

Property and Support Issues

A. The Property Settlement Agreement. This document will resolve all custody, support and property issues between you and your spouse. Entering into such an agreement will significantly decrease your legal fees. Divorces usually either settle in the beginning when both parties feel guilty or in the end when both are exhausted. You can include many things in your agreement, some of which are listed below:

Real property - Who gets the house? Who pays the note? How does the equity get divided if it is sold?

Personal property - Who gets which car, the boat, what appliances, and what happens to the sofa in the den? The prized shotgun? The tools? The pictures of the kids?

Retirement - What happens to any retirement benefits that have accrued? Military, Civil Service and Civilian Retirements are all subject to equitable distribution.

Demand deposits and securities - Who gets the savings account, the mutual fund not in an IRA, the IRA, the KEOGH, the 401K, the children's college fund, the government bonds, etc.?

Debts - Who pays what? Should the debts be paid off by refinancing?

Spousal Support - How much? How long? Fixed or variable? Waived by one? Or both?

Custody - Who gets the children? Should any aspects of custody be shared? Will joint custody work? Is custody going to be contested?

Child Support - How much? How long? Who carries health or life insurance on children? Who gets to claim the children as income tax deductions? Private school or college tuition?

Visitation - Do you want a specific schedule or can you and your spouse work together on it?

Insurance - Health insurance. Who is covered? In many cases an employee's spouse can be covered up to 36 months after the divorce by the employed spouse's insurance for a small additional premium.

Taxes - Interim filing status - who gets dependency deduction for children? Past tax obligations? Future potential audits? One-time capital gains deduction on house?

Court costs and attorneys' fees - Who pays? How much?

If you try to work something out with your spouse, the following are some useful pointers to remember:

Meet on neutral ground - Not at his office or at her mother's home, but someplace where both parties will feel comfortable.

Put aside time - A reasonable amount of time should be set aside to deal with the issues. If you leave to answer a telephone call just as you almost have things worked out, you may find that things have fallen apart when you get back. On the other hand, do not leave the meeting time open-ended. A meeting without a deadline will drag on and issues will not get resolved.

Set an agenda - Decide what will be dealt with at the meeting. "This week we will decide on custody and child support, next week we will decide on the house."

Do not get bogged down - Try to talk about what you agree on. No matter how bad it is, there are some things you agree on ("the marriage stinks" or "the kid is cute"). If you hit a point that gives you trouble, move on to something else and come back to the problem after you have resolved some other issues.

Reschedule as needed - If things start to turn nasty, if someone gets angry, or if you think you are losing everything, re-schedule the meeting for another time. It is important that both of you feel that the agreement is a good thing.

Keep the kids out of it - Your children do not need to be involved in this. Do not have them around. They will interrupt you, and it will upset them.

Start talking early - Divorces usually settle early on when both parties are not locked into a position, or divorces settle after much litigation when the parties are too exhausted to fight anymore.

If you and your spouse work out something and you make notes, do not sign the notes. This could be considered by the court to be an agreement. If it is not in the correct legal language, you may be bound by something other than what you thought you agreed to.

B. Property Division/Equitable Distribution. Virginia is not a community property state. Rather, it is an equitable distribution state. Equitable distribution is fair division of property and therefore is not synonymous with exact equal division and distribution; although the spouse who ends up giving more than he/she feels is fair believes it is a distinction without a difference.

It is critical that you tell your attorney all you know about all the assets. Property includes liabilities as well as assets, real estate and personal property, both tangible and intangible. Property can include houses, pensions, businesses, coin collections – almost anything. The legislature has set out criteria for spousal support, child support and property division. First,

you must find and value the property (equity in the house, value of businesses, pensions, value of antique furniture). Next, you must determine whether the particular piece of property is separate property and remains with the person who owns it or whether it is part of the marital estate. Separate property is usually acquired before the marriage or outside the marriage, such as by gift or inheritance (gifts from one spouse to another can qualify, but the clear burden of proof is on the party claiming the gift). Marital property is usually any and all property acquired during the marriage, no matter whose name it may be in. The gray areas here are tricky. To determine who gets what portion of the marital estate, the court will consider:

