Divorce Toolkit

A guide to separation and divorce in Virginia

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Introduction

One of my favorite aspects of practicing family law is to give people starting the separation and divorce process the knowledge and the plan which they need to navigate through what is often one of the most difficult periods in their lives. Too many people in my personal and professional life have made poor choices in this process due to just not having the facts. Once my potential clients come in and get even a basic understanding of divorce law, and of the process, they begin to exhale and figure out how this is all going to work. It is a great moment. In the context of my speaking engagements with dozens of attendees, that feeling can be even more powerful, as people collectively calm down when the unknown and uncertainty becomes a little more known and a little more certain.

As I write this, COVID-19 is fundamentally altering the process of getting this information. Gone (hopefully very temporarily) are the in-office consults and packed speaking engagements at divorce seminars. Attempting to research this issue online is tedious and difficult, and advice from friends and professionals not in family law can do more harm than good if not applicable to your situation.

To address this, I've prepared a series of chapters to enable those of you who still need the help, the knowledge, the plan, to go through this process. Think of this as your 12-step program for separation and divorce. As always, I and my colleagues within the family law group at Bean Kinney & Korman are here to help, and we would be happy to speak with you and customize this information to your needs or circumstances.

For you literal readers (translation: lawyers) I will have code references for you to google and digest. For the most part, however, this will be a recitation of my experience and knowledge on the subject.

Finally, I am going to discuss cost. Family law is a bizarre industry in one sense: we make more money if we keep people in the dark about how much their separation and divorce will cost. We also make more money if we pursue a case more aggressively. However, if the goal of a family lawyer is to genuinely help people, they should minimize the financial and emotional cost of divorce wherever they can. This means more education around how these strategic decisions impact cost and the emotional expense. Similarly, the goal of these chapters is to provide knowledge, peace of mind, and a plan, at no cost to you. I only ask in return that you share this information with those who need it.

Contents

1. Getting Started

Fault and Separation Grounds - Va. Code 20-91

Let's start with the basics: there are two broad categories of divorce. Which one you choose depends upon strategic considerations and will significantly impact your lawyer's fees spend.

Category one is the divorce based upon separation grounds. If you have no children and you have a signed agreement (often called a Separation and Property Settlement Agreement, Marital Settlement Agreement, Property Settlement Agreement, or some similar term), you can file for this type of divorce after you have been separated for a period in excess of six months (six months and a day or more). If you have children or you have no signed agreement, you can only file for divorce after you have been separated for longer than a year.

There is no filing for legal separation in Virginia. You are considered separated when one or both of the parties forms the permanent intent to be living separate and apart from the other party.

There is no filing for legal separation in Virginia. You are considered separated when one or both of the parties forms the permanent intent to be living separate and apart from the other party. It also includes some sort of physical separation, but not necessarily in two separate residences. Most, if not all, of the Northern Virginia venues recognize in-home separation, provided that the parties are:

1. Refraining from a physical relationship
2. Not working on the marriage in counseling
3. Not going on dates, or otherwise providing "indicia of affection" such as flowers, cards, romantic gestures, etc.

The courts will also look to things such as joint vs. separate bank accounts, celebration of holidays together, joint trips, common meals, etc. You basically must live together as roommates.

Of course, for married parents of young but perceptive children, this can be very difficult. Nobody goes to the neighborhood block party and introduces their estranged spouse as "my soon to be ex-husband". And before discussing the separation with the children, parents want rightfully to maintain normalcy for their children. That's most likely fine, and understandable. The most significant requirements are the absence of a physical relationship, dates, or working on the relationship. Co-parenting counseling is ok in this context, but marriage counseling undermines any claim that there is a permanent intent to be living separate and apart.

In this unique quarantine context, the rules are the same. I suspect living under the same roof when required under existing health and government guidelines probably provides a reasonable justification for

not moving out. However, the “roommate rules” would still govern to ensure the separation is continuous and uninterrupted.

Statistically, about 70-80% of my cases start and end as a divorce based upon separation grounds. It is less expensive ($ 5,000 to $ 20,000 per side is a reasonable estimate per side under this path), less emotional, and if the parties have been separated for some significant period, faster.

» *Cohabitation is permissible in the absence of a physical relationship, dates, or working on the relationship.*

2. Fault Grounds

I'm going to deal with the most common fault grounds in Virginia (leaving out conviction of a felony, sodomy, and buggery—you can look those up yourself!): adultery, cruelty, desertion (abandonment) and constructive desertion.

