the family;
2. The contributions, monetary and nonmonetary, of each party in the acquisition and care and maintenance of such marital property of the parties;
3. The duration of the marriage;
4. The ages and physical and mental condition of the parties;
5. The circumstances and factors which contributed to the dissolution of the marriage, specifically including any ground for divorce under the provisions of subdivisions (1), (3) or (6) of § 20-91 or § 20-95;
6. How and when specific items of such marital property were acquired;
7. The debts and liabilities of each spouse, the basis for such debts and liabilities, and the property which may serve as security for such debts and liabilities;
8. The liquid or nonliquid character of all marital property;
9. The tax consequences to each party;
10. The use or expenditure of marital property by either of the parties for a nonmarital separate purpose or the dissipation of such funds, when such was done in anticipation of divorce or separation or after the last separation of the parties; and
11. Such other factors as the court deems necessary or appropriate to consider in order to arrive at a fair and equitable monetary award.

Who gets to stay in the house pending the divorce?
Because the final divorce will usually not be granted until many months after the separation begins, a decision must be made by the divorcing couple or the court as to who will live in the house until the divorce is finalized. If both spouses' names are on the deed to the property, neither spouse has the power to kick the other spouse out, and so who stays in the home is a subject of negotiation. The court, however, does have the power to order that only one spouse is entitled to remain in the home until the divorce trial.

Who pays the mortgage and other expenses associated with the house?
The general rule is that the person remaining in the home pay all or a majority of the mortgage and other expenses. However, when the spouse remaining in the home does not work or only earns a small income, the court will likely order the other spouse to pay some or all of these expenses, at least until the trial. Because the court is likely to issue such an order, it is not unusual for the spouse who may be ordered to pay the mortgage to grab money in bank accounts or other assets to help defray the cost. A spouse's use of accounts and assets, and a spouse's payment of the mortgage on the marital home should be considered in negotiation or brought to the court's attention at trial.

What will happen to the house in the divorce?
If one spouse wants to keep the house, in negotiation, he or she should be ready to agree to buy out the other spouse and resolve the other spouse from any liability on the mortgage. The most common way to do so is for the spouse keeping the home to refinance the existing mortgage into his or her own name. Any competent lawyer will insist on these terms. The reason is that if the spouse not keeping the house remains liable on the mortgage, he or she will find it almost impossible to acquire another mortgage if he or she later wants to buy a house. If neither spouse is able to refinance the mortgage, the spouses may need to consider selling the house. For complicated liability and tax reasons, it is generally not advisable for the spouses to continue jointly owning the house following a divorce. If this is something you are considering, we can discuss the issue in more detail. If the issue of the house is determined by a court, the judge would not award the house to a spouse unless he or she was able to refinance the mortgage to remove the other spouse. If neither spouse qualifies to assume the mortgage, the judge would almost certainly order the house to be sold.

Intangible property
Intangible property includes: cash, bank accounts, stocks, bonds, mutual funds, goodwill, patents, trademarks, IRAs, 401-Ks, life insurance, profit sharing accounts, pensions, and all other similar property. Like other types of property, intangible property needs to be identified, and if the property is marital the spouses or the court needs to determine how it is to be divided between the spouses. Some intangible property will require the payment of taxes in the future, and so a spouse needs to carefully consider whether the intangible property he or she wishes to receive in a divorce carries a large tax liability. If a couple is able to resolve their issues in settlement, they can divide retirement plans in any manner they wish. If the case goes to court, however, the court is prohibited from awarding more than 50% of one spouse's retirement to the other spouse.

Certain types of retirement plans, such as pensions and 401(K)s, cannot be divided until the court signs a special type of order called a QDRO (a qualified domestic relations order). It is often necessary to obtain documents containing details about the retirement plan from the administrator of any retirement plan <u>before</u> any agreement is finalized or before trial. Each retirement plan is different, and the plan documents need to be analyzed to determine that plan's specific benefits and procedures. Because there are many complicated issues to be addressed when dividing retirement plans, it is very important that the separation agreement addresses these issues and specifies who is going to pay for the cost of drafting the QDRO or other type of retirement order.

