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## Separation as a Ground for Divorce in Virginia

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Jurisdiction to grant divorce in all of the states is purely statutory and the grounds are only those set out in the statutes. Accordingly, no matter how unhappy a married couple is, or how great their desire to end the marriage, unless a statutory ground exists, there can be no relief in the form of divorce. Virginia now has nine statutory grounds for an absolute divorce from the bond of matrimony. Va. Code Ann. Sec. 20-91. (1960 Replacement Vol.)

The general notion running throughout the divorce law of the various states is the equitable doctrine of "clean hands". Only the innocent spouse or the party injured may obtain a divorce decree from the wrongdoer. Generally, if the petitioning party is independently guilty of misconduct constituting ground for a divorce, that party may not obtain a divorce. Thus, the doctrine of recrimination has become a widely used ground of defense and probably the most criticized.

In 1891, Chancellor Kent, speaking of this doctrine in his commentaries on marriage, remarked that "it is throwing the parties back upon society, in the undefined and dangerous character of a wife without a husband, and a husband without a wife," *2 Kent's Commentaries*, 64.

Slowly, state legislatures are realizing that divorce should no longer be regarded as a punishment for the guilty party and that emphasis should be shifted to divorce as a remedy for family troubles, providing for the granting of divorces in cases where normal marital relations are virtually impossible.

At present, the one major statutory ground for divorce not clearly based on notions of guilt and punishment is that of separation of the parties for a period of time.

In 1960 the General Assembly of Virginia amended Sec.

20-91 of the Virginia Code, adding a ninth ground for divorce from the bonds of matrimony. It provides that divorce may be decreed "on the application of either party if and when the husband and wife have lived separate and apart without any cohabitation and without interruption for three years." In 1962 the legislature deleted a requirement that both parties should have been domiciled in Virginia at the time of separation, and removed a limitation which precluded service of process by publication in such a case. It added this provision: "A plea of *res adjudicata* or of recrimination with respect to any other provision of this section shall not be a bar to either party obtaining a divorce on this ground."

The question now presents itself—what limitations, if any, will be read into our statute, and how will it be construed and interpreted by our Supreme Court of Appeals? In an attempt to predict the answer to these questions, inquiry has been made into Virginia's past decisions on divorce to determine whether the state policy tends to be liberal or strict in various phases of divorce law. Also, cases have been collected from other jurisdictions which have the same or similar statutes. Of course, when estimating their value as authority in Virginia, the decisions must always be considered with reference to the particular statute construed.

To date there are nineteen states which make "living separate and apart" a statutory ground for divorce. Ala. Code tit. 34, Sec. 22; Ariz. Code Ann. Sec. 27-802(9); Ark. Stat. Ann. Sec. 34-1202(7); Idaho Code Ann. Sec. 32-610; Ky. Rev. Stat. Ann. Sec. 403.020(1)(b); La. Rev. Stat. Sec. 9:301; Md. Ann. Code art. 16, Sec. 33; Minn. State. Ann. Sec. 518.06(8); Nev. Comp. Laws Sec. 9467.06; N. C. Gen. Stat. Sec. 50-5(4),-6; N. D. Rev. Code Sec. 14-0605; R. I. Gen. Laws c.416, Sec. 3; Tex. Rev. Civ. Stat. Ann. art. 4629(4); Utah Code Ann. Sec. 30-3-1(8); Vt. Rev. Stat. Sec. 3205(7); Wyo. Comp. Stat. Ann. Sec. 3-5906; D. C. Code Ann. Sec. 16-403; P. R. Laws. Ann. tit. 31, Sec. 321(9); Wash. Rev. Code Sec. 26.08-020(9); Wis. Stat. Sec. 247.07(7).

In Arkansas, Maryland and Wisconsin, and the District of Columbia, the statutes expressly require that the living apart

be voluntary. In Vermont and Wyoming the complainant must be without fault. But most of the statutes do not use the terms "voluntary" or "fault" and provide broadly that the divorce may be granted to either party.

The state of Washington expressly provides that divorce will be granted without regard to fault. In Arkansas, fault is relevant only as to property division or alimony. Maryland, North Dakota, and Vermont expressly require that there be no reasonable likelihood of reconciliation. Several other state statutes say divorce will be granted at the court's discretion.

The period of separation should be sufficiently long to indicate little or no chance of reconciliation and yet not so long as to encourage the formation of meretricious relationships. The statutes require anywhere from an upper limit of ten years in Rhode Island to only a two-year separation in North Carolina and Louisiana.

The principal legal questions that probably will be raised by our Virginia living separate and apart statute are as follows:

- (1) What constitutes such separation?
- (2) To what extent must the living apart be voluntary, and what constitutes voluntary living apart?
- (3) The effect of a spouse's insanity during the separation period.
- (4) Under what circumstances will alimony be awarded?

#### *What Constitutes Separation?*

What constitutes such separation? The majority view holds that living under the same roof, even though there has been a severance of sexual intercourse and other marital relations, precludes a finding that the parties have lived separate and apart, 166 A.L.R. 508.

