

The Firm For Men  
Swango Law, P.C.



# **A DIVORCE OVERVIEW BOOK FOR MEN**

BY: Jason Swango, Esq.





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If you are seeking a divorce, it is recommended that you find an attorney who specializes in domestic relations law, preferably divorce law. It is typical that people do not have knowledge of the law on divorce in their area so it is imperative that you find a lawyer that does.

At **The Firm For Men, Swango Law P.C.**, we have extensive experience representing men in cases involving contested divorce, uncontested divorce, military divorce, and all related matters.

***\*See Jason Swango for a free initial consultation and for further questions and concerns. This E-Book is meant to provide information only and shall not be construed as legal advice whatsoever. Please consult Attorney Swango regarding any questions you may have as a result of this publication.***

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## **The Information Provided Should Give You a Basis for Divorce Law in Virginia.**

### **RESIDENT REQUIREMENT AND JURISDICTION**

At least one of the parties must have been for at least six months prior to filing for divorce, both an actual bona fide resident and a domiciliary of Virginia.<sup>1</sup> In determining what type of jurisdiction the court will need to have in order to hear the divorce case, the party must first determine what type of relief is sought. If a declaration that the marriage has ended is the only thing the party desires, then in rem jurisdiction would be sufficient. In rem jurisdiction is jurisdiction over a “res” located or deemed to be located in Virginia. If a monetary judgment is sought as relief, the court will need in personam jurisdiction, which is jurisdiction over a particular defendant.



When the court exercises in rem jurisdiction, the only thing one must do is provide adequate notice to the defendant. This could mean that notice by publication is sufficient. In personam jurisdiction is not as easy. In order to exercise in personam jurisdiction, the court must be satisfied that the proper means of service of process have been used on the defendant. If not, the defendant must have properly waived service of process for the court to continue.

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<sup>1</sup> Va. Code § 20-97.



## PLEADINGS AND SERVICE OF PROCESS



The first thing that needs to be done is the attorney needs to prepare and file a pleading. This pleading, or complaint, is what commences the lawsuit.<sup>2</sup> Second, the complaint is filed with the clerk. After the writ tax and the clerk's filing fees are paid, the clerk will issue "process" which is also called the "summons" in a divorce suit.<sup>3</sup> The clerk will then attach the summons to the complaint and when those papers are served on the defendant, "service of process" is accomplished.

### How Service of Process Is Made

The Virginia Code sets forth several ways that service of process can be made on Virginia residents. The first way that **MUST** be attempted is personal service. This is made when the papers are actually "served" in person to the party at her "usual place of abode."<sup>4</sup>

If personal service to the defendant is not feasible, substituted service may be made by giving a copy of the summons, complaint, and any other necessary information to a family member who is 16 years of age or older and is found at the defendant's "usual place of abode."<sup>5</sup> If neither of these delivery methods is possible, posting a copy of both the summons and complaint at the defendant's front door may make service.<sup>6</sup> The return of service must reflect that these methods were attempted in the proper order; (1) personal service on defendant, (2) substituted service to another family member, and (3) a copy posted on defendant's front door.

If the plaintiff had to use the last delivery method of posting on the defendant's front door, counsel may be required to mail a copy of the process to the defendant and file a certificate of mailing with the court clerk. The plaintiff has 10 days to do this before "judgment by default may be entered."<sup>7</sup>

If the divorce is expected to be uncontested, a notice of the evidentiary hearing should be included with the complaint and summons when it is served on the defendant.<sup>8</sup> No further notice must be given if the defendant does not file an answer, but if she does, the plaintiff must give



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<sup>2</sup> Va. R. 3:2(a).

<sup>3</sup> Va. R. 3:5.

<sup>4</sup> Va. Code § 8.01-296(1).

<sup>5</sup> Va. Code § 8.01-296(2)(a).

<sup>6</sup> Va. Code § 8.01-296(2)(b).

<sup>7</sup> *Id.*

<sup>8</sup> *See Mackey v. Mackey*, 203 Va. 526, 125 S.E.2d 194 (1962).



notice of all subsequent filings in the suit. Subsequent filings could include depositions, any hearing scheduled, and notice of entry of the final decree.

### Who Makes Service of Process



A sheriff or any person 18 years of age or older and who is not a party to the suit may serve process on the defendant.<sup>9</sup> They also must have no interest in the divorce suit to serve. If it is the sheriff, the proof of service must be made in accordance with the Rules of the Supreme Court of Virginia. If a private individual makes service, that person must file an affidavit, which states the person's qualifications. The qualifications that must be stated are the server's name, address, and phone number. In addition, the date and manner of the service must be stated. The affidavit must also be in accordance with the Virginia Code.

### Acceptance or Waiver of Service of Process

There are different ways to accept service of process. One way a defendant may voluntarily accept service of process is by signing the proof of service before an authorized officer. Another way a party may voluntarily accept service is by executing a notarized writing specifying intent to accept a particular process. A party may also voluntarily waive service of process. She can do this by executing a notarized writing specifying intent to waive any particular process.

If the defendant complies with any of these three methods than it is legally the same as if an authorized person has personally served the process on the defendant. Unless a defendant has filed an answer, a court may then enter any order or decree without further notice.

The plaintiff may request that the defendant waive service of process when he notifies the defendant of the commencement of the divorce suit. The complaint can be sent along with a notice that incorporates the request for waiver. It will also provide information about the consequences if the defendant does not comply with the request. Plaintiff should use the form provided from the Office of the Executive Secretary of the Supreme Court of Virginia to accompany the complaint.

