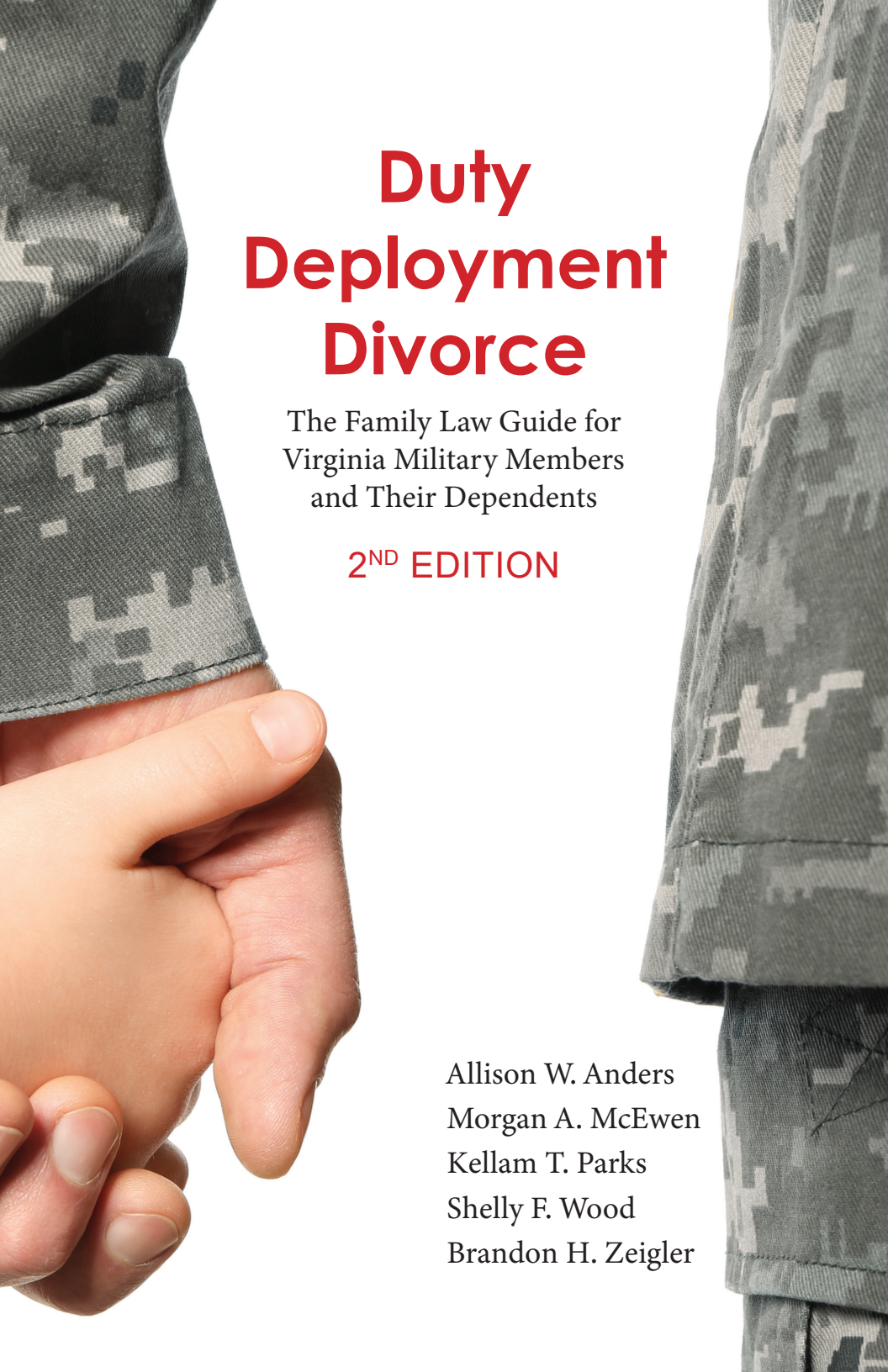

Duty Deployment Divorce

The Family Law Guide for Virginia Military Members and Their Dependents

2ND EDITION

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DUTY

DEPLOYMENT

DIVORCE

The Family Law Guide for Military Members and Their Dependents

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DISCLAIMER

This book provides general information regarding the interplay between Virginia law and the military family and should not be understood as professional legal advice. Each case is different, and the law changes each year, so please consult a Virginia licensed attorney before proceeding.

DEDICATION

To Oliver the Therapy Dog

Oliver is named after Oliver Wendell Holmes who served as a Justice of the Supreme Court of the United States from 1902 to 1932.

As a puppy, he was donated to Mutts With A Mission MWAM, a non-profit organization located in Portsmouth, Virginia and started training as a service dog with the goal of being paired to a veteran or Wounded Warrior. Parks Zeigler, PLLC - Attorneys at Law, sponsored him and their marketing manager, Geri Clark was his puppy raiser.

Due to his dietary issues, he was released from the MWAM program and took the path of training for his Canine Good Citizen (CGC) and Therapy Dog certifications. Now that he is a certified therapy dog, Oliver visits schools, nursing homes, and hospitals and helps spread love and emotional support.

For more information on Oliver, or to arrange a visit, please go to www.facebook.com/oliverthegreatdane or contact our marketing department at (757) 453-4024.

INTRODUCTION

Living and working in Tidewater, Virginia, we see the impact of the military in our everyday lives. We have watched and supported friends and family who bend over backward to help their loved ones serve. The sacrifices that military spouses make are particularly daunting. We sincerely thank you for your service and dedication to this country.

Over time, the frequent moves a military family makes can erode their sense of family and togetherness, often leaving the children feeling like they lack a place to call home. Experiences such as these are shared by the attorneys at our firm; each of us has friends and family who have been impacted by military service. These experiences have helped us relate to our military family clients and understand the issues at play.

Military divorces and/or custody proceedings need not be overwhelming or intimidating. Our goal in writing this book is to provide you the knowledge of what a divorce or custody proceeding entails. We want to provide military members and their spouses a reference outline that makes understanding the process less daunting.[1]

1 Throughout this book you'll see bolded terms—these are legal concepts we've defined in the Glossary at the end of the book.

You are most likely facing a lot of unknowns which cause you to question how things will go and how you will end up after the divorce is final and/or custody has been determined. It does not have to be so scary. We hope that this information will help you feel more confident and less confused about the upcoming process as you try to make the best decisions for yourself, your spouse, and your children.

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CHAPTER 1

Where Do I Start?

This book is meant to help military families who are separating, regardless of marital status. The first question that must be answered before we can tell you where to start is, "Are you married?" The second question is, "Do you have children?"

If you are married with children, you have two choices: (1) file for divorce in the circuit court or (2) file for **custody, visitation, child support,** and/or **spousal support** in the juvenile and domestic relations district court.

If you are married without children, your choices are to (1) file for divorce in the circuit court or (2) file for spousal support in the juvenile and domestic relations district court.

If you are not married but have children, then your only choice is to file for custody, visitation, and child support in the juvenile and domestic relations district court.

Navigating the courts can be very tricky, so it is always important to hire an attorney, or at the very least consult with one, to

ensure you are in the right place, filing the right thing, and maximizing your chances of getting what you want.

The Attorney-Client Privilege

What a client tells his or her lawyer cannot be divulged by the lawyer unless the client gives permission. This is called the "attorney-client **privilege**" and it allows attorney to communicate freely with their clients about the strengths, weaknesses, strategies, and other aspects of a case.

However, this privilege is fragile and can be easily lost by a careless client. If anyone other than the client or his/her attorney is present during meetings, or if communications between the client and the attorney are transmitted to someone else or are accessible by someone else, the privilege is likely to be broken. Often clients will want to bring their family or friends with them to their meeting with their attorney for "support." While moral support is a good thing, having anyone else present when meeting with an attorney causes the attorney-client privilege to be lost. Clients must also use caution when they use technology to communicate with their attorney. Many employers monitor internet usage and some even monitor the internet content of their employees' computers. Sending an electronic communication that you know is monitored might endanger the privacy of your communication and therefore cause you to lose the attorney-client privilege.

Be sure to discuss these topics with your attorney so that he/she can advise best practices. Our firm has a specific communications policy that we go over with our clients, and we use secure online services for sharing documents electronically.

CHAPTER 2

Filing for Divorce

Starting a Divorce in Virginia

Many people do not know what to expect when they start a divorce. Common questions we receive center around what is needed to file, how to be "legally separated," how long the process takes, and how much it costs.

Many are surprised that a divorce is a lawsuit, which means that you have to file a formal document with the court, just as though you were suing someone for money or were the victim of an auto accident. Something else that often surprises people is that Virginia does not have a "formal" separation process—i.e., there is nothing to file with the courts to be "legally separated."

Although there is no formal separation process in Virginia, you do need to be separated before you can file for divorce. Being legally separated in Virginia means that the two spouses are living "separate and apart," and at least one of the spouses intends for that separation to be permanent. While this sounds very simple,

it becomes more complicated if you continue to live together in the same residence. If you are in the same residence, to be living separate and apart you must make sure you and your spouse do not continue to live as a married couple. This means, for example, that you and your spouse should do the following: sleep in separate bedrooms, separate your finances, and avoid doing things together and for each other, like eating together, doing each other's laundry, buying groceries for each other, and attending events together. A checklist of typical factors used by the courts when reviewing whether parties are separated and apart in the same household can be found on our website: www.pzlaw.com/library/Separate-in-Same-Household-Checklist.pdf

Just because you are separated does not mean you can file for divorce. If you have been separated for less than a year and want to file for divorce, you must file on a fault ground (for cause). You can file on a no-fault ground if you and your spouse have been separated for one year. You can, however, also file on a no-fault ground after 6 months if (1) you have no minor children and (2) you and your spouse have signed a separation agreement. It is important to make sure that you are filing at the right time and with the proper grounds for divorce.

Can the Court Do That?

Jurisdiction

The first thing to consider when filing a divorce case is something called **jurisdiction**. It literally means "the court speaks," and it is the power of a court to hear a certain type of legal case. Several factors affect jurisdiction, including the subject of a lawsuit and where the people involved in the lawsuit live.

In Virginia, **circuit courts** have jurisdiction to hear a divorce case and all of the issues that surround one, including child custody, visitation, child support, spousal support (formerly called **alimony**), and property division. According to Code of Virginia §20-96, only a circuit court can hear a divorce. There are no juries in divorce cases; only a judge hears the case.

In divorce cases, if either spouse does not like the court's ruling at trial, he or she can file an appeal to be heard by the court of appeals. This involves a written brief and, in order to win the appeal and change the trial court's ruling, it requires showing that the circuit court made an error. This appeal is a matter of right, which means that the court of appeals must consider your appeal. Having the right to appeal in a divorce case is different from most other types of cases, like an auto accident case, where you have to request an appeal from the Supreme Court of Virginia and may not even be able to have the appellate court consider the matter.

Another element of the circuit court's ability to hear a divorce case is the requirement of **domicile**. Domicile does not just mean where a person lives (that is "residency"). Domicile is the place where someone will return to after a long journey, the place he or she wants to raise a family, the place that person wants to grow roots.

As with many things in family law, there is a Virginia Code section that determines domicile for a divorce. Code of Virginia §20-97 lays out four requirements for a person to file in Virginia for their divorce case: that person must be a (1) bona fide (2) resident (3) domiciliary of Virginia for (4) at least six months. Filing a case in Virginia when a person does not properly meet the Code's requirements can result in the case being transferred

to another court or even dismissed.

Bona fide means "good faith" in Latin. A person must have lived in Virginia while intending, in good faith, to make it his or her domicile for at least six months before divorce is filed. A military member's domicile is sometimes more difficult to determine than a civilian's. Servicemembers typically move more frequently than civilians and enjoy several domicile-related protections under federal law. For example, federal law allows a servicemember to retain a specific domicile for tax purposes. Another federal law allows the servicemember to retain a specific domicile for voting.

Virginia cases have considered several factors when ruling on domicile, including the following:

1. Registering to vote and voting in a county or city;
2. Renting (or buying) a house in a county or city;
3. Moving one's other family members to a state, county, or city;
4. Testimony or statements by a person that they intended to return or not change their domicile from a city;
5. Claiming exemption from jury service in one city or state on the ground that a person's domicile is elsewhere;
6. Switching jobs to a county, city, or state, or keeping a job in one location;
7. Returning to a state, city, or county a person lived in for a long time after doing something in another state;
8. Changing church membership from one congregation to

another;

9. Building a house for one's family in a city, state, or county;

10. Continuing to pay local taxes in a location where one does not live;

11. Leaving a person's family behind in a place and continuing to support them;

12. Maintaining a locality in a state, county, or city to receive mail while absent;

13. Claiming tax exemptions granted to non-residents of a state;

14. Possessing a visa to live in a state;

15. Attempting to secure citizenship in the US in order to remain in a state;

16. Attempting to secure an immigration visa to stay in a state;

17. Maintaining ties to a business interest in another state; and

18. Marrying someone in a state.

Other factors might be raised when determining a person's domicile. They include:

1. Using legal documents (e.g., checks, a will, a deed, hospital records) to claim residence in a state;

2. Moving personal property to a state;

3. Maintaining a safety deposit box or storage facility for one's property in a state;
4. Registering a car or changing a driver's license to a state;
5. Changing one's bank or other account addresses to a state;
6. Maintaining a post office box in a state;
7. Giving money to local charities or causes in a state;
8. Filing a DD Form 2058 (state of legal residence certificate) for a specific state when one is in the military;
9. Maintaining a professional license in a state;
10. Listing an address on a federal or state income tax return; and
11. Paying non-resident tuition to a college or another higher education place in a state.