Adultery is defined as someone having a sexual relationship with another individual who is not their spouse any time before the divorce is final. It can be post-separation, although its impact upon distribution of the assets or spousal support after the separation is often limited (as it did not cause the dissolution of the marriage). To the oft-asked question "Can I date after separation?", I would say definitely not before the agreement is signed, and care must be exerted not to expose children, particularly young children, to a new romantic partner and/or sexual relationship prior to divorce.

The legal system still does not, in my experience, take as broad a view of "abuse" as the mental health world, however. Therefore, "financial abuse" or "verbal abuse" will in many cases not rise to the level of cruelty.

Cruelty is the "abuse" ground for divorce. It most often refers to conduct which causes bodily harm to the other party or places them in a reasonable apprehension thereof. The legal system still does not, in my experience, take as broad a view of "abuse" as the mental health world, however. Therefore, "financial abuse" or "verbal abuse" will in many cases not rise to the level of cruelty. Emotional abuse can constitute cruelty, but it must be significant, repeated acts of emotional abuse to rise to this level.

Desertion is the departure from the marital residence by one party with the intent to permanently stay away, resulting in a divorce. It cannot be consented to by the other party. Going to a hotel or a friend's house for the night to cool off is not desertion. Moving out and signing a lease elsewhere over the objection of the other party is not. Desertion is considered by some to be "fault lite", meaning it probably has the least impact on support or division of the assets.

Constructive desertion is the leaving of one spouse because the other spouse's conduct is so intolerable, the leaving spouse has no choice but to leave the marital residence. This is often due to cruelty/abuse.

Fault-based divorces are more expensive (range: $ 25,000 per side and up). Why is this? A complaint for divorce on fault grounds lists out in detail the specifics of the fault. If adultery, the complaint must list the identities of the individual with whom the adultery occurred, dates, and locations. Cruelty and desertion require similar levels of detail and proof. It often drives the defending party to a more aggressive lawyer who files a similarly aggressive counter-Complaint, and matters escalate quickly.

Given the added expense and emotional turmoil, why file on fault? A couple of answers:

1. If you need help from a judge now (such as support, set up a timesharing schedule for a child, get someone dangerous out of the home), a fault based divorce starts the divorce process immediately, without waiting six months or a year
2. Fault, particularly egregious fault, can impact the amount of spousal support and percentage of marital assets to each side, as well as influence any potential attorney's fees award.

In sum, all potential clients should first examine if the separation-based divorce process suits their needs and goals. If it does not, you should discuss with your counsel the possibility of a fault-based divorce. If no fault grounds exist, but you desperately need an order relating to custody or support, discuss with your counsel the possibility of an action for separate maintenance in the Circuit Court or a petition for custody, visitation, or support in the Juvenile and Domestic Relations District Court of your venue.

3. How are these issues resolved?

Agreement vs. Court Order

Separation-based divorce generally costs between $ 5,000 and $ 20,000 in attorney's fees. I estimate it will cost about 1/6 to 1/8 or even 1/15 in fees to come to an agreement vs. having a judge resolve your case.

You have two, and only two options for resolving the issues in your divorce case:

1. By agreement of the parties
2. By court order

Again, your choice or ability to come to an agreement dramatically impacts the fees you pay. I said in a prior chapter that the separation-based divorce generally costs between $ 5,000 and $ 20,000 in attorney's fees. Most of these cases are resolved by agreement, so there is significant overlap between separation-based divorces and divorce cases resolved by agreement. I estimate it will cost about 1/6 to 1/8 or even 1/15 in fees to come to an agreement vs. having a judge resolve your case. Why? Attorneys must present these cases in a certain way, with significant trial preparation, and develop a game plan for making all important aspects of their case admissible in court.

A case in which all matters are resolved by agreement will cost typically, again, between $ 5,000 to $ 20,000 per side, with some above or below these figures. A case which requires the judge to make these decisions (and it is always a judge, never a jury), will most likely cost over $ 100,000 per side. For particularly contested cases of a complex or high conflict variety, these costs can go over $ 200,000 or even $ 300,000, and very bitterly contested or aggressively litigated cases can cost in the high six figures or low seven figures. I mention these numbers to get people thinking at the onset how to make prudent strategic decisions about which direction to go.

