

Financial Issues in Divorce in Virginia

The tension and anxiety of separation and divorce is increased by the uncertainty of the financial consequences of the dissolution of marriage. The roller coaster of emotions of people experiencing marital conflict is matched by the fear of the uncertain when it comes to money and finances. The purpose of this publication is to provide information on financial issues in divorce in Virginia.

The goal of Virginia's laws on financial issues in divorce is to promote fair and equitable results, by either agreement or court intervention, on all financial issues. The parties to a divorce should not base any financial decisions on emotion alone. All important financial decisions should be made with full disclosure by each party to the other of all assets, liabilities, and income. No agreement in writing should be completed and signed without benefit of professional advice, which may include advice of an attorney and/or a financial adviser such as an accountant.

This publication addresses the following financial issues: Equitable Division of Marital Property and Debts, Spousal Support, Child Support and Attorney Fees. These issues do not necessarily represent all issues related to the financial consequences of divorce in Virginia, but an understanding of each of these issues will go a long way in enabling one to make informed and appropriate decisions regarding important financial issues related to separation and divorce.

Equitable Division of Marital Property and Debts

Virginia is one of more than forty states that has adopted an equitable distribution law for dividing marital property and debts in divorce. Marriage is considered an economic partnership. To determine a fair division of marital property and debts Virginia law requires the following: that property and debts be classified as marital, separate or part marital and part separate; that marital property and debts be valued; and that such marital property or debts be equitably divided based on the statutory factors in Virginia Code Section 20-107.3.

Classification of Property:

Marital property is defined as all jointly-owned property and all other property, other than separate property, acquired from the date of the marriage to the date of separation. Typical examples of marital property are the marital home titled in the names of both

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spouses, or a retirement account accumulated during the marriage even if the account is only in the name of one spouse.

Separate property is all property acquired by either spouse before the marriage or all property acquired during the marriage by inheritance or by a gift from a source other than one's spouse. Typical examples of separate property are an automobile that was given to one of the spouses by a parent and titled in the name of the receiving spouse, an inheritance from a family member, and cash gifts from third parties but only if such gifts and inheritances are then maintained separately from other marital property. Gifts from one spouse to the other spouse such as jewelry are marital property.

The third category of property is property that is part marital and part separate. The application of the law to this category of property is often very complex. Some examples of property that is part marital and part separate include:

- a. Income received from separate property during the marriage provided such income is attributable to the personal efforts of either spouse. For example, if one spouse inherits a business prior to or during the marriage and either or both spouses work in the business producing income, such income may be marital property notwithstanding that the asset is separate property.
- b. The increase in value of separate property during the marriage may be marital property to the extent that marital property or the personal efforts of either party contributed to such increases. Any such personal efforts must be substantial, and result in significant appreciation. For example, if one spouse owned a business before the marriage, and during the marriage either party, through his or her personal efforts, caused the value of the business to increase substantially, the increase in value may be marital property.

Personal effort of either spouse is defined as labor, effort, inventiveness, physical or intellectual skill, creativity, or managerial, promotional, or marketing activity applied directly to the separate property of either spouse.

Where marital property and separate property are mixed together by either separate property receiving marital property or marital property receiving separate property, specific rules of classification apply. For example, one spouse receives an inheritance and deposits that inheritance to the family savings account. The marital property is receiving the separate property, so the inheritance becomes marital property. However, if the spouse who received the inheritance retraces the inheritance with bank records, etc., it may maintain its separate nature. Another example of mixed property would be a home purchased by the parties where one spouse used their separate assets to

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contribute to the purchase but the mortgage on the property is in both names and is paid off during the marriage with marital funds. In such a circumstance, the law provides the means to analyze what portion of the asset is marital and what portion is separate. Only the marital portion would be subject to equitable distribution.

Valuation:

Generally, the date of valuation of marital property or marital debts is the date of the evidentiary hearing or trial.

Retirement plans are an exception regarding the valuation date of marital property. The marital share of these plans is the contributions and earnings from the date of the marriage to the date of separation. Virginia law provides that the court can order that the non-employee spouse receive up to fifty percent of the marital share of any pension, profit-sharing or deferred compensation plan or retirement benefits. Typical examples of marital retirement accounts include company 401(K) plans or defined benefit plans such as those earned during service in the military or civil service.