Code of Virginia §20-97 assigns domicile for military members in Virginia. If a servicemember was stationed in Virginia for more than six months before his or her divorce started, they are presumed to be domiciled in Virginia. Also, if a servicemember is stationed abroad, but was stationed in Virginia for more than six months before his or her foreign or ship-borne assignment, he or she is domiciled in Virginia.

Where Do I File for Divorce?

Venue refers to the place where a divorce must occur. Code of Virginia §8.01-261(19) requires contested cases to be filed in one of two places. The first filing location is the last place the couple

lived together as husband and wife. The second location is where the party being served lives. In the unusual occurrence of service by publication (i.e., the filing spouse doesn't know where the other lives and so publishes notice in a circulated newspaper), the case can be filed where the complaining party lives. If the matter is uncontested (i.e., the parties are filing to finalize a divorce where all terms have been agreed to), a divorce action can actually be filed anywhere in Virginia.

You've Been Served!

For a lawsuit to be effective, the paperwork for a lawsuit must be delivered to the person the suit is being filed against. This is called **service**, and it can happen either in person or by "substituted service," which is discussed below. There have been instances in Virginia of process servers dressing up as party-goers and serving the soon-to-be ex during their social soirees. Usually the process doesn't involve such elaborate schemes, though it can be challenging sometimes.

Code of Virginia §§20-99, 20-99.1:1 and 20-99.2 deal with service of divorce lawsuits in Virginia. Obviously, personal delivery is the best way of serving a lawsuit on another person; however, there are several other ways of doing so, called substituted service. Substituted service could mean leaving the papers with someone who lives at their house or leaving the documents posted on a person's front door. Each way may or may not be deemed valid for a particular case. Having a lawyer at this stage of the case is crucial to either serving or being served correctly.

When a person learns that he or she may be served with a lawsuit, there are several options: (1) attempt to evade service (which is not recommended), (2) "waive" the right to be served properly and accept service, or (3) be officially served as set forth above.

Serving military members on base is a real obstacle. Military base commanders do not always allow process servers to come onto a base and serve a servicemember. The issue becomes more complicated when it involves service on a military base overseas.

The law of service outside of the US is extremely complex. It is governed by an international treaty, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (**Hague Convention**). This is a lengthy and difficult process because the law is already complex and because countries are allowed to opt out of many of the provisions that make service easier. Moreover, not following the law can hurt your case. For service in a foreign country, there is a central authority to which all papers must be directed. The court documents must usually be translated into the host country's language. Failing to do any of these things can result in the refusal of service, more delays, or even not being able to serve a person in the mandated timeframe to maintain the lawsuit. If this issue rears its ugly head, it is critical to have competent legal advice in order to comply with this treaty.

Servicemembers Civil Relief Act (SCRA)

Another important statute concerning lawsuits is the Servicemembers' Civil Relief Act (**SCRA**). This law protects military members and active-duty reserve members from missing court proceedings due to being deployed away from their homes. As

the United States Supreme Court stated in 1943, the SCRA was designed to "protect those who have been obliged to drop their own affairs to take up the burdens of the nation." [2]

The SCRA provides servicemembers with procedural rights that protect them from people taking advantage of military-related absence in a legal proceeding. In addition to protecting active-duty servicemembers, the SCRA also protects mobilized National Guard or reserve members, and even dependents under certain circumstances. It applies to court proceedings and administrative agency proceedings.

The most notorious application of the SCRA is a "stay of proceedings." A **stay** means a delay in the case, during which nothing can occur. For the servicemember, this can be a welcome reprieve from costly and stressful litigation. For the other party, a stay can be a colossal headache. A stay can happen at any time in the case.

When the servicemember has not appeared in a legal proceeding, 50 United States Code (USC) §3931 applies. That law mandates that the plaintiff have an affidavit and certificate stating whether the other person is or is not in the military. The court must appoint an attorney before entering any sort of default judgment (which is a judgment for the plaintiff if the defendant fails to answer the lawsuit). The court must then stay proceedings for at least ninety days; it can do this on its own or by request of a party to the case. The court must determine if there may be a defense that cannot be raised without the presence of the servicemember when the appointed lawyer cannot determine whether one exists.

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2 Boone v. Lightner, 319 U.S. 561, 575 (1943).

Even if a court enters a default judgment, the servicemember can still apply to undo the default judgment. The servicemember may do this in two circumstances:

1. The servicemember is on active duty; or

2. The servicemember files within ninety days of the court proceeding and can show that his or her duty had a "material effect" (i.e., serious obstacle) on the ability to get to court and can also show that there was a meritorious defense (i.e., a true and valid defense).

If the servicemember received notice of the proceedings, then 50 USC §3932 applies. Servicemembers can apply for a stay in the case by proving two things:

1. A letter or other communication that gives facts that imply that current military duty requirements materially affect the servicemember's ability to appear and gives a date when the servicemember will be available to appear; and

2. A letter "or other communication" from their commanding officer that says a servicemember's current military duty prevents appearance and that military leave is not authorized at the time of the letter.

This stay can continue for as long as these two elements exist for the servicemember.

However, a stay is not automatic or invincible. First, the other party can demand the servicemember's Leave and Earning Statement (**LES**), which often will show not only their income but also their leave record. If the record shows that all of the leave was used recently, such as to take a wild vacation in Cancún, it will not help the servicemember's case. Second, if the case can be

done without the servicemember's presence, then a stay might not be granted. For example, if the other party offers up (and the court approves) the use of technology, such as a videoconference, to allow the servicemember to be present virtually at the hearing, then that, too, can potentially defeat the need for a stay in the case. Having a lawyer who is familiar with, and experienced in, military-related civil matters is critical to be able to navigate a case with a SCRA issue.

The SCRA has several other protections that apply to servicemembers, which could be relevant during a divorce when finances are tight. First, servicemembers may potentially ask for relief when it appears that their active duty service may cause them to break an obligation due when, or just before, their service is to begin, such as a contract coming due or rental term.

A servicemember can also be protected from eviction without a court order if the servicemember's rent is less than a certain amount. This threshold amount is tied to the Housing Price Inflation Index and increases each year, usually disclosed in February. The amount effective as of January 1, 2020, is $3,991.90 per month. A servicemember can also end a pre-service lease altogether or end the lease early when he or she receives new orders. This ability can apply to dependents as well.

Additionally, a servicemember can receive an interest rate reduction down to 6% for a pre-military service loan. Servicemembers can use the SCRA to end pre-military service car leases if they get orders of 180 days or longer; they can also use Permanent Change of Station (**PCS**).

Finally, the SCRA helps protect servicemembers from foreclosure if they meet certain conditions:

1. The servicemember owned real or personal property before beginning active duty;
2. The servicemember's property is secured by a mortgage, deed of trust, or other similar security;
3. The security interest began before active duty;
4. The servicemember still owns the property when he or she seeks relief; and
5. A court believes, either after a hearing or on its own, that a servicemember's ability to meet the security interest is materially affected by military service.

This protection may also apply to dependents as well.

The SCRA is useful for many servicemembers. However, like most federal laws, it can be tricky and hard to use. It can also change from time to time. Having an attorney to guide you through a court case when this law is involved can be critical to following the law; failure to understand the SCRA can result in losing a point in your case.

CHAPTER 3

Grounds for Divorce, Cause, and No-Fault Divorce

There are two types of divorce in Virginia: a **divorce a *mensa et thoro*,** which means a divorce from bed and board, and a **divorce a *vinculo matrimonii*,** which means a divorce from the bonds of matrimony—an absolute divorce.

The difference between the two is that an absolute divorce allows the court to handle every aspect, such as dividing property, awarding spousal support, issues concerning children, etc. A bed and board divorce allows the parties to live separate and apart from each other and does not obligate them to care for each other; however, neither can remarry while the other person lives.

Why file for a bed and board divorce over an absolute divorce? It has to do with timing—a bed and board divorce can be granted when cause exists, without having to wait for a period of time to have elapsed (which most absolute divorces require). The court can merge a bed and board divorce into an absolute divorce later, once the statutory period has expired.

That leads into the next topic of discussion: divorce for cause. There are four general causes for divorce in Virginia, and they are listed in Code of Virginia §20-91(A): (1) adultery or sodomy or buggery committed outside the marriage; (2) conviction and incarceration for a felony; (3) cruelty or desertion; and (4) the parties living separate and apart for more than one year, or six months with an agreement and no children of the marriage (known as a no-fault divorce).

Of the causes for divorce set forth above, the first three (adultery, felony conviction/incarceration, and cruelty/desertion) are considered fault grounds. A person does not have to wait a year to file for divorce if a fault ground exists or can be pled, but may have to wait for a period of time to have elapsed for the divorce to be finalized (one year of separation, or six months with a separation agreement and no children).

Adultery

Adultery is when a married person has sexual intercourse with a person who is not his or her spouse. **Sodomy** is broadly defined as having oral or anal intercourse with a person. **Buggery** is broadly defined as having any sort of sexual relation with an animal. Doing any of the above sexual acts with a person (or animal) who is not your spouse is a cause for divorce based on

infidelity. Infidelity is a "fault" ground for divorce.

Proving infidelity is difficult. First, a party must corroborate their testimony— that is they must have evidence above and beyond their own observations. Paper documents, electronic evidence, social media, telephone records, photographs, and even private investigators have been used by a jilted spouse as evidence of an affair. Unfortunately, there is no guarantee that any particular method will work in a case—not only are people often unable to see or photograph two other people committing infidelity, but also any other witnesses' credibility may be attacked by the party "caught" in the act. Adding to the difficulty, the standard of proof for infidelity that a spouse must meet is "clear and convincing" evidence, which is much higher than the standard "preponderance" standard for divorce cases. Furthermore, the faithful spouse must prove that a sexual act itself occurred; merely going on a date with another person is not enough to prove infidelity in the legal sense.

Aside from the higher standard of proof for infidelity, there are several defenses that can be used to prevent a party from using infidelity in a case:

- The infidelity must have occurred within five years of the filing of the lawsuit for divorce.
- If the faithful spouse knew about the infidelity and forgave it and continued to live with their unfaithful spouse, then the defense of **condonation** may be used (i.e., the act has been condoned, or accepted, by the non-guilty spouse).
- The old adage that "two wrongs don't make a right" applies in divorce cases as well—if both parties committed infidelity, then the defense of **recrimination** may be used.

- If the spouses mutually agree to the fault before it occurs, then the "innocent" spouse may not use that behavior as the basis for a fault divorce. For example, if a husband and wife mutually agree that the husband will commit adultery, the wife is not entitled to a divorce on the basis of adultery, as she cannot complain of an action that she consented to. This defense is known as **connivance**.

- Similarly, if the parties fabricate evidence of a marital offense in order to get a divorce faster, the court may dismiss the case or vacate a divorce decree based on the spouses' **collusion**. This defense does not apply unless some fraud was actually perpetrated on the court.

- The criminal law rule against self-incrimination, or making one essentially give evidence against him/herself, may sometimes be used in Virginia to prevent a spouse from forcing another spouse to admit their infidelity. In Virginia, both sodomy and adultery are still crimes, as is buggery. Admitting to those crimes may subject a cheating spouse to prosecution for those crimes; therefore, a spouse may sometimes assert his or her Fifth Amendment right against self-incrimination. While a faithful spouse can sometimes argue that the statute of limitations has elapsed or that the chance of prosecution is so remote as to be negligible, a court may very well err on the side of caution and allow a cheating spouse to assert his or her privilege against self-incrimination. While not technically a defense, this privilege against self-incrimination can make it harder to prove infidelity.

- After reading how difficult it is to prove infidelity, one may be tempted to ask, why do it at all? The answer is two-fold: it relates to money and property (spousal support and **equi-**

table distribution) and to when you can file and finalize a case for divorce.

If one spouse proves that the other is unfaithful, the guilty spouse is typically barred from receiving spousal support. Virginia law does allow an exception if it would be a "manifest injustice" to deny the spouse support, but that does not often occur when infidelity is proven. Moreover, any infidelity is considered by a judge when he or she divides the parties' property and awards attorney fees.