4. Getting to Yes: The Agreement

Traditional vs. Mediation

In today's family law world, there are several different ways to come to an agreement. I outline these below. Which method you choose depends upon the unique circumstances of your situation, including sense of urgency, personality dynamics, and substance of issues to be resolved.

1. Traditional Model: I will call this your Mother and Father's Divorce Process. You hire a lawyer. That lawyer prepares an agreement, and sends it over to your spouse, or your spouse's lawyer. It is either accepted, or revisions are made, and a counteroffer is sent back. This goes on, like many classic legal negotiations, through tracked-change versions of the document until it is settled. In some cases, the lawyers and the clients get together in the same room in a "settlement conference" (seen in movies such as "Intolerable Cruelty" or "A Marriage Story") in which they negotiate face-to-face. This can be an effective method, depending upon the lawyers and the circumstances.

2. Mediation: this form of alternative dispute resolution ("ADR") methods has significantly changed the family law legal landscape. In a traditional mediation model, the mediator meets with the parties and no attorneys present to help the parties come to an agreement. He or she cannot give the parties legal advice, and both parties should strongly consider retaining lawyers to advise them before, after, and sometimes even during mediation sessions. A good mediator is a trained family law attorney or mental health professional who can write a comprehensive and legally appropriate document and who has the appropriate knowledge and training to guide the participants through this process. It will generally cost about ½ to 1/3 the cost of the traditional model, and an agreement is reached often in two to five sessions. I know and can recommend some great mediators in the Northern Virginia area, but would need to know more about the applicable personality dynamic before making this recommendation.

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What kinds of cases are NOT good for mediation? Contrary to what some might think, if your spouse is a lawyer, that doesn't disqualify the mediation process. If your spouse is a lawyer who is domineering, controlling, and will have to speak through the entire session and has consistently gotten his or her way throughout the marriage, perhaps mediation is not the best option. An interesting aspect of the separation and divorce negotiation is the fact that the dynamics of the marriage often continue through the post-separation period. If there is a substantial power imbalance, i.e. if one party always had

to be right during the marriage, they will probably have difficulty compromising and being pragmatic during the separation and divorce process as well. Also, severe mental illness or substance abuse can be a disqualifier (but does not have to be, interestingly).

Aside from just cost savings, a mediated settlement often provides the parties with the tools to resolve problems within their families long after the divorce professionals are gone. Let's face it: if you have kids, you will never be "done" with this person. A whole host of new challenges will crop up, and your ability to solve your own problems now with minimal assistance creates positive momentum into your co-parenting dynamic.

» *Mediated settlements can provide significant cost savings.*

3. Higher Level Mediation or McCammon Mediation: This is like the mediation model above, but in cases of significant complexity or a high degree of conflict, this method makes more sense. Coined "McCammon Mediation" because the McCammon Group is the most frequently used mediation service for this model in Virginia. Relying upon primarily retired judges, this model involves a 1-2 or even 3 day scheduled mediation in which parties and their counsel meet with the retired judge to come to an agreement on all issues. Unlike traditional mediation in which the parties meet largely together in one room, in this mediation approach, the parties and their counsel start in one room, and then break off into individual caucuses, with the retired judge transitioning between both rooms. The goal is to have a signed agreement by the conclusion of the mediation session, with a probability of doing so generally over 80% (and the mediators keep these statistics and are often proud of them with good reason). It is an expensive day or two, with each side incurring between $ 5,000 to $ 12,000 in combined fees for the attorneys and some portion of the retired judge's time. It is therefore often more expensive than both the traditional model and the standard mediation model. It does, however, give finality to an unstable and unpredictable time, which has real value to the parties and their family members.

5. Getting to Yes, Cont'd

The Collaborative Divorce

Perhaps the most innovative development in the ADR world is the concept of a collaborative divorce. Unlike the traditional adversarial system (which encompasses all of the methods above, no matter how amicable), the collaborative divorce process is a team-based approach in which the parties pledge, in writing, to resolve their matter outside of court no matter what, at least with this team of professionals. The parties commit to full transparency, and while an attorney cannot reveal confidential communications without his or her client's consent, they actively encourage the client to be forthcoming with all relevant information, to the point of withdrawing or threatening withdrawal if the client refuses to do so. The team frequently consists of two lawyers, a financial neutral (or two, if necessary), one or more coaches (to help facilitate productive and helpful settlement discussions), and one or more child specialists. The team works together with the clients to try to come up with a mutually agreeable settlement, meeting together with the clients in joint sessions consisting of various members of the team.

