

# Ten Family Law Dos and Don'ts

by Laura A. Thornton

Like most attorneys who specialize in an area of practice, I am frequently asked to answer the same questions and to advise on the same issues. Clients appreciate written reference materials so I give a list of Dos and Don'ts to my family law clients. I hope that your clients will benefit from this handout as well.

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**(1) DO keep a journal or calendar of daily events that involve your children and your soon-to-be ex-spouse.**

In most divorce and custody cases, there is a delay of a year or more before a trial, when you may be required to testify about the facts and circumstances surrounding your separation and your involvement with the children — before and after the separation. Keeping a journal will help you to recall specific dates, times, and incidents relevant to your case. If you refer to your journal when you are asked to testify, your testimony will be much more credible.

**(2) DON'T sign anything until your lawyer has reviewed it with you.**

Writings signed by both you and your spouse will be binding as to property issues. It doesn't matter what kind of paper the writing is on, whether it is typed or handwritten, whether the document is notarized, and whether or not there were witnesses to your signature. If you and your spouse sign a document regarding your property or debts, either of you can ask the divorce court to make the document the court's order. In rare circumstances, you may set aside a written agreement, but in general you are legally bound by the terms of a signed written agreement. Even if you and your spouse go to mediation or other alternative dispute resolution, do not sign an agreement until you have reviewed it with your lawyer. Mediators are very understanding and will usually, at the conclusion of a mediation session, tell you that they will type

up your agreement and give you an opportunity to review it with your lawyer before you sign it.

**(3) DO pay child support as soon as you separate.**

Whether you have a court order or not, as soon as you separate from your child's other parent, if the child is not living with you, start providing your ex-partner with financial support. There are several reasons you should start paying support right away. First, it's the right thing to do. Second, it may take months before a court will be able to enter an original order of support. When the court does enter the order, your obligation will be retroactive to the date your ex files his or her support petition. So you should pay something right away. Your attorney can estimate your obligation. If you underpay, your arrearage will not be as much as it would have been had you not paid at all. If you overpay, the court may credit you for your overpayment. The third reason for paying support right away is that you demonstrate to the court that you recognize your obligation to care for and support your child, and the court likely will consider your support efforts when determining an appropriate custody and visitation schedule for your case.

Support equals money. While it is supportive to provide diapers, milk, and clothing for your child, support in the court's eyes is money. Pay in cash only if you get a receipt. Otherwise, pay by check or money order so you have proof of payment. The recipient of the support does not have to account for or give you receipts for how he or she spends the support money.

**(4) DON'T commit adultery if you want spousal support.**

This paragraph is not meant to say that adultery is acceptable in any circumstance. However, adultery can have a more significant legal impact in spousal support cases than in cases where spousal support is not an issue.

Adultery is adultery whether it happens before you separate or after you separate. If you have sexual intercourse with someone other than your spouse at any time while you are still married, you are committing adultery. If the court

finds that you have committed adultery, whether before or after your separation, the court can bar you from receiving spousal support, depending on the circumstances. So if you have been a faithful spouse for thirty-five years, while your spouse has been unfaithful for years, and post-separation you have sex once with another person, your ex can ask the court to bar you from receiving spousal support. Your ex may also be barred from seeking spousal support because of his or her adultery. But if you are the likely recipient of the support and he or she is the likely payor (i.e., the ex makes more money than you do), then it matters more to you than to your ex whether you are barred from receiving spousal support.

**(5) DO understand that no contact means no contact at all, by any means.**

If you are subject to a protective order, you are not allowed to contact the subject of that order by any means, directly or indirectly. You can't talk to the subject of the order in person. You can't call or text him or her. You can't send him or her a card, a note, or flowers. You can't have your brother, mother, sister, or friend, call and talk to him or her for you. This rule is particularly important because violation of a protective order requires a mandatory jail sentence of at least a day.

If the subject of the protective order contacts you, that doesn't mean it is OK to talk to him or her. If the subject of the order calls you and you know it is him or her calling, don't answer. If you pick up the telephone without knowing it is him or her, hang up as soon as you hear the person's voice, without saying anything. You are the person who will be punished for the contact, even if it is the other side that initiated the contact. If you are being contacted by the person who initiated the protective order, talk to your lawyer about it, and your lawyer may be able to obtain the dismissal of the no-contact.

