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## DIVORCE AND SEPARATION

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

- Cruelty;
- Reasonable apprehension of bodily harm; or

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- 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.

## **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 and must be drafted in proper legal format before it will be accepted by the court. 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, after filling out a fee waiver form called an *In Forma Pauperis* (IFP), the plaintiff may 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 in an uncontested divorce 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.*

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.

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## **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.
- 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.

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- 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 marriage, 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 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 jailed, 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.

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- 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.

### **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.

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## What is an annulment?

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 granted if:

- Either party was physically or mentally 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 or 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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