

SEPARATION AND DIVORCE

HANDBOOK

By

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I. INTRODUCTION

This Handbook, which arises out of the author's experience in handling family law cases for over twenty years, is comprised of three parts. First, there is a discussion of the issues and options faced by a person beginning with the initial marital problems, and continuing until after divorce. Second, there is a glossary of divorce-related terms as defined under Virginia law. Finally, there are several exhibits relating to child support.

The information in this Handbook is intended to be of general educational value to persons involved with a separation and divorce. Obviously, not every issue you may face is addressed. The actual issues and law in your case may be more specific, or complicated, than the general information in this Handbook. This information is intended to supplement, not replace, the advice you receive from your family law attorney. Separation and divorce involve complicated and important legal, financial, family and personal issues. You should consult a family law attorney as soon as it becomes apparent that you or your spouse is considering separation or divorce.

II. DISCUSSION OF ISSUES AND OPTIONS

a) When Marital Troubles Begin

Many couples face problems during their marriage. These problems may include an abusive or irresponsible spouse, infidelity, alcohol or drug abuse, financial difficulties, alienation, overly involved in-laws, excessive or inappropriate internet use, a lack of respect or trust, incompatibility, inability to communicate, or any number of other problems.

The first issue to face is whether there is any hope or expectation that the marriage can be saved. The answer to this question lies primarily in the commitment level of you and your spouse. If you or your spouse is unwilling or unable to commit to the marriage, then the marriage will likely end. If your spouse claims to be committed to the marriage, then you need to consider your commitment.

Whether you are willing to continue your commitment to the marriage is a personal decision for you to make. The factors to consider include your children (if any), the transgressions and current attitude of your spouse, your views, religious or otherwise, regarding marriage and commitment, your history with your spouse, and your expectations for the future.

If you have minor children with your spouse, you should be aware of the various studies tracking the impact of divorce on children. Though there is no way to know in advance how any particular child will cope with divorce, the research indicates that some children will suffer long lasting harm as a result of their parents' divorces. The research also suggests, among other things, that continuing a high-conflict marriage could be more harmful to children than divorce. Research shows, however, that 70 percent of divorces are occurring in low conflict marriages. See, *A Generation at Risk*, by Paul Amato and Alan Booth.

b) Happy Marriages

Recently there has been a renewed focus on healthy, happy marriages. Most bookstores carry numerous titles on this topic. In *The Case for Marriage*, Linda Waite reports that 86 percent of people who said they were in bad marriages, but who decided to stay married, said five years later that their marriages had turned around and were now happier. Sixty percent said their marriages were “very happy.”

Many books focus on the fact that happy, successful marriages are skill based. If both parties are committed, they can create a better marriage. If you are in a low-conflict marriage, especially if you have children, you should at least consider the research referenced above.

c) Separation

If either you or your spouse is unwilling or unable to commit to the marriage, then it is time to consider separation. If it is clear to both parties that the marriage is going to end, then you should explore a full settlement at this time.

You should first hire an attorney to become educated regarding the issues you face, which may include separation, divorce, the division of property and debt (called “equitable distribution”), spousal support, child custody and visitation, child support, and the litigation you will face if you are unable to resolve your differences by agreement.

While you are in the process of becoming educated, you should attempt to maintain communication with your spouse. Civility and communication between you and your spouse may help to minimize both your personal stress and the difficulty of achieving an agreement.

Once you understand the issues and the applicable law, there are several procedures you can follow to obtain a settlement. You can try to reach an agreement directly with your spouse, you can engage in mediation with your spouse, or you can hire collaborative family law attorneys and use the collaborative divorce process.

There is no one right way for everyone. Instead, the way in which you proceed depends

upon the facts and personalities involved in your situation. The important thing is to try to work by agreement rather than having contested court hearings. Contested court proceedings are stressful and expensive for the parties, and the results can be unpredictable.

If for some reason either you or your spouse is unable or unwilling to discuss a full settlement at this stage, you may either attempt a limited settlement focusing, for example, on temporary issues, or you may separate without an agreement. A limited settlement agreement will typically provide; 1) that the separation is by agreement; 2) for the temporary possession of the home by one of the parties; 3) for the temporary allocation of income and expenses; and 4) for temporary arrangements regarding custody of and visitation with children. Any agreement should be prepared or reviewed by your attorney before you sign.

