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FINANCIAL ISSUES IN DIVORCE

Uncertainty regarding the financial consequences surrounding the dissolution of a marriage can significantly increase the anxiety of those going through a separation and divorce. The emotional roller coaster of people experiencing marital conflict is matched by fear of the unknown when it comes to money and finances. The purpose of this information 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 from an attorney and/or a financial adviser such as an accountant.

The following issues are addressed: Equitable Division of Marital Property and Debts, Spousal Support, Child Support, and Attorney Fees. These topics do not necessarily represent all issues related to the financial consequences of divorce in Virginia, but an understanding of each of these areas will go a long way in enabling one to make informed and appropriate decisions regarding some of the important financial aspects of a 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 spouses or a retirement account accumulated during the marriage even if the account is only in the name of one spouse.

Separate property includes all property acquired by either spouse before the marriage and 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 business 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., and it was not a gift, 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 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, marital property and marital debts are valued as of the date of the evidentiary hearing or trial; however, there are some exceptions to this rule. In addition, a party may request that the court hearing the divorce trial use a different valuation date and such a request may be granted depending on the specific circumstances.

Valuing the marital share of some retirement assets can be complex and may require use of a valuation date other than the date of trial or evidentiary hearing. The marital share of these plans is comprised of contributions to the plan and earnings on those contributions from the date of the marriage to the date of separation. There may be further adjustments to value resulting from market changes from the date of separation until the asset is divided. 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, other defined contribution plans and individual retirement accounts (IRAs).

Some marital debts also require use of a valuation date that is not the date of the evidentiary hearing and instead the date of the parties' final separation is the valuation date. 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, National Automobile Dealers' Association (NADA) or similar valuation services, tax assessments, the financial page of periodicals for stocks, bonds and mutual funds, forensic accountant opinions on the value of businesses, and credit card statements. Gathering copies of these types of documents 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:

The contributions, monetary and nonmonetary, of each party to the well-being of the family;
The contributions, monetary and nonmonetary, of each party in the acquisition and care and maintenance of such marital property of the parties;
The duration of the marriage;
The ages and physical and mental condition of the parties;
The circumstances and factors which contributed to the dissolution of the marriage, specifically including certain grounds of divorce;
How and when specific items of such marital property were acquired;
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;
The liquid or nonliquid character of all marital property;
The tax consequences of dividing marital property;
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
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 and 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 and debts 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 by one spouse to the more financially dependent spouse and is based on a number of factors, described below, 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.

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, or if either party waives spousal support, a court cannot modify that agreement in the future; however, any agreement regarding spousal support that is signed on or after July 1, 2018, must specifically contain the following language to prevent the possibility of future court modification: “The amount or duration of spousal support contained in this [Agreement] is not modifiable except as specifically set forth in this [Agreement].”

A. Periodic Payments for an Undefined Duration

A periodic payment for an undefined duration is a specific sum that a spouse or an ex-spouse pays at designated intervals (e.g., monthly). The grand total of this award is uncertain because the payments do not end on a specific date but instead end upon the occurrence of an event, such as the death of either spouse, remarriage of the spouse receiving support, and may end if the recipient spouse cohabits in a marriage-like relationship for a year or more, or further order of the court. When ordered as part of a divorce, a court is most likely to award this type of support in a marriage of long duration or when the more financially dependent spouse has a limited ability to enter or re-enter the workforce, and is often referred to as “open-ended spousal support” or “permanent spousal support.”

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 in a relationship analogous to marriage for more than one year, or if either spouse dies.

Rehabilitative spousal support is designed to help the payee spouse 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. Any of these events may lead to a modification of support.

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.

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. This type of temporary support is frequently called pendente lite spousal support,

III. When Spousal Support Cannot Be Awarded

Under some circumstances, a spouse may be legally barred from receiving spousal support. 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 might receive spousal support despite proof of adultery.

IV. What Factors Does a Court Consider in Awarding the Amount of Spousal Support?

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 does, however, provide numerous factors a court must consider, but only after it finds that spousal support is not barred. 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.

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.

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. This factor allows the court to consider any other facts necessary to reach a fair decision. For example, the court can consider tax consequences and fault grounds for divorce, such as adultery, cruelty or desertion.

