

DIVORCE AND SEPARATION IN VIRGINIA

LANGLEY LAW CENTER 2010

The issues surrounding divorce and separation can be very complex. This pamphlet provides general information on Virginia laws and important issues in Virginia, but is NOT a substitute for consulting with an attorney.

Remember, the Air Force has several cost-free resources dedicated to helping military families work through trying times. If, however, you decide to proceed with a separation or divorce, the following information will give you an idea of the process, and will hopefully answer some of your questions.

SECTION I: DIVORCE

Divorce is the legal separation of husband and wife, effected by the judgment or decree of court, which totally dissolves the marriage or suspends its effects so far as it concerns the cohabitation of the parties.

There are two types of divorce in Virginia. A bed and board decree is a partial or qualified divorce under which the bond of marriage is not entirely dissolved. Under this type of divorce, a husband and wife are legally separated from each other, but are not permitted to commit adultery with another person or marry again. A complete divorce from the bond of matrimony dissolves the marriage totally and reestablishes individual "singlehood" such that a party may marry again. Even if both husband and wife agree on a divorce, legally sufficient grounds or prescribed reasons must exist and be proven to the satisfaction of the court.

The Servicemembers Civil Relief Act (SCRA) provides that military members may stay ("short-term delay") civil legal action against them. Military members whose duties prevent them from obtaining proper representation or materially affect their ability to appear in court may delay divorce proceedings under this coverage. This benefit normally applies to members on extended deployments or overseas assignments. *See* 50 U.S.C. app. § 522.

1. Can I get a divorce in Virginia?

In order for a military member or spouse to file for a divorce in Virginia, he/she must reside in Virginia for at least six months prior to filing for the divorce, or be a resident of the Commonwealth of Virginia.

2. Grounds for divorce.

To get a divorce in Virginia, there must be grounds, that is, there must be a reason why the court should grant the divorce. *See* Va. Code Ann. § 20-97. Without grounds, the court will not grant the divorce. There are five grounds for divorce in Virginia, some requiring waiting periods:

a. Adultery or Sodomy Outside Marriage. To be granted a divorce for adultery or sodomy outside the marriage, clear and convincing proof must be presented to show that the spouse did engage in sexual relations with another. If the guilty spouse can show that the other spouse "condoned" the adultery by voluntarily living with the guilty spouse after knowing of the adultery, divorce will not be granted on this ground. The adultery must have occurred within five years of the filing of the suit for divorce. Adultery committed after the couple is legally separated can be grounds for divorce. No waiting period is required before filing for divorce under this ground. *See* Va Code Ann. §§ 20-91(A)(1), 20-94.

b. Conviction of a Felony. If either spouse is convicted of a felony and is jailed on a sentence that exceeds one year, the other spouse may immediately seek a divorce so long as he/she has not lived with the guilty spouse after knowledge of the confinement. *See* Va Code Ann. § 20-91(A)(3).

c. Desertion and Cruelty. One year after a party has been guilty of cruelty, caused reasonable apprehension of bodily harm, or willfully deserted his/her spouse, a divorce may be immediately granted. *See* Va Code Ann. § 20-91(A)(6).

d. One-Year Separation. You may file for a divorce if you and your spouse have lived apart continually for one year without any cohabitation. If you get back together (even for one day) with the intent to reconcile, the time period will start over. *See* Va Code Ann. § 20-91(A)(9)(a).

e. Six-Month Separation. If you have no minor children born of the marriage, and live under a separation agreement for six months without cohabitation, a divorce will be granted. *See* Va Code Ann. § 20-91(A)(9)(a).

SECTION II: LEGAL SEPARATION

A "legal separation" is simply the term used to describe when spouses live apart, but with some legal action taken. The legal action is either a separation agreement or a decree of a court. Separated couples are still married, so all support obligations continue. Also, sexual relations with someone other than a spouse still constitute adultery. A "legal separation" is not required to get a divorce; only one of the specific grounds listed above is necessary to get a divorce.

1. Separation Agreements/Settlement Agreements

These agreements are contracts between the spouses that spell out the rights and responsibilities of each party during the separation and in the event of a divorce. The agreement should address all issues including child support, custody and visitation, spousal support, and division of marital property and debts. There are advantages to having a separation

agreement. The main advantage is that you will decide the terms of your separation and divorce. Without the agreement, the judge will decide the terms of your separation and divorce. **The attorneys at the Langley Law Center do not prepare separation agreements.** We recommend that you see a civilian attorney to ensure that all of your rights are protected.

SECTION III: PROPERTY DIVISION

Virginia is not a community property state, so marriage does not result in each spouse owning one-half of the other spouse's property. Instead, all property is classified as either "marital" or "separate" and the court will make an equitable distribution of marital property. The Court has no authority to order the division or transfer of separate or marital property which is not jointly owned except under limited circumstances. *See* Va. Code Ann. § 20-107.3.

1. Separate Property - *See* Va Code Ann. § 20-107.3 A1.

- a. All property acquired before the marriage;
- b. Property acquired by inheritance or gift (from a person other than the spouse); and
- c. Proceeds from the sale of separate property, so long as the property has been maintained separately.

2. Marital Property – *See* Va. Code Ann. § 20-107.3 A2.

- a. Property titled in both names; and
- b. Property acquired during the marriage which is not separate property. All property acquired during the marriage is presumed to be marital property unless there is a clear indication to the contrary. The classification of the property as marital does not necessarily mean that the parties have an equal interest in the property, just that the court may divide it.

If a valid separation agreement has been reached, the court will not divide the marital property. The parties, therefore, have the power to make all property division decisions in the separation agreement.

In dividing or "equitably distributing" the marital property, the court considers the following:

- (1) The contributions, both monetary and otherwise, of each spouse to the family;
- (2) The contributions, both monetary and otherwise, of each spouse to the acquisition and maintenance of marital property;
- (3) Duration of the marriage;

- (4) Ages & mental condition of parties;
- (5) Circumstances leading to the divorce;
- (6) How and when marital property acquired;
- (7) Debts of each spouse, when the debts were acquired, and what property secures the debts;
- (8) Liquidity;
- (9) Tax consequences to each party;
- (10) Use or dissipation of funds in anticipation of divorce;
- (11) Other necessary and appropriate factors.

SECTION IV: RETIREMENT PAY

In Virginia, retirement pay is always divisible regardless of how long the parties were married. There is no requirement, however, that retirement pay be divided. The court will look at the factors listed above to determine if retirement pay should be divided. If the marriage lasted ten years, and the ten years overlapped with ten years of creditable service toward retirement, the non-military spouse is eligible to receive his/her portion of the retirement pay directly from the Air Force. (Note: The Air Force can only directly pay 50% of a member's retired pay, so if your share exceeds that, the remaining money will come from the ex-spouse.)

SECTION V: SPOUSAL SUPPORT/ALIMONY

A spouse may get an award of support after the separation or divorce. The court will look to see who is at fault in the divorce, and will usually not grant support to a party at fault. If no party is at fault, the court will look at the following to determine whether to award support:

- a. Income and earning capacity of each party;
- b. Needs of each party;
- c. Standard of living established during the marriage;
- d. Age and condition of both parties;
- e. Contribution, monetary and otherwise, of each party to the family; and
- f. Other necessary and appropriate factors.

Note: The information in this handout is general in nature. It is not to be used as a substitute for legal advice from an attorney regarding individual situations.