If you are unable to reach any agreement with your spouse prior to separation, you need legal advice about how to proceed. Your options include separation without an agreement, or filing divorce papers with the court.

d) Selection of Attorney

How should you make your selection if you need a family law attorney? A recommendation from a friend, family member, CPA, Counselor, or another attorney is often a good approach. The best approach may be to gather several names and interview each potential attorney. Recognize that you are seeking a good fit. Are you satisfied with the attorney's education and experience? Is he or she responsive to calls or e-mail? Is the attorney's calendar such that he or she is available to see you within a reasonable time? Are the attorney's hourly rates and retainer in line with others of similar experience and reputation?

When you meet with the attorney, are you comfortable with him or her? Do his or her values seem to match yours? Is he or she able to explain things in a way that make sense to you? Does he or she have satisfactory trial experience in the event a court appearance may become necessary in your case? Do you feel that you can trust and have confidence in the attorney?

Obtain names, meet with several attorneys, ask yourself these questions, and odds are that you will be satisfied with your choice. If, at any point, you are not satisfied with your attorney, you should consider changing attorneys. The right attorney is an important counselor and advocate helping you through this challenging process.

e) **Selection of Process**

Some divorces are bitterly litigated at great financial and emotional expense to the family. The vast majority of cases, however, are resolved by settlement. If you are going to divorce, what is the best process to follow? There is no one process that is best for everyone.

Mediation

In the early 1990s, mediation became popular, and many divorce cases have been resolved by mediation. (See glossary for more information).

Collaborative Law

In this decade, collaborative law (see glossary and separate article on Collaborative Law for more information) has gained popularity.

Traditional Approach

The traditional approach to divorce involves clients negotiating issues directly between themselves or through their attorneys. Issues which are not resolved by agreement are resolved by a judge. There are relatively few cases in which the judge has to decide every issue because the parties just cannot agree. And these cases may have previously involved mediation or the collaborative law process.

If both sides have competent, well-prepared family law attorneys, the traditional approach has a very high settlement rate. Even if some of the issues are resolved by the judge, the parties and the attorneys still typically work together to resolve as many issues as possible.

Conclusion

So what process should you and your spouse follow if you divorce? If you are not sure, consult with an attorney that is comfortable with all three approaches. He or she can talk to you in more detail about the pros and cons of each approach and can help you decide what is best for you. Or have this topic be one of the issues you discuss with several attorneys as part of your initial attorney selection process. There is no one approach or procedure that is best for everyone. Selecting the process, like selecting an attorney, involves finding a good fit.

f) Divorce

Divorce is a legal process instituted by the filing of a complaint with the court, usually in the jurisdiction where you and your spouse last lived together. The complaint sets forth certain facts and contains a request for the court to order certain things such as the divorce, the division of property and debts (equitable distribution), spousal support, child custody and visitation, child support, attorney's fees and temporary ("pendente lite") relief. The temporary relief which can be granted by the court includes spousal support, attorneys' fees, an injunction against interference, child custody, visitation, child support, exclusive use and possession of the marital home, and an injunction restricting the use or transfer of marital assets.

Once divorce papers are filed, the parties can continue to negotiate in an attempt to resolve the issues in dispute. This can be done in mediation, through the attorneys, or directly between the parties. There are good reasons for attempting to resolve matters by agreement. Litigation is expensive, stressful and distracting for the parties, and often further damages their already strained relationship with each other. In some cases, there is not an acceptable option to having the judge resolve the parties' differences. In that situation, it is important that you have a skilled and experienced family law trial attorney.

Either side can request a hearing on one or more of the temporary issues identified above. This hearing usually lasts one or two hours (though this varies from court to court). After this

hearing, the parties can continue to attempt to settle the remaining issues in dispute. If the case is not settled, then a trial may eventually be held.

At trial, both parties are given the opportunity to present evidence relevant to the issues in dispute. The issues may include divorce, equitable distribution, spousal support, child custody and visitation, child support and attorneys' fees. After all evidence has been presented, each attorney is allowed to argue the case and make specific requests of the judge.

After trial, the judge follows his or her own procedure for rendering a decision. Typically, the judge will write a letter to the attorneys several weeks after the trial setting forth and explaining his decision. The attorneys then prepare a decree of divorce reflecting the judge's ruling. Once this decree is entered by the judge, the parties are divorced.

g) Post-divorce

After the divorce is granted, your attorney may need to handle the conveyance of real estate or the division of retirement benefits. You should review and revise your estate planning documents and all beneficiary designations.

