

## **The Legal Process of Divorce in Virginia: Where It Has Been, Where It May Go**

By Lawrence D. Gaughan

In the 50 years since I became a member of the Virginia State Bar in 1967, there have been three revolutions in Virginia family law. The **substantive** revolution includes equitable distribution, the child support guidelines, access to joint legal and shared physical custody, time-limited spousal support, “same residence” separation, “parenting time” instead of “visitation,” and many other changes. The **procedural** revolution brought us the Court of Appeals, a substantial expansion of civil discovery, the end of separate Chancery dockets and routine use of Commissioners, and the increasing complexity of document forms. There has also been a **process** revolution, with the advent of mediation and collaborative practice, the formation of consortiums of retired judges, and the ever-expanding bureaucratization of family law.

Most of these changes have taken place in the 35 years since 1982, the year when the equitable distribution statute was enacted and the Court of Appeals was established. Even so, and despite the excellence of the family law bar in Virginia, the Commonwealth has not necessarily been a leading state in the modernization of divorce. Virginia was among the last states to enact equitable distribution and the very last to authorize courts to time-limit spousal support (in 1998). Our sister states of West Virginia and Tennessee substantially revised their custody laws well over a decade ago, which included the downgrading as such of the term “custody.” Many states now style divorce actions as *in rem* rather than as adversarial, and no longer include marital fault as a formal ground for divorce.

The term “divorce American style” was coined to describe divorces that wind up being nasty, expensive, time-consuming, and emotionally draining. The 2013 pseudo-documentary *Divorce Corp* was directed at “bad divorces” and led to the creation of a national divorce reform movement under the same name. In Virginia these bad divorces are now less common as public expectations of divorce have continued to evolve. The film was focused mainly on procedural reform. However, it is the evolution of the **divorce process** that may well be the more important focus for the future. That is an area in which Virginia can exercise real leadership.

So let’s distinguish “process” from “procedure” in this context. Procedure only deals with what happens in the courts. Process is a much broader term and includes all of the elements relating to how divorce cases get resolved. Since over 90% of all divorce settlements take place by agreement, process clearly deserves our attention. We attorneys frequently talk as if everything revolves around substantive law and procedure as administered by the courts. Clearly it doesn’t! “The law” may be important, but it’s far from being the only element.

A major source of process evolution in Virginia has already come from the active involvement of family lawyers in alternative dispute resolution. The first major national organization for divorce mediation, the Academy of Family Mediators, was founded in Arlington in 1981. In 1993 the Virginia Supreme Court created one of the first state certification programs for family mediators. The mid-1990's saw a major increase in the number of family law attorneys taking mediation training and adding mediation to their professional practices. The McCammon Group of mostly retired judges was founded in 1995. Although it is not necessary to be a lawyer to do mediation, most of the divorce mediating in Virginia is in fact done by attorneys.

The two main areas where the divorce process is most rapidly evolving are (1) the public perception of how divorces should be managed, and (2) the way in which family lawyers conduct their practices. Civility among divorce lawyers is now routinely expected, and attorneys who do not practice civility are less respected. As a motions conciliator for the Fairfax Circuit Court, I have been impressed by the increase in cooperation and congeniality between the lawyers involved in those cases.

The process revolution is by no means limited to mediation. Virginia has also been actively involved in the development of collaborative practice. There are now a number of energetic collaborative practice groups throughout the Commonwealth.

A major impact of collaborative practice has resulted from the periodic meetings of collaborative professionals. These meetings to discuss aspects of the divorce process include family law attorneys, financial specialists, and mental health professionals. Their exchanges have had an impact. Most importantly, they have enhanced the participants' appreciation of complexity of the divorce process and the skills and knowledge of all the involved professionals.

There is still another crucial perspective on the legal process of divorce. If we define alternative dispute resolution as an alternative to litigation rather than to the entire adversarial system, then attorney negotiated settlements can and should be deemed a form of ADR. Measured in terms of the number of cases settled, this may legitimately be considered the most important form of ADR. Courts aren't set up to assist the parties in formulating practical financial or career plans or promoting long-term parental respect and cooperation. Yet these are among the many matters that may be considered as part of a negotiated agreement. If the attorney-led negotiations are deemed to be ADR, then arguably the lawyers involved should be open to adapting process skills emanating from ADR.

If we look for concrete examples of what agreements can do but courts can't, we don't have to be theoretical. Every experienced family law attorney has

seen many such provisions, including making spousal support modifiable based upon a future formula, or making a trade between house equity and rights in a pension, or reorganizing a family business to change the ways in which each of the parties benefits. An agreement can use “parenting plan” as an alternative to “custody” and “parenting time” as a synonym for “visitation.” If the parties agree, they don’t have to wait for state law to change that archaic terminology.

Here’s the core of the matter: Courts are established to make decisions based mainly on past events or situations, while legislatures are empowered to establish appropriate guidelines for the future. When the parties are striving to settle their pending court case, and nothing more, they are acting as a two-person court, and their agreement decides the case. However, they can instead decide to act as a two-person legislature and use their agreement to effectively pass a fair and practical law for their own futures. Except for changed circumstances affecting custody and child support, these agreements generally supersede state law, and they are not limited to matters within a court’s jurisdiction. Once we start to think of family law negotiations in this way, we open up a new realm of options.

There will always be an adversarial element to divorce negotiations, and that reality has by no means been obliterated by ADR. Clearly there will also be cases that can only be resolved by litigation. And we should never forget the basic objective of settling the actual legal case. But if we consider what many of us actually do professionally, we may be surprised at how much time we spend on the various elements of negotiating agreements. This in turn should encourage us to study more explicitly the range of ADR strategies on defining and sorting out options and resolving disputes.

Lawyers who are divorce mediators or participate in collaborative practice quickly learn that ADR requires some essential additional skills and knowledge. Understanding this, we can appreciate the value of maintaining an active curiosity concerning the many useful ADR ideas regarding the divorce process that have been developed over the last 35 or 40 years. There are some real benefits in learning and sharing these ideas and the experience behind them through professional organizations and programs that include mediation or collaborative practice.

So let’s encourage more exchanges among lawyers whose practice involves negotiated agreements. These should involve counsel in more conventional family law practice as well as collaborative practice attorneys and mediators. Remember that ostensibly we all have the same goal – getting fair and workable agreements. We all have divorce cases and clients that require expertise that we don’t fully possess. Examples include sound financial planning, tracing assets and liabilities, developing practical career strategies, creating workable parenting plans, or enabling a family business to continue to prosper. There are also the

challenges that our clients face as they go through their divorce process, and especially maintaining emotional stability and striving to define new futures for themselves. Although we possess valuable expertise as family law attorneys, none of the above are areas in which our expertise is exclusive. Thus we are able to appreciate the various benefits of collaboration with other divorce-related professionals.

As we consider the various ways in which financial and emotional elements are integrated into the legal process of divorce, we can better discern how the family law bar in Virginia may share the leadership in continuing to modernize this process. For the most part, this goal does not depend on legislative changes.