



**COMMANDER**  
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## **2021 Family Law for Mediation**

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## I. Legal Process of Divorce

### Uncontested

- Complaint
- Acceptance of Service and Waiver
- Affidavits of Party and Witness (Witness no longer required effective July 1, 2021)
- Final Decree of Divorce

### Contested

- Complaint
- Answer/Counterclaim
- Answer to Counterclaim
- Pendente Lite Hearing/ Pendente Lite Order
- Final Hearing/ Final Decree of Divorce
- Appeal to Court of Appeals
- Appeal to Virginia Supreme Court

Note: Virginia has a sometimes confusing system of courts. Divorces are filed only in the Circuit Court. In divorce cases, the Circuit Court can adjudicate custody, visitation, child support, spousal support, property division, and attorney's fees.

There is a lower system of courts which share some, but not all, of the powers of the Circuit Court. For example, the Juvenile and Domestic Relations District Court cannot grant divorces or divide property, but it can enter Orders relating to custody, visitation, child support, and spousal support.

## **II. Types of Custody**

Legal and Physical Custody to one parent (“Full Custody”)

Joint Legal Custody with Physical Custody to one parent; visitation to the other

Shared Custody (can be equal sharing of time; Non-custodial parent has 90 or more days with the child)

Split Custody (each parent has at least one or more child)

NOTE: There are separate child support guidelines used in cases of shared custody and split custody.

Legal Custody = Decisions that are above and beyond routine matters. This would include elective medical treatment.

Physical Custody = Child’s primary residence.

### **III. Spousal Support**

A. Formula – Presumed to apply in Circuit Court Pendente Lite and Juvenile and Domestic Relations Court (JDR) spousal support cases.

- i. JDR – Virginia Code Section 16.1-278.17:1
- ii. Circuit Court – Virginia Code Section 20-107.1
- iii. For cases with no children, the formula is:  
27% of Payor’s monthly gross income minus 50% of Payee’s monthly gross income. This is a 2020 reduction from previous formula which was 30% of Payor’s gross income.

Example: Payor Monthly Gross Income - \$5,000/month  
Payee Monthly Gross Income - \$2,000/month

$\$1,350 - \$1,000 = \$350.00$  spousal support per month

- iv. For cases with children, the formula is:  
26% of the Payor’s monthly gross income minus 58% of Payee’s monthly gross income. This is a reduction of the prior 28% of the Payor’s monthly gross income, effective for cases filed after 7/1/2020.

Example: Payor Monthly Gross Income - \$5,000/month  
Payee Monthly Gross Income - \$2,000/month

$\$1,300 - \$1,160 = \$140.00$  per month

- v. The new amounts apply to cases filed after July 1, 2020.
- vi. The guidelines are only for cases below \$10,000 combined gross incomes.

- vii. The Court can deviate from the formula for good cause shown, including the impact of any tax considerations or the impact of tax exemptions/credits.
- viii. The guideline support amount is temporary and to the extent any inequity is later determined when considering the final award of spousal support, the amount can be adjusted retroactively per the recent Virginia Supreme Court case of Everett v. Tawes.
- ix. When using military pay, gross income includes both taxable and non-taxable pay (such as BAH) not just base pay.
- x. Actual overtime pay received is used in the calculation, even if it is not guaranteed.
- xi. Commission pay usually is averaged in a manner to provide the most accurate picture of the overall income.
- xii. Spousal support must be calculated before calculating child support because the spousal support is a deduction from the income of Payor and an addition to the income of Payee in running the Virginia Child Support Guidelines (Va. Code Section 20-108.2).

B. Divorce Spousal Support (Final) (Circuit Court)

- i. The Guidelines do not apply in a final award, and it is error for the trial court to rely on them in awarding final support.
- ii. The factors for the judge to consider (Virginia Code Section 20-107.1(E)) are:
  1. The obligations, needs and financial resources of the parties, including but not limited to income from all pension, profit sharing or retirement plans, of whatever nature;
  2. The standard of living established during the marriage;
  3. The duration of the marriage;
  4. The age and physical and mental condition of the parties and any special circumstances of the family;
  5. The extent to which the age, physical or mental condition or special circumstances of any child of the parties would make it appropriate that a party not seek employment outside of the home;
  6. The contributions, monetary and nonmonetary, of each party to the well-being of the family;
  7. The property interests of the parties, both real and personal, tangible and intangible;
  8. The provisions made with regard to the marital property under § 20-107.3;
  9. The earning capacity, including the skills, education and training of the parties and the present employment opportunities for persons possessing such earning capacity;
  10. The opportunity for, ability of, and the time and costs involved for a party to acquire the appropriate education, training and employment to obtain the skills needed to enhance his or her earning ability;
  11. The decisions regarding employment, career, economics, education and parenting arrangements made by the parties during the marriage and their effect on present and future

earning potential, including the length of time one or both of the parties have been absent from the job market;

12. The extent to which either party has contributed to the attainment of education, training, career position or profession of the other party; and

13. Such other factors, including the tax consequences to each party and the circumstances and factors that contributed to the dissolution, specifically including any ground for divorce, as are necessary to consider the equities between the parties.

