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

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 the children can be transported back and forth without spending 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.