BEAN KINNEY & KORMAN PC
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FAMILY LAW NEWSLETTER

Volume 1, Issue 1 May 2014

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Marriage, Divorce & Your Business

By James Korman

If you own a business, or any asset for that matter, and you intend to marry or divorce, you need to read this.

Virginia is **not** a community property state. But it is an equitable distribution state. What does that mean to you? If you acquire an asset during your marriage, unless you inherited it or got it as a gift (from someone other than your spouse), it is presumed to be martial property. It doesn't matter if the asset is only in your name, your spouse's name or joint names. It is still presumed to be marital if it was acquired any time between the date you got married and the date you and your spouse finally separate. And marital property is subject to being equitably divided by the court when a marriage breaks up.

So let's consider an example. Suppose you got married back in 1980, and after your happy honeymoon you begin a new business. You incorporate (using one of Bean, Kinney & Korman's lawyers, of course), and you own 50 percent of the shares of stock. Your buddy from high school is your business partner. He owns the other 50 percent. Naturally, your shares of stock are restricted. The shareholders' agreement provides that shares of stock cannot be transferred to anyone outside the corporation. Even though 50 percent of the shares of stock are in your name, they were acquired during the marriage so they are now considered marital property. In a divorce, the value of all marital property will be divided by the court.

As if that isn't enough, your 401(k) and IRA are marital property to the extent that they accrued during the marriage. Any part of any retirement plan, IRA or stock option plan you had before you married can be considered separate property. It goes without saying that all of this is a double edged sword. Your spouse's assets are subject to the same rules. If assets are acquired during the marriage, they are presumed to be marital, and the value of the marital assets are subject to division.

Back to our hypothetical. The good news is that even if your shares of stock in your business are marital, you can still keep possession of them.

Here's how this works. In Virginia, the court first determines what property is separate and what is marital. Then the court decides, based on the evidence, how much each marital asset is worth. Finally, the judge determines what share of the marital assets each party will receive. **But** the judge can literally divide only marital assets which are in joint names. That division can be in kind (the wife gets some of the marital widgets and the husband gets some) or by a sale of the asset and a division of the proceeds of sale. It is not unusual, for example, for the court to order that the former marital residence be sold, and after expenses

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of sale, the net proceeds to be split between the husband and wife. Remember, though, that Virginia is not a community property state, so marital assets do not have to be divided 50/50. They can but do not have to be.

Okay, back to our hypothetical again. The judge orders that 45 percent of your shares of stock in your business should be allocable to your spouse. You then have a choice. You can just give your spouse 45 percent of your shares of stock, or you can give her cash in an amount equal to that 45 percent. Remember, the court will determine the value of those shares at your equitable distribution court hearing. Maybe you can offer your share of the equity in the marital home instead of the cash payment or the actual shares of stock. But what you offer has to be accepted by your spouse, or, failing that, approved by the court. The purpose of that requirement is to avoid a situation where one spouse offers the other all of his "dog" stocks to satisfy an equitable distribution award.

When you reach settlement or when the court awards your spouse an interest in your retirement, IRA or whatever, the tax penalties can be avoided by having the lawyers prepare a Qualified Domestic Relations Order ("QDRO"). The QDRO has the effect of transferring the interest in the plan or account to the benefit of your spouse without triggering the penalties. The transfer of an IRA, if it is done as part of the divorce can be accomplished directly from your IRA custodian to your spouse's IRA custodian, again avoiding tax penalties.

What factors determine the percentage of each marital asset the court will give to the husband and to the wife?
The Virginia Code lists ten factors the court ***must*** consider. They are:

1. How much did each spouse contribute to the family? Both monetary and non-monetary contributions are considered.
2. How much did each spouse contribute, monetary and non-monetary, to acquiring and maintaining the asset?
3. How long were you married?
4. Your age, your physical condition, and that of your spouse.
5. What caused the marriage to break up?
6. How and when specific items of marital property were acquired.
7. What are the debts, how did they arise, and what property is security for the debts?
8. Is the asset liquid or not?
9. What are the tax consequences to each spouse?
10. And the catch-all. Such other factors as are necessary or appropriate for the court to make its decision.

There are no percentages or weight assigned to each of these criteria. There is a reason for that. The statute is not intended to be a mathematical formula. Instead, it prescribes guidelines within which the trial judge exercises his or her discretion. You should be aware that there have been cases where someone has tried to hide assets or moved assets around to confuse the situation. Competent counsel can discover that kind of chicanery. And if a judge thinks someone is playing games, the consequences can be dire.

Where there is a business that is not publicly traded on a stock exchange, you can expect that there will be valuation issues. What does that mean? It usually means dueling experts. Each side hires an expert to do an evaluation of the business. There are various accepted methods of doing such evaluations, and there are various facts and figures that can be subject to differing interpretations.