Who pays the debts?
Typically, debt associated with a particular piece of property is paid by the spouse receiving that property. For example, if a wife is to receive a vehicle, she will usually agree to pay the loan on that vehicle. Many debts, for example medical bills or credit cards, are not connected to any item of property. Assuming that the debt was incurred for marital purposes, most couples divide the debt fairly equally. It is not uncommon, however, for one spouse or the other to run up a credit card on personal items, attorney's fees, or other non-marital items. In that case, the spouse incurring the debt will be expected to pay a larger share. If the issue is decided by the court, most judges examine the reasons the debt was incurred. If the debt was incurred for marital purposes, and both spouses participated, most judges will order the debt to be split fairly equally. If, however, the debt was incurred primarily by one spouse for primarily non-marital purposes, most judges will order that spouse to pay all or a majority of that debt. If the divorce has been filed with the court, but a trial is many months away, either spouse can ask the court to order the other spouse to pay the debts until trial. In cases where only one spouse is employed, even though it will place a great burden on the employed spouse, most judges will order the employed spouse to pay the debts until the final trial.

Spousal support.
Who is eligible for spousal support?
A spouse who is guilty of adultery or a "crime against nature" may be barred from receiving support. There are exceptions to this rule. Otherwise, any spouse is eligible to receive support. In very general terms, a spouse is entitled to continue living at the same standard of living he or she enjoyed during the marriage provided the other spouse is financially able to provide that standard of living. In practice, however, spousal support is unlikely to be granted in a marriage of short duration (1-5 years) or where the spouse asking for support earns more than 50% of what the other spouse earns.

By statute, the trial judge is required to consider the following factors when deciding whether to award spousal support:

1. The obligations, needs and financial resources of the parties, including but not limited to income from all pension, profit sharing or retirement plans, of whatever nature;
2. The standard of living established during the marriage;
3. The duration of the marriage;
4. The age and physical and mental condition of the parties and any special circumstances of the family;
5. The extent to which the age, physical or mental condition or special circumstances of any child of the parties would make it appropriate that a party not seek employment outside of the home;
6. The contributions, monetary and nonmonetary, of each party to the well-being of the family;
7. The property interests of the parties, both real and personal, tangible and intangible;
8. The provisions made with regard to the marital property under § 20-107.3;

9. The earning capacity, including the skills, education and training of the parties and the present employment opportunities for persons possessing such earning capacity;
10. The opportunity for, ability of, and the time and costs involved for a party to acquire the appropriate education, training and employment to obtain the skills needed to enhance his or her earning ability;
11. The decisions regarding employment, career, economics, education and parenting arrangements made by the parties during the marriage and their effect on present and future earning potential, including the length of time one or both of the parties have been absent from the job market;
12. The extent to which either party has contributed to the attainment of education, training, career position or profession of the other party; and
13. Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

What can prevent spousal support from being awarded?
If the spouse seeking spousal support has committed adultery or a "crime against nature", even after the separation, he or she may no longer be eligible for spousal support. For this reason, a spouse hoping to obtain spousal support must carefully consider the impact of a non-marital relationship. If the other spouse is also at fault in the marriage, or the adultery cannot be proved, or if the spouses continued to cohabit after the adultery was discovered, spousal support may still be an option. In addition, in rare cases, a court can still grant a spouse guilty of adultery spousal support if the court finds that denying spousal support would be a "manifest injustice".

How long will spousal support last?
The duration of spousal support is often the subject of fierce negotiation. In looking at how long spousal support could last, most attorneys use some rules of thumb. Typically, the shorter the marriage the shorter the amount of time the court is likely to award spousal support. So, for a 3 year marriage, a trial judge may award support for 1-3 years or not at all. For a 15 year marriage, a trial court may award support for 8 or 10 years or even indefinitely. For a marriage lasting 20 or more years, it is likely that the court won't put any time limit at all on spousal support. Generally, court-ordered spousal support will end automatically if the spouse receiving spousal support remarries or lives with someone in a relationship like marriage for a year or more. Spousal support will also end automatically if either spouse dies. If circumstances change materially in the years after the divorce decree is entered, either spouse can ask the court to raise or lower the amount of court-ordered spousal support. If the parties decide support by agreement, the support is only modifiable if the agreement specifically provides.