Marital debts are another exception to the evidentiary hearing as the date of valuation. Such debts are valued as of the date of the separation. For example, post separation credit card charges are not marital debts unless the charges are related to some marital purpose.

The tools of valuation include real estate appraisal reports, income tax returns, Internet valuation of motor vehicles or boats, the financial page of periodicals for stocks, bonds and mutual funds, accountant opinions on the value of businesses and credit card statements. Gathering copies of these types of information is an excellent way to prepare for an initial meeting with an attorney.

Division of Marital Property and Debts:

The following factors are required to be considered in dividing marital property and debts:

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;

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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 certain grounds of divorce;
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 of dividing marital property;
10. The use or expenditure of marital property by either of the parties for 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.

Equitable division of marital property or debts does not automatically mean an equal division. The purpose of these factors is to enable the court to have criteria to determine how the property accumulated during the marital partnership should be fairly divided.

Spousal Support

I. What Is Spousal Support?

Spousal support is an amount of monetary support paid to the more financially dependent spouse and is based on a number of factors, including the need for and ability to pay spousal support, and the life style to which the parties became accustomed during the marriage. Section 20-107.1 of the *Virginia Code* governs spousal support. It is not designed to reimburse funds to one of the parties nor is it designed to punish a spouse. Spousal support is also different from property division, or “equitable distribution,” which is governed by section 20-107.3 of the *Virginia Code*. The terms “spousal support” and “alimony” (also “maintenance”) are generally used interchangeably.

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II. What Are the Types of Spousal Support?

Periodic payments for an undefined duration, periodic payments for a defined duration, and a lump sum award are the three basic types of spousal support. A court may fashion an award based on one of these three types of support, or it may fashion an award that is a combination of two or all of these types. While a court is authorized to award spousal support under the *Virginia Code*, parties may enter into agreements that provide for different combinations of spousal support, various payment methods, and longer or shorter durations of support. Parties may even agree that neither party will ever have to provide spousal support to the other. If they agree that one party will pay spousal support that a court cannot modify the amount in the future.

A. Periodic Payments for an Undefined Duration

A periodic payment for an undefined duration is a specific sum that an ex-spouse pays at designated intervals (*e.g.*, monthly). This type of spousal support is often referred to as “open-ended spousal support” or “permanent spousal support.” The grand total of this award is uncertain because the payments end upon death, remarriage, or further order of the court. A court is most likely to award this type of support in a marriage of a long duration or when the more financially dependent spouse has a limited ability to enter or re-enter the workforce.

B. Periodic Payments for a Defined Duration

This type of spousal support, also referred to as “rehabilitative spousal support,” is periodic but has a certain end date. For example, it could be awarded for five years payable in monthly installments. However, like spousal support for an undefined duration (see II.A. above), periodic payments for a defined duration can terminate before the end of the five-year period if the payee remarries, resides with a person analogous to marriage for more than one year, or if either spouse dies.

Rehabilitative spousal support is designed to help the payee spouse to become self-supporting. During the prescribed time period, the spouse receiving the spousal support may obtain employment if he or she has been out of the workforce, increase his or her income to a self-supporting level or get more education or training to become self-supporting.

The spousal support statute requires that an order entered by a court for periodic payments express the amount of support in fixed sums, and state the payment interval, the payment due date, and first payment date.

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In contested cases in the circuit courts, the statute requires that any order granting, reserving, or denying spousal support must contain the court's written findings and conclusions and must identify the statutory factors (set forth below) relied on. Orders of support for a defined duration must contain even more specific findings.

C. Lump Sum

In contrast to periodic payments, a lump sum award of spousal support is a set amount that is due when a court awards it. It can be paid all at once, or in installments but the total amount is known.

D. Reservation

In addition to or in place of awarding spousal support, a court can grant a "reservation" of the right to seek spousal support in the future. This reservation generally lasts half the length of the marriage. This is a "rebuttable presumption." Once granted, the length of the reservation cannot be changed.

E. Temporary Spousal Support

A court can also award temporary spousal support while a divorce suit is pending.

III. When Spousal Support Cannot Be Awarded

A court first determines whether the spouse seeking support is barred from getting it. For example, adultery is a bar to spousal support except when special findings are made. If denial of spousal support "would constitute a manifest injustice, based on the parties' respective degrees of fault during the marriage and the relative economic circumstances of the parties," a spouse who committed adultery could get it anyway.