Would it surprise you to learn that the expert hired by the spouse who owns the business often reports a low value, and the expert hired by the so-called "out spouse" comes in with a higher value? Could that have anything to do with the fact that the out spouse expects cash in lieu of a marital share of the business?

In most cases, it is wise to give serious consideration to trying to settle your case. It is the best way for you to have some input and control over the result. If you go to court, you present your evidence, you make your argument, and then you sit down and the judge makes a decision. You have to live with that decision, like it or not. If you appeal a court decision you don't like (and why else would you appeal?), appellate judges decide the case based upon the arguments and the evidence in the trial court. You have even less input and control.

You can try to settle your case directly with your spouse, although this can be dangerous without advice from a lawyer. You can also work with your lawyer to negotiate a settlement with your spouse's counsel. Or you can go to a mediator to try to settle your case.

There is much to think about when you become involved in a divorce or think you might. This article gives just the barest outline some of the considerations that can arise in dividing marital property.

And there are many issues besides the division of property. There is child custody, support payments for the children, support payments for or from your spouse, and the divorce itself. There is a lot more you must know about. And – do I even have to tell you – you can only get full information and advice from a lawyer.

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New Child Support Guidelines under Virginia Code Section 20-108.2: What do They Mean for You?

By Christian Lapham

The child support laws in Virginia are changing significantly, and clients should understand how this development impacts them. On July 1, 2014, the Virginia Child Support Guidelines will be revised, in some ways substantially, and will impact present and future support obligations throughout the Commonwealth. This law marks the first time since 1995 that the Virginia General Assembly has tinkered with the existing statutory guidelines. The effect on clients and potential clients, both on the paying and receiving end is significant. This will impact initial child support awards sought after July 1, 2014, and also individuals with existing child support obligations or awards under certain circumstances. For this last group, it is important to note that under existing Virginia case law, the new child support guidelines allow support recipients and payors, under certain conditions, to seek a modification with no "other" changes in the parties' circumstances.

The revisions to Virginia Code Section 20-108.2 provide for two key changes:

1) the prior formula is replaced with a new formula which goes up to $35,000 in combined monthly gross income (adding the two parents together), rather than the prior ceiling of $10,000 (after which it provided simple percentages above this amount); and

2) it eliminates the $250 annual obligation upon the custodial parent for the child or children's unreimbursed medical expenses, before further allocation between the parents.

The former change is the more significant, as this chart illustrates: http://www.beankinney.com/assets/htmldocuments/Chart%20of%20Support%20Differences%20Between%20Statutes%2000450627xAC2B5.pdf. Particularly for individuals whose combined monthly income exceeds $14,000 (which can include a sizeable percentage of parents in Northern Virginia), the formula provides a child support increase ranging from $200 to $400 even prior to marginal health insurance costs or work-related childcare expenses, which can drive this figure even higher. It is suspected that the thinking behind this change is to bring Virginia in line with neighboring states such as D.C. and Maryland, particularly for children of higher-earning parents who have historically received significantly less in Virginia than their D.C. and Maryland counterparts. The second change simply allocates the children's unreimbursed medical expenses in proportion to income shares.

A copy of the full legislative change is found here: http://www.beankinney.com/assets/htmldocuments/Va%20Support%20Statute%20with%20Chart%2000450624xAC2B5.pdf.

For existing clients paying or receiving child support, these new guidelines alone could allow them to change the child support amount

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after July 1, 2014. Under normal circumstances, a party seeking modification of an existing child support obligation needs show there has been a material or substantial change in circumstances which justifies the change. This discourages people from flooding the courthouse with requests to modify the current amount unless something which would drive the support amount (income, health insurance, daycare, etc.) has changed considerably. However, existing Virginia case law suggests that the imposition of new guidelines, even with nothing else, justifies changing the support amount, where the change in amount is significant. (See Milligan v. Milligan, 12 Va. App. 982 (1991), see also Slonka v. Pennline, 17 Va. App. 662 (1994) and Head v. Head, 24 Va. App. 166, 176, 480 S.E.2d 780 (1997).

How do the courts define "significant"? The courts tell us that $400 per month or $790 per month is certainly significant. There is currently no more guidance on this issue at levels lower than $400 we are aware of. However, it is important to ensure that the party seeking the modification files after July 1, as existing case law also suggests the guideline change must be in effect upon filing. Cook v. Cooke, 23 Va. App. 60, 65 (1996).

What does this mean for the individual client?

You should strongly consider seeing your counsel. Find out how this new piece of legislation impacts you specifically by running the new guidelines and have a candid conversation about the pros and cons of filing to revisit this sum. Whether or not you are the payor or the recipient, knowing in advance what sum the court will award in child support should drive your negotiation strategy in the post-July 2014 world of child support calculation.