It is important to note that it is the defendant's duty to avoid unnecessary costs of serving process and if she fails to comply with a request for waiver without good cause, the court will impose the costs incurred from serving process on her. (Cautioned should be used by Counsel when deciding whether to use this service of process procedure)

*\*See Jason Swango for more information on waiver of service of process procedures.*



## Service of Process Must Be Made Within 12 Months.<sup>10</sup>

### Special Parties

Special service of process procedures must be followed for special parties.<sup>11</sup> For people with disabilities, service must be both on the person “under the disability” and on the person’s court-appointed guardian.<sup>12</sup> Service on a prisoner is made to an officer in charge of the jail and also the prisoner’s guardian.<sup>13</sup>

## OUT OF STATE RESIDENTS

### Obtaining Personal Jurisdiction

The requirements of Virginia’s long arm statute must be satisfied if a person wants to obtain personal jurisdiction over a defendant who is a nonresident.<sup>14</sup> However, personal service may be made on a nonresident if she is found within Virginia, but this is usually not the case.<sup>15</sup> Service of process will usually take place outside of Virginia and will only be valid if the defendant comes within the terms of the Virginia long-arm statute. In order for the defendant to come within the terms, the plaintiff must allege in the complaint that a minimum connection between Virginia and the defendant exists.<sup>16</sup>



The Virginia long-arm statute permits a Virginia court to exercise personal jurisdiction over a nonresident defendant if the defendant has executed an agreement in Virginia to pay spousal or child support to a domiciliary of Virginia. Personal jurisdiction is also permitted when the defendant has been ordered to pay spousal or child support by a Virginia court having personal jurisdiction over the person. Another

1-275.1; Va. R. 3:5(e).

10 Va. Code § 8.01-2.

<sup>12</sup> Va. R. 3:5(c); Va. Code § 8.01-9.

<sup>13</sup> Va. Code § 8.01-297.

<sup>14</sup> Va. Code § 8.01-328.1.

<sup>15</sup> *Ragouzis v. Ragouzis*, 10 Va. App. 312, 391 S.E.2d 607 (1990).

<sup>16</sup> *Cabaniss v. Cabaniss*, 46 Va. App. 595, 620 S.E.2d 559 (2005); *Price v. Price*, 17 Va. App. 105, 435 S.E.2d 652 (1993).



way personal jurisdiction is permitted is if the defendant has conceived or fathered a child in Virginia, which constitutes personal conduct.<sup>17</sup> The court may also exercise personal jurisdiction over a nonresident who has maintained a matrimonial domicile in Virginia.<sup>18</sup>

### **Methods of Service of Process**

Obtaining jurisdiction over a person who has executed an agreement in Virginia<sup>19</sup> requires service of process by either a law enforcement officer or any authorized person in the jurisdiction where party is located. In order to exercise in personam jurisdiction, personal service must be accomplished. The party should obtain the papers that are to be served from the clerk in that jurisdiction. In an uncontested divorce suit, a notice of depositions or other relevant information notifying the defendant when evidence will be presented should accompany the complaint and summons. The deposition or hearing should be scheduled in advance so as to give enough time to get the documents from the attorney to the defendant, and to allow an additional 21 days for the defendant to file a responsive pleading before the hearing.

Waiving the service of process is the same for nonresidents as it is for residents.

\*See Jason Swango for more information on waiver of service of process.

## **IN REM JURISDICTION**

### **Virginia Residents – Service By Publication**

Parties should be given the best possible notice of a lawsuit under the circumstances.<sup>20</sup> When the defendant's whereabouts are unknown but is believed to reside in Virginia, the plaintiff may go forward without obtaining personal jurisdiction by publishing notice of the proceeding.

The court may order publication for two reasons. First, publication may be necessary if the plaintiff has made diligent efforts to locate the defendant. A diligent effort means a devoted and painstaking application to accomplish an undertaking. Publication may be used when those efforts have been unsuccessful and the location of the defendant remains unknown. The second reason publication may be ordered is when the last known residence of the defendant was in the jurisdiction in which service of process was sought, and the sheriff has filed a return of service. The return of service must state that the process has been in the sheriff's hands for 21 days and that service of process has been unable to be made.<sup>21</sup>

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<sup>17</sup> Va. Code § 8.01-328.1(A)(8).

<sup>18</sup> Va. Code § 8.01-328.1(A)(9).

<sup>19</sup> Va. Code § 8.01-328.1(A)(8)(i).

<sup>20</sup> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Hayes v. Hayes*, 3 Va. App. 499, 351 S.E.2d 590 (1986).

<sup>21</sup> Va. Code § 8.01-316.



A request for an order of publication must be supported by an affidavit specifying the basis for the request. The affidavit must state, if known, the last post office address of the defendant or plaintiff must state that it is unknown.<sup>22</sup> The court clerk will then enter the order for publication<sup>23</sup>, which will state the object of the suit.<sup>24</sup> It will also require the defendant to appear and defend her interests on or before a certain date. The date will be provided by the publication, but it can be no sooner than 50 days after entry of the publication.<sup>25</sup>

The order of publication is then published once each week for four successive weeks in a newspaper prescribed by the court. The order must also be posted at the front door of the courthouse, and a copy of the order must be mailed to the defendant at the defendant's last known address.<sup>26</sup> The clerk is usually responsible for doing those three things within 20 days after entry of the order. The clerk will then file a certificate in the court's file stating the publication requirements have been completed.<sup>27</sup> The plaintiff usually bears the significant expense of publication but the court can assess this cost against the defendant if it is requested along with other types of relief in the complaint.<sup>28</sup>



If the defendant fails to appear, further notice is not required unless the court orders it.<sup>29</sup> If she does appear, the court can decree the marriage has ended by divorce along with other matters such as child custody and visitation but only the divorce is enforceable under in rem jurisdiction if personal jurisdiction is required.

### **Out of State Residents – Not Subject to Long-Arm Jurisdiction**

If plaintiff knows the address of the defendant, he may choose to serve her personally since it is cheaper than publication and is more likely to provide notice to the defendant. If the defendant is not subject to Virginia's long-arm statutes, the effects of personal service will be the same as publication, which is only in rem jurisdiction.<sup>30</sup>

Personal service of process on a nonresident may be made by any person authorized to serve process in that jurisdiction where the party to be served is located, or any person 18 years of age or older who is not a party or interested in the subject matter of the suit.

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<sup>22</sup> Va. Code § 8.01-316(A)(3).

<sup>23</sup> Va. Code § 8.01-316.

<sup>24</sup> Va. Code § 8.01-317.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Va. Code § 8.01-316(B).

<sup>29</sup> *See Mackey v. Mackey*, 203 Va. 526, 125 S.E.2d 194 (1962).

<sup>30</sup> Va. Code § 8.01-320.