Having a cause-based initial filing can also allow a party to file before being separated for a year and allows a court to grant a divorce even if the parties have not been separated for a year (though, practically speaking, the time for a contested divorce to work its way through the court system is almost always more than a year).

Felony Conviction and Incarceration

The second category of fault grounds is conviction and incarceration for a felony. A person can file for divorce if their spouse is convicted of a felony and incarcerated for more than one year.

Cruelty or Desertion

The third general category of fault grounds in a divorce is cruelty or desertion. According to Virginia law, **cruelty** is behavior that causes bodily harm or danger to life, limb, or health and thus renders cohabitation unsafe. Cruelty does not have to be in the form of physical abuse, but can be found with angry words, abu-

sive language, humiliating insults, and annoyances that could effectually endanger a person's life or health. It must be more than yelling and name-calling. Cruelty can be subject to a recrimination defense in a similar manner as infidelity.

Desertion is when one spouse leaves the other without justification. A spouse "walking out" on his or her partner and children, abandoning them for no reason whatsoever, is the classic example of desertion. Alternatively, if one spouse's behavior is so intolerable that it forces the innocent spouse to leave the marital residence, the innocent spouse can file on grounds of "constructive desertion."

Impact on Military Members

Some servicemembers may be concerned about whether a divorce for cause could hurt their career. While many branches of service generally leave their servicemembers' divorces to the civilian courts, several things bear mentioning. As discussed above, adultery and sodomy are still criminalized in the Code of Virginia, so these offenses could affect a security clearance.

Finally, the Uniform Code of Military Justice (UCMJ) criminalizes adultery if it affects order and discipline. More than one general officer has been prosecuted under this line of legal reasoning. The UCMJ may also contain criminal consequences for abandonment. In short, divorce for cause may have further-reaching implications than the divorce itself.

No-Fault Divorce in Virginia

The remaining cause for divorce in Virginia is the separation of the parties. No-fault divorce was added into the Code of Virginia in the second half of the twentieth century, paving the way for spouses to divorce each other without all of the legal wrangling over fault that occurred in the past. Code §20-91(A)(9) contains Virginia's no-fault divorce ground. To get divorced based on this ground, a couple must live separate and apart for at least a year without the intent to resume the marriage. This time period can be reduced to six months if there are no minor children between the spouses and they have signed a separation agreement.

CHAPTER 4

What to Expect in a Divorce Proceeding

Complaint, Answer, and Counterclaim

Divorces are started when a **complaint** is filed. A complaint serves several roles. It is a pleading, or a formal demand for court action. A complaint is also a list of accusations by a plaintiff, or the person asking for court action, against a defendant.

The named defendant must **answer** the complaint made against him or her. An answer is a pleading that responds to a complaint. Answers must be filed within twenty-one days of the date that the complaint is served on the defendant. If the answer is not filed within this time period, the court can infer that the complaint's

accusations are true. Answers can admit or deny the accusations in a complaint.

A **counterclaim** is a filing that commonly accompanies a defendant's answer. It is a pleading that makes a complaint by the defendant against a plaintiff without having to file a separate lawsuit. Thus, it lists accusations that the defendant makes against the plaintiff. Like a complaint, it must be answered by the plaintiff within twenty-one days of the plaintiff being served.

Due to the nature of circuit court and the complexities involved in a divorce proceeding, if you are involved in a divorce lawsuit, having an attorney is essential. Beyond the enormous disadvantage you would have if the other side had an attorney, the actual procedures and rules for circuit court are complex and almost always violated by a person without an attorney. This is such a regular occurrence that some local courts have a special notice they send to unrepresented parties, advising them to retain an attorney in order to mitigate mistakes and disadvantages, as the court cannot give legal advice.

Pendente Lite Relief

Pendente lite is a Latin term meaning "awaiting the litigation." Either party can ask for pendente lite relief after a complaint is filed. This is a common procedure in divorces, and it allows the court to make temporary rulings as to what monies are being paid to whom while the divorce is pending, the custodial and visitation arrangements of children, who gets to live in the marital residence, etc. The court is limited in what pendente lite relief it can provide to the parties; Code of Virginia §20-103 gives the court the authority to provide the following pendente lite relief:

- Compel a spouse to pay spousal support
- Compel a spouse to maintain health insurance coverage for their spouse and children
- Compel the parties to pay certain debts
- Compel a spouse to provide funds to the other spouse for attorney's fees
- Temporarily grant the parties custody and/or visitation of the children
- Compel a spouse to pay child support
- Prevent either party from imposing any restraint on the personal liberty of the other party
- Provide one of the parties with exclusive use and possession of the marital residence
- Compel both parties to preserve the marital and/or separate assets of the parties
- If pendente lite relief is granted, an order is entered setting forth such relief. Pendente lite orders are temporary, and they are not supposed to influence the final decision of a court in a divorce case. Unfortunately, sometimes inertia prevails over what the Code of Virginia states, so it is important to hire an attorney and prepare thoroughly for a pendente lite hearing.

Discovery

During a lawsuit in circuit court, the plaintiff and defendant are empowered to find out information relevant to the lawsuit from

the other side. That process is called **discovery**. While many people know a lot about their spouses, some do not. Also, some people do not know if their spouse is hiding information, such as spending patterns or bank accounts.

There are several ways of doing discovery in circuit court. First, a party can send over written questions, called **interrogatories**, that must be answered under oath by the other side. Each side gets thirty interrogatories unless more are allowed by the court. Second, a party can request documents from the other side. This is called a **request for production of documents,** and the rules do not limit the number of these requests. Third, a party can send over statements and ask the other side to admit or deny them under oath. These are called **requests for admissions,** and each party is limited to thirty, with more allowed if they are just asking the party to admit the genuineness of a document.

A party may also hold a **deposition** of another party or of a witness. A deposition is a chance to ask questions under oath to a witness before the trial (usually live, in person). In most cases, a court reporter is present and the session may be videotaped. Depositions can be useful in uncovering the weaknesses of the other party and/or their witnesses before trial, locking people into positions so they cannot change their stories later, and recording the testimony of a witness who cannot appear at trial.

Depositions exist in part because of the rule against hearsay—what someone said before the court hearing generally cannot be presented in court. Depositions allow both sides to be present and to examine or cross-examine a witness, and this questioning is done under oath. Those characteristics allow for deposition testimony to be used over a hearsay objection.

Subpoena means "under power," and it places something under the power of the court. Subpoenas are often used in divorce proceedings for two purposes. First, subpoenas may be used to compel a witness to attend a trial, hearing, or other court appearance. Second, a subpoena *duces tecum* may be used to gather documents from a third party not involved in the litigation, such as a bank or health care provider.

For all forms of discovery, there are deadlines that a party must meet. If a party does not respond with information within the deadlines, they are required to confer with the other party to try to resolve the issue. If that conference fails, the party looking for the discovery may file a motion to compel (a filing seeking the court to force the non-responding party to answer the discovery), and the court will then either grant or deny the motion to compel. If the party with the information does not follow that order, they may be disciplined by the court.

If all of these requests and subpoenas and motions seem complex, that's because they are. Lawyers spend years perfecting the use of these methods to find out information in a case. While some of these methods are easier than others to use, they all cost money. In a hotly contested case, use of these methods can run up legal bills quickly, yet they can be the determining factor between a good or bad result in a divorce case. To ensure that these tools are used most effectively and you are not caught unaware, it is imperative to have the assistance of an experienced attorney in any contested lawsuit.

Judicial Settlement Conference/Mediation

Before a divorce case can proceed to trial, the parties must attend a judicial settlement conference or mediation. Judicial settlement conferences are conducted by a retired judge and are paid for by the Commonwealth of Virginia. Mediation can be handled by a retired judge or anyone who has been certified as a mediator by the Commonwealth. In mediation, the mediator is paid an hourly rate by the parties, so it is more expensive than a judicial settlement conference.

Knowing about the additional the expense, you may wonder why someone would choose a mediation over a judicial settlement conference. Mediations can be very helpful in difficult and complex cases. There are a limited number of retired judges available for judicial settlement conferences, and parties may want a mediator who is more specialized and knowledgeable in the issues of their case. Additionally, judicial settlement conferences are only available to divorces pending in circuit court.

No matter which mediation method you use, utilizing neutral third parties can be very helpful in settling divorce cases. If the matter is settled, the parties typically sign a property settlement agreement and proceed with a no-fault divorce.

Trial

Normally, you and your spouse must be separated for more than one year before you can proceed to trial. There are two exceptions: (1) fault, such as adultery, cruelty, or desertion as a ground

for divorce (Code of Virginia §§20-91 and 20-95); or (2) the trial is limited to custody and visitation of the minor children.

As discussed earlier, if either party alleged adultery, cruelty, or desertion, the court can grant the divorce even if the parties have not been separated for a year. However, due to discovery and other court procedures, the typical contested divorce case takes over a year from start to finish, so it is rare for a court to grant a divorce in under a year. In addition, both circuit courts and retired judges have very full dockets, so it can take months to schedule settlement conferences and trials. An attorney who is familiar with local courts, procedures, and judges can assist in expediting your case.

Sometimes custody and visitation issues are heard prior to the divorce trial. This occurs when the courts will not make a decision at the pendente lite hearing on custody and visitation or when custody and visitation are hotly contested issues and the parties want them resolved more quickly than waiting for the normal trial date.

You may think that, once the court hears the witnesses' testimonies and views the submitted evidence, the judge will make a decision immediately thereafter. In most instances however, this is not the case. The judge may ask the parties to file a post-trial brief supporting their position, or the judge may need time to sort through the evidence or request a copy of the transcript of the proceedings before making his or her ruling. Either way, you may be waiting several months to get a ruling from the court after the trial is concluded.

Final Decree

The final court order in a divorce is called a **decree of divorce**, or final decree. This order lays out property distribution, spousal support, child support, and child custody/visitation issues, if applicable. Most things addressed in a final decree are not modifiable after entry by the court unless both parties agree to do so. However, custody, visitation, and child support are always modifiable if a party shows that there has been a "material change in circumstances" with any of the parties. A job loss, family move, remarriage, promotion, permanent change of duty station, or any number of other circumstances can serve as a material change in circumstances. Spousal support may also be modifiable depending on the circumstances; again, a party must show a material change in circumstances before the court will consider modifying the support.

Courts can also reserve jurisdiction on issues, meaning that the court keeps the ability to address a specific issue in the future. However, barring a special ruling by the judge, circuit courts are required to send or "remand" the issues of custody, visitation, child support, and spousal support to the juvenile and domestic relations district court once the final decree is entered.

As discussed before, if the parties have children and have reached an agreement in their case, they must wait a year from the date of separation to finalize the divorce. However, if the parties do not have children and enter into an agreement resolving all issues, then they have to wait only six months from the date of separation to finalize their divorce.

Appeal

Either party may appeal the judge's ruling to the court of appeals. A notice of appeal must be filed within thirty days of the entry of the final decree of divorce. As discussed earlier, appeals from divorce matters are a matter of right, meaning that, so long as the procedures are properly followed, the court of appeals must consider the briefs of the parties and hear oral argument if requested by the parties.

CHAPTER 5

Spousal Support

Spousal support (formerly known as alimony—a term no longer used in Virginia) in the twenty-first century is awarded to a dependent spouse regardless of whether that spouse is male or female. There are no hard and fast rules for determining spousal support.

The following are five possible outcomes for spousal support in Virginia:

- a lump sum award
- monthly, weekly, or other time-spaced payments
- rehabilitative support for a set amount of time
- reserving the issue and right to ask for it later
- a combination of the above

Unlike child support, which will be discussed in the next chapter, spousal support in Virginia for divorces does not have a legislatively-established formula. However, informal guidelines ex-

ist and are used by some of the courts. As of July 1, 2020, there is a formula for an award while the divorce is pending (pendente lite support) which is the difference between 26% (27% if there are no minor children) of the payor's monthly gross Income and 58% (50% if there are no minor children) of the payee's monthly gross income.