You may be unhappy with the judge's decision and wish to appeal. You should recognize that, in almost every case, both parties are dissatisfied with some part of the judge's ruling. An appeal is appropriate only when the judge commits an error in the way in which she handles the case or reaches her decision. In most cases, you should simply accept the ruling, move on with your life, and try to get yourself in a good position emotionally, physically, and financially. It may seem hard and you may feel overwhelmed. Be positive while recognizing that things take time.

h) Children and divorce

Both parents should make every attempt to play a vital role in the lives of their children. Children need the ongoing affection, interest and concern of their parents. Children should feel that they have two parents who love and care about them, and are closely involved in their lives.

Guidelines for Parents

1. Tell your child that you love him or her and that the divorce is not his or her fault.
2. Make every effort to avoid showing anger or bitterness toward the other parent.
3. Don't say negative things about the other parent, even if you believe they are true.
4. Encourage your child's relationship with the other parent. Do not place the child in the middle or make her feel guilty for loving the other parent.
5. Don't use your child to deliver support checks or any type of negative message to the other parent.
6. Allow your child to continue being a child. Avoid using the child for emotional support. You need to be the parent; do not put the child in that role.
7. Pay child support on time.
8. Do not use your child to try and hurt the other parent (e.g., by discouraging visitation). Recognize that your child's relationship with the other parent should be positive, despite your own feelings. Be supportive of your child's relationship with the other parent.
9. Do not give your child the false belief that he is the decision maker in matters of custody or visitation. His wishes are only one factor to be taken into account by you and the other parent if the issues are resolved by agreement, or by the judge if a trial is necessary.
10. Try to establish and maintain a calm atmosphere and a stable environment.
11. Make sure the child has regular and frequent contact with both parents.
12. Provide stability and discipline. Children need consistent control and direction. Overly permissive or indecisive parents interfere with the child's healthy development. Children feel more secure and are more likely to thrive when clear limits and expectations are set. Children need leadership and benevolent authority.

If You Need Help

Most people going through a separation and divorce go through emotional stages which

may include denial, anger, depression, and, finally, acceptance. People involved in a divorce often feel they are on an emotional roller-coaster, dealing with the loss of the marriage, less time with their children, new living arrangements, new financial and other responsibilities, and the emotions and problems of other family members, all resulting in increased stress.

You and/or your children may benefit from counseling to assist you through the process. Seek your attorney's or your family physician's help in locating the appropriate professional help for your particular problem. Be sure to ask questions so you understand the counselor's areas of specialty, his or her background and training, fees and payment arrangements, and the general procedure to be followed in helping you resolve your problems.

Advice from well-meaning friends and relatives, in many cases, further aggravates the situation. Friends and relatives can seldom be objective. Professional counseling may assist you in dealing with your and your children's problems.

III. GLOSSARY

a) Attorney's Fees

If your case goes to trial, the judge has discretion to order one party to pay the other party's attorney's fees. In many cases, the party with the greater income has to pay a share of the other party's attorney's fees and costs. In other cases, each party is responsible for his or her own attorney's fees. The judge makes this determination in accordance with what he or she feels to be equitable or fair.

b) Child Custody and Visitation

The custody of and visitation with your child or children should be resolved by agreement, if possible. Custody litigation is expensive, time consuming and emotionally difficult for all concerned.

In determining custody and visitation arrangements, the court is required to give primary consideration to the best interests of the child. The court shall assure minor children of frequent and continuing contact with both parents, when appropriate, and encourage parents to share in

the responsibilities of rearing their children. In determining the best interests of the child, the court is required to consider the following factors.

1. The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs;
2. The age and physical and mental condition of each parent;
3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child;
4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members;
5. The role that each parent has played and will play in the future, in the upbringing and care of the child;
6. The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child;
7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child;
8. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference;
9. Any history of family abuse. If the court finds such a history, the court may disregard the factors in subdivision 6, above;
10. Such other factors as the court deems necessary and proper to the determination.

Legal custody involves the authority to make important decisions regarding the child, such as the choice of schools and elective surgery. The parent with physical custody of the child can have sole legal custody, or the parents can share joint legal custody.

Physical custody involves the child's living arrangements. One parent can have primary physical custody (with the other parent having visitation), or the parents can have shared physical custody. The parties have shared physical custody when they each have more than 90 days per year with the child. A day is considered a 24 hour period. An overnight but less than 24 hour period is considered a half day.

c) **Child Support**

If you go to court for child support, the amount of child support awarded will be determined in accordance with the Virginia Child Support guidelines. A guideline worksheet is

attached as Exhibit A. The Virginia Department of Social Services has an online Child Support Calculator at http://www.dss.virginia.gov/family/dcse_calc.cgi

Using the worksheet, the judge first determines the income of both parents. The information for line 6. a. comes from a table in the Code of Virginia, Section 20-108.2. A copy of this table is attached as Exhibit B.