1. The contributions, monetary and non-monetary, of each party to the wellbeing of the family;
2. The contributions, monetary and non-monetary, of each party in the acquisition and care and maintenance of such marital property of the parties;
3. The duration of the marriage;
4. The ages and physical and mental condition of the parties;
5. The circumstances and factors which contributed to the dissolution of the marriage, specifically including any ground for divorce;
6. How and when specific items of such marital property were acquired;
7. The debts and liabilities of each spouse, the basis for such debts and liabilities, and the property which may serve as security for such debts and liabilities;
8. The liquid or non-liquid character of all marital property;
9. The tax consequences to each party; and
10. Such other factors as the court deems necessary or appropriate to consider in order to arrive at a fair and equitable monetary award.

If you and your spouse can agree on how things will be divided and if your agreement is reasonable, it will be approved by the court. If you cannot agree, the court will divide the property, provided you can prove one of the grounds for divorce. If you cannot agree and cannot prove at least one of the grounds, you cannot get divorced.

Despite an agreement for one spouse to pay a debt that is in both parties' names, if the party responsible for the debt does not pay the debt, the other party can still be held liable and be sued for the debt by the creditor.

For example, the wife gets the house and agrees to pay the mortgage. The wife dies or goes bankrupt. The husband may or may not be able to sue the wife. In any case the mortgage company can foreclose on the house if the payments go unpaid and sue the husband for any unpaid balance after foreclosure. The best way to protect the husband in this case would be for the wife to refinance the property and to remove the husband from the debt if possible. Frequently, this is a practical impossibility for large debts such as houses, but may sometimes be done with smaller debts such as second mortgages and charge accounts.

Do not hide assets. These assets are usually found and if they are found, you will look like a crook to the court. The commissioner and/or the judge will have trouble believing what you say about anything after that, but the judge will not have any trouble assessing attorneys' fees and/or costs against you for your behavior.

C. Spousal Support (Formerly Known as Alimony). Spousal support is a right that under existing law is extinguished only by agreement, remarriage, death or some adultery grounds and is something to be negotiated away if you are the one who is going to have to pay it. Technically, husbands can get spousal support from wives, but it almost never happens. Spousal support is based upon the relative needs and resources of the parties. The legislature has set out criteria for the court to consider and they include the following:

1. The earning capacity, 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;
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 non-monetary, 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;
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, as are necessary to consider the equities between the parties.

Court Ordered Spousal Support is subject to up and down change when there is a change of circumstances. If you do not get spousal support, or at least a reservation of spousal support, at the time of the divorce, you cannot get spousal support later on. The terms of spousal support can be agreed upon, or waived altogether, in a PSA (the agreement needs to be carefully worded to cover the real intent).

Living with someone after the divorce, regardless of whether sex is involved, is now grounds for the court to terminate spousal support unless a stipulation or contract provides otherwise or unless it is proven by a preponderance of evidence that terminating support would be unconscionable.

D. Insurance. If you cover your spouse or children on your auto, homeowners or health insurance, do not drop them from the policy at least until the divorce is final. You are probably responsible for their medical bills until then anyway. If your spouse wrecks a car that is jointly owned and you have dropped the insurance, you have “cut off your nose to spite your face”. Even after the divorce, the employed spouse may want to keep the spouse and children covered. If you are paying child support, a large unexpected medical expense for the child could be assessed against the non-custodial parent as additional child support. The same could happen with an ex-spouse who has modifiable spousal support. A federal law (COBRA) allows many employees to cover their spouses for up to 30 months for a small additional premium. However, the employer must be notified prior to the Final Decree.

E. Credit. Close joint accounts and notify the banks, charge cards and others by a certified, return receipt letter that you are no longer responsible for your spouse’s expenses. You may want the company to reopen an account in your own name. This is a good time to request it.

At the bank you may want to divide joint accounts or put them in your name. Appropriating the bank accounts always makes the other side mad and sometimes will make the judge angry with you, but it is often easier to give money back than to get it back. If you are the breadwinner do not put your dependent spouse out in the cold without some money to get by on. This will aggravate the judge, who will make you pay anyway.

Do not cut off the utilities at your spouse or your spouse and children's residence without giving them plenty of notice. Make sure you can prove this notice to the court because leaving your spouse and children home without heat or lights in December seldom sits well with the judge.

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