### C. Reservation of Spousal Support

- i. Rather than awarding spousal support at the time of divorce, the parties may agree or the court may decide to reserve spousal support for later determination. This often happens when all of the other issues have been agreed upon, but spousal support remains in dispute. Rather than having a contested divorce trial on that single issue, support can be reserved. This also can be done when spousal support may not be appropriate at that time, but some future financial change may be expected to occur.
- ii. Effective July 1, 2020, Virginia Code Section 20-107.1(D) was amended and now provides that unless provided for by an agreement entered into after 7/1/20 or unless ordered by a court on or after 7/1/20, a party seeking spousal support after support was reserved “shall be required to prove a material change of circumstances as a prerequisite for the court to consider the exercise of such reservation.”
- iii. A provision can be added to an agreement which waives the “material change of circumstances” requirement.
- iv. There is a rebuttable presumption that the reservation of spousal support shall continue for a period equal to 50% of the length of the marriage from the date of marriage to the date of separation.
- v. The duration of the modification, if stated, cannot be modified.
- vi. A reservation of spousal support must be requested explicitly in the divorce complaint.

D. Imputation of Income

- i. If the court finds that either the Payor or Payee are voluntarily (by action or inaction) unemployed or underemployed, the court can impute to that party the income that they are found to be able to earn. The impact of COVID-19 on the imputation of income is unknown and probably depends on the industry involved.

This is why quitting your job or refusing available overtime will not avoid or reduce spousal support.

Retirement as a reason for altering or awarding spousal support was changed by statute in 2018. Prior to this, “work until you drop” was the general rule. Now when the Payor reaches full Social Security retirement age, this is considered a material change of circumstances. This does not guarantee a reduction or lower support amount, but it does get the issue in front of the court.

- ii. The new law - Virginia Code Section 20-107.1 (F) – requires that any Order granting or reserving spousal support must state whether retirement was considered or contemplated by the court in its decision and if so, how it considered it and the facts that the court contemplated.
- iii. Virginia Code Section 20-109 added new subdivisions (E), (F), and (G).
- iv. Subsection (E) provides that reaching the maximum Social Security age as defined by federal law will be considered to be a material change of circumstances.
- v. Subsection (F) provides that in spousal support modification proceedings, the Court “may” consider the factors set forth in Virginia Code Section 20-107.1. The subsection also adds additional factors: whether the retirement was contemplated, whether the retirement was mandatory, the current age and health of the parties, and the duration and amount of the support already paid. The assets of the parties also can be considered.

- vi. Subsection (G) provides that the court may consider the assets of both parties in all modification proceedings, not just those based on retirement. The court also is required to make written findings and conclusions.
- vii. Subsection (F) states that the retirement provisions of (E) and (F) apply to all cases, not just those after July 1, 2018.

#### E. Modification of Spousal Support

- i. Spousal support may be modified (eliminated, reduced or increased) based upon a material change of circumstances. This does not apply if the parties have contracted as to the amount of support and have not included a provision stating that no change shall be made.

The previous law provided that if there was no provision for the modification of a spousal support award in an Agreement, then it could not be modified by a court. The parties always could mutually agree to make a change.

Effective July 1, 2018, the law changed. Unless the Agreement states: “The amount or duration of spousal support contained in this Agreement is not modifiable except as specifically set forth in this Agreement,” - there can be a modification based upon a material change of circumstances. You must state that it is non-modifiable. This change only applies to Agreements executed after July 1, 2018.

- ii. Spousal support awarded by a judge, after hearing evidence, is always modifiable upon proof of a material change of circumstances which justify a change.

## **IV. Equitable Distribution**

Equitable distribution in the Virginia system in which property, both real and personal, tangible and intangible, is divided by the court in a divorce. This is not the same as in Community Property states which require a 50/50 equal division of assets. Courts in Virginia are allowed to use 50/50 as a starting point, but they are permitted to award an unequal, ultimate division should the equities so require.

To accomplish this, the court must first classify the property as either the separate property of one of the parties or as marital property or as part marital and part separate (hybrid).

The division of the property after classification is also governed by statute.

### **Definitions:**

“Separate” Property: Property that was owned by one of the parties prior to the marriage or that was received via gift or inheritance by one of the parties and was kept separate from the other party during the marriage. For example, Wife inherits \$10,000.00 upon the death of her mother. She places this in a bank account under her own name. Husband has no claim on this money in a divorce.

