Annual Survey of Virginia Law: Domestic Relations

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DOMESTIC RELATIONS*

Peter N. Swisher**

I. 1987 LEGISLATION

A. The Virginia Postmarital Agreement Statute

The Virginia Premarital Agreement Act\(^1\) applies to any premarital agreement executed on or after July 1, 1986. The Act basically allows the parties prior to marriage to contract regarding: (1) the right to manage and control property, whenever and wherever acquired or located; (2) the disposition of property upon separation, marital dissolution, divorce, death, or the occurrence or nonoccurrence of any other event; (3) spousal support; (4) the making of a will, trust, or other agreement; (5) life insurance ownership rights; (6) the choice of law governing the agreement; and (7) "any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty."\(^2\)

The 1987 General Assembly, by enacting section 20-155 of the Code of Virginia (the "Code"),\(^3\) intended that postnuptial agreements as well as premarital agreements would come under the ambit of the Virginia Premarital Agreement Act. Prior to this statute, Virginia case law recognized that with either antenuptial or postnuptial agreements, "the general rule is that agreements between husband and wife relating to the adjustment of property rights, even though in contemplation of divorce, are not violative of estab-

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\(^3\) VA. CODE ANN. § 20-155 (Cum. Supp. 1987) provides:

Marital agreements—Married persons may enter into agreements with each other for the purpose of settling the rights and obligations of either or both of them, to the same extent, with the same effect, and subject to the same conditions, as provided in §§ 20-147 through 20-154 for agreements between prospective spouses, except that such marital agreements shall become effective immediately upon their execution.

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lished public policy unless collusive or made to facilitate a separation or to aid in procuring a divorce. Nevertheless, section 20-155 and the Virginia Premarital Agreement Act now clarify prior judicial uncertainty in defining what would constitute valid divorce planning in antenuptial and postnuptial agreements as opposed to invalid divorce promotion or facilitation.

Like the Virginia Premarital Agreement Act, the postnuptial agreement statute provides that all agreements must be in writing and signed by both parties. The agreement must be entered into voluntarily, and each party must make a fair and reasonable financial and property disclosure or a written waiver of the right to that disclosure. Any issue of unconscionability in the postnuptial agreement would be decided by a court as a matter of law.

B. Spousal Support

1. Spousal Support and Separation Agreements

There were two important amendments made to both section 20-109 and section 20-109.1 of the Virginia Code regarding spousal support on divorce and the effect of any written agreements filed by the parties. Section 20-109 was amended to provide that “if a stipulation or contract signed by the party to whom such relief might otherwise be awarded is filed before entry of a final decree, no decree or order . . . shall be entered except in accordance with that stipulation or contract.” The old statute required that the

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5. See, e.g., Cooley, 220 Va. at 749, 263 S.E.2d at 49; Capps, 216 Va. at 378, 219 S.E.2d at 901.


11. Id. § 20-109.1.

12. Id. § 20-109.
written contract must have been filed "with the pleadings or depo-
sitions." Likewise, amended section 20-109.1 now provides that
the court may "affirm, ratify and incorporate by reference" in its
annulment or divorce decree "or by a separate decree prior to or
subsequent to such decree, any valid agreement between the par-
ties . . . ." Both statutes in their amended form also expressly
provide that if the spouse receiving support dies or remarries,
spousal support shall terminate unless the parties have otherwise
provided through stipulation or contract. The former statutes re-
quired the court, upon the payee's remarriage or death, to order
the cessation of spousal support absent any agreement to the con-
trary. The amended statutes, however, now appear to make ces-
sation of spousal support automatic upon the death or remarriage
of the payee.

2. Interest on Spousal and Child Support Arrearages

Interest on spousal and child support arrearages under section
20-78.2 of the Virginia Code has been reenacted so the support
order "shall also include an amount for interest on the arrearage at
the judgment interest rate if the person to whom such arrearage is
payable requests that interest be charged." However, the burden
is on the person to whom such arrearage is payable to compute all
interest due at the judgment interest rate established by section
6.1-330.10 and to furnish this information to the court.

3. Spousal and Child Support Enforcement Statutes

There have been important amendments to the Virginia spousal
and child support enforcement statutes. The primary purpose of
these new amendments is to create more efficient spousal and child
support enforcement procedures and to re-establish a localized system for collection and disbursement of such support. For example, various statutory amendments now provide that the Virginia Department of Social Services may contract with a public or private entity for the processing of support payments, and thus hopefully resolve many of the collection and disbursement problems previously experienced with a centralized administration. Although an order directing a person to pay child or spousal support may be enforced through a payroll deduction from that person's employer, an employer of 10,000 persons or more cannot be required to make payments other than by a single combined payment to the Department of Social Services' central office in Richmond unless the employer consents in writing to another plan.

Finally, section 20-60.5 now provides that, in addition to


It is the purpose of this chapter to promote the efficient and accurate collection, accounting and receipt of support for financially dependent children and their custodians, and to further the effective and timely enforcement of such support. The centralization of these functions being largely accomplished by Chapter 488 of the Acts of Assembly, 1985, and thereby resulting in consequences inconsistent with such purposes, it is the further purpose of this chapter to correct the inefficiencies of such centralization by reestablishing a localized system of collection and disbursement of such support, with appropriate local accounting, while maintaining centralized accounting, enforcement and other functions in the Department of Social Services as are appropriate or necessary to comply with applicable federal law, recognizing that reestablishment of such localized system requires careful planning and flexibility in its implementation.

