

FAMILY LAW NEWSLETTER

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Divorce and Your Business, Part I: Plan B

By James Korman



WARNING: The following article is NOT legal advice. Do not act on it without consulting a qualified attorney. Every case is different.

You think your job is stressful? Wait till you find out what impact a divorce can have on your business and on your income, not to mention your life.

A divorce can be more or less amicable. Having an idea about what is involved can help.

First choice: take every reasonable step to keep your marriage together. But some marriages cannot be saved, and you have to go to Plan B. A qualified divorce lawyer can tell you what your options are, what is realistic, and how you can put together your Plan B.

Plan B For the Virginia Business Owner or Professional

If you or your spouse lives in Virginia, your divorce will likely be governed by Virginia law, assuming one or both of you is a legal resident and physically domiciled here.

In general, there are four issues to be resolved. They are:

- 1) The divorce itself, and the grounds of divorce.
- 2) Custody of minor children.
- 3) Payment of child and spousal support.
- 4) Division of marital property.

I am going to start with the fourth, because it is the category that can most affect your business.

Virginia is an “equitable distribution” state. In equitable distribution, marital property is divided equitably, meaning fairly. The Virginia Court of Appeals has stated that “equitably does not mean equally.”

First, says the Code of Virginia, only marital property is subject to division in a divorce. So it has to be determined what is marital and what is separate.

Separate Property. Property you or your spouse owned before you married is separate. Property you or your spouse inherits, or that either receives as a gift, is separate. But, of course there are exceptions. Gifts between spouses are marital. And this is important: for any separate property to remain separate, you should try to avoid co-mingling it with marital property. There can also be “hybrid” property that is part marital and part separate.

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Marital Property. Property acquired during the marriage is presumed to be marital. If you want to claim that property acquired during the marriage is all or part separate, it is your burden to prove it.

What does “during the marriage” mean? Your marriage obviously begins on the day you get legally married. In Virginia, the end date for the purposes of these financial issues is the date of “final separation.” That means the date one party moves out with no intention of returning.

So now that we know that property acquired during the marriage is presumed to be marital, what property does that include? The answer can be scary – pretty much everything.

Whether an asset is titled in your name, your spouse’s name or in joint names, it is still presumed to be marital. That will include bank and brokerage accounts, securities, real estate, vehicles, IRA’s, 401K’s, pensions and your business, whether it is a corporation, partnership, LLC or sole proprietorship. If it had its inception during the marriage, or if its value was enhanced during the marriage, it will likely be in large part marital property. And all marital property, if you recall, is subject to division between the spouses in the event of divorce. I bet that got your attention.

The court will determine the value of all marital assets and then equitably divide those assets. Some can be divided in kind. You have 100 shares of Enron, the judge can give half of the shares (or some other percentage the judge deems as fair) to each party. Some jointly titled assets, like the marital home, or any other real estate, cannot be readily divided, so the court can order it sold and the proceeds divided.

The court will consider and value all marital property, but the court can only order the division, or sale and division, of property that is jointly titled. If your ownership interest in your business is in your name alone, the court will place a value on your interest in the business and award your spouse part of that value. You will have to either transfer to your spouse that percentage of your ownership interest, or give him/her something else of equal value: whatever your spouse agrees to accept or the court approves.

The predicate to all of this is a valuation of an often closely held business. That can be complicated, particularly with a service business where the value is far more than what you could get for some used desks and computers. And it can be more than your share of the capital account. It often requires the hiring of an experienced forensic accountant to do the valuation. Under Virginia law, the “intrinsic value” of the business is what will be considered. With many businesses, the intrinsic value is the ability to generate profits and income, now and in the future. The evaluation will offer an opinion about the value of your interest in the business. Relying on the evidence the court thinks is most credible, the judge will determine the value, and divide it “equitably.”

I have been referencing throughout what the court would do, or what a judge would do. That does not mean you have to submit to that modern version of medieval combat – the court trial. The vast majority of cases will settle. You can negotiate, you can mediate, you can collaborate, you can even arbitrate. If none of that succeeds, you may have to litigate.

The difference in each of these alternatives has to be the subject of another article.

The conclusion. If you do get a divorce, your income and all of your assets, including your business, are at risk. You had better see a lawyer early if you think a marital split could be in your future.

This article was originally published on the Arlington Chamber of Commerce Blog.

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Family Law Attorney and Counsellor at Law

By Christian Lapham



In a recent custody proceeding, my co-counsel and I picked up on the fact that the father and mother were noticeably absent from the child's birthday photos the father's counsel introduced in evidence. Relying upon a hunch, we explored this topic in cross-examination. In her ruling, the judge indicated that her disgust with the fact that the father did not attend and prevented the mother from attending the boy's birthday party significantly impacted her decision. It was a calculated gamble which paid off, and the client was ecstatic with the payoff and the result. It was influential in the judge's decision, and it reflected well on us. It also barely ranked in the top twenty-five of the most helpful things we have done for our clients in the past month.

Less visible, but often more helpful, are the other twenty-four moments when we have effectively counselled clients outside of the courtroom in ways to resolve their cases, avoid trial and/or help their chances of success in trial by making reasonable and thoughtful decisions prior to court. Counselling is defined as "advice; opinion or instruction given in directing the judgment or conduct of another."¹ This is a forgotten aspect of our profession, but in family law, is perhaps the most important. The judges in our region seem to agree with this notion. To paraphrase a rather famous and very helpful settlement conference speech from one of the finest local judges in Northern Virginia, the Honorable Burke F. McCahill, we are attorneys and counsellors at law, and the latter is every bit as important as the former. We have an obligation to our clients not only to share our legal knowledge but also to give sound, prudent advice which clients should follow to improve their chances of achieving their goals.

Taking such advice is not always easy. It might involve not relocating your young children closer to your extended family and friends. It could also involve (and often does) taking down your social media accounts in their entirety. Finally, it might involve compromise in a tough situation which you analogize to "giving in" or "losing". We don't give this advice because we don't like you, don't want you to relocate, don't want you to enjoy up-to-the-minute tweets from your Twitter-sphere. We do this for a living, and we have a very good understanding of how your actions will help or hurt your case. And we don't control your spouse, so we cannot advise them to do the same. We are on your side, and this counselling comes from a good place.

So while we are not mental health professionals, licensed clinical social workers or professional counselors, counselling is actually part of our profession. I would submit it is the most important part of our profession. So please consider this next time we ask you to take down your Facebook page. Your friend's impressive treadmill pictures (distance AND time) will be available for you to "like" when your legal process comes to an end.

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¹Dictionary.com

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