What amount of spousal support is likely?
This is one of the hardest questions for a divorce lawyer to answer. The reason is that there is no one formula or rule that circuit judges use. As a result, spousal support awards vary widely. This is true even for individual judges – that is, the same judge might order a high amount in a case on Monday and a low amount in a case on Friday and it is difficult to determine the reasons. Some lawyers use a rule of thumb to obtain a **rough** estimate of what the amount may be – specifically, where a couple doesn't have children, take 30% of the paying spouse's gross income and subtract 50% of the receiving spouse's gross income; where a couple has children, take 28% of the paying spouse's gross income and subtract 58% of the receiving spouse's gross

income. Another **rough** indicator is to determine the "need" of the receiving spouse. The need is simply the amount of monthly expenses that cannot be paid by that spouse's own income. If the other spouses "ability to pay" – that is, the amount he or she has left over each month after paying his or her own expenses – is sufficient to pay the "need", that is the likely amount.

Waiver and Reservation
If spousal support is not requested, either in an agreement or at trial, it is waived forever unless a specific reservation is requested. Even if a spouse does not need support at the current time, he or she can reserve the right to ask for it later for a period up to ½ of the length of the marriage. If a spouse does not need support at the time of the divorce, but the possibility exists that he or she may later need support, a reservation should be made in the agreement or a request for a reservation should be made at trial.

What is imputation of income?
If the court believes that an unemployed spouse should be working, or that a spouse can obtain a better-paying job, the court can "impute" income to that spouse. This means that the court will calculate child and spousal support using the income the court believes the spouse should be making rather than the income the spouse is actually earning. Expert testimony, usually a vocational expert, is usually needed to prove that a spouse should have income imputed to him or her. If there was an agreement during the marriage that a spouse would stay home to take care of children, or if one or more children are still very young, the court may choose not to impute income.

<u>Child support</u>
Can parents agree that there will be no child support?
A separation agreement can say that for the present there will be no child support, but an agreement cannot say that there will never be child support, or that a court is prohibited from ordering child support later. So, even if the agreement says that child support will be $0.00 now, the court always has the authority to order child support later.

How much will child support be?
In most cases, the amount of child support is determined by the use of a formula. However, spouses in negotiation or the court at trial can use a different method if there is a legitimate reason for doing so. The formula takes into consideration the gross income of each spouse, the number of children, support of children not of the marriage, the cost health insurance for the children, and the cost of work-related day care.

Number of days of visitation
If the non-custodial parent has 90 or more days of visitation per year the amount of child support drops dramatically. Conversely, if the non-custodial parent has 90 or less days of visitation the amount of child support is maximized.

How long does child support continue?
The default length of time that child support will have to be paid is until each child turns 18 (or 19 if the child doesn't graduate high school until then). Even though the court will not ordinarily

order a parent to pay child support past that date, parents are free to agree to a longer payment period (for example, until the child graduates from college).

Custody and visitation

The term "physical custody" refers to where a child lives. There are many different ways that physical custody is arranged. The most common physical custody arrangement is for one parent to have primary physical custody with the other parent having visitation. All this means is that the children primarily live in one house and visit with the other parent. A less common type of custody arrangement is joint physical custody or 50/50 physical custody. In this type of custody arrangement, the child basically has two separate homes and lives 50% of the time in each.

The term "legal custody" refers to who makes the decisions for the child. The terms "joint custody", "joint legal custody", "sole custody" or "sole legal custody" usually refer to legal custody. Quite often, a parent hears "sole custody" and believes that the term affects his or her visitation or physical custody. But the term likely only refers to legal custody. Joint custody (or joint legal custody) means that both parents retain joint responsibility for the care and control of the child and joint authority to make decisions concerning the child even though the child's primary residence may be with only one parent. Sole legal custody means that one parent has the authority to make major decisions concerning the child. However, the other parent can always ask a court to intervene.

If a couple cannot agree on custody and visitation, and the matter must be decided by a court, a judge will look closely at a number of issues. By statute, the judge is required to consider these factors:

1. The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs;
2. The age and physical and mental condition of each parent;
3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child;
4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members;
5. The role that each parent has played and will play in the future, in the upbringing and care of the child;
6. The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child;
7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child;
8. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference;
9. Any history of family abuse as that term is defined in § 16.1-228 or sexual abuse. If the court finds such a history, the court may disregard the factors in subdivision 6; and
10. Such other factors as the court deems necessary and proper to the determination.