## Venue

The preferred venue in a divorce suit is in the jurisdiction where the husband and wife last cohabitated, or at the option of the plaintiff, where the defendant resides (if the defendant is a resident of Virginia). If publication is ordered against the defendant, venue is also proper where the plaintiff resides.

An objection to venue must be made by motion of the defendant within 21 days after service of process, unless the court orders otherwise. Failure to object constitutes a waiver of one's objection to improper venue. When an objection is made, it must state where venue would be proper. If granted, the court must transfer the case to the proper venue and notify each party of the transfer. The court may also award costs and attorney's fees.<sup>31</sup>

A court may transfer a suit not filed in a preferred venue on its own motion. The court must give notice to all parties, and the transfer should be implemented within 60 days after service of process on all parties.<sup>32</sup>

## SPECIAL PARTIES

### Person Under a Disability

Virginia Code section 8.01-2 includes the following persons as a "person under a disability" in civil actions:

1. A person convicted of a felony during the period of confinement;
2. A person under the age of 18 years;
3. An incapacitated person as defined in section 37.2-1000;
4. An incompetent ex-service person under section 37.2-1011; or
5. Any other person who, upon motion by any party to an action, is found to be, (i) incapable of taking proper care of his person, (ii) incapable of properly handling or managing his estate; (iii) otherwise unable to defend his person or property because of age or temporary or permanent impairment, which impairment may be physical or mental impairment caused by substance abuse.

### Appointment of Guardian

When a person under a disability is a defendant in a suit, the court appoints "a competent and competent attorney-at-law" as the guardian ad litem for the defendant.<sup>33</sup> If the plaintiff knows that the defendant is a person under a disability, counsel for the plaintiff can allege that fact in the complaint and request appointment of a guardian ad litem in the prayer for relief. If it is not made there, counsel will have to file a separate motion for the appointment of a guardian ad litem. If the person under a disability

<sup>31</sup> Va. Code § 8.01-264, -266.

<sup>32</sup> Va. Code § 8.01-264.

<sup>33</sup> Va. Code § 8.01-9.



is represented by an attorney-at-law who is counsel of record, the court is not required to appoint a guardian ad litem unless the interest of justice requires it. In addition, a guardian ad litem is not responsible for the costs of the suit. The court may allow reasonable compensation, usually paid by the defendant, to the guardian ad litem if they have rendered substantial service in representing the interests of the person under a disability.

### Service of Process and Notice

Service of process should be made on the person under the disability and the guardian ad litem.<sup>34</sup> If the person under the disability is an incarcerated person, service must also be made on the officer in charge of the jail or institution.<sup>35</sup> Prisoners may also need a court appointed committee if he is sued after conviction and while incarcerated. Unless there is a request to determine property rights,<sup>36</sup> a committee is not required to establish that the prisoner is the parent of a child or to establish a prisoner's child support obligation.<sup>37</sup>

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### PRO BONO LEGAL ASSISTANCE

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Virginia assist people problems by services free divorce suits, still have to fees, costs that may instances

where publication or a guardian is needed. In addition, the court has the authority to waive filing fees and costs if it is requested. However, the court lacks the authority to order a private newspaper to waive its fees if service by publication is needed. In these cases, counsel should request the court to only order publication by requiring posting of the notice at the front door of the courthouse and for the notice to be mailed to the defendant's last known address.

<sup>34</sup> Va. R. 3:5(c).

<sup>35</sup> Va. Code § 8.01-297.

<sup>36</sup> Va. Code § 53.1-223.

<sup>37</sup> *Id.*



If a guardian is needed for a person under a disability and there are no funds in the defendant's estate, the court may assess the costs against the plaintiff. If the plaintiff is indigent, there is no ability to pay the fees of the attorney who has served as the guardian ad litem. If the divorce suit involves an incarcerated felon who has committed crimes against the spouse or children, the court may order the commonwealth to pay compensation and then tax the incarcerated felon.<sup>38</sup> If the suit does not involve an incarcerated person, one should try to locate an attorney who is willing to accept appointment as a guardian ad litem on a pro bono basis.

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## DIVORCE FROM BED AND BOARD

### Grounds

A divorce from "bed and board" can only be awarded to the plaintiff when the defendant has deserted or been cruel to the plaintiff.<sup>39</sup> Cruelty or a "reasonable apprehension of bodily harm" is defined as acts of physical violence and conduct that endangers the life, safety or health of the plaintiff.<sup>40</sup> For desertion or "willful desertion or abandonment," there must be proof of both (i) the actual breaking off of matrimonial cohabitation and (ii) an intent to desert in the mind of the offender.

There is no waiting period that must be satisfied in order for the court to grant the divorce, but a final decree cannot be granted until a period of one year from the date of the acts complained of has passed.<sup>41</sup>

### Disadvantages

In contrast to separation, a divorce on bed and board can only be granted upon the "fault ground" of cruelty or desertion. This tends to aggravate a relationship even more than it already is. Almost all

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<sup>38</sup> Va. Code § 8.01-9(A).

<sup>39</sup> Va. Code § 20-95.

<sup>40</sup> See, e.g., *Sollie v. Sollie*, 202 Va. 855, 120 S.E.2d 281 (1961); *Hudgins v. Hudgins*, 181 Va. 81, 23 S.E. 2d 774 (1943).

<sup>41</sup> Va. Code § 20-91(A)(6).



divorces will involve a period of time when the husband and wife have a difficult time communicating but with the passage of time, they usually are able to resolve issues such as child support and visitation. However, when “fault grounds” exist, it can take much longer to reach a point where their communication returns to a level where they’re able to resolve those issues.

There is an increased likelihood of counterclaims from the defendant when the relationship is aggravated because she may disagree that she is to blame for the failure of the marriage. In addition, bringing a divorce suit on “fault grounds” almost always costs more time and money than one based on a mutual separation. A great deal of time will be needed to provide counsel with enough facts to verify the allegations. Allegations will then need to be supported by interviewing any witnesses and possibly reviewing medical records and other evidence.

## **Advantages**

There are a number of reasons to consider a divorce from bed and board. One advantage is that there is no waiting time. A plaintiff may commence an action seeking a divorce from bed and board as soon as the grounds exist. Therefore, the plaintiff will not have to wait the required separation time to commence the suit. Although, counsel will still need time to conduct an investigation and acquire evidence, and the final decree cannot be granted until one year following the cruelty or desertion.