Code of Virginia §20-107.1 lists thirteen factors that a court must consider before making an award of spousal support in divorces. Those factors are:

1. The obligations, needs, and financial resources of the parties, including but not limited to income from all pension, profit sharing, or retirement plans, of whatever nature;

2. The standard of living established during the marriage;

3. The duration of the marriage;

4. The age and physical and mental condition of the parties and any special circumstances of the family;

5. The extent to which the age, physical or mental condition, or special circumstances of any child of the parties would make it appropriate that a party not seek employment outside of the home;

6. The contributions, monetary and nonmonetary, of each party to the well-being of the family;

7. The property interests of the parties, both real and personal, tangible and intangible;

8. The provisions made with regard to the marital property under §20-107.3;

9. The earning capacity, including the skills, education, and training of the parties and the present employment opportunities for persons possessing such earning capacity;

10. The opportunity for, ability of, and the time and costs involved for a party to acquire the appropriate education, training, and employment to obtain the skills needed to enhance his or her earning ability;

11. The decisions regarding employment, career, economics, education, and parenting arrangements made by the parties during the marriage and their effect on present and future earning potential, including the length of time one or both of the parties have been absent from the job market;

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

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

When determining spousal support and equitable distribution, courts consider fault. Additionally, when evaluating the parties' contributions to the family's well-being, courts consider the facts that may have led to the dissolution of the marriage. For example, any economic harm to the family, such as spending money on the extra-marital lover or counseling bills caused by the children's discovery of a parent's infidelity, can be considered by the court when awarding support. Likewise, the void left behind by the party leaving the marriage to be with their

paramour can be considered by a court when it awards support. Courts are required to consider equitable distribution awards prior to calculating spousal support, as the division of property and debts has a critical effect on the amount and duration of a support award.

Spousal support, like equitable distribution, may be waived or negotiated by a party in a divorce proceeding. A receiving spouse could trade his or her ability to receive spousal support for other things, such as getting more property, the other spouse taking more debt, or claiming a tax exemption. Also, receiving spousal support may be conditioned on the performance of other things, such as titling over a car or a house if the parties are negotiating towards an agreement. The court will generally allow most anything that the parties have agreed to when it comes to working out the finances during a divorce.

When dealing with spousal support, both parties must keep in mind the taxable nature of such support. Under current law, the default is that spousal support is treated as taxable income to the payee and tax deductible to the payor. The current law does allow for changing this default position if the parties choose (i.e., making the spousal support not taxable to the payee and not deductible to the payor). In some cases, the court may award more spousal support to account for taxes the recipient will incur.

The Tax Cut and Jobs Act (signed into law on December 22, 2017), however, changes the tax treatment for divorces entered and agreements executed after 2018. Beginning January 1, 2019, spousal support no longer is deductible by the payor, and the receiving spouse does not have to include it in gross income or pay federal income tax on it. Depending on the case and the amount of spousal support, it may be important to hire an accountant

to determine the tax consequences of receiving and/or paying spousal support. With the changes to the tax status of spousal support, it is important to consult with a knowledgeable attorney in order to make the best financial decisions for your family and your case.

When negotiating spousal support, the parties should also consider whether to make the support modifiable or non-modifiable. If the support is modifiable, either party may petition the court to change the spousal support based upon a material change in circumstances. If the support is non-modifiable, the court does not have the authority to modify the support. If your case ends up going to trial, the court will automatically make any spousal support modifiable. There are advantages and disadvantages to making the support modifiable or non-modifiable, so it is important to discuss this issue with an attorney.

Under Virginia law, spousal support is subject to automatic termination upon the remarriage of the payee spouse. The payee spouse has a duty to inform the payor spouse if he or she is getting married. If he or she fails to do so and continues to receive spousal support after getting married, the payee spouse will likely be required to reimburse the payor spouse for the support received.

Spousal support is also subject to termination if the payee spouse cohabitates with another person in a relationship analogous to marriage for more than one year. This is not an automatic termination like remarriage. The payor spouse must petition the court to terminate the spousal support and must prove that the payee spouse is meeting the legal requirements of cohabitation. If you believe your ex-spouse is cohabitating in a relationship analogous to marriage, you should talk to attorney. “Cohabita-

tion" is a legal term and you will want to make sure you have the necessary evidence before seeking to terminate spousal support.

In sum, the parties in an agreement can waive both of these terminating events—remarriage and cohabitation—as events that would terminate the obligation to pay spousal support; however, it must be an explicit waiver of this provision.

It is also important to note that spousal support will automatically terminate upon the death of the payee or payor.

Spousal Support for Servicemembers

There are several additional factors that a military member must consider. The following list is based on the current version of the Military Personnel Manual for the Navy as an example; guidelines vary in each branch of military:

- Military personnel must pay a just debt. Failing to do so can lead to sanctions.
- Some command structures may help a dependent spouse obtain spousal support. For example, a non-support letter to a person's commanding officer may be a more expedient way of getting support when there is no order in place and the servicemember is not paying.
- There are several involuntary methods of extracting support from a non-paying servicemember if they violate a court order for support. Those include involuntary **allotment** and involuntary **garnishment** under the Uniformed Servicemembers' Former Spouses Protection Act. A legal action for contempt (a "Show Cause") may be used as well. All of these

methods require an entered court order, and the first two divert part of the servicemember's paycheck to the dependent spouse. These methods can also be used against retired servicemembers.

- For reservists, it may be wise to put a plan in place for deployments and spousal support. Specifically, a reservist's income can change dramatically when the military activates them for duty. A doctor making over $200,000 a year could suddenly be paid a Lieutenant's salary, and that could make paying an existing amount of spousal support difficult. It is crucial to have the assistance of an experienced attorney when advocating for this sort of arrangement in a divorce case.

Spousal support calculations involve a complex series of factors that can have a lasting effect on post-divorce life for both spouses. This area of the law can get even more complicated when one of the spouses is military or retired military. Whether you are a servicemember or a servicemember's spouse, it is very important to consult with an experienced family law attorney to help you navigate this difficult field.

CHAPTER 6

Child Custody and Visitation

Unfortunately, children's time with their parents permanently changes when they go through a divorce. Even for children of unmarried parents, courts can intervene and determine when the child will visit each parent and who the child will stay with most of the time.

General Facts about Custody

There are two forms of custody in Virginia: legal and physical. **Legal custody** relates to which parent has decision-making power concerning the child's education, religion, medical treatment, and other issues. **Physical custody** relates to where the child lives on a day-to-day basis.

There are three types of legal custody. **Sole legal custody** is when one parent controls every legal aspect of a child's custody. **Split**

legal custody is when there is more than one child, and one parent controls legal custody of one (or more) child(ren) entirely and the other parent controls that of one (or more) child(ren) entirely. **Joint legal custody** is when both parents have an equal legal say in how their children are raised.

There are four types of physical custody in Virginia. **Primary physical custody** refers to a situation where one parent has a child most of the time and the other parent has a child for ninety or fewer days per year. **Shared physical custody** is when each parent has more than ninety days per year with their child. **Split physical custody** is similar to split legal custody—there is more than one child, and the children are literally split between two parents as to where they live. Finally, **sole physical custody** is when one parent has physical custody of the child and the other has no visitation rights.

Custody cases may be heard as part of a divorce by a circuit court or as a stand-alone case by a juvenile and domestic relations district court. Importantly, custody and visitation of a minor child are always modifiable by a court. The court must first determine whether a material change in circumstances has occurred. Once the court determines that there has been a material change, the court then determines if the best interest of the child would be served in modifying custody or visitation. In most cases, a **guardian *ad litem*** (GAL) is appointed by the court to represent the child. The GAL is a licensed attorney that must meet certain qualifications, including mandatory training, to be able to represent children.

In Virginia, courts use the "best interest of the child" standard to determine custody and visitation. The courts use the ten factors listed in §20-124.3 of the Code of Virginia to determine which

custody and visitation arrangement is in the best interest of the children:

- The age, physical state, and mental state of children, including developmental needs
- The age, physical state, and mental state of parents
- The relationship between each parent and child, including positive involvement in the child's life and the ability to assess a child's needs
- The needs of the child, including relationships with siblings, peers, and extended family members
- The role each parent has and will play in raising the child
- The propensity of each parent to actively support a child's contact and relationship with the other parent, including unreasonable denial of access to the children
- The willingness and ability of a parent to maintain a close and continuing relationship with the child; and the ability of a parent to resolve disputes with the children
- The reasonable preference of a child if court deems the child to be of reasonable intelligence, understanding, age, and experience
- The history of family abuse, if it exists, and as of July 1, 2020, any history of sexual abuse, child abuse, or an act of violence, force or threat that occurred no earlier than 10 years prior to the date a petition is filed
- Such other factors the court deems necessary

There are several considerations that are specific to servicemembers. First, a servicemember custodian or a servicemember who is not a custodian of a child may apply for a stay under the SCRA during a custody case. In these cases, it is important to know that the SCRA was intended to be used as a shield to protect servicemembers from harassment, such as when a deploying parent is served with a custody case summons the day before a deployment. The SCRA should not be used as a "sword" to abuse one's case.

Courts consider the conduct of a non-military parent when applying the SCRA, such as the non-military parent serving the military parent with court papers the day before a deployment. The same goes for the conduct of the military parent; thus, actions that can hurt the military parent's case include removing the child from the country on a deployment without the permission of another parent, breaking promises to the non-military parent, or denying visitation to the other parent.

When servicemembers are mobilized, a number of issues can arise regarding custody. Specifically, temporary custody trumps the SCRA. A stay can stop only parts of the case related to the presence of the military member. The SCRA does not stop the need of a child to have a parent present to assist with important decisions. Thus, a court will consider a child's best interest and can enter a temporary custody order over a SCRA stay. This rule is important in cases of quick mobilization when a servicemember has custody of a child. The **non-custodial parent** can often obtain temporary custody, even over a SCRA stay by the servicemember.

Moreover, when there is a natural parent who is not married to the servicemember, his or her temporary custody rights will usually trump the SCRA and a **Family Care Plan** (FCP), so far as the FCP gives custody to a non-parent when the servicemember parent deploys. This means that even if a servicemember has a FCP giving the child to their spouse, and it has been approved, a biological parent's rights to custody would trump the FCP in a court. The same can be said for a power of attorney—a biological parent's rights to custody would trump that document in court.

A court can use emergency powers when a mobilization results in an abandoned child. Child support can also be affected by mobilizations and transfer of custody. Thus, a servicemember with custody of a child who then loses that custody during a mobilization could have to pay child support to the other parent during that temporary change in custody. That situation could be stressful, so the help of an attorney is critical in dealing with the fallout from a fast mobilization.

Jurisdiction

The Uniform Child Custody Jurisdiction Enforcement Act (**UCCJEA**) governs where someone can file for custody. A person may file in the state where the child lives—a child's "home state." Typically, the home state is determined based upon where the child has lived for at least six months; however, it can get tricky when a child moves with a military parent or when a child gets placed with a non-military parent during deployment. In those circumstances, in order to determine the child's home state, a court looks at whether the child has "substantial ties" to that state. That being said, if there is a prior court order, the court

that entered the order retains jurisdiction until it releases jurisdiction to another state. This typically occurs when the child has been in another state for more than six months or neither parent lives in the state that issued the prior court order.

Another issue that can arise with custody and territorial jurisdiction is parental kidnapping. In Virginia it is a crime to withhold a child in violation of a court custody order. When that withholding involves the child being withheld outside of Virginia, it becomes a felony. The same is also a crime internationally.

Virginia Parentage Law

An issue that arises in some cases is whether a child was conceived by the man the mother says is the father. While this situation almost always arises between two parents who have never been married, it does come up occasionally between married people. Under Virginia law, a child born of a marriage is presumed to be the biological child of both spouses. When questions of parentage arise between either married or non-married parties, the Code of Virginia contains provisions to establish or determine parentage.

Chapter 3.1 of Title 20 (the domestic relations title of the Code of Virginia) deals with parentage. Most of these cases occur in the juvenile and domestic relations district court; however, a circuit court may hear this issue if it occurs in a case that is already before it, such as a divorce.

In the juvenile and domestic relations district court, parentage proceedings are started by a **petition.** A child, a person claiming to be a parent, a person standing *in loco parentis* (in the place of

a parent), or the Department of Social Services may file a petition. After that, the case begins.

There are three ways to establish parentage in Virginia:

- If both parents sign a voluntary written statement that acknowledges paternity, such as one at a hospital, then that document establishes parentage. To be valid, both parents have to be informed of the rights and duties of parenthood, and the signed statement must not be retracted after 60 days. Barring any fraud, duress, or material mistakes, a statement not retracted after 60 days has the same effect as a court order.

- Parentage may be established by a "scientifically reliable test" that produces at least a 98% chance that the person is the father. These tests may include blood tests; the Code of Virginia makes it fairly simple to put blood tests into evidence in a paternity case.

- If there is no acknowledgement or 98% or better paternity test, other evidence may be considered by the court to determine parentage. Code of Virginia §20-49.4 lists several types of evidence that are often presented to courts. Those types of evidence may include:

    * Evidence of open cohabitation and sexual intercourse between the known parent and the alleged parent at the time of the conception of the child

    * Medical or anthropological evidence relating to alleged parentage based on expert-performed tests; the court may require all parties to submit to tests

    * Results of scientifically reliable genetic tests, including

blood tests, weighted with all the evidence

* Evidence of potential parent consenting or acknowledging paternity of the child by conduct, such as the child's common use of the parent's surname

* Evidence of potential parent claiming the child on a statement, tax return, or other document filed by him or her with any state, local, or federal agency

* True copy of acknowledgement pursuant Code of Virginia §20-49.5

* An admission by male between ages of 14–18 pursuant Code of Virginia §20-49.6

If a parent proves the paternity of another parent, several consequences can occur. The court can craft an order establishing legal custody, physical custody, visitation rights, and child support. The court can also order the father to pay for any unpaid medical bills of the mother during the pregnancy and birth of the child. If the mother already paid those costs, then the court can equitably apportion those costs.