To that end the Department shall, as soon as practicable, proceed with the necessary planning and implementation to establish at least in each judicial district a location at which such support may be paid by obligors and from which payees may receive such payments, unless the payments are in cases in which public assistance is being paid. Such implementation shall be accomplished by July 1, 1988, unless such date be extended by mutual agreement of the Department, the Secretary of Human Resources and the Committee on District Courts. The Department shall have the authority to establish such additional locations within judicial districts as its resources may permit. In the implementation hereof the Department shall have authority to enter into contracts with clerks of juvenile and domestic relations district courts with the approval of the Committee on District Courts, the Department of Corrections, local departments of social services and any other appropriate public or private entities to enforce, collect, account for and disburse payments for child or spousal support . . . .


27. Id. § 20-60.5 (Cum. Supp. 1987).
promptly paying the payee all support payments collected by it, the Department of Social Services must pay interest to the payee whenever the interest amount on a support payment exceeds five dollars as provided in section 63.1-250.1:1.\textsuperscript{28}

C. *Procedural Matters*

1. *Marriage Requirements*

Certain health information must be furnished to the applicants for a Virginia marriage license under section 20-14.2,\textsuperscript{29} including birth control information, genetic disorders information, and a list of family planning clinics.\textsuperscript{30} A 1987 amendment to this statute further required information on acquired immunodeficiency syndrome [AIDS] and the available tests to determine the presence or absence of the disease.\textsuperscript{31}

Section 20-25\textsuperscript{32} authorizes certain persons, other than ministers, to perform the marriage rites. A recent amendment to this statute provides that:

any judge or justice of a court of record, any judge of a district court of this Commonwealth or any retired judge or justice may celebrate the rites of marriage either within or without the county or city

\textsuperscript{28} Id. The Code states:

The Department shall pay interest to the payee as provided in this section on certain spousal or child support payments it collects which have been ordered by a court or established by administrative order to be paid to or through the Department to the payee and for which the Department has an assignment of rights or has been given an authorization to seek or enforce a support obligation as those terms are defined in § 63.1-250. Such interest shall accrue, at the legal rate as established by § 6.1-330.9, on all support payments collected by the Department and paid to the payee more than thirty days following the end of the month in which the payment was received by the Department in nonpublic assistance cases. Interest shall be charged to the Department on such payments if the Department has an established case and if the obligor or payor provides identifying information including the Department case number or the responsible person's name and correct social security number.


\textsuperscript{30} Id.

\textsuperscript{31} Id. Unfortunately, in a number of surveys I have taken over the past ten years with married law students in my Domestic Relations course, it appears that many clerks of court have not been furnishing applicants for marriage licenses in Virginia with this required health information under § 20-14.2. In light of the present AIDS epidemic, and other medical and social developments, this statutory requirement should, indeed, be met.

\textsuperscript{32} Id. § 20-25 (Cum. Supp. 1987).
2. Divorce Jurisdiction, Venue, and Forum Non Conveniens

Under section 20-96 of the Virginia Code, the chancery side of the circuit court has jurisdiction in all suits for divorce and for annulling or affirming marriages. Venue for the suit lies in the county or city where the parties last cohabited as husband and wife, or at the option of the plaintiff, where the defendant resides. If the defendant's whereabouts are unknown, or the defendant is an out-of-state resident, venue lies where the plaintiff resides. The 1987 statutory amendment added a forum non conveniens provision to this statute: "The court where such action is commenced may, upon motion of any party or on its own motion, and for good cause shown, transfer the action to any forum within the Commonwealth in which such action could have been brought."

3. How a Defendant May Accept Service of Process

A defendant under section 20-99.1 may now accept service of process for divorce, annulment, or affirming a marriage by signing the proof of service before any officer authorized to administer oaths. In addition, service of process may be accepted or waived by either party upon voluntary execution of a notarized writing or by a defendant by filing an answer by counsel in the suit. A notarized writing may be provided in the clerk's office of any circuit court or may be drafted and filed by counsel for either party to the proceeding. Such effect and authorization also applies when a defendant has filed an answer by counsel in the suit. The basic

33. Id. (emphasis added). The statute also authorizes the circuit courts to appoint one or more residents of the city or county under bond to celebrate the rites of marriage.
35. Id. § 20-96(B).
36. Id.
37. Id. § 20-96(C).
39. Id.
40. Id.
41. Id. Some of the repetitious language within this statute may be explained by the fact that the various amendments to § 20-99.1 were based on two separate bills. See Va. H.B. 1324, 1987 Session; Va. H.B. 1325, 1987 Va. Acts Ch. 589.
thrust of these amendments is that the defendant may now accept service of process by filing a pleading.