Another advantage is that the court may obtain personal jurisdiction over the defendant as soon as possible. This is important if the defendant wishes to leave Virginia because if she does, she may not be subject to personal jurisdiction under Virginia’s long-arm statute. Therefore, the court will be able to grant relief that may otherwise be unavailable if the suit is commenced earlier and the defendant is personally served before leaving Virginia.

A juvenile, domestic relations or circuit court may have to solve some hard to resolve issues, such as child custody and visitation. This brings advantages because more complete discovery is available in these courts. In addition, the circuit court does not require counsel to seek permission before commencing discovery. Witnesses are benefited as well because they will not have to testify twice if the suit is first heard in circuit court. This is because if it starts in juvenile and domestic relations district court, the case may need to be heard again in circuit court on appeal.

Another advantage is that a decree of divorce from bed and board will constitute a “divorce decree,” for tax purposes. Maintenance payments made by the payor spouse will generally be deductible from the gross income of that spouse as long as other requirements of the Internal Revenue Code are satisfied.

A divorce from bed and board also has some property effects. The court may decree, “that the parties be perpetually separated and protected in their persons and property.” If the court does so, that decree would operate just as a final decree of divorce, in that it will operate upon any property of the parties.<sup>42</sup> The equitable distribution statute presumes that property acquired by either spouse after the date of their separation is “separate property.” However, a decree of divorce from bed and board may provide more certain effects than the presumption available in the equitable distribution statute.

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<sup>42</sup> Va. Code § 20-116.



Finally, if obtaining a final decree of divorce is contrary to the religious beliefs of a couple, they can get a decree from bed and board which will maintain the marital status while affecting personal and property rights like a final decree of divorce.

### **Legal Effects**

A granting of a divorce from bed and board does not disintegrate the marital relationship. It is only after a final decree of divorce has been granted that the parties are completely dissolved. When the court decrees that the parties be “perpetually separated and protected in their persons and property,” the decree operates upon any property thereafter acquired and upon the personal rights and legal capacities of the parties just a decree for divorce would. However, if the circumstances change and the parties decide they do not want to divorce, the parties retain the ability to revoke their decree of divorce from bed and board. To do this, both parties must endorse a consent order, and it must be submitted to the same court that entered it.

### **Pleadings**

The jurisdiction of a court is dependant upon the facts that are pled.<sup>43</sup> The facts must be stated in such a way as to “clearly inform the opposite party of the true nature of the claim or defense.”<sup>44</sup> Facts must be alleged in the complaint or they are not properly an issue.<sup>45</sup> As a general rule, pleadings do not need to be verified. However, to verify, the plaintiff need only swear that the statements made in the complaint are true. The need for stronger verification may arise if the plaintiff seeks relief ex parte. Before granting relief, the court should cross-examine and investigate the facts.<sup>46</sup>

### **Confidential Information and Separate Addenda**



The Virginia Code prohibits the disclosure of certain information in documents filed with the court to prevent identity theft. Documents that cannot contain confidential information include petitions, pleadings, motions, agreements of the parties, transcripts, order of decrees, affirmation, and annulment. The clerk has explicit authority to reject documents that failed to comply with the statute.<sup>47</sup>

A separate addendum may be filed with the court and incorporated by reference in

<sup>43</sup> *Dobbs v. Dobbs*, 150 Va. 386, 143 S.E. 702 (1928).

<sup>44</sup> Va. R. 1;4(d).

<sup>45</sup> *Harris v. Deal*, 189 Va. 675, 54 S.E.2d 161 (1949).

<sup>46</sup> Canon of Judicial Conduct 3(B)(7).

<sup>47</sup> Under section 16.1-241(A)(3) or (L), these privacy protections apply in those actions.



the above stated documents to safeguard confidential information that is required by law to be provided. This information may include things like Social Security numbers on child support orders.

### **Relief Available**

A circuit court can grant a variety of forms of temporary relief, or “pendente lite relief” while the divorce suit is pending. The court may make an order to accomplish the following:

1. To compel a spouse to pay any sums necessary for the maintenance and support of the petitioning spouse;
2. To enable a spouse to carry on the suit;
3. To prevent either spouse from imposing any restraint on the personal liberty of the other spouse.
4. To provide for the custody and maintenance of the minor children of the parties;
5. To provide support for any child of the parties to whom a duty of support is owed and to continue to support any child over the age of 18 who meets the requirements set forth in the Virginia Code;
6. For the exclusive use and possession of the family residence during the pendency of the suit;
7. To preserve the estate of either spouse so that it will be forthcoming to meet any decree, which may be made in the suit;<sup>48</sup> and
8. To compel either spouse to give security to abide by such decree.

The court can also enter an order excluding a party’s family or household member from the jointly owned or jointly rented family dwelling upon a showing of reasonable apprehension of physical harm.

Parties to any petition where a child’s custody, visitation, or support is contested must attend an educational seminar or program approved by the court that relates to the effects of separation and divorce on minor children, parenting responsibilities, options for conflict resolution, and financial responsibilities. The program, once approved by the court, may charge a fee of up to \$50, depending on the party’s ability to pay. Statements made by parties when in the seminar will be held to be confidential except if the statements admit to criminal activity, child abuse, or child neglect.<sup>49</sup>

### **Procedure**

If the plaintiff knows that pendente lite relief will be needed at the onset of the divorce suit, he may want to ask for it in the complaint. If the plaintiff does not know, the need for pendente lite relief may become apparent after the complaint has been filed. In other cases, the need may develop for a particular type of pendente lite relief.

If the court grants the variety of types of relief allowed, counsel will draft a lengthy pendente lite order. A pendente lite order has no presumptive effect on the determination made by the court in its final

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<sup>48</sup> See *Buchanan v. Buchanan*, 266 Va. 207, 585 S.E.2d 533 (2003); see also *Estate of Hackler v. Hackler*, 44 Va. App. 51, 602 S.E.2d 426 (2004).