IV. What Factors Does a Court Consider?

A court has broad discretion in determining whether a spouse should receive support. The *Virginia Code* does not provide a set formula for determining the amount of spousal support that courts can apply uniformly to each and every spousal support case. The *Virginia Code*, however, does provide numerous factors a court must consider, but only after it finds that spousal support is not barred.

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These factors include the following:

- ***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.*** A major factor that a court considers in setting spousal support is the payor spouse's ability to pay spousal support as compared to the payee's need for such support. For example, consider a spouse with the lower earning capacity who wants to pursue a master's degree so that she can earn additional income after the divorce. If both spouses earned approximately equal incomes during the marriage, then it is unlikely that a court would find need and award support. If, however, the higher earning spouse earned twice as much during the marriage as the spouse who now wants to go back to school, the court could award "spousal support for a defined duration," to help the lower earning spouse to obtain the degree.
- ***The standard of living established during the marriage.*** The Virginia Code requires the court to consider this factor, but often the standard of living established during the marriage cannot be maintained after a divorce. The reality is that establishing and maintaining two households is simply more costly than maintaining one.
- ***The duration of the marriage.*** A financially dependent spouse of a long-term marriage is more likely to receive an award of spousal support than one who has been in a short marriage.
- ***The age and physical and mental condition of the parties and any special circumstances of the family.***
- ***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.*** This factor addresses the situation, for example, of a family with a child who has special needs. If a parent is unable to work because of the time commitment required to attend to the special needs of that child, a court could factor this circumstance into its decision to award more spousal support to the caregiving parent.
- ***The monetary and nonmonetary contributions of each party to the well-being of the family.***
- ***The property interests, both real and personal, tangible and intangible.*** This factor, for example, could include income from a trust or from investments.

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- *The provisions made with regard to marital property under the divorce statute.* A court will not require a payee spouse to exhaust a large equitable distribution award just to keep the spousal support payor from having to pay. However, the court may consider the income earned from the property award and offset it against a spousal support award.
- *The earning capacity of the parties.* This factor includes the skills, education, and training of the parties and the present employment opportunities of the parties.
- *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.*
- *The decisions regarding employment, career, economics, education, and parenting arrangements that were made by the parties during the marriage, and their effect on present and future earning potential.* This factor includes the length of time one or both of the parties were absent from the job market.
- *The extent to which either party has contributed to the attainment of education, training, career position, or profession of the other party.*
- *Other factors, including tax consequences to each party, which are necessary to consider the equities between the parties.*

V. May a Court Modify the Spousal Support Award in the Future?

A court generally can increase, decrease, or terminate the amount or duration of spousal support if a party can show a change in circumstances. A number of factors influence such a decision. Virginia Code section 20-109 governs the modification of spousal support awards. A court, however, may not modify spousal support that was part of an agreement unless the agreement says there can be future modification.

VI. What Are The Tax Consequences of Spousal Support?

Generally, spousal support is deductible to the payor and taxable to the payee for federal and state income tax purposes.

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Child Support

In Virginia, judges must first calculate child support using a formula commonly referred to as the child support guidelines. In order for the judge to calculate child support, the judge will need to know each party's monthly gross income, any employment-related day care expenses for the child, and any monthly cost for health care premiums attributable to the child. The *Virginia Code* defines "gross income" as all income from all sources, and includes, but is not limited to, income from salaries, wages, commissions, royalties, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits (with some exceptions), workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, veterans' benefits, spousal support, rental income, gifts, prizes and awards. Some examples of income found in the case law include gifts from parents, inheritances, voluntary contributions to retirement plans and capital gains (after determining how much is actually income and not capital recoupment).

If either parent is self-employed, a partner in a partnership, or a principal in a closely held business, the judge may deduct from that gross income of the business reasonable business expenses and one-half of the self-employment taxes paid by that parent. If either parent has another child from a prior marriage or relationship, the court may give that parent an adjustment in the child support calculation. If there is an existing court order or a written agreement setting forth the amount of child support to be paid for that other child, that amount set forth in the order or agreement will be deducted from the parent's monthly gross income when calculating child support. If there is no order or written agreement in effect for that other child, the court may deduct from that parent's income the amount he or she would pay according to the schedule set forth in the Code of Virginia based on that parent's monthly gross income. If spousal support is paid by one parent to the other, it is included in the recipient's gross income and deducted from the payor's gross income.