Generally, acknowledgements of paternity, described above, stand up over time. However, Code of Virginia §20-49.10 allows a person to seek relief from a previous paternity determination if several conditions are met:

- A scientifically reliable genetic test proves that a person is not a child's parent

- Even if a test establishes the exclusion of a person from being a child's father, a court will not undo that determination if the person adopted the child, signed an acknowledgement

of parentage knowing he was not the father, or knew that the child was conceived through artificial insemination

- Importantly, if an acknowledgement of parentage is involved, the person seeking to overturn a support order or other child-related obligation must show that the form was signed under fraud, duress, or a material mistake of fact

Even if a person can do all of these things, he or she still cannot overturn past child support or other obligations; only those going forward may be changed.

CHAPTER 7

Child Support

Once a court determines custody and visitation of a child, it can then order one parent to pay child support to the other parent. The theory behind child support is that a child shares in the successes of his or her parents. Furthermore, a child is entitled to be supported by both of his or her parents.

Virginia uses presumptive guidelines established by law to determine how much a **custodial parent** receives in child support. The guidelines are determined by the Code of Virginia and were recalculated in the summer of 2014 for the first time in nineteen years. When they were recalculated, the modifications took into account the prices of food, fuel, housing, and many other factors. In general, the 2014 revisions increased child support about 11%.

When calculating child support, the guidelines take into account the gross income of both parents, the amounts they pay for work-related childcare, and the amounts they pay for medical, dental, and vision insurance premiums for the child. As of 2014, the court may also consider parental education-related

childcare, though that is not mandatory in the calculations as it is with work-related childcare.

In some circumstances, such as when a parent voluntarily quits his or her job or is voluntarily underemployed, a court will impute income to a party (i.e., assign an income to that party even though he/she isn't working, or is underemployed). The imputed amount is considered income to that party, and is entered into the guidelines. Starting with the gross incomes of the parties, courts reference a chart in Code of Virginia §20-108.2, then factor in other items, like health insurance premium costs and work-related childcare, to determine the presumptive amount of child support one parent must pay to the other. Typically, the non-custodial parent must pay support to the custodial parent. However, even when both parents have equal parenting time, one parent may still have to pay the other parent child support depending on the ratio of incomes between the parents.

If the non-custodial parent has ninety or fewer days of visitation, the courts use sole guidelines to determine child support. When the non-custodial parent has more than ninety days of visitation, or the parents have equal parenting time, the courts use shared guidelines to determine child support. If the parties are utilizing a split custody arrangement, the court uses a more complicated formula to determine proper support.

The thought behind the different guidelines is that a parent who has more than ninety days of visitation is spending more money on food, clothing, and other necessities for the child than he or she would with fewer than ninety days of visitation. The shared guidelines take this into account and thus reduce the non-custodial parent's child support obligation. The more visitation the non-custodial parent has over ninety days, the more the child

support will be reduced. A day is a 24-hour period of time, and an overnight, not equaling 24 hours, is a half day. Anything less than an overnight is not counted.

The guidelines create a rebuttable presumption, which means that the courts must use the guideline support figure, but are permitted to deviate from the guideline amount following consideration and application of the following factors found in Code of Virginia §20-108.1:

- Actual monetary support for other family/former family member
- Arrangements regarding custody of children, including cost of visitation travel
- Imputed income to a party that is voluntarily unemployed or under-employed
- Childcare costs incurred on behalf of custodial parent in education to better earning
- Debts of party for benefit of child
- Direct payments ordered for maintaining life insurance coverage for child, education expenses, or other court ordered direct pay
- Extraordinary capital gains (e.g., sale of marital home)
- Special needs of child for physical, emotional, or mental condition
- Independent financial resources of the child
- Standard of living during marriage

- Earning capacity, obligations, financial resources, or special needs of each parent
- Provisions made regarding marital property (§20-107.3) where property earns money
- Tax consequences to parties
- Written agreement/stipulation
- Any other factors necessary

Like child custody, the amount of child support is always modifiable by a court when either party shows a material change in circumstances. Child support may also be bargained for between two parents and agreed upon. Parents may not agree to permanently waive child support, but can agree that neither pay the other child support at the current time. As with spousal support, a court order is the most reliable way of ensuring child support flows from one parent to another.

There are several other considerations for support in Virginia. Virginia law allows a court to order a parent to maintain a life insurance policy for the benefit of his or her children and can make orders concerning health insurance and out-of-pocket medical costs.

A question that often arises in divorce or custody cases is whether a parent can be made to pay for extracurricular activities, private school, and/or college tuition for their children. In Virginia, the court has no authority to order a parent to pay for a portion of extracurricular activities or college tuition. However, a court can order a parent to pay a portion, if not all, of private school tuition and expenses. In determining whether a parent will be required to pay for private school, the courts look at how long

the child has been in private school, if there is a special need for the child to be in private school, and the parents' ability to pay for private school. A tuition order is considered an upward deviation from support guidelines (i.e., a factor that increases support above beyond what the presumptive guidelines would be).

While the court has no authority to order either parent to pay for extracurricular activities and college tuition, these issues can be negotiated between the parents. The parties can agree to equally divide the costs, set limits that each will be obligated to pay, or require that one parent pay it all. For college, parents often set certain conditions, such as limiting tuition payments to in-state tuition costs, requiring the child(ren) to attend an in-state school, and/or allowing the non-custodial parent to have a say in choosing the school.

Military Members

For servicemembers, interim guidelines for child support exist in some branches of service before a child support order can be put in place. This is complex, as it is done through regulation. When a non-servicemember parent is receiving support, the Leave and Earnings Statement (**LES**) of the servicemember is invaluable for calculating support. It lists all of the pay, including the base pay, allowances, and extra pay, that they receive from the military. All of this information is needed to determine how much support a parent should receive. Other branches of service, such as the Air Force, maintain a non-interference policy and defer to the courts entirely.

As with spousal support, child support can also be obtained from a servicemember via non-support letters to a servicemem-

ber's chain of command. However, a non-servicemember may want to be cautious with that route—the chain of command can sanction the servicemember, including demotion, which could reduce the amount of support ultimately received. Moreover, the same involuntary support options, such as garnishment or involuntary allotment, exist if a servicemember violates a court order regarding support. Sadly, a servicemember parent does not share the same options if a civilian parent dodges child support.

Mobilization can also affect child support by changing which parent has custody of a child. With a reservist, mobilization or activation can also decrease a paying parent's salary, which can make it very hard for that parent to pay support.

Finally, the Post-September 11 GI Bill is transferrable between family members. It is available to servicemembers with six or more years of service. It can be transferred to a dependent who is enrolled in DEERS (Defense Enrollment Eligibility Reporting System). Importantly, the later marriage of the child does not affect the ability to transfer the benefit. This, too, can be bargained for in a divorce or custody case. However, a court has no authority to order a servicemember to shift this benefit to someone in a contested divorce.

Jurisdiction

The Uniform Interstate Family Support Act (**UIFSA**) sets the rules as to where a person can file for child support if no case has yet been filed. The home state of the child dictates the place where the case must be filed. The home state is often where the child lived for the previous six months before the filing. However, it can be more complicated if a family moves often. Also, the

law gets more complicated when there has been a court order. One state has continuing, exclusive jurisdiction to modify orders unless and until all parties leave the state. However, that state's orders may be registered and enforced in other states. Often, the parties must return to the same court until everybody has left that state. In any case, as this body of law can be complicated, you should always have an attorney to assist you so that you do not run afoul of the UIFSA's numerous requirements.

CHAPTER 8

Equitable Distribution

Equitable distribution occurs only in divorce cases and involves the division of assets (property) and liabilities (debt) of the parties. Virginia law defines property as three types: marital, separate, and hybrid. **Marital property** is property acquired during the marriage by either the husband or the wife. **Separate property** is property acquired before the marriage, acquired via gift that belongs to either the husband or the wife alone, or acquired after the date of separation of the spouses. **Hybrid property** is property that is part marital and part separate.

According to Code of Virginia §20-107.3(E), a court considers several factors when it classifies property as marital, separate, or hybrid:

- All contributions, both monetary and non-monetary, to the well-being of the family
- Any contributions to care or maintenance of property

- The duration of the marriage
- The ages and mental condition of parties
- Any circumstances and factors that caused the dissolution of the marriage, including any fault-based grounds
- How and when marital property was acquired
- The debts and liabilities of each spouse, basis for them, and property as security for each
- The liquid or illiquid nature of property
- The tax consequences to each party
- The use of marital property for non-marital purpose or dissipation of funds when done in anticipation of a divorce or after the parties' last separation
- Such other factors necessary and appropriate

While all of these factors seem straightforward, they take on a life of their own when a non-tangible (not a physical) asset, such as business goodwill (the value given to someone's efforts and time invested into a business, separate from the actual paper value of the company), is involved. Spouses may dispute the value of some of their property as well, and that dispute can result in the need for an expert property appraiser.

Importantly, the court considers the factors that caused the marriage to fail when it determines how to split the property and debt between two parties. Courts often tend to consider the economic consequences of any fault of a divorcing spouse; however, they may not be limited to merely monetizing the effects of any infidelity, cruelty, or other cause. That being said, any monetary

effects of fault in the divorce, such as an unfaithful party paying to put up the lover in a hotel room or any hospital bills for a party suffering from marital cruelty, will certainly be accounted for during the divorce.

Moreover, a court's division of property covers any type of property that a person can own. Thus, houses, cars, furniture, pets, tools, and any other tangible item of property may be divided. Also, stocks, bonds, and trust fund benefits, as well as the value of songs, books, copyrights, rights to legal claims, and even retirement plans may also be divided by a court. Debts, too, fall under the court's power to divide.

When a court exercises equitable distribution, it first decides which property is marital, which is separate, and which is hybrid. The court then assigns a value to all of the property in a marital estate, including the marital portions of any hybrid property. This may be assisted by evidence presented by either spouse. Once this is done, the court distributes a percentage of the estate to each spouse. Often, this is done via a monetary sum.

Importantly, when the spouses cannot agree which of them will possess a piece of property, the court can order the property sold and distribute the proceeds of the sale. Each spouse will get a portion of the marital share of the sold property. While this makes little economic sense with small personal property items, such as tools or even some older cars, this can lead to large sums of money changing hands when a house sells. It is imperative to have the assistance of legal counsel when dealing with complex equitable distribution issues in a divorce case.

Retirement—Defined Benefit vs. Defined Contribution Plans

A military pension is a defined benefit plan, as are other types of pension plans. They are employer-sponsored retirement plans completely controlled by the employer. Typically, a person must be employed for a certain number of years to be eligible to take part in the plan.

Defined benefit plans are typically divided by using a fraction and multiplying that fraction by 50% or some other percentage agreed to by the parties or ordered by the court. This is known as a **coverture fraction.** The numerator of the coverture fraction is the number of months of marriage during which retirement benefits were accruing. The number of months of marriage is typically calculated from the date of marriage to the date of separation. The denominator of the coverture fraction is the total number of months of service during which retirement benefits were accruing. A Qualified Domestic Relations Order (**QDRO**) is usually necessary to divide defined benefit plans. Depending on the retirement plan, the non-owning spouse may choose between a shared interest or separate interest division of the retirement plan.

Under a shared interest division, the non-owning spouse cannot start receiving benefits under the plan until the owning spouse retires. The amount of the monthly benefit is also based on the owning spouse's life. There can also be a survivor benefit to the non-owning spouse.

Under a separate interest division, the non-owning spouse can choose to begin receiving benefits earlier than the owning spouse's retirement. Such earlier times are mandated by the re-

tirement plan. Also, when the non-owning spouse begins to receive benefits under the plan, the monthly payments are based on the non-owning spouse's life expectancy. There is usually no survivor benefit available to the non-owning spouse.

A defined contribution plan is a retirement plan wherein the employer and employee contribute to the plan. The employer establishes separate accounts for each employee and the employee typically has control over how his/her contributions are invested. A Thrift Savings Plan (**TSP**) is a defined contribution plan, as are 401(K) accounts, 403(b) accounts, 401(a) accounts, and the like.