<sup>49</sup> Va. Code § 20-103(A).



decree. It will remain in effect as long as the suit is pending and final decree has not yet been entered. If the divorce suit is dismissed, any pendente lite order entered while the suit was pending will abate.<sup>50</sup>

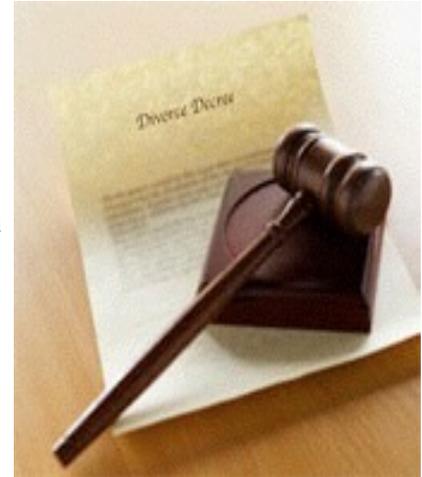
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## FINAL DIVORCE

### Grounds

The grounds for a final divorce are:

1. A separation of six months, if the parties have no minor children and have entered into a separation agreement;<sup>51</sup>
2. A separation of 12 months;<sup>52</sup>
3. Adultery;<sup>53</sup>
4. Felony conviction and confinement in excess of one year;<sup>54</sup>
5. Cruelty or causing “reasonable apprehension of bodily hurt” after a period of one year from the date of the acts;<sup>55</sup> and
6. Willful desertion or abandonment after a period of one year from the date of the act.<sup>56</sup>



### Pleading and Complaint

The jurisdiction of a court to grant a divorce is dependant upon the facts that are pled. Every pleading should state the essential facts, which will inform the opposite party of the “true nature of the claim or defense.” Allegations of legal conclusions are insufficient. A complaint for divorce should include specific factual allegations.

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<sup>50</sup> Va. Code § 20-79.

<sup>51</sup> Va. Code § 20-91(A)(9).

<sup>52</sup> *Id.*

<sup>53</sup> Va. Code § 20-91(A)(1).

<sup>54</sup> Va. Code § 20-91(A)(3).

<sup>55</sup> Va. Code § 20-91(A)(6).

<sup>56</sup> *Id.*

<sup>57</sup> *White v. White*, 121 Va. 244, 92 S.E. 811 (1917); *Miller v. Miller*, 92 Va. 196, 23 S.E. 232 (1895).



Circumstances should be set forth so that the defendant will be able to respond to the charge.<sup>57</sup> Furthermore, the court cannot grant relief concerning an issue that was not pled. Counsel should not rely on a general claim but should plead a claim for each type of relief sought.<sup>58</sup> See \*Jason Swango, Esq. for examples of factual allegations.

It is best to plead the essential facts in support of each claim. Some claims, however, will be heard even when raised in the form of a request for relief. These claims may concern:

1. Child custody and visitation;
2. Child support;
3. Spousal support, maintenance or alimony (or a reservation of jurisdiction to award support in the future);
4. Equitable distribution of property and other relief under section 20-107.3; and
5. Change of name to maiden or former name.

### **Prayer for Relief**

Counsel for the plaintiff should ask the court to grant each different form of relief in the prayer for relief. If a specific request is not pled, it will keep the court from obtaining jurisdiction over that subject matter.

A modern interpretation of pleading allows relief to be granted as long as sufficient allegations of fact have been pleaded to support relief, even when the relief granted is different from the relief requested.<sup>59</sup>

### **Answer**

In response to the plaintiff's complaint, the defendant may provide his or her version of the events by admitting, denying, and alleging facts. The defendant may also plead facts, which may set a defense to the plaintiff's claim. The answer will help to narrow the factual issues in the case. The defendant should respond to every material part of the complaint. An allegation of fact set forth in the adverse party's pleading is considered to be admitted if not denied.<sup>60</sup>

The defendant's answer, or response, is due before the defendant is in "default."<sup>61</sup> Default is when the defendant has not filed a pleading and one of three things has occurred:

1. More than 21 days have elapsed after due service of a summons and complaint in Virginia or due service outside of Virginia;

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<sup>58</sup> See *Wilson v. Wilson*, 25 Va. App. 752, 492 S.E.2d 495 (1997); *Reid v. Reid*, 24 Va. App. 146, 480 S.E.2d 771 (1997).

<sup>59</sup> *Johnson v. Buzzard Island Shooting Club, Inc.*, 232 Va. 32, 348 S.E.2d 220 (1986).

<sup>60</sup> Va. R. 1:4(e).

<sup>61</sup> Va. R. 3:19.



2. If service of the summons has been waived and 60 days have elapsed after that date when the request for waiver was sent or 90 days have elapsed after that date if the defendant's address is outside the commonwealth; or
3. The period within which the defendant may appear to protect interest as specified in an order of publication duly executed has elapsed.<sup>62</sup>

Defendant must file an answer within 21 days after entry of an order, which overrules all motions, demurrers, and other pleas filed by the defendant from the court.<sup>63</sup>

### **Available Relief**

Defendants usually request to dismiss the plaintiff's complaint and allow the defendant to recover costs expended in the suit as relief. However in divorce suits, the defendant can seek more relief from the trial court than just that. For instance they may seek dismissal as well as asking the court to determine issues such as spousal support, child custody, visitation, and child support. Circuit courts can even grant these things if they do not grant the divorce.<sup>64</sup>

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## **DEFENSES**

The granting of a divorce can be barred by a variety of procedural defects and doctrines. Some of the ways a divorce can be barred are as followed:

1. The court may lack jurisdiction, and divorce may be barred if no valid marriage can be proven in cases where jurisdiction does exist.
2. A statute of limitations of five years may bar a divorce on the ground of adultery.<sup>65</sup>
3. The doctrine of res judicata (Latin for "a matter already judged") may bar a fault-based divorce. This is when there has been a final judgment and the case is no longer subject to appeal. The term is also used to refer to the doctrine meant to bar re-litigation of such cases between the same parties.<sup>66</sup>
4. Even after a divorce has been granted, the judgment may be attacked based on fraud or on lack of notice.<sup>67</sup>

Some defenses relate to the conduct of the parties in the marriage relationship.

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<sup>62</sup> *Id.*

<sup>63</sup> Va. R. 3:8(b).

<sup>64</sup> Va. Code § 20-107.2.

<sup>65</sup> Va. Code § 20-94.