4. Merger of a Bed and Board Divorce into an Absolute Divorce

In the past under section 20-121, a bed and board divorce\textsuperscript{42} could be merged into an absolute divorce\textsuperscript{43} only after a one-year period of living separate and apart without cohabitation or interruption. The 1987 amendment to that statute now provides for such a merger after a six-month period if the parties have entered into a separation agreement and have no minor children.\textsuperscript{45}

D. Related Criminal Statutes

1. Parental Child Abduction

Parental abduction is a crime under the newly enacted section 18.2-49.1.\textsuperscript{46} Section 18.2-49.1 provides that any person who knowingly, wrongfully and intentionally withholds a child from the child's custodial parent in a clear and significant violation of a court order respecting the custody or visitation of such child is guilty of parental abduction punishable as a Class 6 felony.\textsuperscript{47} This section, however, appears to be applicable only if the child is withheld in another state.\textsuperscript{48}

2. Criminal Trespass

The 1987 General Assembly also amended section 18.2-119\textsuperscript{49} of the Virginia Code covering trespass. The law now provides that:

[I]f any person, whether he is the owner, tenant or otherwise entitled to the use of such land, building or premises, goes upon, or re-

\textsuperscript{43.} A divorce a mensa et thoro, or a bed and board divorce, may be obtained under id. § 20-95 (Repl. Vol. 1983) for cruelty, reasonable apprehension of bodily harm, willful desertion or abandonment. The parties in a bed and board divorce, as opposed to an absolute divorce, may not remarry.
\textsuperscript{44.} See id. § 20-91(6) (Cum. Supp. 1987).
\textsuperscript{45.} Id. § 20-121.
\textsuperscript{46.} VA. CODE ANN. § 18.2-49.1 (Cum. Supp. 1987), see also Shepherd, supra note *, at 793.
\textsuperscript{47.} VA. CODE ANN. § 18.2-49.1 (Cum. Supp. 1987). A “class six” felony provides for imprisonment of not less than one year nor more than five years; or confinement in jail for not more than twelve months and a fine of not more than $1,000; or both. See id. § 18.2-10 (Repl. Vol. 1982).
\textsuperscript{48.} Id.
mains upon such land, building or premises after having been pro-
hibited from doing so by a court of competent jurisdiction by an
order issued pursuant to §§ 16.1-253, 16.1-253.1, 16.1-279, 16.1-
279.1, . . . and after having been served with such order, he shall be
guilty of a Class 1 misdemeanor. 50

II. JUDICIAL DECISIONS

A. Marriage

1. Nonaffirmation of a Bigamous Marriage

In Hager v. Hager, 51 a husband and wife took part in a South
Carolina marriage ceremony in 1958, but the husband did not se-
cure a final divorce decree from his first wife until 1959 in Al-
bemarle County, Virginia. The second “wife” brought an action to
affirm this questionable marriage under section 20-90. 52 The circuit
court found the South Carolina marriage to be valid, but the Court
of Appeals reversed the trial court decision and held that such a
marriage was bigamous. 53

Citing section 20-43 54 with approval, the court held that “[a]ll
marriages which are prohibited by law on account of either of the
parties having a former wife or husband then living shall be abso-
lutely void.” 55 Therefore, the South Carolina marriage ceremony
“conferred no legal rights, and it was as if no marriage had ever
been performed.” 56

The Hager case was decided differently from the well-known
case of Spellens v. Spellens. 57 In Spellens, the wife married her
husband in Mexico before a California divorce from her first hus-
band became final. The California Supreme Court held that al-

50. Id.; see also id. § 16.1-253 (preliminary protective orders); id. § 16.1-253.1 (preli-
nary protective orders in cases of spouse abuse); id. § 16.1-279 (involuntary parental termin-
ation for abused, neglected or abandoned children); id. § 16.1-279.1 (protection orders in
cases of spouse abuse). A “class one” misdemeanor provides for confinement in jail for not
more than twelve months and a fine of not more than $1,000, either or both. Id. § 18.2-11(a)
1983)).
56. Id. at 417, 349 S.E.2d at 909 (quoting Chitwood v. Prudential, 206 Va. 314, 317, 143
S.E.2d 915, 918 (1965)).
57. 49 Cal. 2d 210, 317 P.2d 613 (1957).
though this was indeed a bigamous marriage under California law,\textsuperscript{58} nevertheless the husband and wife by their conduct were both estopped to deny the marriage's validity.\textsuperscript{59} Although the \textit{Hager} decision did not squarely address this estoppel issue, it may still be used to argue by analogy that even if husband and wife are estopped to deny the validity of their marriage, the State is not estopped to question their bigamous relationship.\textsuperscript{60}

2. Presumptive Ownership of a Marital Joint Bank Account

The case of \textit{Lewis v. House}\textsuperscript{61} presented the novel question of to what extent a marital joint bank account is subject to garnishment by a creditor of the husband. In construing section 6.1-125.3\textsuperscript{62} of the Virginia Code, the Virginia Supreme Court held that because a joint account belongs to the spouses "equally" does not mean that the entire account is owned by each.\textsuperscript{63} The presumption therefore arises that husband and wife each owned one-half of the funds of their joint bank account.\textsuperscript{64} Thus, unless the creditor could show by clear and convincing evidence that the debtor husband owned more than one-half of the funds, the creditor could garnish no more than one-half of the joint bank account, less the debtor husband's homestead exemption entitlement.\textsuperscript{65}

B. \textbf{Equitable Distribution of Marital Property on Divorce}

1. Method of Distribution

The Virginia Court of Appeals has frequently recognized that a trial court's task in making an equitable distribution award upon divorce is formidable.\textsuperscript{66} Nevertheless, the court has recently emphasized and re-emphasized the crucial point that when making

\textsuperscript{58} CAL. CIV. CODE § 61 (West 1967) (current version at CAL. CIV. CODE § 4401 (West 1970)).
\textsuperscript{59} Spellens, 49 Cal. 2d at __, 317 P.2d at 619.
\textsuperscript{61} 232 Va. 28, 348 S.E.2d 217 (1986).
\textsuperscript{63} Lewis, 232 Va. at 31, 348 S.E.2d at 219.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
any monetary award, the trial court must follow all the provisions of section 20-107.3,67 governing equitable distribution of property on divorce, or that award will be invalid. The trial court, in other words, cannot be selective as to particular provisions under the statute that the judge will or will not apply; the judge must apply all the provisions of section 20-107.3.68 Thus, the failure of the trial court when making a monetary award to consider the equities of each party in the marital real estate, would render that award invalid.69