The collaborative model makes the clients the primary actors, and the collaborative professionals serve to offer their perspectives and evaluations of certain topics, with an eye to serving the client's collective goals, whatever they may be.

I am admittedly only recently collaboratively trained, so my perspective on this process is not a seasoned or experienced one as of the date of writing this paper. However, the clear strength of this process is the client has total control over it. There are no secret back-door negotiations, no attorney or other professional taking over the negotiations for his or her own benefit. The collaborative model makes the clients the primary actors, and the collaborative professionals serve to offer their perspectives and evaluations of certain topics, with an eye to serving the client's collective goals, whatever they may be. Collaborative professionals (be they legal, financial, or mental health) must undergo a rigorous training process and participate in ongoing ADR training to remain appropriate certified.

This process also keeps the temperature of the divorce appropriately low without the threat of litigation. It can be, however, on the balance more expensive than the more amicable traditional or mediated cases, as it brings together a team of professionals in various constellations for team meetings. However, the result is often an excellent one, as it has incorporated the client's wishes and the recommendations and observations of several seasoned professionals in the divorce process.

6. Divorce and the Courts

As noted above, in the event the parties cannot agree, the court is there as the final arbiter on matters of child support, spousal support, how to divide your assets, matters of fault, and certain ancillary issues (such as tax-related issues).

In all Northern Virginia venues, these issues can be resolved in stages, and at multiple hearings. Shortly after you file, all Northern Virginia jurisdictions will grant parties the option of seeking temporary relief under Virginia Code 20-103 as an interim measure for resolving issues such as support, who will remain in the home, attorney's fees, and other matters relating to the family and maintaining the status quo. Many counties will resolve custody temporarily, but Fairfax will not absent a compelling emergency. Fairfax Circuit Court will hear custody matters on a final basis earlier than the other divorce issues in a separate hearing, however. All other local venues hear these issues on a final basis at one hearing.

While most relevant information can and should be exchanged informally when negotiating an agreement, in an active court case you can request discovery, which is the pre-litigation phase in any legal proceeding in which you are entitled to information relevant to your case. This comes primarily in the form of subpoenas, document requests, interrogatories (open-ended questions answered under oath), depositions, and admissions (yes or no questions intended to get the other party to concede a point to narrow or refine the issues in the case). It can be expensive, but in litigation, worth it.

Important point

If engaging in "self-help" to obtain information, be very careful snooping around your spouse's electronic information, placing a tracking device on their vehicle or person, or other such surveillance or investigative method. Not only could such efforts render the information useless, it could be a crime. It could also cause you or your attorney to be sanctioned or penalized for such conduct, so speak to a lawyer before going down this path.

7. Child Support

Virginia Codes 20-108.2, 20-108.1

Fortunately, child support is generally predictable and formulaic in Virginia. Child support guideline formulas consider the following variables:

1. The parties' gross incomes from all sources (very inclusive, includes bonuses, commissions, capital gains, social security income, gifts, etc.)
2. The cost of work-related childcare
3. The marginal cost to cover the child or children on the participating health insurance plan
4. If both parents have the children more than 90 days in a year (in which case the "shared custody" guideline is used)

If one party is voluntarily unemployed or under-employed, the court can and will impute income to them to a level which the court deems is the party's income if fully employed. This can happen in a variety of ways:

1. The party has the experience, education, and skills to work, but simply won't
2. The party recently left his or her employment voluntarily without the other party's agreement
3. The party lost this employment through a voluntary act or neglect which caused their dismissal

Nannies or au pairs of older children can be successfully argued to constitute "work-related childcare" if such care providers are necessary to transport the children to their various activities during the school week.

When are camps "work-related childcare"? Probably at age 12 or below, provided they are during work hours. The same goes for nannies or au pairs, although many litigants have successfully argued such care providers of older children are necessary to transport the children to their various activities during the school week. In my experience, judges tend to err on the side of inclusion, as they view such care as supportive of the children and their status quo during an otherwise turbulent time.