<sup>66</sup> Va. Code § 20-91(A)(9)(a).

<sup>67</sup> *See Peet v. Peet*, 16 Va. App. 323, 429 S.E.2d 487(1993).



## **Condonation**

This occurs when the injured party knows of the offense and freely consents to the restoration of marital rights, for instance, resumption of cohabitation or sexual intercourse. Even a brief resumption can establish condonation. However a single act of sexual intercourse, without any intent to reconcile, will not amount to condonation of desertion. The condonation only extends to known offenses. A repetition of the offense after the condonation has occurred will revive the right of the injured party to obtain a divorce based on the original offense. Condonation should be pled as an affirmative defense but even so, the court may deny a divorce where evidence shows plaintiff has condoned the marital fault.<sup>68</sup>

## **Recrimination**

This occurs when both parties are guilty of marital fault grounds. A divorce can be barred based on the conduct of either party. It is not a defense to a final divorce based on a separation of the parties.<sup>69</sup>

Pleading recrimination entails describing the plaintiff's conduct just as it would be described in a complaint. If the same set of facts were pled as part of the defendant's counterclaim, a divorce may be awarded to the defendant if the court does not credit the evidence offered in support of the plaintiff's alleged grounds. But when the facts are raised in support of the defense of recrimination and the defendant files no counterclaim, the court can only decline to award a divorce based on fault conduct of both parties.

## **Justification for Leaving**

This defense may be raised when the misconduct of one spouse is so serious that it makes the relationship intolerable and the court concludes that the other spouse cannot reasonably be expected to remain in the marital home.<sup>70</sup>

The defense of "justification for leaving" can be pled when a spouse is charged with desertion. This is often used when a defendant has suffered a single, severe incident of physical abuse or when the defendant took reasonable measures to eliminate a danger without leaving but was unsuccessful. Courts have sometimes found justification for leaving when one spouse has insisted the other leave.

## **Connivance**

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<sup>68</sup> *McKee v. McKee*, 206 Va. 527, 145 S.E.2d 163 (1965).

<sup>69</sup> Va. Code § 20-91(A)(9)(a).

<sup>70</sup> *See, e.g., Lee v. Lee*, 13 Va. App. 118, 408 S.E.2d 769 (1991)



This occurs when one spouse consents to the misconduct of the other spouse. If one party encourages the other party to participate in the misconduct and then sues that spouse for the offense, the claim will be barred by the defense of “connivance.”<sup>71</sup> The injured party is not barred from asserting this defense even though the defense was not expressly pled.

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## COUNTERCLAIMS

A counterclaim is a claim for affirmative relief made by the defendant. It functions like a complaint so it must comply with the rules governing the sufficiency of the pleadings. In divorce suits, it is not necessary to issue a summons to be served on the plaintiff along with the counterclaim and is it sufficient to serve the counterclaim without process being issued.

In the counterclaim, the defendant can and should ask for all of the forms of relief he could have asked for just as if the defendant had filed the complaint for divorce. The defendant should plead for all the forms of relief desired.

The plaintiff must file pleadings in response to the counterclaim within 21 days after the counterclaim has been served on the plaintiff.<sup>72</sup>

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## MOTIONS

The parties can make a variety of motions while a divorce suit is pending. Motions for additional time, to strengthen pleadings, or to challenge the sufficiency of pleadings are some of the more common motions. Other motions may help the court to handle the litigation more efficiently.

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## INFORMATION GATHERING, DISCOVERING AND ARRANGING FOR AN EVIDENTIARY HEARING

To prepare the best case possible, counsel will need to gather information

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<sup>71</sup> See also *McKee v. McKee*, 206 Va. 527, 145 S.E.2d 163 (1965).

<sup>72</sup> Va. R. 3:9(c).



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on the relative issues that develop in the particular case. For example, issues on visitation and child custody will require counsel to explore information on the child's school, health care, and recreational activities. Issues on dividing marital property equally may require counsel to gather information on the value of particular items and business holdings.

A final decree of divorce cannot be granted by default.<sup>73</sup> Evidence must be presented to the court in support of the allegations found in the pleadings. If the case is uncontested, it may take less than 30 minutes to present the evidence and it may even be done by deposition in some jurisdictions. However, a contested divorce may take several days in the circuit court to hear because it involves complicated fact issues. Evidence related to an equitable claim may be received in the circuit court:

1. By deposition;
2. By use of a commissioner in chancery; and
3. In an ore tenus hearing before a judge of the circuit court.

*\*See Jason Swango, Esq. for more on how evidence is presented.*

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## FACTORS IN DETERMINING CHILD CUSTODY<sup>74</sup>

In determining best interests of a child for purposes of visitation arrangements including any pendente lite orders, the court shall consider the following:

1. How old is the child? What is the physical mental condition of the child? (Giving due consideration to the child's changing developmental needs)
2. How old is each parent? What is the mental condition of each?
3. What is the relationship existing between each parent and each child? (Giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child)
4. What are the needs of the child? (Giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members)
5. What is the role that each parent has played and will play in the future, in the upbringing and care of the child?
6. What is the propensity of each parent to actively support the child's contact and relationship with the other parent? (Including whether a parent has unreasonably denied the other parent access to or visitation with the child.)
7. What is the relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child?

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<sup>73</sup> Va. Code § 20-99; *see* Va. R. 3:19(c).

<sup>74</sup> VAPRAC FL § 15:8



8. What is the reasonable preference of the child? (If the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference.)

~~9. Is there any history of family abuse as that term is defined in § 16.1-228<sup>75</sup>? (If the court finds such a history, the court may disregard the factors in subdivision 6)~~  
<sup>75</sup> Va. Code Ann. § 16.1-228 - "Abused or neglected child" means any child:

1. Whose parents or other person responsible for his care creates or inflicts, threatens to create or inflict, or allows to be created or inflicted upon such child a physical or mental injury by other than accidental means, or creates a substantial risk of death, disfigurement or impairment of bodily or mental functions, including, but not limited to, a child who is with his parent or other person responsible for his care either (i) during the manufacture or attempted manufacture of a Schedule I or II controlled substance, or (ii) during the unlawful sale of such substance by that child's parents or other person responsible for his care, where such manufacture, or attempted manufacture or unlawful sale would constitute a felony violation of § 18.2- 248;

2. Whose parents or other person responsible for his care neglects or refuses to provide care necessary for his health; however, no child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination shall for that reason alone be considered to be an abused or neglected child;

3. Whose parents or other person responsible for his care abandons such child;

4. Whose parents or other person responsible for his care commits or allows to be committed any sexual act upon a child in violation of the law;

5. Who is without parental care or guardianship caused by the unreasonable absence or the mental or physical incapacity of the child's parent, guardian, legal custodian or other person standing in loco parentis; or

6. Whose parents or other person responsible for his care creates a substantial risk of physical or mental injury by knowingly leaving the child alone in the same dwelling, including an apartment as defined in § 55-79.2, with a person to whom the child is not related by blood or marriage and who the parent or other person responsible for his care knows has been convicted of an offense against a minor for which registration is required as a violent sexual offender pursuant to § 9.1-902.