“Marital” Property: All property acquired by either party during the marriage, regardless of how it is owned or titled. For example, the marital residence is purchased and placed solely in Husband’s name. It is still marital property, and wife has a claim on the equity.

“Hybrid” Property: Property can be part marital and part separate.

### **Increases in Value after Marriage**

Increases in the value of separate property after marriage remain separate property if they are not attributable to the “personal efforts of either party”. Income from separate property also remains separate unless it results from marital property or personal efforts and then it is marital only in proportion to increase from such contributions. The personal efforts must be “significant and result in substantial appreciation of the separate property” to be considered marital. Personal effort is “labor, effort, inventiveness, physical, intellectual, skill, creativity or managerial, promotional or marketing activity applied directly to the separate property by either party.”

**Pensions**

- i. Pensions/Retirement are the most frequently seen hybrid (part marital/part separate property) Any portion earned before the marriage or after the final separation is separate property. The portion earned during the marriage is marital property. You will see the spouse's share expressed as the following formula:

$$50\% \times \frac{\text{\# months of marriage during service}}{\text{total \# months of service}}$$

- ii. The law recently has changed, so using old forms or Orders can jeopardize approval for payment by the Defense Finance and Accounting Service (DFAS) in military divorces. If a servicemember is still on active duty, the former spouse's share of the retirement is based on the member's high three pay for the preceding 36 months. An example of the appropriate language is:

“The Plaintiff (Former Spouse) shall receive as her share of Defendant's (Member's) military retirement 50% of the marital share of his disposable pay using the pay rate of Defendant (Member) retiring as an O-5 with "a retired pay base (high-3) of \$7,163.00 and with 20 years of creditable service on 1 Sep 09", together with applicable cost of living allowances. The marital share is computed by dividing the 232 months of marriage by the total months of service of Defendant (Member).”

- iii. An interesting provision of the new law is that time of marriage and service continues until the date of divorce instead of the date of separation previously used for the military and used for all other retirements.
- iv. The court cannot award more than 50% of a pension to the non-earning party.
- v. The court may order a party to designate a spouse or former spouse as the irrevocable beneficiary of a survivors benefit or annuity plan.
- vi. The so-called military “10 year rule” only applies to direct payment of the spouse's portion of the retirement from the finance center. A spouse is entitled to a portion of the retirement even if the marriage has not lasted 10 years.

### **How Can an Equitable Distribution Award Be Satisfied?**

The court can order the transfer of jointly owned property.

The court can order a monetary award, payable either in a lump sum or over time.

The court, through use of a Qualified Domestic Relations Order, can have tax deferred accounts transferred without penalty or interest payment between the parties.

If a party does not deal with equitable distribution of property (either by making disposition or reserving the issue for later determination), the case cannot be reopened at a subsequent time to request an award.

### **What Factors Does A Court Consider In Equitable Distribution ?**

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

The court does not consider spousal support in making the property division. Instead, it makes the property division first and then uses the property division as a consideration in awarding spousal support. Spousal support is then considered in awarding child support.

### **What About Debt?**

#### *Definitions:*

- Separate debt is (i) all debt incurred by either party before marriage, (ii) all debt incurred by either party after the date of the last separation of the parties, if at such time of thereafter at least one of the parties intends that the separation be permanent, and (iii) the part of any debt classified as separate pursuant to subdivision A 5. However, to the extent that a party can show by a preponderance of the evidence that the debt was incurred for the benefit of the marriage or family, the court may designate the debt as marital.
- Marital debt is (i) all debt incurred in the joint names of the parties before the date of the last separation of the parties, if at such a time of thereafter at least one of the parties intends that the separation be permanent, whether incurred before or after the date of the marriage, and (ii) all debt incurred in either party's name after the date of the marriage and before the date of the last separation of the parties, if at such a time of thereafter at least one of the parties intends that the separation be permanent. However, to the extent that a party can show by preponderance of the evidence that the debt, or portion thereof, was incurred, or the proceeds secured by incurring the debt were used, in whole or in part, for a nonmarital purpose, the court may designate the entire debt as separate or a portion of the debt as marital and a portion of the debt as separate.

The court has the authority to order the transfer or appointment of debt, just as it does assets.

The downside is that the court's ruling is not binding on third party creditors who still may pursue collection against both parties.

**WARNING:** This is a very general overview of some of the Family Law issues that may arise in mediation. If a true legal question arises, the party should be directed to speak with an attorney.

This is to give you a “feel” for the law and also to show you that there are many complexities and possible pitfalls. You are not now competent to practice family law nor would you want to be.