Virginia law defaults to addressing the value of defined contribution plans as of the date of the divorce trial, unless one of the parties requests an alternate date be used. Typically, the parties opt to use the date of separation for valuation. The non-owning spouse will usually be awarded 50% of the marital share (the amount accumulated during the marriage). It is important to address whether gains and/or losses will be applied to the non-owning spouse's share. Defined contribution plans also need to be divided using a QDRO.

When addressing any type of retirement plan in a divorce, it is important to address who will draft the QDRO and how any fees charged by the plan administrator to review the QDRO and/or divide the account will be divided and/or paid. The division of retirement accounts can get complicated very quickly, so it is wise to have an attorney advise you in your case if it involves or may involve any of these issues.

Military Pension

In a contested divorce involving a spouse or spouses who were in the military, a large amount of effort can go into dividing a military pension. It can be an emotional issue when the serving spouse does not want his or her pension divided.

For many years, the legal issue of whether a military pension was divisible by a divorce court was hotly contested. The Supreme Court of the United States eventually decided the issue in a case that prevented division. Afterwards, Congress enacted the Uniformed Services Former Spouses' Protection Act (**USFSPA**). That federal law now trumps the Supreme Court case and directs states to govern whether a military pension may be divided and, if divisible, how it may be divided.

Code of Virginia §20-107.3 allows state courts to divide military pensions. The non-serving spouse's share of a pension is one half of the fraction of the pension that was earned during the marriage. Importantly, the spouses' date of separation sets the length of the marriage for purposes of Virginia pension division.

For example, if a couple married in 2001 and separated in 2011, then the length of marriage would be 10 years. If the military spouse was in the military from 1991 until 2011 (when his/her pension vested), then there are 20 years of creditable service. The non-military spouse's share is half of the marital portion of the pension. The marital share is the portion of the pension earned when the marriage overlapped with military service, which in our example is 10 years or 120 months. The non-military spouse's share is half of the number of months of marriage

that overlapped with military service divided by the number of months of total military service—half of 120 months divided by 240 months. In this example, the non-military spouse's share is 25%.

Military pension payments may be paid in several ways. As with any normal pension, the paying party could theoretically be ordered to pay a lump sum representing half of the value of the pension. However, as most military pensions are paid monthly, that would present difficult valuation problems, and require the use of an expensive expert witness. Instead, the ex-spouse's share of pensions is paid in monthly installments as the retired servicemember receives retired pay.

Monthly installments may be paid in two ways—one way involves the retired servicemember getting the retirement pay and paying it to the receiving spouse directly, and the other involves the retired servicemember's pay being taken out automatically by the Defense Finance and Accounting Service (**DFAS**).

People may prefer DFAS to handle the payment rather than direct payment to or from a former spouse. It is faster and leaves no amount to question. It also automatically accounts for a cost of living adjustment (**COLA**). However, there is an important condition that must be met for DFAS to handle the retirement pay: the parties must have been married for at least ten years and have at least ten years of marriage overlap with a servicemember's time in the military. This is called the "10/10 Spouse" rule. Note that the date of the entry of a final decree of divorce sets the length of a marriage for DFAS payment purposes. This is different than the date of separation; thus you can have a ten-year period of marriage overlap even if the parties separate before the ten-year period is up.

Several other issues can pop up with military pension division; for example, the court must have jurisdiction over the pension a person hopes to divide. Generally, the servicemember's domicile is the place where a court would have jurisdiction over the pension. Thus, a spouse seeking to divide a servicemember's pension should be careful where they file a divorce lawsuit. This is a decision best made with an experienced attorney.

Further, Congress amended the USFSPA on December 23, 2016, and changed how rights to future pensions may be divided by the states beginning on January 1, 2018. Previously, if a servicemember got divorced before they retired, the spouse would receive the applicable marital fraction of the servicemember's full pension. So, the non-serving spouse would receive the benefit of any upward change in the servicemember's rank or pay grade that occurred after the divorce. The change to the law caps the retired pay that a spouse receives at the amount a servicemember would get if they retired at the moment of a divorce, no longer taking post-divorce service into consideration. The statutory revision also changed the requirements for acceptable pension division orders. Given the recent and complicated changes, a spouse seeking to divide a military pension should consult an experienced military divorce attorney regarding dividing a pension and preparing an order to ensure it is done correctly and that his or her rights are protected.

Disability Pay vs. Retirement Pay

Another issue that can arise is when a servicemember becomes eligible for disability pay. **Disability pay** is what a servicemember receives when he or she is rated disabled. That pay is tax-free; it is also not divisible as a military pension. A disabled servicemember may elect to receive a portion of pay as disability

pay and waive the receipt of retirement pay. If this occurs before a divorce, oftentimes little can be done to increase a receiving spouse's share of retirement pay, as it will significantly decrease if the servicemember spouse takes the election. However, if a divorce occurs before the election, a recipient spouse should consult an attorney to ensure that their rights are protected.

Survivor Benefit Plan

A Survivor Benefit Plan (**SBP**) is also something that can affect the amount of a pension received. An SBP is a percentage of a pension paid to the recipient spouse when the pensioner dies before the recipient spouse. An SBP is different than life insurance, and the owner of the pension elects whether to participate. SBPs are paid out of the retired pay, and the amount of coverage can be chosen by the pensioner.

By default, an SBP covers the entire amount of retirement pay and pays 55% of that covered amount. However, parties can elect SBPs with varying amounts of coverage. The cost of the SBP is 6.5% of the covered amount of pay. The pensioner can elect SBP for a spouse or former spouse. If the servicemember is married when the SBP is elected, the spouse's signature is required for anything but full coverage of their current spouse. A court can order the servicemember to select an SBP for a former spouse if they have not yet done so. The issue of an SBP is complex, and either party in a military divorce should be assisted by counsel in evaluating whether one should be selected (if it was not already), how much coverage should be selected, and who should pay for the plan.

Blended Retirement System

In 2017, the Department of Defense announced a dramatic change to military pension and benefits, which will impact current and future servicemembers. The new retirement program, called the **Blended Retirement System** (BRS) combines a traditional pension with a defined contribution plan. This plan reduces the pension award by 20%, but now allows servicemembers to receive a matching contribution of up to 4% and an automatic contribution of 1% to the TSP. BRS also includes a lump sum retired pay option, where eligible members may reduce their monthly retired pay by 25 or 50% in exchange for a lump sum. Servicemembers who enter service on or after January 1, 2018, were automatically enrolled in BRS. Those who have served twelve years or more as of December 31, 2017, will remain in the legacy retirement plan. Those who have fewer than twelve years of service must choose whether to opt into the BRS program or remain in the legacy program.

With the dramatic changes to the legacy retirement system and the new and varied options for servicemembers regarding their retirement, it is imperative for military members and their spouses to seek out attorneys with experience in military divorces in order to make the best financial decisions for their future.

Other Military Benefits

A non-military spouse can continue to receive military benefits in some cases. Spouses who have been married to a servicemember for more than twenty years when at least twenty years of the marriage overlapped with active military service can continue to receive military benefits post-divorce. These are called 20/20/20 spouses. For spouses who have been married to a servicemember for more than twenty years when at least fifteen years of the

marriage overlapped with active military service, and the other spouse has at least 20 years of service, they can continue to receive military benefits for one year after the divorce. These are called 20/20/15 spouses. These privileges include TRICARE status, base access, and access to the commissary. These benefits are statutory in nature, and can be changed on the whim of Congress.

CHAPTER 9

Juvenile and Domestic Relations District Court

The juvenile and domestic relations district court (**JDRDC**) has jurisdiction to determine custody, visitation, child support, and spousal support.

If you are not married but have children, you will need to file for custody, visitation, and child support in the JDRDC, as the circuit court has no jurisdiction in your case.

If you are married (with or without children), there are times when it may be more beneficial to have the JDRDC determine custody, visitation, child support, and/or spousal support, rather than filing for divorce in the circuit court. For example, if you do not have a fault ground and must wait a year to file for divorce, you may not be in a position to wait or may not want

to wait a year to have these issues determined. Since the JDRDC has jurisdiction to hear these issues, you can file immediately upon separating. However, the jurisdiction of the JDRDC can be taken away if your spouse files for divorce in the circuit court and sets a hearing date for pendente lite relief.

Proceedings in the JDRDC start with a form called a petition, which is signed under oath and makes out the initial allegations for a custody, visitation, child support, or spousal support case. Another party may file responsive motions to answer the petition; they may take their own petition against the original filing party, or they may do nothing and wait until the trial of the case. The JDRDC has a different, more streamlined procedure for pleading than does the circuit court. Moreover, it is not a court of record. This means that any person who is not happy with the result can fill out a form and have the matter heard all over again in circuit court without needing to give a reason for the appeal.

In most cases, the JDRDC will refer you to mediation. While attendance is often mandatory, reaching a resolution is not, and typically your counsel is not involved. The mediator is appointed by the court, and often the mediation is done at court. If you go to mediation and you reach an agreement, the mediator will draw up a written agreement, have you and the other party sign it, and, once signed by both parties, submit it to the judge to be entered as a binding court order.

If mediation is unsuccessful or you (if able) choose to skip it altogether, a contested trial date will be set. If your case involves custody and visitation, a guardian *ad litem* may be appointed to represent the child(ren).

Once a contested trial date is set, you will most likely enter the discovery phase. In JDRDC, discovery is a bit more simplified

and usually more limited than in circuit court (for instance, there are no depositions allowed). The Supreme Court rules governing cases state that discovery is allowed, but only if the court grants the ability (whereas in circuit court it is the party's right to engage in discovery). Some courts have standing orders allowing discovery, while others handle the allowance on a case-by-case basis.

Having a lengthy trial in JDRDC can be difficult. Typically, the courts will provide you limited time per court appearance for a contested trial (often three to four hours in Hampton Roads's courts). This means that you may have to break up the trial over several days, and those days could be broken up by months at a time. Or, some judges may limit you to a total of three to four hours or less to put on the entire case.

Once you have an order from the presiding judge, either party has ten days to file an intent to appeal the case to the circuit court. If the case is appealed to the circuit court, the circuit court has a trial *de novo* ("new trial"). This means that you essentially start the case from ground zero, as if the trial in the JDRDC never happened. However, unless the JDRDC stays its order pending the appeal, the parties must comply with the JDRDC order until the circuit court issues a new order.

IN CLOSING . . .

Whether your case is a divorce case, custody case, or another type of family law matter, the law and processes surrounding these issues can be complex. We hope this book gives you a basic framework to make sense of a very confusing and stressful topic and time in your life.

Divorce and child-related cases are not going away any time soon. If anything, they will change with the times, which means that they can conceivably become more complicated. Our intent in writing this book is to give you the groundwork to understand your case, properly assess your needs, and plan your case with your lawyer to make the most impact. To further assist you, we have published links to additional information and resources that will help you understand the process. These links can be found at www.pzlaw.com/resources.cfm.

Thank you for taking the time to read this book. We hope it has provided you with a deeper understanding of the complexity of divorce, especially when one or both spouses are in the military. If you have questions about your individual situation, we encourage you to contact us either through our website at www.pzlaw.com or by calling us at (757) 453-7744.

Do I have to allow visitation if I am not receiving child support?

Yes. If your child's other parent is not paying child support, you may not withhold visitation. On the flip side, if your child's other parent won't let you see your children, do not withhold child support. Either instance could lead to jail or fines. Make sure you document any and all interactions concerning the issues. If the two of you can't resolve your problems, contact your lawyer to discuss your options.

Can a separation agreement or court order stop my spouse from moving out of state with my children?

Yes. You can always agree to insert a provision into a separation agreement limiting the removal of your children from their residential state if that is a concern. If you are in a divorce action and can't reach an agreement, you can seek relief from the court on this issue and request a temporary order to protect your rights. The federal Parental Kidnapping Prevention Act was enacted to establish national standards for the enforcement of child custody matters. So, if your spouse takes your children out of state and you have a written agreement in place regarding this issue, the other state will honor the terms agreed to in Virginia.

Can I change custody/visitation arrangements after the divorce is final?

Yes. Custody and visitation are always modifiable; however, you must prove a material change in circumstances before getting any changes, and the court will continue to examine the best interests of the child as to any new arrangement. What constitutes a "material change" varies widely and is case-specific, but some examples of likely qualifying changes are: if the other parent has a substance abuse problem, is neglecting or abusing the children, has become seriously physically or mentally ill and is no longer able to care for the children, or fails to supervise the children in some significant way. Do not settle for verbal agreements with the other parent—they are not legally valid. Once a court order is in place, you need a modifying order entered by the court to make any changes enforceable by the court. You can agree to one-time or temporary changes to visitation or custody, but without a replacement order, the other parent can dishonor any agreement reached.

Can I change the child support requirements after the divorce is final?