Once the judge determines the gross income for both parties and applies any deductions, the judge must refer to the chart set forth in the child support guidelines statute to determine the basic support obligation for that child. To that amount, he adds the employment-related day care expenses for that child, and any monthly costs for health care and dental premiums attributable to the child. Having added all those figures together, the judge then allocates an amount of child support to the non-custodial parent proportional to that parent's share of the combined gross income. If the non-custodial parent provides the health insurance, that parent receives a deduction from their child support amount based upon the amount of that monthly health care premium. In addition, any reasonable and necessary medical or dental expenses of a

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child that are not covered by insurance and exceed \$250.00 per year for each child are to be shared by each parent proportional to their gross income.

There is a different calculation if a parent exceeds ninety (90) days of visitation per year. In order to use this calculation, the judge must know the number of days each party has custody/visitation. For purposes of this calculation, a day means a period of twenty-four (24) hours. However, if the parent with the least number of days has a period of time that includes an overnight but is not twenty-four (24) hours, that period shall be calculated as one-half of a day.

The amount of child support calculated pursuant to the guidelines is presumed to be correct. However, either parent may request that the court raise or lower that amount.

The factors that the court is to consider are as follows:

1. Actual monetary support for other family members or former family members;
2. Arrangements regarding custody of the children;
3. Imputed income to a party who is voluntarily unemployed or voluntarily under-employed; provided that income may not be imputed to the custodial parent when a child is not in school, child care services are not available and the costs of such child care services are not included in the computation, and the good faith and reasonableness of changes in employment made by a party;
4. Debts of either party arising from the marriage for the benefit of the child;
5. Direct payments ordered by the court for health care coverage, maintaining life insurance coverage (for the child), education expenses or other court ordered direct payments for the benefits of the child and costs related to the provision of health care coverage;
6. Extraordinary capital gains such as capital gains resulting from the sale of the marital abode;
7. Age, physical and mental condition of the child or children, including extraordinary medical or dental expenses, and child-care expenses;
8. Independent financial resources, if any, of the child or children;
9. Standard of living for the family established during the marriage;

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10. Earning capacity, obligations and needs, and financial resources of each parent;
11. Provisions made with regard to the marital property;
12. Tax consequences to the parties regarding claims for dependent children and child care expenses;
13. A written agreement between the parties which includes the amount of child support; A pendente lite decree, which includes the amount of child support, agreed to by both parties or by counsel for the parties; and
14. Such other factors, including tax consequences to each party, as are necessary to consider the equities for the parents and children.

The most common “deviation factor” is income “imputed” to a parent who is underemployed or unemployed. Usually, that deviation factor applies when a parent has had a voluntary reduction in income through changing professions or taking a lower-paying job. Also, the courts have imputed income to a parent who has chosen to have a child during a second marriage and stay at home to take care of that child. In addition, courts have also allowed for an upward deviation for private school when there has been evidence of the parent’s ability to pay and a history of the children being in private school before the separation.

The court has authority to determine which parent receives the dependency exemption for a child and the child tax credit for a child. If there is a child care expense related to the employment of the custodial parent, the amount of the child care is included in the guideline calculation. However, effective July 1, 2004, the amount of child care expense may be reduced by the amount of the tax benefit the custodial parent receives for the child care deduction.

Do I Need an Attorney? Who Pays My Attorney?

An attorney is not *required* in a divorce proceeding. However, the process can be complex. It may be advisable to have an attorney. At the very least, each spouse should have independent legal advice whenever he or she is involved in a divorce. One attorney cannot represent both parties because to do so would be a conflict of interest.

Where one spouse is without funds to pay attorney’s fees at the outset of the representation, and the other spouse has much greater earnings or has control of the bulk of the marital assets, the court may award temporary attorney fees and costs to be

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paid by the other spouse. How much is awarded depends on many factors including the complexity of the case, the disparity in income between spouses, and the assets available to pay fees.

At the conclusion of the case either party may request the court to order the other party to pay attorney's fees and other litigation costs. There are no statutory criteria or guidelines for determining the amount. The amount is discretionary with the judge. The criteria to determine the amount of attorney fees include the fault of either spouse in the divorce; the earning capacity of each spouse; the need for assistance with fees of the spouse requesting the award; the equitable distribution award that was made; how long the case took and whether one party caused any delay; how contentious the case was and whether one party was particularly contentious; the length of the marriage; and the amount of the attorney fees and costs for the party requesting an award.

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