Most judges, however, also consider other factors such as a) which parent was the primary caretaker during the marriage, b) which parent has more time available to care for the child, c) does either parent have a live-in boyfriend or girlfriend, d) has either parent acted irresponsibly while having the children in his or her care, e) does either parent have a physical or mental condition that would impact his or her ability to care for the child appropriately, f) will the child be able to stay in the same school district, g) will the child be able to stay in a familiar home, and h) in some instances, the preference of the child. Obviously, moving out of the marital residence, especially if the move is to another school district, can make it more difficult to obtain primary custody of the children.

Can a spouse "snatch" the children?
If there is no existing court order regarding custody of the children, it is **not** illegal for either parent to keep the children, or even to take them to another state. Likewise, in the absence of a court order, if your spouse grabs the children, you can grab them back.

Can a spouse keep the other spouse from seeing the children?
If there is no existing court order regarding custody and visitation, one parent can legally keep the other parent from seeing the children. However, a parent who prevents the other parent from seeing the children is not looked upon kindly by the court. Therefore, unless the other parent poses a legitimate physical or a serious psychological danger to the children, it is often a good idea to let the other parent see the children during the months before a court order is issued.

Will the court take the kids away from one spouse?
Virginia law makes it extremely difficult for one spouse to prevent the other spouse from at least some visitation with the children. Specifically, Virginia law states that: "The court shall assure minor children of frequent and continuing contact with both parents, when appropriate, and encourage parents to share in the responsibilities of rearing their children. As between the parents, there shall be no presumption or inference of law in favor of either." (Section 20-124.2 of the Virginia Code).

A parent, even when he or she has drug or alcohol problems or is not a very good parent, will likely be awarded some limited amount of visitation. Moreover, because most judges believe that, in the vast majority of cases, children need both their father and their mother involved in their lives, a spouse who asks the court to forbid the other spouse from ever seeing the children may actually harm his or her case.

Should you keep written records?
In general, yes, you should record your contact with the child, what you did and who was there, and also of all of the time the other parent has the child, when and where each exchange of the child took place and who else was present, and any other information related to your children and their care and needs. Keep in mind, however, that anything you put into writing can be "discoverable" – this means that you may be required to turn over the writing in the discovery process.

Should I have a witness present at visitation exchanges?
It is generally a good idea to have a witness present at all times when you are meeting with your spouse. This will prevent your spouse from making false claims as to what occurred at the meeting.

Should I smoke?
Smoking is looked on very unfavorably by most judges, and some judges consider smoking around a child to be child abuse. If you have to smoke, don't do it in the car or in the house because your child will routinely be in both of those places. If the custody issue is remotely close, a judge may well decide custody on the basis of which parent smokes. If you smoke and stop, the effort you made in stopping will also do a great deal to convince the court you are sincere in your desire to do all you can for your children.

Should I move out of the home?
Courts generally are hesitant to alter the status quo in any custody case. The conventional wisdom of mental health evaluators and judges is that children have certain "anchors" or stabilizing factors in their lives that provide security and comfort in times of stress. The biggest one is the home and its trappings, such as the child's bedroom, neighborhood, backyard and pet. The parent who occupies the marital home is therefore at a great advantage. On the other hand, staying in the marital home may be explosive and potentially more harmful to the children than leaving.

Who represents the children in court?
If the case is going to be decided in court, an attorney may be appointed for the children. This attorney is known as a guardian *ad litem* (also known as a GAL). Some judges automatically appoint a GAL and other judges require one of the parties to file a motion seeking the appointment. The GAL usually speaks with both parents and to other people who have a relationship with the child. The GAL will also want to speak with the child about his or her wishes in the matter if the child is old enough.

Psychological evaluations and home studies.
In a contested case, the judge can order one or both parents to undergo a psychological evaluation. The cost of the psychological evaluation is often paid initially by the parent who wants the evaluation conducted. The judge may also decide to order a home study through the Department of Social Services.

<u>Medical and dental insurance</u>
A spouse is almost never eligible to remain covered by his or her spouse's health insurance policy after a divorce. As a result, usually one spouse will need to obtain new health and dental insurance. If the spouse needing insurance is also requesting spousal support, in calculating how much he or she needs, the cost of new insurance should be included. If the case goes to trial, the law in Virginia doesn't allow for one spouse to be ordered to pay for the other spouse's health insurance. The law in Virginia does provide, however, that a judge can order one spouse to pay the cost of health insurance for the children.