Health care insurance costs and day care costs are also calculated. A sample completed worksheet is attached as Exhibit C. Extraordinary medical and dental expenses in excess of \$250 per year are shared by the parents in proportion to their gross incomes.

If both parents have the child or children more than 90 days per year, then a shared support guidelines worksheet is used. A continuous 24 hour period constitutes a day, and an overnight visit, if less than 24 hours, counts as a half day. A blank shared custody form is attached as Exhibit D, and a completed sample is attached as Exhibit E.

Though judges usually order child support in the amount determined by the guidelines, they do have authority to enter a different amount of child support on the basis of the following factors.

1. Actual monetary support for other family members or former family members;
2. Arrangements regarding custody of the children; including the cost of visitation travel;
3. Imputed income to a party who is voluntarily unemployed or voluntarily underemployed; provided that income may not be imputed to the custodial parent when a child is not in school, child care services are not available and the cost of such child care services are not included in the computation; and provided further, that any consideration of imputed income based on a change in a party's employment shall be evaluated with consideration of the good faith and reasonableness of employment decisions made by the party;
4. Debts of either party arising during the marriage for the benefit of the child;
5. Direct payments ordered by the court for maintaining life insurance coverage, education expenses, or other court-ordered direct payments for the benefit of the child;
6. Extraordinary capital gains such as capital gains resulting from the sale of the marital home;
7. Any special needs of a child resulting from any physical, emotional, or medical condition;
8. Independent financial resources of the child or children;
9. Standard of living for the child or children established during the marriage;
10. Earning capacity, obligations, financial resources and special needs of each parent;
11. Provisions made with regard to the marital property where said property earns income or has income-earning potential;

12. Tax consequences to the parties including claims of exemptions, child tax credit, and child care credit for dependent children;
13. A written agreement, stipulation, consent order, or decree between the parties which includes the amount of child support; and
14. Such other factors as are necessary to consider the equities for the parents and children.

d) **Collaborative Divorce**

Collaborative divorce is a specific process of working together to reach a mutually acceptable outcome regarding the various divorce issues. Both parties hire attorneys trained in the collaborative practice process, and the parties and the attorneys all sign a contract committing to the process, and stipulating that the attorneys will not participate in litigation in the event all issues are not resolved collaboratively. This is a good option for parties interested in and capable of working together fairly, and with full disclosure. Some family law attorneys only handle collaborative cases, others only handle non-collaborative cases, and some family law attorneys are trained in the collaborative process but also handle non-collaborative cases.

e) **Discovery**

Informal discovery, which is simply the voluntary exchange of information, can be done at any stage of the proceedings. Once a lawsuit is filed, both parties are allowed to engage in discovery as set forth in the Virginia rules of court. Discovery includes interrogatories (written questions to be answered by the other party under oath), requests for production of documents, requests for admission, and depositions (oral questioning of a party or a witness under oath, before a court reporter).

Your attorney can recommend specific discovery in your case. Your goal should be to gather, in an economical manner, whatever information you need to settle or to prepare for trial.

f) **Divorce**

A divorce may be granted in Virginia based upon either fault grounds, or upon no fault grounds after a period of separation. Fault grounds include adultery, conviction of a felony

subsequent to the marriage, cruelty, and desertion. There is no waiting period for adultery, but clear and convincing proof is required. The other fault grounds require a one year waiting period.

A divorce based upon no fault grounds may be granted after a one year period of separation. If the parties do not have minor children and have a written separation agreement, then a divorce may be granted after a six month period of separation.

Virginia law also provides for a preliminary divorce, known as a divorce from bed and board, which does not allow the parties to remarry. This type of divorce was more common in the past when a longer waiting period was required for a regular or absolute divorce.

g) Equitable Distribution

Equitable distribution is the process in Virginia for allocating assets and debts between a husband and wife in a divorce case. The judge identifies all property owned by the parties and determines how title is held. The judge classifies property as marital, separate, or part marital and part separate.

The classification of property is a complicated issue in some cases. As a general rule (with several significant exceptions), property obtained during the marriage, before the final separation of the parties, is marital. Other property, provided it is separately maintained, is separate property.

The court can allocate any debt of the parties. The court can divide marital, but not separate, property. The court can allocate jointly titled property, and/or make a monetary award.