Although Virginia has no presumption favoring a 50-50 equal division of marital property under its equitable distribution statute,70 a court may nevertheless make an equal division of the marital property if, based upon the factors of section 20-107.3(E),71 an equal division is appropriate.72

Finally, it has been held that the trial court may make an equitable distribution award only after it has identified and valued the parties' marital assets, and thus the trial court's determination of ownership and value of the marital property must go beyond mere guesswork in order to support an equitable distribution award.73

2. Commissioner's Reports and Chancellor's Trial Court Decree

In Virginia, a commissioner in chancery may recommend to the chancellor that a certain equitable distribution award on divorce be made, and generally a commissioner's report should be affirmed by the chancellor unless the commissioner's findings are not supported by the evidence.74 But when the chancellor disapproves the commissioner's findings, the appellate court must review the evidence and ascertain whether, upon a correct application of the law, the evidence supports the findings of the commissioner or the conclusions of the trial court.75 However, when a court refers a case to a commissioner in chancery, it does not delegate its judicial func-

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75. Price, 4 Va. at 228, 355 S.E.2d at 907.
3. Classification and Valuation of Marital Property

In making an equitable distribution monetary award determination, the courts are faced initially with the two-fold problem of identifying both the proper date for classification of marital property and the proper date for valuing the marital property. The two dates are not necessarily the same since the factors involved in the selection of one may not be involved in the selection of the other.\(^7\)

In the case of *Mitchell v. Mitchell*,\(^7\) the husband argued that in making a monetary award pursuant to Virginia Code section 20-107.3, the trial court must value the marital property as of the filing date of the bill of complaint. The wife, however, contended that the trial court was correct in valuing the property at the date of the evidentiary hearing, which was held shortly before entry of the final divorce decree.\(^7\) The Virginia Court of Appeals acknowledged that there are a number of valuation dates available for consideration: (1) the date of separation of the parties; (2) the date of filing the bill of complaint; (3) the date of trial; and (4) the date of the final divorce decree.\(^8\) The Court of Appeals held that since section 20-107.3 does not fix a date for determining the value of all real and personal property of the parties, the trial court must select a valuation date if the parties cannot agree on one.\(^9\) The Court of Appeals concluded that the trial court:

> should determine the value of the parties’ assets as of a date as near as practicable to the date of trial; except that, the trial court in its decree may value all or any part of the assets as of a date after the separation of the parties if necessary to arrive at an award more consistent with the factors enumerated in Code § 20-107.3. Using

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\(^7\) Id.; Dukelow v. Dukelow, 2 Va. App. 21, 26-27, 341 S.E.2d 208, 211 (1986).


\(^7\) Id. at 116, 355 S.E.2d at 20.

\(^7\) Id. at 117-18, 355 S.E.2d at 20-21. The court acknowledged that each valuation date “has its advantages and disadvantages,” citing L. Golden, Equitable Distribution of Property §§ 7.01-04 (1983) and Annotation, Proper Date for Valuation of Property Being Distributed Pursuant to Divorce, 34 A.L.R.4th 63 (1984) as authority.

\(^7\) Mitchell, 4 Va. App. at 118, 355 S.E.2d at 21.
this standard, we find no error in the trial court’s decision to select the date of the evidentiary hearing for the valuation of the parties’ assets.82

In Price v. Price,83 the commissioner classified as marital property the husband’s pension fund and certain other items of real and personal property that were purchased by the husband after the separation of the parties. But the appellate court held that those items acquired after the parties’ last separation should not have been included as marital assets absent a showing by the wife that marital assets were used to purchase them. Thus, the presumption that property is marital rather than separate property ceases on the date of the de facto dissolution of the marital partnership.84

The Price case also discussed the value of a ring that was “created” prior to the parties’ separation by remounting stones from two other rings: an engagement ring given to the wife prior to the marriage and another ring given to the wife after marriage by the husband.85 Thus, when separate property (the engagement stone) is combined or commingled with marital property (the marital stone), as these two rings were, the separate property loses its character as separate property and the “new” property thus created is marital property through transmutation.86

82. Id. The court added:

There may be occasions where a trial court should select a date after separation but prior to the date of trial upon which to value all or part of the assets involved. If one spouse dissipates assets or deliberately allows their value to decline following separation, or if the value of marital property increases due to the efforts of one of them, values determined upon the date of trial may result in a monetary award which is not fair and equitable as required by Code § 20-107.3.

Id. See also Price v. Price, 4 Va. App. 224, 232, 355 S.E.2d 905, 909-10 (1987), where the court held that:

Use of the commissioner’s hearing date for valuation of the marital property was not error under the facts of this case. No specific date was designated by the legislature for valuation of marital property. The evidentiary hearing date or trial date may be the most practical and suitable valuation date in most instances. We recognize, however, that this date may not always be the most appropriate since both fortuitous or intentional events can drastically affect values and equities between date of classification and valuation, and courts should have the discretion to adopt a different date if the equities of the case demand it.

Id.