Legal fees

The legal fees incurred are often a subject of negotiation, although it is rare that one spouse will agree to pay all of the legal fees incurred by the other spouse. The reason is that courts rarely order one spouse to pay the entirety of the other spouse's legal fees. More commonly, courts either make no award of legal fees or only a fraction of the total amount.

Taxes

The tax law changes daily. Because I am not a tax attorney, I highly recommend to my clients that they obtain the services of a certified public attorney or a tax attorney to advise them on the tax impact of divorce. Subject to many qualifications, spousal support may be deductible to the party paying it and taxable to the party receiving it, child support is not deductible to the party paying it or taxable to the party receiving it, and filing taxes jointly with a spouse can result in liability for all tax due and errors in the return. The transfer of property between spouses in connection with a divorce is usually without any tax consequence, however, if the property is later sold, there may be capital gains tax consequences. The child dependency exemption normally goes to the parent with primary physical custody; however the court can allocate the right to the exemption between the spouses, and the parties can allocate it between themselves by agreement.

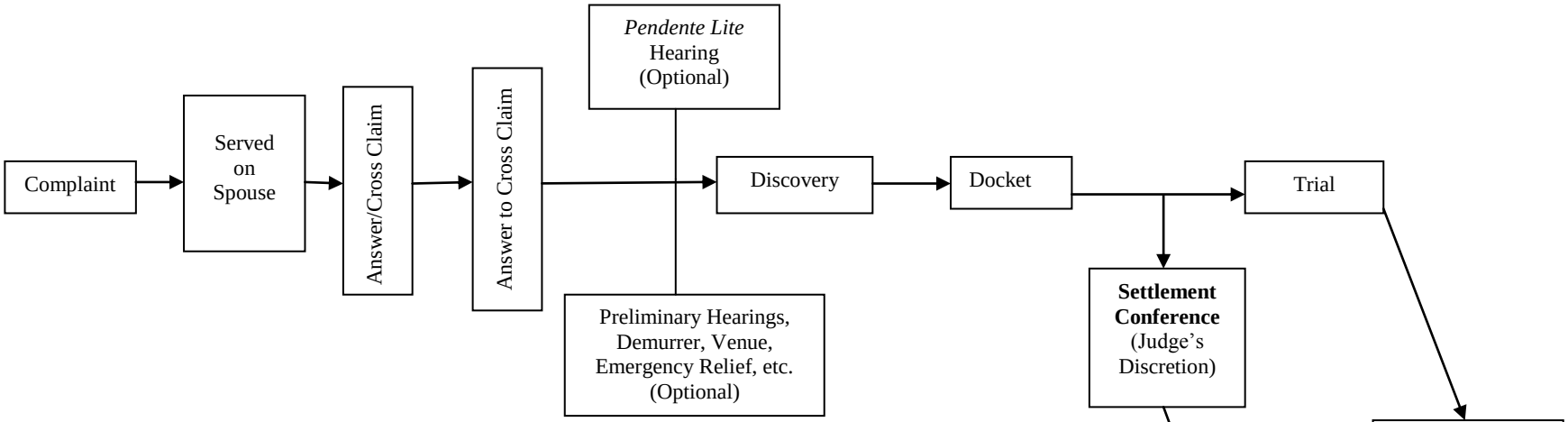
A Judge's Discretion

Divorce law is notoriously grey – this simply means that in almost every case, the "law" allows the judge a great deal of wiggle room. For instance, for custody the "law" is that the judge must award custody based on "the best interests of the child?" What is in the best interests of a particular child, however, is left up to the trial judge to determine. Another example is adultery – it must be proved by "clear and convincing evidence". Yet another example is spousal support – the "law" is so vague that in any case, the trial judge is free to award no support, to award a little support or to award a lot of support, and none of those outcomes would be "wrong" under the law. This is not to say that knowing the law is not important. Knowing the laws and rules is an important start. But, because it is ultimately the judge who makes the calls, knowing the judge, and knowing that judge's likes and dislikes, and preferences, is vitally important. Knowing these things allows us to advise our clients on what actions to take leading up to trial, and allows us to submit evidence and make arguments to the court that we know will be effective with the particular judge who is handling the case.

As I mentioned at the outset, a full overview of divorce law would be thousands of pages long. There are almost certainly many questions you have that this general overview does not address. If you have additional questions, please contact our office.

OVERVIEW OF A DIVORCE CASE

DIVORCE THROUGH A TRIAL



DIVORCE THROUGH SETTLEMENT