Yes. Child support is always modifiable; however, you must prove a material change in circumstances before getting to recalculation. Qualifying changes vary widely, but can include an increase or decrease in either parent's income, or a seriously ill child (physically or mentally) who needs treatment. Do not settle for verbal agreements with the other parent—they are not legally valid. Once a court order is in place, you need a modifying order entered by the court to make any changes to child support.

Is adultery a crime in Virginia?

Yes. With all of the social changes over the last century, many people are surprised to learn that adultery is still a crime in Virginia. Having an affair can not only ruin a marriage but it is also a class 4 misdemeanor, meaning that it is a crime punishable by a fine and the stigma of having a conviction. Adultery may also be a crime under military law, depending on the circumstances.

If I remarry, can I still receive child support from my child's biological parent?

Yes. Your marriage status has no immediate impact on getting child support. In fact, your new spouse's income isn't part of the presumptive child support guidelines at all when calculating the amount of support to be paid by the non-custodial biological parent. However, if your new spouse adopts your child, then the other biological parent's support would cease, as his/her rights will have been terminated. Note, however, that termination of parental rights is an exceedingly complex area of the law and should not be undertaken without legal counsel.

Am I responsible for my spouse's debt incurred before our marriage?

No. The Code of Virginia classifies property as **separate, marital, or a hybrid of both.** Property obtained or debt incurred prior to marriage is included in the definition of separate property. The only way you could be responsible for the pre-marital debt of your spouse is if somehow that debt became co-mingled with marital debt and tracing it back out was impossible. This sometimes occurs with property but is much harder to do with debts.

In finalizing a divorce, you want to be sure to resolve all marital debt, remove yourself from all joint accounting, and have in writing who is responsible for paying off specific debts as part of your divorce decree (in a separation agreement or otherwise determined by a court).

What happens with custody of children if both parents are in the military and deployed at the same time?

Although the Virginia Military Parents Equal Protection Act helps define situations where a military parent is deploying, it is important that military parents have a custody order in place to avoid unnecessary court battles. In such situations, third party custody designations need to be considered. Yet another consideration is that of remarriage and the role of the step parent. While the military may require a Family Care Plan, be advised that any designation within that document will not trump Virginia law. Custody does not legally transfer with a designation made by the parents nor with a power of attorney. Courts have the sole right to assign custody, not the parents (though courts will usually approve any arrangement agreed upon by both parents). Also keep in mind that third parties such as step-parents or grandparents are rarely given custody over a child. There have been many cases where a military parent felt he/she had custody covered, only to have the children be given to the other parent while deployed because of the lack of a proper court order prior to leaving.

How your custody order is written can mean the difference between relative harmony between parents or a costly legal battle due to loopholes. If you are in the military, it is important

that you have the right legal documents in place to protect your rights and those of your children.

Do I need a JAG divorce attorney if my spouse or I is in the military?

No. There is no such thing as a JAG divorce attorney. While each base has a legal department, their role is not to pursue divorces (and, in fact, they may not even be licensed to do so in Virginia). While there are not many differences in the law involving divorces between civilians and those in military service, there are unique topics and a few laws that require additional experience and knowledge to ensure the military members or their spouses are protected. Virginia will have jurisdiction over any divorce proceedings, and you will want to be represented by an attorney who has experience with the military regulations, laws, and factual issues that arise in these types of cases. As an example, one such law is the Uniformed Services Former Spouse Protection Act (USFSPA), which deals with the disbursement of pensions and use of the commissary after a divorce is finalized.

Can I receive more support now that I am not working full-time?

Maybe. Child custody, visitation, and support are always modifiable by a court. To change something that has been entered in an order, you must first show a material change in circumstances from the time the order had been entered, and then, if you meet that hurdle, the court will determine what is in the best interests of the child for custody and visitation, and run presumptive guidelines as to support. Many things can constitute a material

change—every case is unique, which is why we recommend hiring counsel before seeking a change in court.

Can I have child support modified based on my ex-spouse's new spouse's income?

Not likely. According to the Code of Virginia, child support is based solely on the two parents' incomes. The increase in household income due to marriage, by itself, cannot be grounds for child support modification. However, if your ex-spouse quits his or her job, thereby becoming voluntarily unemployed and not able to provide their share of the child's support, a modification may be warranted. If the court is going to deviate from the presumptive child support formula (which it can do if it finds that the application of such guidelines would be unjust or inappropriate in a particular case), then it might be able to take such other income into account under the catch-all factor of the Code for such deviations.

I've heard foreign divorces are much cheaper and easier. Why wouldn't someone in the military take advantage of this option?

You can get divorces quickly in Mexico and the Dominican Republic, among other places. Getting a divorce where you or your spouse have not established domicile will cost you much more when you have to hire a lawyer to make your divorce legal. Per the U.S. Supreme Court, only a divorce granted in the state in which one or both individuals have established legal residence has the jurisdiction to issue such a decree. You wouldn't want to be in the position of committing bigamy after getting re-married

because your first marriage wasn't properly ended.

My spouse is in the military and deployed; will this delay our divorce?

Maybe. The Servicemembers Civil Relief Act allows suspension of civil action involving deployed servicemembers until they are home and able to fairly participate. However, servicemembers can waive their right to delay proceedings, thereby allowing the finalization of your divorce while they are deployed.

How long do I have to pay child support?

Unless there is an agreement between the parents in place, child support is statutorily paid until a child reaches age 18, or—so long as that child is a full-time high school student, not self-supporting, and living at home—until age 19 or graduation from high school, whichever comes first. The courts may also order the continuation of support for any child over the age of 18 who is severely and permanently mentally or physically disabled, unable to live independently and support him or herself, and resides in the home of the parent seeking or receiving child support.

Does being (or having a spouse) in the military make a difference in my divorce?

Yes. For military families, it is vital that you have an experienced Virginia family attorney in your corner. Few lawyers understand the unique issues that military families face when dealing with a family law matter, so it is important to choose experienced counsel.

What is a guardian *ad litem*?

A guardian *ad litem* (often referred to as a "GAL") is an attorney appointed by the court to represent the interests of the children or incapacitated adults. GALs must be qualified by the Commonwealth. If you are in juvenile and domestic relations district court, GAL fees are regulated by the Commonwealth (in circuit court, GAL's fees are not so capped, and are usually charged to the parties). A GAL's duty is to, in essence, be the "eyes and ears" of the court. He/she investigates the matter and speaks to the parties, the children, and all relevant persons to come to an opinion as to what is in the children's best interest. The GAL then makes a report to the court of his/her findings, to which judges usually give great weight. A useful reference is the "Standards to Govern the Performance of Guardians *ad Litem* for Children," drafted by the Supreme Court of Virginia (see www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal_performance_standards_children.pdf).

What is DCSE?

DCSE stands for the Department of Child Support Enforcement. It is an arm of Virginia's Department of Social Services tasked with enforcing child support. It can be involved in a case either by request of a parent (administrative orders) or be involved through the court to assist the person seeking support. Oftentimes payment of support is ordered by a court through DCSE (who then administratively collects and monitors support). A party seeking support does not have to use DCSE if they choose to proceed with a private attorney or on their own (or after a case is concluded and they prefer to be paid directly).

GLOSSARY OF TERMS

Adultery:

When a married person has sexual intercourse with someone other than the married person's spouse.

Alimony:

A term no longer used in Virginia; it is now called spousal support.

Allotment:

Either voluntary or involuntary, an allotment is when a servicemember has part of their pay set aside by DFAS and paid directly to another party.

Answer:

A pleading that responds to a complaint.

Blended Retirement System (BRS):

The military retirement system that commenced on January 1, 2018, which blends the traditional legacy retirement pension with a defined contribution to the servicemember's Thrift Savings Plan account.

Buggery:

When a person has sexual relations with an animal. Buggery can also refer to sodomy, which is described below.

Child Support:

Direct payments of money from one parent to another for the benefit of the child for the support of the children.

Circuit Court:

The court in Virginia that can hear a divorce case. It is also referred to as a "court of record," meaning that a court reporter will take stenographic records of all proceedings.

Cohabitation:

Two adults living together in the manner of a married couple.

Collusion:

Fraud on the court by the husband and wife in fabricating evidence of a marital offense.

Complaint:

A formal demand for relief from a court. This document is where a party alleges fault (if applicable), the separation date, and any other facts that may influence a marriage, separation, custody, support, or property division.

Condonation:

Discovering infidelity but forgiving it and resuming cohabitation with that person afterwards.

Connivance:

The corrupt consenting by one spouse to the marital fault of another.

COLA:

Cost of Living Adjustment—when the government increases a benefit it pays out based on the cost of living increase.

Counterclaim:

A complaint against a person who has already filed a complaint in a case, usually accompanying an Answer (see above).

Coverture Fraction:

A mathematical formula used to calculate the percentage of a pension distributed to a non-contributory spouse in a divorce action. In a coverture fraction, the denominator is the employed or servicemember spouse's total earning period. The numerator is the years of marriage that overlap with the employment or service.

Cruelty:

When a spouse, more than once to his or her spouse, either (i) physically harms or (ii) creates the reasonable fear of physical harm.

Custodial Parent:

The parent who has physical custody of their child for the majority of the time.

Custody:

Legal custody is having the ability to decide on issues regarding how a child is raised. Physical custody is having the ability and responsibility of caring for a child in your presence.

Decree of Divorce:

A final order in a divorce case that divides property; sets child custody, visitation, and support; and may decide spousal support.

Deposition:

Putting a witness under oath and questioning them, usually in person.

Desertion:

When one spouse leaves the marital home with the intent to quit the marriage.

DFAS:

Defense Financial Accounting Service—the government organization that functions as the paymaster for the military.

Disability Pay:

Pay that a retired servicemember receives for being disabled in the line of duty. It is not taxable as income and is not divisible.

Divorce *a Mensa et Thoro*:

A divorce from bed and board. It means that the husband and wife do not have to live together anymore; however, neither of them can remarry as long as the other is alive.

Divorce *a Vinculo Matrimonii*:

Absolute divorce; as in a divorce *a mensa et thoro*, the husband and wife do not live together. Additionally, both people can marry another person immediately.

Domicile:

The place that a person intends to make their permanent home. It is the place to which they will return after a long trip, and the place they want to raise their family.

Equitable Distribution:

The dividing and distribution of marital property and debt by the court between a married couple.

Family Care Plan (FCP):

A plan that a military member completes that governs how the member's children are cared for in the event of a rapid deployment.

Garnishment:

When a court orders money be withheld from a person's paycheck and paid directly to a support recipient.

Guardian *ad Litem* (GAL):

An attorney appointed by the court to investigate the best interests of the children and assist the court in determining the circumstances of a matter before the court.

Hague Convention:

A treaty between several nations, including the United States, that spells out how to serve paperwork for a lawsuit to people who live in another country.

Hybrid Property:

Property that is classified as both marital and separate. Usually these types of property are houses or other valuable assets.

Interrogatories:

Questions written under oath that are sent to another party in litigation and must be answered under oath.

Joint Legal Custody:

When both parents share the legal decision-making ability for a child or children.

Jurisdiction:

A court's ability to hear a case. Generally, there are two kinds of subject-matter jurisdiction, or the ability of a court to hear a specific type of case; and personal jurisdiction, or the ability of a court to hear a case involving a specific person.

JDRDC:

Juvenile and domestic relations district court—a court that may hear standalone child custody, child visitation, child support, and other cases that relate to children and families. It is not a court of record and has different procedures than a circuit court.

LES:

Leave & Earnings Statement—a statement issued by a federal employer that shows how a federal employee, including a servicemember, is paid.

Marital Property:

Property acquired by a husband or wife after the marriage date that presumptively belongs to both of them.

Non-Custodial Parent:

The parent who does not have physical custody of their child the majority of the time.

PCS:

Permanent Change in Station—when a servicemember's permanent base is changed.

***Pendente Lite* Order:**

A temporary order in a divorce case in circuit court that may establish support and property provisions, as well as order the parties to do or not to do things while the case is active.

Petition:

A form document that alleges a cause of action in the juvenile and domestic relations district court. They are used to start custody, visitation, parentage, and child support cases.

Physical Custody:

Physical custody is having the ability and responsibility of caring for a child In your presence.

Primary Physical Custody:

When one parent has more than 270 days per year of custody with a child.

Privilege:

An ability to not disclose something discussed between a lawyer and their client.

QDRO:

Qualified Domestic Relations Order—an order that transfers investment or retirement assets in a divorce between divorcing spouses.

Recrimination:

A charge made by an accused person against his or her accuser.

Request for Admissions:

Statements that must be admitted or denied under oath.

Request for Production of Documents:

A written request for documents from a party in a case that must be responded to under oath by the other party.

SBP:

Survivor Benefit Plan—a plan to pay the spouse of a military pensioner on the death of the pensioner.

SCRA:

Servicemembers Civil Relief Act—a law that provides military personnel legal protections against other people taking advantage of their absence due to military duty.