10. Are there any other factors the court deems necessary and proper to the determination?

The judge shall communicate to the parties the basis of the decision either orally or in writing.

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### **MOVING FROM A BED AND BOARD DIVORCE TO A FINAL DIVORCE**

Where a decree of divorce from bed and board has been granted, the Virginia Code allows the court to merge that decree into a final divorce decree upon application of either party. One year must have elapsed since the event that gave rise to the bed and board divorce, or the parties must have entered into a separation agreement. If the parties are in separation, there must be no minor children involved and a period of six months must have elapsed since the event that gave rise to the bed and board divorce. The court should find that no reconciliation is probable and the parties must have lived separate and apart without interruption and without cohabitation since the bed and board divorce was granted.

The injured party need not give notice to the guilty party of the petition for merger or the taking of depositions unless the injured party intends to raise new matters. If the guilty party initiates the merger, 10 days notice should be given to the injured party.

Sometimes the court is not asked to merge the bed and board divorce with the final divorce decree because the parties do not feel the need to press the bed and board ground for divorce. In some cases, the parties may reach an agreement resolving issues to avoid expenses, time and aggravation of presenting evidence in support of the original claim for the bed and board divorce.

If the required separation has taken place and there is no possibility of reconciliation, the court may enter a final decree without having entered a decree of divorce from bed and board. The moving party will need to offer evidence in support of the allegations contained in both the complaint and in this motion. The plaintiff may offer evidence in support of the continuous and uninterrupted separation alleged in this motion.

Either party may move the court to grant a final divorce based on a separation, without filing an amended complaint or counterclaim. Evidence will need to be offered in support of this complaint and this motion, but no evidence of any fault conduct needs to be entered.

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### **DIVORCE DECREES – FINAL**



Parts of Decree – A circuit courts decree disposing of an equitable claim is composed of the following parts:

1. Caption – The caption states the name of the court where the suit is pending.
2. Style –The style identifies the parties by name and distinguishes the suit from others.
3. Case Number – the clerk assigns this to each suit that is filed. Also referred to as a docket number. The case number identifies the particular suit and distinguishes it from others. The number will remain with the suit until the conclusion of the matter, and all papers filed should bear the case number so the clerk can file the papers properly.
4. Recitals – The introductory paragraph of each circuit court decree recites how the matter was brought before the court. It provides a summary of the procedural history of the case. It usually identifies the pleadings before the court, the manner in which service of process and notice were provided, and how evidence was received.
5. Preamble to Adjudication – This recites the facts found by the court, usually starts with “it appears to the court that...” In a divorce, the following facts are usually found in the preamble to the adjudication:
  - a. The date and place of the marriage;
  - b. The age of the husband and the wife;
  - c. The Social Security numbers of the husband and the wife;
  - d. Facts satisfying residence and domicile requirements;
  - e. The military or non-military status of the defendant;
  - f. The venue for the suit (where parties last cohabitated, where the defendant resides, or where the plaintiff resides if the defendant is a nonresident);
  - g. The names and dates of birth of any children;
  - h. The essential facts establishing a ground for the divorce
  - i. That there is no probability of reconciliation; and
  - j. Identification of an agreement submitted to the court for incorporation into the decree, if applicable.
6. Adjudication – This portion of the decree states the order of the court and the relief granted. The typical words used are, “it is adjudged, ordered, and decreed that...” In a divorce suit, when one party prevails, the adjudication will state to whom the divorce is granted and upon which ground. It will continue with the disposition of the pleading of the party that has not prevailed. The granting of the divorce may not be the only relief given by the court. The court may grant child custody, visitation, child/spousal support or equitable distribution. The divorce decree, however, does not grant the change of a party’s name.
7. Directions to the Clerk – The decree will include this to either retain the matter on the docket as a pending matter requiring further attention or to remove it from the docket and place it with the ended causes. A reason to retain the matter in a divorce suit is so that the court can later grant further relief such as spousal support or equitable distribution.
8. Decree entered by the Court – The decree will be entered by the court on a specific date, which is the “date of order.”
9. Endorsement of Counsel – Most decrees will require this but courts can decide to waive the endorsements. It may be endorsed as “Seen and Objected to,” “Seen and Agreed,” or just “Seen.”



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## SPECIAL CIRCUMSTANCES IN DETERMINING CUSTODY

Homosexual conduct as affecting fitness - Is a homosexual parent per se unfit?<sup>76</sup>

There is a great gulf that has continued to widen between the Court of Appeals and the Supreme Court of Virginia on the issue of sexual misconduct. The Supreme Court does not ignore the issue of sexual misconduct, specifically since being a homosexual parent is punishable as a felony and constitutes an "important consideration" in determining custody of children.<sup>77</sup>

The Court of Appeals in Virginia has held (a decision reversed by the Supreme Court of Virginia) that an admitted lesbian mother cohabiting with her companion was not unfit to have custody of her three-year-old son in preference to the child's maternal grandmother merely because she had engaged in "private illegal sexual conduct" without proof that such conduct "poses a substantial threat to the child's emotional, psychological, or physical well-being."<sup>78</sup>

However, the Supreme Court of Virginia has held that a parent's unfitness is manifested by his/her willingness to impose this burden upon the child in exchange for the parent's own gratification.<sup>79</sup> It is clear that the Supreme Court virtually presumed harm when it spoke of the "burden" a parent places upon a child to "gratify" one's self, a conclusion that the Court of Appeals refused to reach.