84. Id. at 229, 355 S.E.2d at 909.
85. Id. at 234-36, 355 S.E.2d at 911-12.
86. Id. at 236, 355 S.E.2d at 911-12.
4. Pension or Retirement Plans as Marital Property

It is clear that a pension fund or retirement plan is within the definition of marital property since it is acquired during the marriage, and is not separate property as defined by section 20-107.3. The statute specifically states that:

The court may direct payment of a percentage of pension, profit-sharing or retirement benefits, whether vested or nonvested, payable in a lump sum or over a period of time and only as such benefits are payable. No such payment shall exceed fifty percent of the cash benefits actually received by the party against whom such award is made . . . .

The practical effect of this statute is that the trial judge must specify separately any part of a monetary award that is based upon pension or retirement benefits, and make special provisions for its payment in order to conform with these payment restrictions.

Thus, in the case of McLaughlin v. McLaughlin, a lump sum marital property award to the wife of 40% of the husband’s vested retirement pension was held to be equitable. But in the case of Artis v. Artis, a trial court order awarding only 15% of the husband’s military pension to the wife was set aside as not being supported by the record.

5. Personal Injury Awards as Marital Property

The traditional view in many jurisdictions is that since there is a presumption that all property acquired during the marriage is marital property, any claim for tortious personal injury by one spouse should be equitably distributable upon divorce. Other courts have held that such a cause of action cannot be divided at

A middle ground "apportionment" rule has been adopted in some states holding that although lost wages and medical payments made from marital funds should be considered as marital property, the personal suffering and disability suffered by the injured spouse as part of an inchoate personal injury claim is not a property right subject to equitable distribution. This rule was apparently adopted in the circuit court decision of *Mabe v. Mabe*.

6. Third Party Equitable Distribution Factors

In the case of *Woolley v. Woolley*, it was held that in making an equitable distribution award, the court had no basis upon which to grant the husband's mother, who was not a party to the divorce action, a portion of the sale proceeds of the marital residence absent any elements for imposing a constructive trust. This result was reached even though there was evidence that the husband's mother had put $27,500 into the marital property.

Likewise, the court did not err in refusing to grant a monetary award in *Bentz v. Bentz*, where the husband's mother provided $10,000 for the down payment on the marital home, since this money might have been intended for the parties jointly.

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95. 8 Va. Cir. 339 (Wise County 1987). The court cited *Amato*, 180 N.J. Super. 210, 434 A.2d 639 with approval. But see *L. Golden, Equitable Distribution of Property* § 6.25 (1983) ("States [including Virginia] which have a presumption of marital property are likely to hold that all components of a personal injury claim received during the marriage are marital property.")

The *Mabe* decision also held that worker's compensation awards constituted marital property and marital property wrongfully converted into separate property would also be deemed to be marital property. 8 Va. Cir. 339.


97. *Id.*


99. *Id.* at 489, 345 S.E.2d at 775; see also *Robinette v. Robinette*, 4 Va. App. 123, 354 S.E.2d 808 (1987) (for purposes of determining marital property on divorce, grantor-spouse may not establish a parol trust in favor of a third party defeating or contradicting a written deed to another.).
C. **Spousal Support**

1. **General Guidelines**

As is true with equitable distribution awards under section 20-107.3, failure by the trial judge to consider all the statutory factors of section 20-107.1 in determining spousal support constitutes reversible error. However, when the trial court did consider all the factors of section 20-107.1, it was held not to be an abuse of discretion to order the husband to make mortgage payments on the marital home for the benefit of the wife and children in lieu of ordering spousal support. Finally, the right to spousal support will survive an absolute ex parte divorce proceeding in another state, since the right to spousal support is a personal claim which may not be denied without due process.

2. **Denial of Spousal Support: When Justified**

In *Collins v. Collins*, the Virginia Supreme Court reaffirmed the rule followed in three earlier opinions stating that whenever a divorce decree based upon living separate and apart denies an award of spousal support, whether expressly or by failure to address the issue, the decree will be reversed and the cause remanded unless the record on appeal reveals that the chancellor made a finding, supported by credible evidence, that: (1) the appellant was guilty of a marital fault ground; or (2) in consideration of the factors enumerated in section 20-107.1, the equities of the parties weighed against an award of spousal support.

Thus, although fault in the breakup of a marriage is a factor that the court must consider in making a spousal support, it would be reversible error for the trial court, upon the request of either party,
to fail to make a reservation in the divorce decree of the right to receive future spousal support in the event of a change of circumstances.\footnote{Bacon v. Bacon, 3 Va. App. 484, 351 S.E.2d 37 (1986).}

Likewise, it was held that when a husband who was guilty of desertion had an annual income in excess of $64,000 and a net worth of between $167,000 and $189,000, and his wife had a weekly income of $145.00 and no separate property of any significance, it was an abuse of the chancellor's discretion to deny the wife any spousal support.\footnote{Hodges v. Hodges, 2 Va. App. 508, 514, 347 S.E.2d 134, 138 (1986).}

However, in a case of first impression in Virginia,\footnote{Smith v. Smith, 4 Va. App. 148, 354 S.E.2d 816 (1987).} the Virginia Court of Appeals held that \textit{pendente lite} spousal support would be terminated when a divorce action is dismissed, although laches would not constitute a bar to the wife in collecting her support arrearages.\footnote{\textit{Id.} at 151-52, 354 S.E.2d at 818.}