**(6) DON'T verbally modify your agreement or order without legally modifying your agreement or order.** If you make an agreement with your ex and you put those terms into a written separation or property settlement agreement or make the terms into a court order, the written agreement or court order is controlling. You cannot change the terms of that agreement or order orally. For example, if you have agreed in writing or are court ordered to pay \$100 per week in child support and your ex says, "Don't worry about it, you can just pay me \$50 per week," you cannot rely

upon that statement. If you do so, your ex can take you to court at any time and have a judge order you to pay the difference between the \$100 you were ordered to pay and the \$50 you paid. Even worse, your ex can ask a judge to hold you in contempt of court and put you in jail for not obeying the court order. A judge may be sympathetic, but must enforce a prior order.

Another common example of this issue is when you and the ex agree to modify your custody or visitation arrangement, but don't get the written agreement or order changed. This invariably leads to problems. For example, your ex's work schedule changes, so now your ex would like you to be with the children for three weekends per month instead of every other weekend. You agree to the ex's request for more than a year. Suddenly, your ex goes back to the old work schedule and tells you that now he or she is cutting you back to the prior every-other-weekend schedule with the kids. If you try to keep the children for the third weekend, over his or her objection, you will be violating the court order and subject to contempt proceedings. So always modify your agreements or order in writing as required by your agreement and with the court.

**(7) DO file for modification of your support order as soon as you would like a change.** You can ask the court to modify your child support obligation any time there has been a material change in circumstances since the last order was entered. If your income is decreased through no fault of your own, you should immediately file to reduce your obligation. Unlike an original support order, modifications to your support obligation are not necessarily retroactive to the date you file. In modification cases, the judge can't modify your support order any earlier than when your ex is served with your motion to modify your obligation. For example, if you lose your job May 1, you file to reduce your support obligation on August 1, your ex is served with your motion on August 14, and you don't get into court until late October, a judge only has the option of reducing your obligation retroactive to August 14, because that is when your ex was notified of your request to reduce your obligation. A judge cannot go back to May 1 because your ex wasn't served with notice of your request until August 14.

The decision of whether the modification should be retroactive at all is up to a judge. It is not guaranteed that the change will be retroactive. Also, until a judge modifies your support order, everyone must obey the prior order.

**(8) DON'T have your girlfriend or boyfriend sleep over when your child is with you.** If you are married, you shouldn't have a boyfriend or girlfriend at all — let alone have someone spend the night. There are many legal ramifications to dating while you are married, even if you are separated. Please consult your attorney before dating if you are not yet divorced. However, if you were never married and have a child, or if you are divorced and want to have a boyfriend or girlfriend spend the night with you, do so when your child is with your ex. Virginia case law provides that having a boyfriend or girlfriend spend the night in the presence of your child is exposing your child to an immoral environment. Doing so can be held against you in your custody and visitation case.

*So if you tell your child that something is wrong with your ex or that your ex is a bad person, your child may think that something is wrong with him or her. The long-term effects of this diminishment of your child's self-esteem are devastating.*

**(9) DO save your documents.** When you divorce, you will likely be dividing your assets and your debts a year after you separate from your spouse. Your attorney and the court will need to know what assets and debts were in existence on the date you separated from your spouse and what has happened to the assets and debts since you separated. By saving your documents, you can save yourself the expense of paying your lawyer to subpoena the documents later. You likely will need your bank statements, pension or retirement plan statements, credit card statements, tax assessments, deeds, deeds of trust, mortgage loan histories, car payment histories, titles to your vehicles, investment account statements, life insurance policy statements, and any other documentation relating to assets or debts in your name, your spouse's name, or your joint names as of the date of separation and as close to the date of your trial as possible.

Your lawyer and the court will also need to know what happened to the assets and the debts after your separation. For example, if you had \$10,000 on the equity line secured by your home at separation, but there is \$15,000 on the equity

line at the trial date, you or your spouse will need to account for the other \$5,000. Or, if you have a VISA account at separation and pay it off after the separation, you want to be able to get credit from the court for your reduction of that debt. So you should have your monthly VISA statements from separation until trial. Your lawyer will tell you specifically what documents you should provide.

**(10) DON'T bad-mouth your ex to your child or allow anyone else to do so.** If you criticize your ex to your child, you are telling the child that something is wrong with the child. Your child knows that he or she is one-half of both of you. So if you tell your child that something is wrong with your ex or that your ex is a bad person, your child may think that something is wrong with him or her. The long-term effects of this diminishment of

your child's self-esteem are devastating. This rule applies to other persons in your child's life. It is no less damaging to your child if grandma or Uncle Bob says what a jerk your ex is than if you make the statement. No matter who says it, our child will feel criticized.

#### **Disclaimer**

The Dos and Don'ts set forth above are general principles for application in Virginia family cases and are not meant to be specific legal advice for all cases. You should always consult with a qualified family law attorney about the application of Virginia law to the facts and circumstances of your specific case. ■