Separate Property:

Property that presumptively belongs to one spouse alone and the other has no claim on it during the divorce process. It is acquired before the marriage, after the date of separation, or through certain other conditions during the marriage, such as by gift from a third party to one spouse.

Service:

Delivery of a lawsuit to another person.

Shared Physical Custody:

When each parent has at least 90 days of visitation with their child over the course of the year. A day is a 24-hour period of time. An overnight, but not a full 24 hours, is considered a half-day. Anything less than an overnight doesn't count.

Sodomy:

When a person has anal or oral sex with another person.

Sole Legal Custody:

When one parent has all of the legal decision-making rights to a child or children.

Sole Physical Custody:

When one parent has all of the physical custody rights to a child.

Split Legal Custody:

When one parent has all of the legal decision-making rights to one child, and another parent has all those rights to another child.

Split Physical Custody:

When the children are split between the parents so that each parent has a child the majority of the time.

Spousal Support:

Previously known as "alimony," spousal support is monies paid by one spouse to another during the pendency of a divorce case, or following the finalization of a divorce. It can be a lump sum amount, for a period of time, or open-ended in duration.

SBP:

Survivor Benefit Plan—a plan to pay the spouse of a military pensioner on the death of the pensioner.

Subpoena:

A document ordering a person to attend court or ordering a party not involved in the case to give over documents to the court.

Stay:

A stay of proceedings is when a court freezes a case.

Subpoena:

A document ordering a person to attend court or ordering a party not involved in the case to give over documents to the court.

TSP:

Thrift Savings Plan—an employee-contributed retirement plan for federal employees.

UCCJEA:

Uniform Child Custody Jurisdiction Enforcement Act—an act that sets the rules for where a person may file a child custody case.

UIFSA:

Uniform Interstate Family Support Act—an act that sets the rules for where a person may file a child support case.

SFSPA:

Uniformed Services Former Spouses' Protection Act—a federal law that enables states to divide a military pension. It also empowers the Defense Finance and Accounting Service to pay a portion of the servicemember's retirement pay to a former spouse if the law's provisions are met.

Divorce a Vinculo Matrimonii:

Absolute divorce; as in a divorce a mensa et thoro, the husband and wife do not live together. Additionally, both people can marry another person immediately.

Venue:

The location of a court in which a case must be filed.

Visitation:

The right to spend time with your child; this term refers to that right when it is used by a parent who does not usually have primary physical custody of that child.

ABOUT THE AUTHORS

Allison W. Anders

Allison grew up in Chesterfield County, Virginia, but always knew she would live in Virginia Beach one day. After graduating from Old Dominion University in 1996, she worked as a legal secretary for a small law firm in Chesapeake. Allison always wanted to be a lawyer, and working as a legal secretary confirmed her choice. In 1998, Allison moved to New Orleans to attend the College of Law at Loyola University in New Orleans. After being admitted to the Virginia State Bar in June 2003, Allison started working for Jim McKenry at a small law firm in Virginia Beach where her practice focused on traffic and misdemeanor defense and family law. In May 2006, she started focusing 100% of her practice to family law when she joined the firm of Kaufman & Canoles. Allison became a partner in January 2011 and remained at K&C until joining Parks Zeigler, PLLC, in August 2015.

Allison is a Fellow of the American Academy of Matrimonial Lawyers (AAML), of which there are fewer than ten in the Tidewater area and fewer than 60 in all of Virginia, and she is currently serving as the publicity chairperson of the Virginia chapter of the AAML. Allison is also a member of the Virginia Beach Bar Association (VBBA), Virginia State Bar Association (VSB), Virginia Trial Lawyers Association (VTLA), and Virginia Bar Association (VBA). She has been very active with the VBBA,

serving on various committees since 2003. She has also been a member of the VBA Family Law Coalition since November 2015.

Allison has been honored and recognized by numerous organizations: she's been named Top Lawyer by *Coastal Virginia Magazine*; AV rated by Martindale-Hubbell; a moderator for Virginia CLE; and she's achieved a 10.0 rating by AVVO.

Outside of the law, Allison has served on the Board of Directors for REACH (Reading Enriches All Children), Inc., a local non-profit that supports the literacy needs of homeless and at-risk children living in shelters throughout the Hampton Roads area. She also spends as much time as possible with her husband and son. They love the outdoors, so they try to spend summers at the beach or swimming at Ocean Breeze. They also enjoy camping and hiking in the spring and fall. Allison is passionate about reading and loves a good suspense novel.

Morgan A. McEwen

Morgan was born and raised in Denver, Colorado. In 2011 she graduated summa *cum laude* from Creighton University in Omaha, Nebraska with a Bachelor of Arts degree in political science. After undergrad, Morgan attended William & Mary Law School. During law school, Morgan was a member of the Business Law Review and Vice President of the Alternative Dispute Resolution Team where she trained and competed in negotiation, mediation and arbitration. Morgan graduated from William & Mary in 2015 with a concentration in business law and was admitted to practice law in Virginia later that year. After graduation, Morgan served as a law clerk for the Norfolk Circuit Court. Eager to begin practicing law and call the Tidewater area home, Morgan

started at Parks Zeigler in October of 2019.

Morgan is a member of the Norfolk/Portsmouth Bar Association as well as the Virginia Beach Bar Association. She is also a volunteer in the Virginia Beach CLASS program, assisting domestic violence victims in juvenile court.

Outside of her legal work, Morgan spends as much time as possible with her friends and family. She enjoys being active outdoors and loves to run, swim, ski and golf. Morgan can't deny her passion for food and loves trying new restaurants in the area.

Kellam T. Parks

Kellam comes from a long line of Tidewater natives. After graduating from Salem High School in Virginia Beach, Kellam attended a small liberal arts college, St. Andrews University, in North Carolina, where he fell in love with learning. Kellam graduated summa *cum laude* with a philosophy degree with honors in 1996, and a triple minor of politics, psychology, and law. For law school, Kellam chose the Marshall Wythe School of Law at the College of William & Mary in Williamsburg, Virginia, because of its strong academic history and his desire to settle back in Tidewater once he graduated in 1999.

Kellam began his legal career with a mid-sized firm doing primarily insurance defense work. He then moved through a number of local firms seeking the right fit of practice areas, camaraderie, and compensation. After a little over six years at his last firm, he founded the Law Office of Kellam T. Parks, PLLC, in 2012. One of the motivating factors in forming his own firm was to integrate modern technologies into his practice, which was

hard to do in a larger firm environment. Kellam created the law firm to be paperless with cloud-based systems to enable immediate and remote access for himself and his clients. This has served the firm well as it transitioned over time to Parks Zeigler, PLLC. The attorneys and staff utilize digital technologies for all aspects of the practice of law, from legal research to trial presentation. The law firm is also able to harness the power of social media to inform the public on the attorneys' practice areas and keep in touch with their clients.

Kellam has always been very active in legal-related organizations. He currently serves on committees for both the Virginia Beach and Norfolk/Portsmouth Bar Associations. Kellam is also a member of the Virginia Trial Lawyers Association and the Virginia Bar Association. He is very active with the Virginia State Bar Association, serving as the co-chair of the Technology and the Practice of Law Special Committee, as well as vice-chair of the Committee on the Future of Law. Kellam has taught at Tidewater Community College, has authored numerous articles in various legal publications, and has presented materials to other lawyers and the public on his various practice areas and the use of technology in the practice of law.

Kellam has been honored/recognized by numerous organizations: he's been named Legal Elite by *Virginia Business* magazine, as well as Top Lawyer by *Coastal Virginia Magazine*; he's been rated a Super Lawyer by Superlawyers.com and AV rated by Martindale-Hubbell; he's served as a faculty member and author for Virginia CLE; and he's achieved a 10.0 rating by AVVO.

Away from the office, Kellam spends as much time with his family as he can. Kellam and Kelly have raised their daughter Avery, who is pursuing dance at Old Dominion University. Kellam is

extremely fortunate that his sister Deborah has been working with him as the firm's office manager since the formation of the firm in 2012. Kellam (obviously) enjoys exploring and tinkering with various forms of technology. He also enjoys reading and listening to almost all genres of music, though he often laments his almost total lack of musical ability. He enjoyed traveling and studying abroad in Europe during college and looks forward to sharing more travel experiences with his wife and daughter in the future.

Shelly F. Wood

Shelly is a native of Chesapeake and attended Deep Creek High school, as did her mom and all her mother's siblings. She attended ODU and graduated in 1997 with a B.S. in Political Science and a minor in Criminal Justice. Shelly knew she wanted to attend law school and throughout college and law school she worked part-time with local attorneys as a legal assistant in the areas of family and criminal law.

Shelly attended Regent University School of Law and graduated in 2001. In law school, she competed on the mock trial team and served as an officer for the American Bar Association. In her third year, Shelly obtained a third-year practice license and practiced as an intern with the Norfolk Commonwealth's Attorney's office.

After passing the bar exam, Shelly's career began as a Public Defender for the City of Norfolk in 2002 handling misdemeanor and felony cases. Shelly went into private practice in January 2004 doing family law, including serving as a Guardian *ad Litem* on custody matters, and serving as court-appointed counsel

for indigent defendants. Shelly continues to handle criminal and traffic cases in addition to her active family law practice. While Shelly has had great success with her own law firm, the opportunity to become the Manager Partner of a Chesapeake office for Parks Zeigler was enticing and the two firms merged in 2020.

Shelly has served on the Chesapeake Bar Association Board for five years and has served as Secretary, Treasurer, Vice President, and President. She has also achieved a 10.0 rating by AVVO.

Shelly is married with three active boys. In her spare time, she is a founding member of the King's Daughters Infinity Circle. The Infinity Circle is an organization that develops and hosts fundraisers to raise money for the Children's Hospital of the King's Daughters. She has been involved with the King's Daughters for over seven years with over 500 volunteer hours and having chaired many projects. Shelly enjoys traveling with her family and friends, boating, is an avid reader, and cherishes time with her extended family and close friends.

Brandon H. Zeigler

After graduating from Maury High School in 1986, Brandon attended George Mason University to study politics and international affairs with a concentration in the Middle East and economics. During and immediately after college he worked in the restaurant business, and after graduation (and between jobs) he traveled extensively. While in law school at California Western School of Law, he was the president of the trial team for two years and worked with the JAG Corp stationed at the 5th Street Naval Base. After passing the bar and getting married in 1996, Brandon moved back East and obtained a job with a well-

known, small, litigation-based law firm, where he worked for seven years. Thereafter, he joined a mid-sized firm for the next eleven years.

Wanting to be more entrepreneurial and hands-on in helping run and grow a business, Brandon decided the merge his practice with Kellam's in 2015. Brandon and Kellam had been long-time friends and had worked together at two previous firms. Brandon appreciated Kellam's knowledge and use of cutting-edge technology, which allows a law firm to be more efficient and better serve clients by assisting in real-time communication, and allows instant access to a client's file. At work Brandon finds the most enjoyment in helping individuals and small businesses find creative and effective solutions to their problems.

Brandon has been honored and recognized by numerous organizations: he's been named Legal Elite by *Virginia Business* magazine, as well as Top Lawyer by *Coastal Virginia Magazine*; he's been rated in Top 100 Attorneys in Virginia and AV rated by Martindale-Hubbell; he's been name a Super Lawyer by Superlawyers.com for the last 10 years; he's a faculty member and author for Virginia CLE; and he's achieved a 10.0 rating by AVVO.

Brandon is involved with many outside groups, including being immediate past president of the Virginia Beach Bar Association. Brandon has taught business law at Tidewater Community College, has judged many local and regional trial and mediation competitions, has volunteered in assisting victims of domestic abuses through Virginia Beach's CLASS program for the past twenty-one years, and has authored chapters for and spoken at continuing legal educational seminars consistently for the past ten years.

When not working, Brandon spends most of his time having fun

with his family. He enjoys shooting and fishing with his son, as well as following Pittsburgh Steelers Football, Pittsburgh Penguins Hockey, and New York Mets Baseball. He enjoys racquetball, scuba diving, white water rafting, rugby, boating, mountain biking, and traveling with his family. Brandon also enjoys listening to new music and reading about economics, politics, and history.

No matter where you are stationed or deployed, Parks Zeigler, PLLC is here to help you with all your Virginia legal needs. We are a technology-driven, paperless law office, enabling communication and 24/7 secure remote access to your files—regardless of location.

In addition to practicing military family law, our attorneys also have years of experience in disputing credit report errors, small business representation, personal injury, and civil litigation.

When you hire our firm, you join our family. We understand the stress and fear that these situations cause. We have worked for years helping people navigate these difficult waters. No attorney will be able to solve your problems overnight; however, it is our job to clearly explain the process, provide a clear path forward, and be a valuable member of your team. We look forward to working with you to achieve a successful outcome.

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