D. \textit{Property Settlement Agreements}

In at least four recent decisions,\footnote{See, e.g., Henderlite v. Henderlite, 3 Va. App. 539, 351 S.E.2d 913 (1987); Smith v. Smith, 3 Va. App. 510, 351 S.E.2d 593 (1986); Hederick v. Hederick, 3 Va. App. 452, 350 S.E.2d 526 (1986); Harris v. Woodrum, 3 Va. App. 428, 350 S.E.2d 667 (1986).} the Virginia Court of Appeals re-emphasized: (1) that property settlement agreements are contracts, and therefore courts must apply the same rules of interpretation applicable to contracts generally;\footnote{Harris, 3 Va. App. at 431, 350 S.E.2d at 669 (citing Tiffany v. Tiffany, 1 Va. App. 11, 15, 332 S.E.2d 796, 799 (1985)); see also Hederick, 3 Va. App. at 455, 350 S.E.2d at 528.} and (2) that Virginia adheres to the "plain meaning rule" that if an agreement is complete on its face and plain and unambiguous in its terms, the court is not at liberty to search for its meaning beyond the instrument itself because the writing is the repository of the final agreement of the parties.\footnote{Harris, 3 Va. App. at 432, 350 S.E.2d at 669 (citing Berry v. Klinger, 225 Va. 201, 208, 300 S.E.2d 792, 796 (1983)).} However, on review, the appellate court has an equal opportunity to consider the words of the contract, and thus is not bound by the trial court's construction.\footnote{Hederick, 3 Va. App. at 455, 350 S.E.2d at 528 (citing Wilson v. Holyfield, 227 Va. 184, 187-88, 313 S.E.2d 396, 398 (1984)).}
E. Divorce Grounds and Defenses

1. Adultery

In the case of *Bentz v. Bentz*, the husband sought a divorce from a thirteen-year marriage on the grounds of desertion and cruelty. The husband requested equitable distribution of the marital property, but neither party requested spousal support. The court granted the parties a divorce on the ground of living separate and apart in excess of one year.

When the husband later moved to amend his bill of complaint to allege adultery, the trial court denied his motion and the Court of Appeals affirmed the trial court's decision. The husband contended that the trial court erred in denying his motion to amend his bill of complaint to allege adultery because the amendment would have strengthened his argument for a monetary award under section 20-107.3(D).

The Court of Appeals agreed that the right to file an amended pleading rests in the sound discretion of the court and shall be liberally granted in the furtherance of justice. But in this case, the trial court did not abuse its discretion in denying the motion to amend since, under section 20-107.3(E)(5), in determining any equitable distribution award, the court must consider the factors—including adultery—which contributed to the dissolution of the marriage.

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118. *Id.* at 487, 345 S.E.2d at 773.
119. *Id.* at 487, 345 S.E.2d at 773.
120. *Id.* at 448, 345 S.E.2d at 774 (citing *Va. Code Ann.* § 20-107.3(D) (Cum. Supp. 1987)).
121. *Id.* (citing with approval *Va. Sup. Ct. R.* 1:8; *Roberts v. Roberts*, 223 Va. 736, 742, 292 S.E.2d 370, 373 (1982)).
122. *Va. Code Ann.* § 20-107.3(E)(5) (Cum. Supp. 1987). This section provides that the court shall consider the factors which contributed to the marriage dissolution, including adultery, conviction of a felony, or cruelty and desertion. *Id.*
123. *Bentz*, 2 Va. App. at 488, 345 S.E.2d at 774. It should also be noted that the clear and convincing evidence test to prove adultery as enunciated in *Dooley v. Dooley*, 222 Va. 240, 278 S.E.2d 865 (1981), has been reaffirmed in *Seeman v. Seeman*, 233 Va. 290, 355 S.E.2d 884 (1987). In *Seeman*, the husband proved that the wife had spent a number of nights in the same room with another adult male, but the wife testified she had not slept in the same bed nor had sexual intercourse due to her strong religious beliefs. The court held that adultery had not been proved by clear and convincing evidence. But see *Coe v. Coe*, 225 Va. 616, 303 S.E.2d 923 (1983) (adultery proved when wife stayed at paramour's house).
2. Desertion

The Virginia Supreme Court, in the case of Sprott v. Sprott,\textsuperscript{124} summarized the divorce grounds for proving desertion in Virginia and overturned the trial court by concluding that “[a] gradual breakdown in the marital relationship” did not constitute grounds for proving desertion.\textsuperscript{128} The court held that:

For many years, this Court adhered rigidly to the rule that “one spouse is not justified in leaving the other, unless the conduct of the other is sufficient to establish the foundation of judicial proceeding for a divorce.” The rule has been relaxed in more recent decisions.

But we have never held, and we decline here to hold, that one spouse is legally justified in leaving the other merely because there has been a gradual breakdown in the marital relationship.\textsuperscript{126}

Thus the wife in Sprott was found guilty of desertion and was not entitled to spousal support.\textsuperscript{127}

In addition, another recent supreme court decision has emphasized that a spouse is not guilty of legal desertion in separating from the other spouse while a divorce suit is pending between them if the suit is not frivolous and was not instituted as a sham to shield the complainant from a charge of desertion.\textsuperscript{128}

In the case of Jamison v. Jamison,\textsuperscript{129} the Virginia Court of Appeals held that although a showing of mere cessation of sexual intercourse would be insufficient to establish cruelty or desertion as grounds for divorce,\textsuperscript{130} nevertheless:

\textsuperscript{125} Id. at 242, 355 S.E.2d at 883.
\textsuperscript{126} Id. at 241-42, 355 S.E.2d at 882-83 (citations omitted); cf. Rowand v. Rowand, 215 Va. 344, 346, 210 S.E.2d 149, 151 (1974) (wife who left at husband’s order was free from legal fault); Capps v. Capps, 216 Va. 382, 385, 219 S.E.2d 898, 900 (1975) (wife who left husband because of one single act of physical abuse was free from legal fault); Breschel v. Breschel, 221 Va. 208, 212, 269 S.E.2d 363, 366 (1980) (wife who left husband when she reasonably believed continued cohabitation endangered her health); McLaughlin v. McLaughlin, 2 Va. App. 463, 346 S.E.2d 535 (1986) (only proven misconduct of an offending spouse that is so serious that it makes the relationship intolerable or unendurable will justify the other spouse’s departure; and if wife cannot prove husband’s alleged cruelty, she is guilty of desertion).
\textsuperscript{127} Sprott, 233 Va. at 244, 355 S.E.2d at 883.
\textsuperscript{130} Id. at 649, 352 S.E.2d at 722 (citing Goodwyn v. Goodwyn, 222 Va. 53, 278 S.E.2d 813 (1981); Aichner v. Aichner, 215 Va. 624, 212 S.E.2d 278 (1975)).
[T]he willful withdrawal of the privilege of sexual intercourse, without just cause or excuse, constitutes willful desertion, within the meaning of such statute on the subject as that in Virginia, when such withdrawal is accompanied, as in the cause before us, with such willful breach and neglect of other marital duties as to practically destroy home life in every true sense, and to render the marriage state well nigh intolerable and impossible to be endured. Such conduct, on the part either of husband or wife, is considered to be a general withdrawal from the duties of the marital relationship and, if willfully done, without just cause or excuse, this, by the great weight of authority, constitutes willful desertion.\textsuperscript{131}

Finally, in the case of Petachenko v. Petachenko,\textsuperscript{132} the Virginia Supreme Court held that a single act of sexual intercourse, without any intent to reconcile, did not constitute a resumption of marital cohabitation, nor did it constitute an intent to end the desertion.\textsuperscript{133} The court also held that: (1) once separation and the intent to desert have been established, desertion is presumed to be continued until the contrary is shown; and (2) the jurisdiction of the court to adjudicate a divorce proceeding is not destroyed by the conduct of the parties that might require dismissal of the bill or cross-bill of complaint.\textsuperscript{134}

3. Living Separate and Apart

The circuit court case of Doggett v. Doggett\textsuperscript{135} addressed the issue of whether a husband and wife living under the same roof can be considered to be living “separate and apart” without cohabitation or interruption pursuant to Code section 20-91(9)(a).\textsuperscript{136} In Doggett, Judge Hughes granted a divorce, finding that the husband and wife had lived “separate and apart” even though they were living under the same roof, because they did not sleep in the same room nor did they “spend any time together as husband and wife.”\textsuperscript{137} The court recognized that neither party had moved out,

\textsuperscript{131} Jamison, 3 Va. App. at 647-48, 352 S.E.2d at 721 (emphasis added) (quoting Chandler v. Chandler, 132 Va. 418, 430-31, 112 S.E. 856, 860-61 (1922)).
\textsuperscript{132} 232 Va. 298, 350 S.E.2d 600 (1986).
\textsuperscript{133} Id. at 301, 350 S.E.2d at 602-03. This case overruled in part the earlier decision of Anderson v. Anderson, 196 Va. 26, 82 S.E.2d 562 (1954).
\textsuperscript{134} Petachenko, 232 Va. at 301, 350 S.E.2d at 603.
\textsuperscript{135} 5 Va. Cir. 349 (Richmond 1986); see also Swisher, Domestic Relations: Annual Survey of Virginia Law, 20 U. RICH. L. REV. 811, 823 (1986).
\textsuperscript{137} 5 Va. Cir. at 349-50.
however, because of financial hardship. But in the circuit court case of Yane v. Yane, Judge Kulp disagreed with the Doggett rationale and held that husband and wife could not live "separate and apart" while under the same roof, stating:

[T]he Legislature did not intend that a divorce could be granted on the ground of 'separate and apart' when the parties live together in the same house. [T]he Supreme Court has interpreted the word 'cohabit,' as it appears in the divorce venue statute, to mean 'having dwelled together under the same roof with more or less permanency.'

The general rule of statutory construction is that words used in the same act or statute should be given the same meaning unless the contrary should be made clear by other qualifying or explanatory terms. In my opinion the word 'cohabitation' in § 20-91(9)(a) should be given the same meaning as the word 'cohabited' as used in § 20-96. These terms are both used in Chapter 6 of Title 20, and both are concerned with [divorce] . . . .

Finding no authority to the contrary, the court defined "cohabitation" as used in section 20-91(9)(a), as "[dwelling] together under the same roof with more or less permanency." The court distinguished cohabitation from desertion, which can occur even when the parties live under the same roof. "It seems . . . to be a contradiction in terms to say parties are living separate and apart but are dwelling together under the same roof . . . ."

Hopefully, an appellate decision will soon clarify these divergent circuit court opinions.