Child Support is retroactive to the date of filing a pleading requesting child support in either the Circuit Court or the Juvenile and Domestic Relations District Court. It is also inherently modifiable based upon a material change in circumstances in factors 1-4, above. Upon a modification, the guideline formula is presumptively correct. Also, a modification of child support may be retroactive to the date of service of the requested modification.

While the guidelines are presumptively correct on either an initial determination or a modification, the courts can deviate from the guidelines

under Virginia Code 20-108.1 (see the factors for deviation in the code section). They rarely do, and in most cases the cost of seeking a deviation exceeds the deviation itself, particularly given the low likelihood of such deviation.

Practice Tip #1

If you are going to change child support, do so with an order. This is not a money grab from your lawyer, it is just good practice. Child support continues until there is another order changing it, unless and until the youngest child ages out. It is a very unfortunate case when the parties "decide together" to end child support but do not do so with an order. The person paying child support will often find themselves with a debt of thousands or tens of thousands of dollars.

Practice Tip #2

The guideline formula applies state-wide. The notion that it costs the same to raise kids in Arlington as it does in Abingdon is, respectfully to the parents in Abingdon, probably false. Therefore, in any agreement between well-intentioned parents in Northern Virginia, it makes sense to have a cost-sharing provision for extracurricular activities, provided such a provision is clear and well-defined.

8. Spousal Support

Virginia Code 20-107.1

As clear and defined as child support is, spousal support in Virginia is exactly the opposite. It is, to quote a well-known retired judge from the Fairfax County Circuit Court, "like throwing darts at a dart board." It is also where lawyers like me really earn their money. Consider the following scenario, which I will make less misogynistic for this example: Stay at home dad earns no income, children are seven and ten. Working mom earns $ 360,000 per year. The parties have been married for fourteen years. Assuming no voluntary unemployment issues, the amount of support could be $ 3,000 to $ 4,000 per month for three years. It could also be 6,000 to 8,000 for seven to ten years. My Loudoun County colleagues have told me such a person in Loudoun could receive spousal support until the payor retires, or even later. This is a swing of hundreds of thousands of dollars over the life of the support obligation. Therefore, at best, we can provide what the trends are with respect to this issue, and I encourage you to look at the factors under 20-107.1 to know what types of things are important to the court or in a negotiation on spousal support.

There are two ways that judges arrive at the amount of spousal support. First is a kind of guideline method first developed in Fairfax County. Effective July 1 of 2020, this method is as follows:

1. For cases in which child support is also payable, you multiply the payor's monthly gross income (from all sources, same as for child support) by 26%, and then subtract 58% of the recipient's monthly gross income, and the resulting difference is the monthly amount;
2. For cases with no child support, you do the same math, but take 27% of the payor's gross income and subtract 50% of the recipient's income. This is often called "the Fairfax Method" and is legally required under Code Section 16.278.17:1 for any temporary ("pendente lite") spousal support matter in which the combined household income does not exceed $ 10,000.

With such a narrow focus, why include this formula here? Because even in cases over $ 10,000, many judges, particularly in Fairfax County, will rely upon this guideline in temporary support hearings and run this number in their heads in final support determinations. It is easy, quick, efficient, and predictable, and does not require lengthy hearings or complex analysis. In crowded dockets, it gives judges a quick method with which to resolve a case in less time.

The second method is the Income and Expense Method. This method requires both parties to fill out and exchange/submit to the court an

When using the Income and Expense Method, both parties are incentivized to expand the costs to reveal a larger need and a smaller ability to pay, so the other party's expenses should be carefully scrutinized and compared to that party's actual historical and recent spending to ensure it is accurate.

itemized list of their gross income, net income with applicable deductions for taxes, health insurance, etc., and itemized expenses across dozens of categories. It looks like a financial planning tool, because it otherwise is one. This method, when done correctly, reliably captures the recipient's actual need and the other party's ability to pay. However, both parties are incentivized to expand the costs to reveal a larger need and a smaller ability to pay, so the other party's expenses should be carefully scrutinized and compared to that party's actual historical and recent spending to ensure it is accurate.

Often a judge will rely upon one method, or the other method, or some combination of both. It is not uncommon for one party (often the payor) to rely upon the formula, and the other (often the recipient) to rely upon the Income and Expense Method, up to a certain income level. At gross incomes above $ 800,000 or even $ 1,000,000 this starts to reverse, with the payor focusing on need ("Who really needs $ 25,000 or $ 30,000 in spousal support!"), and the recipient focuses on the formula ("This is

» *Spousal support calculations can vary based on the method used, the duration of the marriage, and the need for child support.*

what the formula shows! It is just numbers and you can afford it!").