Credit is given to Daniel L. Gray, Esq. for writing an excellent piece on this subject in the Virginia Family Law Quarterly Newsletter. The author has consulted with and obtained permission from Mr. Gray to write this article on a very similar topic for the benefit of this readership. Credit is also given to Lorhel Stokes, our wonderful law clerk, who drew up the excellent chart comparing support obligations.

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Moving Out of the Marital Home - Should You Stay or Should You Go?

By Lynn Hawkins

If you've made the decision to separate from your spouse, you may be wondering, "is it ok for me to move out of the marital home?" As a practical matter, in every case of separation and divorce one or both parties will eventually need to move out of the marital home. Yet, whether and when to leave the marital home is not only a complicated emotional issue, but can be a highly strategic decision as well. Prior to making a decision, you should consider the following:

1. Will You Be Accused of Desertion or Abandonment?

Virginia continues to recognize both fault and no-fault grounds for divorce. One such fault ground is "willful desertion and abandonment." In order for a party to prove willful desertion or abandonment he/she must prove (1) that the deserting spouse intended to end the marriage; (2) that the deserted spouse did nothing to justify the desertion; and (3) the desertion was against the wishes of the deserted spouse. For this reason, if your spouse asks you to leave the house or agrees to your leaving, then it is not desertion. If, on the other hand, your spouse does not agree with you leaving and you decide to leave anyway, you may be creating a ground for divorce upon which your spouse can file a complaint for divorce against you. Then you have to consider whether being "guilty" of desertion really matters.

2. Are You Forfeiting Any Property Rights?

By leaving the marital home, you are not giving up your right to claim an interest in the real property itself or the personal property within it. While "abandonment of property" is a legal concept that exists in the area of property law, it rarely comes up in domestic matters. For this reason, you do not need to be concerned that by leaving the marital home, you are abandoning your property or your interest in that property. You should be aware, however, that once you leave the marital home you will lose a lot of control over what goes on inside the house, including the care or upkeep of the home and furniture or furnishings. Just as you will have an expectation of privacy in your new home, your spouse may expect the same right to privacy once you leave the marital home. In other words, once you make the decision to leave, even though you may have a legal right to access the property, you can expect a fight if you continue to come and go at will after you've moved out. As such, prior to leaving, you may want to photocopy important documents and safeguard items of sentimental or financial value, such as family photographs. You may also want to take detailed photographs or videos of each room in the house so that when it comes time to divide personal property, you will recall what is there, what condition it is in, and be able to address it with specificity.

3. Can You Afford It?

If you decide to move out, you will want to consider the affordability of sustaining two homes. If you are the primary wage earner, you should be aware that you may be required to continue to pay all or a portion of the rent or mortgage and expenses on the marital home, in addition to paying for all of your own, new living expenses. If you are the economically dependent spouse, you should make sure that you have sufficient funds to pay for the new residence at least for several months. If your spouse decides to financially cut you off, you will want to have sufficient funds available to you to pay for your living expenses until a temporary support order or agreement is put into effect.

4. Is There A Potential Impact on Your Custody Case?

Generally speaking, if you have minor children and custody is in dispute, you should not leave the marital home prior to coming to an agreement with your spouse on a schedule that you believe is in your child(ren)'s best interests. This does not need to be a comprehensive custody agreement, just a temporary time-sharing schedule until a more permanent arrangement can be reached. Further, keep in mind that your new residence should be appropriate for your children. If you have two children and select a one bedroom apartment that is 45 minutes away from their school, you are not doing yourself or your children any favors in terms of your custody action. Try to select a residence with an appropriate number of bedrooms and bathrooms that is in or near the children's existing school district; that is safe for them (e.g. not on a busy thoroughfare or in an unsafe neighborhood); and is close enough to the other parent that children can be transported without significant time traveling.

5. Your Psychological and Emotional Well-Being.

Living under the same roof with your soon to be ex-spouse can range from merely awkward and uncomfortable to unbearably tense and anxiety-producing. Living in a high-conflict environment on a day-to-day basis can impair your physical health, job performance and ability to care for your minor children. It can also be psychologically harmful to your children. There may come a point when remaining in the marital home simply becomes untenable. If and when that happens, it may be time to put your own mental health and well-being , and that of the children, ahead of your case strategy. If this means that your spouse gets the temporary satisfaction of seeing you displaced, or that he/she feels they have won some victory, so be it.

Keep in mind that no two family cases are alike, and you should consult an attorney regarding your specific circumstances prior to making any decisions. If your case involves domestic violence and/or there is any risk to your or your children's safety, you should secure your safety first and then consult with an attorney. No judge would expect you and/or your children to remain in an unsafe environment.

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