In making its equitable distribution award, the court considers the following factors:

1. The contributions, monetary and nonmonetary, of each party to the well-being of the family;
2. The contributions, monetary and nonmonetary, 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 nonliquid character of all marital property;
9. The tax consequences to each party;
10. The use or expenditure of marital property by either of the parties for a nonmarital separate purpose or the dissipation of such funds, when such was done in anticipation of divorce or separation or after the last separation of the parties; and
11. Such other factors as the court deems necessary or appropriate to consider in order to arrive at a fair and equitable monetary award.

h) Guardian Ad Litem

When custody or visitation is an issue, either in a divorce case in circuit court, or as a result of a petition in juvenile and domestic relations district court, the court may appoint an attorney to represent the children. The attorney appointed to represent the children is a "guardian *ad litem*." His or her role is to represent the children in the pending court proceeding.

Some judges routinely appoint guardians *ad litem*, while other judges do so only upon motion of one of the parties. The fee of the guardian *ad litem* is usually paid by the parties as ordered by the court.

i) Litigation

“Litigation” refers to the legal procedures involved in a court action, leading up to and including the hearing or trial.

j) Mediation

Mediation is a process or means of resolving differences by agreement. The parties meet with one or two mediators and discuss the issues in dispute and explore ways of trying to resolve the differences. Mediators do not rule on the dispute. Instead, they are trained to help the parties themselves work out a mutually acceptable solution. Some mediators are attorneys or retired judges. The attorneys for the parties may, but are not required to, attend mediation sessions. Mediation may be helpful and should be at least considered in your case.

k) **Name Change**

If you changed your name as a result of the marriage, you may return to your prior or maiden name as a result of the divorce by the entry of a name change order.

l) **Retirement Benefits**

Retirement benefits are marital property to the extent they were earned during the marriage and prior to the last separation of the parties. Marital retirement benefits may be divided by the court as part of the equitable distribution process. Retirement benefits are typically divided so that the non-employee spouse receives a percentage of the benefits.

m) **Separation**

Separation for purposes of divorce simply means not living together as husband and wife. It is possible to live apart and not be separated, or to live in the same house and be separated. You are separated when you no longer behave as or carry out the duties of husband and wife, and you or your spouse has the intent to end the marriage.

No paperwork or court order is required to establish a separation. Nonetheless, it may be in your interest to either obtain a settlement or to file a complaint for divorce prior to your separation. You should consult with your attorney on this issue.

n) **Settlement**

You and your spouse may reach an agreement on all or certain issues. Settlement may occur at any point during the process from when you are not yet separated until immediately before the issues are resolved by the court.

A settlement is typically set forth in a written document which may be called a "Marital Agreement," a "Separation Agreement," a "Property Settlement Agreement," or a "Settlement Agreement." An agreement may cover one or more of the following issues: child custody (physical and legal), child visitation, child support, spousal support, division of assets and debts,

allocation of tax consequences and attorneys' fees. This is not an exhaustive list, as a settlement agreement may cover almost any issue that the parties wish to address.

o) Spousal Support

Courts in Virginia have authority to award spousal support to either party by periodic payments (usually monthly) for a defined duration, or in periodic payments for an undefined duration, or in a lump sum, or in any combination.

In making its decision regarding spousal support, the court will first consider whether the party seeking spousal support should be denied an award due to adultery or other marital fault.

If an award of support is not barred by fault, the court will consider the following factors:

1. The 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 and any special circumstances of the family;
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 nonmonetary, 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.

p) **Tax Consequences**

The Internal Revenue Service rules and regulations are complex, detailed and constantly changing. Though a few general rules are set forth below, be aware that there may be applicable exceptions or qualifications. A certified public accountant is often a valuable advisor during the process of separation and divorce.

The transfer of property between spouses incident to a divorce normally is without tax consequence. The party receiving property does not receive a stepped up basis, and will bear the full capital gains consequences upon a subsequent transfer.

Subject to many qualifications, spousal support is usually deductible to the party paying it, and taxable to the party receiving it.

Child support is not deductible to the party paying it, nor taxable to the party receiving it.

The child dependency exemption can be allocated by the court to either parent. If there is no ruling or agreement to the contrary, the party with physical custody of the child may take the exemption.

q) **Temporary Relief**

Once a complaint is filed initiating a divorce action, either party can request temporary, or *pendente lite* (“pending the suit”) relief. The court may hold a hearing and enter an order regarding spousal support, child custody, visitation, child support, exclusive use and possession of the marital residence, and restrictions on the transfer or use of assets. This relief lasts until there is a final order in the case which supersedes the prior order of temporary relief.