As to duration, again, little guidance from the actual statutes. Here are the trends in most non-Loudoun venues:

- 20 years and above - most likely spousal support until further order of the court, or what is called "permanent alimony"
- 15-20 years - perhaps spousal support for a defined duration, perhaps permanent, with the trend toward defined duration or "rehabilitative" alimony.

For such rehabilitative alimony, the unwritten rule is that alimony will extend for a duration of approximately half the length of the marriage. Borrowed frankly from the statute relating to a reservation of alimony, which is an entirely different concept, many judges have adapted this to mean simply half the length of the marriage, plus or minus a couple of years. This durational information is not written anywhere, nor set in stone, but simply reflects my experience. It does contain exceptions and outliers.

Spousal support is modifiable or non-modifiable based upon what the parties decide, and if the court determines it, it will be modifiable. It is no longer taxable nor tax-deductible unless there was an existing legally valid support obligation which was in force prior to January 1, 2019.

Spousal support can be barred from the recipient if he or she committed adultery and it would not be manifestly unjust to bar him or her from spousal support. This is not only an economic analysis, but under recent case law, an analysis of the degree of fault. Translation: if you are owed a lot of spousal support otherwise, but egregiously commit adultery in the face of your innocent spousal, you will most likely be barred. Further, under recent amendments to the statute, the court will have to consider the facts and circumstances which led to the dissolution of the marriage, including any degree of fault, including specifically adultery. Therefore, fault is alive and well when it comes to determination of spousal support, reversing the earlier trend and focus on getting away from fault and misdeeds in the court's analysis of support and property issues.

9. Custody

Perhaps the Hottest Topic - 20-124.3

Custody is often the most interesting topic for potential clients, and with good reason: nothing is more important to a parent than their children.

First, some basic vocabulary: there is legal custody and physical custody. Legal custody is the right, ability, and obligation to make major decisions impacting your children's health, academics, religion, and general welfare. It is most often joint legal custody, meaning the parties have equal say in major decisions impacting their kids. This promotes positive co-parenting and encourages active engagement, which most mental health studies show is positive for a child's development and relationship with both parents. The alternative is sole legal custody, where only one parent can make this major decision, or joint legal custody with final decision making authority to one parent, meaning the parties have to confer over such major decisions but ultimately in the event of an impasse, the final decision-maker can make the call. I have heard judges call this final option a "wolf in sheep's clothing" because while it sounds nice and amicable, while still allowing decisions to be made, it begs the question how hard the final decision-maker will try to forge consensus when everyone knows he or she has the final say. I often counsel the more involved parent not to waste their money and resources on fighting for sole legal custody even given the past track record, because most judges really want to keep the other party involved, and will award joint legal custody as a means of incentivizing their involvement.

Legal custody is the right, ability, and obligation to make major decisions impacting your children's health, academics, religion, and general welfare. Physical custody refers to where the children physically reside.

Physical custody refers to where the children physically reside. The primary physical custodian is the party with whom the children live more than 50% of the time. As noted in the child support post, if both parties have more than 90 days with the children, this is a shared custody arrangement. "Shared custody" does not have to mean a 50/50 schedule but can be. Although the term "visitation" is still on the books and in the statute, it is considered in some legal circles to be pejorative, and the other party may refer to this as "custodial time". In my humble opinion, it is a waste of time to argue over the vocabulary of this; I would recommend instead focusing on the schedule itself.

Parties can arrive at a mutually agreeable schedule themselves, with the help of their attorneys, or using a mediator. Often, the mediator for an exclusively custodial issue can be a mental health professional. Mental health professionals who specialize in such matters can provide excellent guidance to parents jointly or individually on what type of schedule may work for their family, both from a family dynamic and developmental perspective. Relatedly, parent coordination is a process whereby a mental

health professional helps parents improve communication and resolve matters impacting their children, including helping with a schedule, develop tools to resolve conflict, and in some cases come to a consensus on difficult decisions impacting their children. Like the mediators, I know many good ones, and would be happy to provide a referral.