The Supreme Court reaffirms its prior rulings that a homosexual parent is not per se an unfit parent. The Court concluded, however, that living daily under conditions involving an active homosexual relationship practiced in the home would impose a burden on the child by reason of the "social condemnation" involved which "will inevitably afflict the child's relationships" with its peers and community.<sup>80</sup> The Court expressly rejected the Court of Appeals' conclusion that "the evidence fails to prove" harm to the child. <sup>81</sup>

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## PRESENTATION OF DECREE

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<sup>76</sup> VAPRAC FL § 15:8

<sup>77</sup> *Bottoms v. Bottoms*, 249 Va. 410, 457 S.E.2d 102 (1995).

<sup>78</sup> *Id.*

<sup>79</sup> *Roe v. Roe*, 228 Va. 722, 324 S.E.2d 691 (1985)

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*



After the ruling from the bench, circumstances may arise that make it necessary for counsel to move the court to enter a decree. The court may ask counsel to draft a proposed decree but since opposing counsel may disagree about phrases presented or recollections as to the ruling, counsel can present a proposed decree to the court with notice to opposing counsel. A brief hearing can be held if there are differences but this is not an occasion to address an issue for the first time.



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## MILITARY PERSONNEL

**Jason Swango** is experienced in “military” divorces. It is not enough for you that he is knowledgeable on domestic or family law that is why he is intimately familiar with military marriages, benefits, and military retirement.

DO NOT assume that just because an attorney is a former JAG (military lawyer, judge advocate general), that he or she knows about divorce law, let alone military divorce. They may NOT know the particular family law in Virginia, where you will be obtaining a divorce.



### Residence

For residence purposes for military members, if the member has been stationed or has resided in Virginia for a period of six months or more immediately preceding the commencement of the law suit, the member is presumed to be domiciled in and a bona fide resident of Virginia. Members should not assume the state in which they claimed as their state of residence on their “Leave and Earnings Statement” (LES) will be the one that retains jurisdiction over them for divorce purposes.

### Service of Process

All of the above service of process procedures apply, but in addition, if the nonmilitary spouse serves the member with papers while the member is on active duty, then there must also be a statement called (title varies) a Soldiers and Sailors Affidavit. This form acts as a safeguard for the military member who does not answer the complaint or appear at a hearing and as a sworn statement, which often has to be signed in the presence of a notary public.

### Servicemembers Civil Relief Act of 2003

This Act provides procedural safeguards for military personnel who are unable to protect their interest because of their active duty services. This Act applies to all members of the United States armed forces on active duty. The Act is meant to be a shield not a sword. This means the military member may not litigate actively and gain positive relief from the court and then discharge counsel and ask to invoke the protections of the Act.

When a military member receives notice of a suit, the member may request a stay of 90 days or more by submitting a letter to the court explaining how military duties “materially affect” his or her ability to appear and provide a date when the member would be able to appear for a hearing. The member’s commanding officer must also write a letter stating the above and that no leave is authorized. If the court refuses a stay, it must appoint an attorney to represent the servicemember. A court must also appoint an attorney if the servicemember has not received notice of the suit. A 90-day stay may be granted on request of this attorney if defendant is unable to be contacted or if the defendant’s presence is required. An attorney appointed under the Act cannot waive any right or bind the military member unless the attorney is acting under authority granted by the member.



If the attorney was appointed and the divorce suit proceeded to its conclusion, the final decree should reflect compliance with the Servicemembers Civil Rights Act. If the servicemember wishes to be divorced just as much as the spouse, the member may waive his or her rights under the Act. Counsel's compliance with the ethical requirements will be best shown if the waiver form includes the acknowledgment of the military legal officer.

### **USFSPA – Uniformed Services Former Spouses' Protection Act**

This federal law authorizes state courts to treat military retired pay as *property* (as opposed to income) and to award up to 50 percent of it to a former spouse in a divorce settlement. This Act applies to active duty, retired, and reserve/guard (whether active duty, inactive status, or retired), pay and non-pay categories.

To qualify for payments, the marriage need not have lasted for 10 years for the spouse to acquire a share of or interest in the military member's retire pay. However, the marriage does need to have lasted 10 years (credible military service) in order for the ex-spouse to receive a direct payment (irrevocable) from the DFAS. Courts can give lifetime awards of a part of the military retired pay to the former spouse based on the member's pay grade at retirements and *not at the time of divorce*, regardless of whether the ex-spouse remarries or is financially or economically stable.

Even if permanent alimony is awarded, the court will also award a portion of military retirement pay. The court will consider certain factors, such as age and health, potential for supplementary income and future earnings ability, educational level, standard of living during the marriage, length of the marriage, etc. A spouse may qualify for military benefits, such as medical and use of the commissary and the Base Exchange. Keep in mind that the court will not always consider or require a showing of the military spouse's contributions in order to award a share of the retired pay. The only thing the spouse must prove is the length of marriage in order to receive a portion of the military retired pay.

### **Survivor Benefit Plan**

The award of the Survivor Benefit Plan (SBP) to a former spouse is exclusive from an award of retired pay under USFSPA. An ex-spouse may not get any portion of the retired pay but might be named as the SBP beneficiary. SBP premiums are deductible from the amounts involved in USFSPA payments to the same ex-spouse.

Individuals married to military members have access to all the remedies and protections available to non-military couples in divorce court.

**It is the member's duty and his best interest to keep his attorney, Jason Swango, informed of both party's monthly living expenses, property inventory, and a forecast as to future financial requirements so that he may get the member awarded the best possible outcome.**



**If you are seeking a divorce, it is recommended that you find an attorney who specializes in domestic relations law, preferably divorce law. It is typical that people do not have knowledge of the law on divorce in their area so it is imperative that you find a lawyer that does.**

**At The Firm For Men, Swango Law P.C., we have extensive experience representing men in cases involving contested divorce, uncontested divorce, military divorce, and all related matters.**

*\*See Jason Swango for a free initial consultation and for further questions and concerns.*



I have a Constitutional right to represent myself.

And I have a Constitutional duty to advise you that exercising that right makes you an idiot.



## REFERENCES

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