138. Id.
139. 8 Va. Cir. 336 (Henrico County 1987).
140. Id. at 336 (citing with approval Netzer v. Reynolds, 231 Va. 444, 345 S.E.2d 291 (1986); Colley v. Colley, 204 Va. 225, 228, 129 S.E.2d 630, 632 (1963); McDaniel v. Commonwealth, 199 Va. 287, 99 S.E.2d 623 (1957)).
141. Id. at 337.
142. Id. The court distinguished Chandler v. Chandler, 132 Va. 418, 112 S.E. 856 (1922) relied on by Judge Hughes in Doggett. Chandler involved a divorce on the grounds of desertion and never considered the meaning of "cohabitation."
In the case of Carter v. Carter, the Virginia Supreme Court, in a 4-3 decision, held that Virginia’s ten-year statute of limitations, as applied to the enforcement of a Florida divorce judgment, was neither stringent nor unreasonable, nor did it offend the federal full faith and credit clause. Moreover, even if the classification of foreign judgment creditors was subject to an equal protection challenge, there was no suspect classification or fundamental right involved, and the disparate treatment of foreign judgment creditors was rationally related to a legitimate state purpose.

The Virginia Supreme Court recently decided the seminal case of Smoot v. Smoot which discusses three concepts of major importance to the Virginia family law practitioner: (1) the “inception of title” doctrine versus the “source of the funds” doctrine as applied to equitable distribution of property; (2) the “transmutation” doctrine of separate property becoming marital property when it is commingled with marital property; and (3) the role of fault in determining equitable distribution of property upon divorce.

1. “Inception of Title” Doctrine versus “Source of the Funds” Doctrine

Ronald and Bernice Smoot, prior to their marriage, took title to a tract of land as joint tenants with the right of survivorship. In 1977, two years after their marriage, they commenced construction of a new home on this tract of land. Funding was obtained from two sources: a $25,000 construction loan secured by a deed of trust

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145. U.S. Const., amend. XIV.
on the property; and $20,000 in cash contributed by the husband from a personal injury settlement he received two years before the marriage. During the four-year construction period between 1977 and 1981, the wife's salary was primarily used to pay the parties' basic living expenses, while the husband's earnings were primarily used for construction expenses.149

In 1983, when the husband filed a bill of complaint seeking a no-fault divorce from his wife, he asked the trial court to award him the $20,000 from his personal injury award as his "separate property."150 The trial court, citing the case of Harper v. Harper151 as persuasive authority, held that the husband was entitled to "a credit . . . of $20,000 for funds contributed by him," arguably under a "source of the funds" doctrine.152

On appeal, the wife argued that by awarding the husband the $20,000 monetary award, the chancellor, in effect, had classified the marital home as "part marital and part separate" under the "source of the funds" doctrine, when such a classification should not be permitted under Virginia's equitable distribution statute.153 The Virginia Supreme Court agreed with the wife, and rejected a "source of the funds" doctrine in Virginia.154

149. Id. at 437, 357 S.E.2d at 729.
150. Id. For a discussion of the Smoot v. Smoot trial court decision, see Swisher & Bucur, supra note 2, at 749-51.
151. 294 Md. 54, 448 A.2d 916 (1982).
152. 233 Va. 437, 438, 357 S.E.2d 728, 729. Under a "source of the funds" theory:
when property is acquired by an expenditure of both nonmarital and marital property, the property is characterized as part nonmarital and part marital. Thus, a spouse contributing nonmarital property is entitled to an interest in the property in the ratio of the nonmarital investment to the total nonmarital and marital investment in the property. The remaining property is characterized as marital property and its value is subject to equitable distribution.

Harper, 294 Md. at 80, 448 A.2d at 929.

However, this "source of the funds" rule runs counter to an "inception of title" doctrine, adopted by other courts, which states that property on divorce can be either marital or separate, but not both. See, e.g., Fisher v. Fisher, 86 Idaho 131, 383 P.2d 840 (1963); In re Marriage of Smith, 86 Ill. 2d 518, 427 N.E.2d 1239 (1981); Cain v. Cain, 536 S.W.2d 866 (Mo. App. 1976). But even under the "inception of title" doctrine, the other spouse who contributed payment to the original property could have a right to reimbursement or an equitable lien in the property. See generally Harper, 294 Md. 54, 448 A.2d 916, for a good discussion of both doctrines.

154. "Unlike the Maryland statute as construed by the Harper court, Code § 20-107.3 contemplates only two kinds of property—marital property and separate property, each expressly defined. Our statute does not recognize a hybrid species of property . . . ." Smoot, 233 Va. at 441, 357 S.E.2d at 731.
2. "Transmutation" of Separate Property into Marital Property

Even though the Virginia Supreme Court in Smoot v. Smoot rejected the "source of the funds" theory that property can be "part marital and part separate," the court nevertheless affirmed the doctrine of transmutation holding that when "a spouse fails to segregate and instead, commingles separate property with marital property, the chancellor must classify the commingled property as marital property subject to equitable distribution."155

3. The Role of Fault in Determining Equitable Property Distribution on Divorce

Finally, the wife in Smoot v. Smoot argued that the chancellor's monetary award to the husband failed to balance the equities of the parties because the chancellor "ignored" the husband's fault ground in divorce under the applicable statute.156 But the Virginia Supreme Court affirmed the chancellor's award, holding that the chancellor did in fact consider each of the enumerated factors,157 and "although the [husband] has been found at fault, the total relationship between the parties does not dictate that a division [of property] different than as set forth should be made."158 Thus, since the record showed that the chancellor did not abuse his discretion, nor misapply any statutory mandates, the equitable distribution award was not reversed on appeal.159