Practice Tip

Online research with respect to custody is very helpful. Google the code section above (Virginia Code 20-124.3) for the best interest of the child factors. Not only are these factors critical for the parties to consider, the judge will have to say that he or she has considered these factors in making any custody decision (it is reversible error if he or she does not). When I litigate custody, I organize my case and facts in relation to these factors. Tip #2-google parenting plans to get ideas on what might be an appropriate sc schedule for you and your children.

10. Property

Understanding "Equitable Distribution" in Virginia-20-107.3.

The process whereby the court divides assets in a divorce case in Virginia is called equitable distribution and is contained in Virginia Code 20-107.3. When passed, it refocused family law, its attorneys, judges, and parties on the math of dividing assets, and gave some much needed consistency to the process. First, what it does: with any asset, the court does the following:

1. Identifies the asset (table, chair, retirement account, car)
2. Values the asset (as of the date of the negotiation or the hearing, not the separation date
3. Classifies the asset as marital, separate, or hybrid
4. Distributes the asset, if possible, or assigns a monetary award to the other party in consideration of the asset.

If an asset is marital, or part-marital, the marital portion is subject to division, or subject to an offset for the non-receiving party. If it is separate, it is beyond the court's power to distribute or assign a monetary award to the other side.

Virginia statute provides several factors for the court to consider in dividing up marital assets. However, many judges will simply divide up marital assets 50/50, or very close to 50/50.

The statute provides several factors for the court to consider in dividing up these assets. However, many judges will simply divide up marital assets 50/50, or very close to 50/50. It is often not a good strategy to expend significant attorney resources arguing for a substantially higher percentage of the marital assets, absent compelling circumstances.

What makes an asset marital vs. separate? At the risk of over-simplifying, it has far more to do with the timing of when the asset is acquired than who "earned" it or in whose name the asset is titled. With some notable exceptions (including inherited assets and gifts from a third party intended for only one of the parties), assets acquired during the marriage and prior to the separation of the parties are considered marital assets. For retirement or stock assets, the appreciation follows the contribution, meaning all retirement contributions made during the marriage are marital, as well as the passive interest on those marital contributions. Likewise, all passive interest in contributions made prior to the marriage and after the separation are separate property.

For real estate, the breakdown of marital vs. separate equity in a home can be determined a variety of ways and using a few different formulas. One is simply returning any separate contributions to the contributor "off the top" and prior to division. Another is what is called the "Brandenburg Formula" named after a Kentucky case and family of the same name,

which applies the same ratio of marital vs. separate contributions to the home to the appreciation on the home from date of purchase to date of valuation. Yet another one, popularized by a Circuit Court judge in Arlington after the real estate boom in Arlington created inequitable results, is called the Keeling formula. There are others, but the important thing to remember is the court can use any one it deems fair.

Practice Tip

With all of these concepts, document retention is key. If you want to establish you made a $ 40,000 down payment on your marital home, or that you have $ 40,000 in your IRA at the time of marriage, it is your burden (meaning your obligation) to provide this information to the attorneys or sometimes the judge.

11. Next Steps

What Now? How do I get started?

It is time to hire a lawyer. Of course, I or any member of my team would be happy to help. But this must be a good fit financially and professionally. This is the person who will give you hard advice to hear, and hopefully will guide you through a difficult time. You need to trust them with the future of your family. Professional chemistry is important. If you are not immediately convinced this is the right fit, don't be afraid to ask for a referral and that you want to talk to a couple of attorneys. I or anyone else who is good at this will be happy to provide a referral. We don't take it personally. Remember, this must work for you.

Make sure before you hire a lawyer that you have a good solid understanding of your income and assets. If this is not your forte, get a trusted friend or family member to help. The better and more accurate the information you can provide that lawyer in the initial consult, the more value you will get out of that consult.

Good lawyers will want a minimum of $ 5,000 for a non-litigation situation, and if litigation is imminent, a minimum of $ 10,000.

At or prior to the initial consult, have a financial plan in place. The attorney will want a fee deposit for representation. Good lawyers will want a minimum of $ 5,000 for a non-litigation situation, and if litigation is imminent, a minimum of $ 10,000. Be prepared with this, as most lawyers will not start until the retainer is signed and the fee deposit is paid.

I wish any reader the best of luck as you go through this journey. It won't always be easy, but the decisions you make along the way will have a significant impact on you and your family's future. This decision starts with developing what your goals are and selecting excellent counsel. Good luck!

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