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 material change in circumstances. A number of factors influence such a decision. Virginia Code Section 20-109 governs the modification of spousal support awards. Under previous law, the court could not modify spousal support that was part of an agreement unless the agreement said there can be future modification; however, for spousal support agreements signed on or after July 1, 2018, the court can modify the spousal support in the future unless the agreement has the following language: “The amount or duration of spousal support contained in this [Agreement] is not modifiable except as specifically set forth in this [Agreement].”

VI. What Are The Tax Consequences of Spousal Support?

Spouses involved in a separation or divorce should always consult a tax professional for answers to their tax questions. Generally, spousal support ordered before January 1, 2019, is deductible to the payor and taxable to the payee for federal and state income tax purposes and spousal support ordered after January 1, 2019, are not deductible by the payor or included in the recipient’s income for income tax purposes.

Child Support

In Virginia, judges must first calculate child support using a formula commonly referred to as the child support guideline. 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. In addition to child support payments between the parents, the court has the authority to order either parent to maintain an existing life insurance policy and to name the child(ren) as the beneficiary.

I. Gross Income

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 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. In addition, if a parent is paying spousal support to a former spouse under a court order or agreement, that spousal support is deducted from his or her income before the guidelines are calculated.

A. Self-Employment, Partnerships, and Closely Held Businesses

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.

B. Children from Prior Relationships

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.

II. Work-Related Child Care and Health Care Costs

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 in proportion 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 proportionate shares of the amount of that monthly health care

premium. In addition, any reasonable and necessary medical or dental expenses of a child that are not covered by insurance are to be shared by each parent in proportion to his or her gross income.

III. Shared Custody Calculation

There is a different calculation if a parent exceeds ninety (90) days of custodial time 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.

IV. Deviations

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:

- Actual monetary support for other family members or former family members;
- Arrangements regarding custody of the children, including the cost of visitation travel;
- 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;
- Any child care costs incurred on behalf of the child or children due to the attendance of a custodial parent in an educational or vocational program likely to maintain or increase the party's earning potential;
- Debts of either party arising from the marriage for the benefit of the child;
- Direct payments ordered by the court for maintaining life insurance coverage (for the child), education expenses, or other court-ordered direct payments for the benefits of the child;
- Extraordinary capital gains such as capital gains resulting from the sale of the marital abode;
- Any special needs of a child resulting from any physical, emotional, or medical condition;
- Independent financial resources of the child or children;
- Standard of living for the child or children established during the marriage;
- Earning capacity, obligations, financial resources, and special needs of each parent;
- Provisions made with regard to the marital property, where the property earns income or has an income-earning potential;
- Tax consequences to the parties including claims for exemptions, child tax credit, and child care credit for dependent children;
- A written agreement, stipulation, consent order, or decree between the parties which includes the amount of child support; and
- Such other factors 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.

V. Tax Consequences

The court has authority to determine which parent receives 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.

VI. Modification of Child Support

The court will typically retain jurisdiction over child support orders, even after the divorce is final. If there has been a material change in circumstances since the entry of the support order, either spouse may petition the court to modify the support amount based on the best interests of the child. On July 1, 2014, the Virginia Child Support Guidelines were revised for the first time since 1995. The revision itself is considered a material change in circumstances and may allow support recipients and payors to seek a child support modification, even when there are no other changes in the parties’ circumstances. Additionally, there are a number of factors that may influence a court’s decision to modify child support.

VII. Length of Child Support

In most circumstances, child support continues until the child turns 18, unless the child is still a full-time high school student and is not self-supporting. In that case, so long as the child is still living in the home of the parent receiving support, support will continue until the child graduates from high school, but not later than age 19. The court has the authority to extend an existing support order beyond these milestones for a child who is severely and permanently disabled.

Do I Need an Attorney? Who Pays My Attorney?

An attorney is not required in a divorce proceeding. However, the process can be complex, and it is often 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 create 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 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 whether there will be an attorney's fees award or the amount if there is one, and such an award is in the presiding judge's discretion. Some of the criteria the judge will consider in determining whether there will be an attorney's fees award and the amount thereof 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; whether or not spousal support was awarded; 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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