The Alabama court expressed the majority view by stating " 'separate and apart,' means we think, not only a complete cessation of all martial duties and relations, but that the husband and wife lived separate and apart in such a manner that

those in the neighborhood may see that they are not living together," *Rogers v. Rogers*, 258 Ala. 477, 63 So. 2d 807 (1953). See also *York v. York*, 280 S.W. 2d 553 (Ky. 1955).

In contrast to this strict view, that there must be a complete physical separation, is the case of *Hawkins v. Hawkins*, 191 F. 2d 344 (D.C. Cir. 1951), which has essentially the same facts. The United States Court of Appeals granted a divorce under the District of Columbia separation statute which allows an absolute divorce for a "voluntary separation" for five years without cohabitation. It appeared that for some twenty years the parties had no marital relations, occupied separate bedrooms, and had no sort of social life together. The whole family occasionally ate together, but the husband and wife did not speak to each other on these occasions. In allowing the divorce, the court quoted *Boyce v. Boyce*, 153 F. 2d 229 (D. C. Cir. 1946). "The essential thing is not separate roofs but separate lives."

How will Virginia hold on the question of whether a complete physical separation is necessary? The phrase in our statute which reads "separate and apart without any cohabitation and without interruption" seems to clearly indicate a legislative intent of a complete physical separation, or that the parties must live under separate roofs. It would seem that the courts must assign to that phrase the meaning which its reading spontaneously suggests.

There is a second issue which falls under the question of separation and merits consideration. The cases suggest a split of authority on just what type and degree of conduct by the parties will prevent the statutory period from running. In *Reilly v. Reilly*, 57 R.I. 432, 190 A. 476 (1937), the couple engaged in marital relations on only three occasions during the ten-year separation period—twice at the home of the wife's relatives where she lived and once on a steamer going to New York. The court in not permitting a divorce rejected the appellant's contention that these engagements should only be construed as unsuccessful attempts at reconciliation and not cause a break in the separation period. The court said the language of the statute was clear and unambiguous—that not

only must the parties live apart from one another, but all ordinary marital relations must cease entirely.

The opposite view is presented in *Ayala v. Ayala*, 182 La. 508, 162 So. 59 (1945). Here the evidence showed that the husband visited his wife at her home on various occasions to plead with her to be lenient with him because of his inability to pay alimony. In a suit by the husband, the wife argued that cohabitation had occurred on these visits, but that in any event the living separate and apart as contemplated by the statute was not continuous. The court affirmed the granting of a divorce saying that it believed that it was to the best interests of society and the parties concerned that estranged spouses be encouraged to continue their friendly relations and thereby increase the probability of a reconciliation.

Virginia's statute reads "separate and apart, without cohabitation *and without interruption.*" (Emphasis added.) None of the other state statutes uses the phrase "without interruption". When the Virginia bill to amend Sec. 20-91 was originally presented, it did not contain this phrase. The phrase "without interruption" also appears in the Virginia statute, Va. Code Ann. Sec. 20-121 (1950), merging a bed and board decree into an absolute divorce, in describing the one year period of separation. There are few Virginia cases which indicate just what the interpretation of "without interruption" should be in regard to our merger statute. In *Anderson v Anderson*, 196 Va. 26, 82 S.E. 2d 562 (1954), the Virginia court said that frequent week-end visitations between husband and wife during the legal separation period showed failure to comply with the requirement that the separation must have been continuous without interruption. Certainly, when the phrase "without interruption" was added in drafting the final enactment of the separation statute, it was added for a purpose. It is suggested then, that the Virginia courts will follow the strict view, and hold that there will be a tolling of the statutory period upon one instance of a resumption of any of the marital relations.

*Must Separation Be Voluntary?*

To what extent must the living apart be voluntary? In *Otis v. Bahan*, 209 La. 1082, 26 So. 2d 146, 166 A.L.R. 494 (1946). while the husband was away from home in the Navy, the wife left the home; at the time of suit less than two years had elapsed since she left but more than two years had elapsed since the husband went away. It was held that the required time (two years) had not elapsed. The court said:

“The separation means more than mere living apart. Business and other necessities may require the husband to live in one place and the wife in another. The separation intended by the statute is a separation by which the marital association is severed. It means the living asunder of the husband and wife. It is a voluntary act, and the separation must be with the intent of the married persons to live apart because of their mutual purpose to do so, or because one of the parties with or without the acquiescence of the other intends to discontinue the marital relationship. It certainly was not the intention of the lawmaker that the statute should apply to cases where the separation of the spouses was involuntary as in the case of a husband inducted in the military service. If, however, while the husband is serving in the service, his wife absents herself from the matrimonial domicile with the intent to discontinue all the marital privileges and responsibilities and continues her absence for the statutory period, it must be presumed that her act is a voluntary act.”

This opinion expresses the view of most states whose statutes do not expressly state that the separation must be “voluntary”. According to the majority, it is sufficient if the separation is voluntary as to only one of the spouses, and it need not be by the consent of both parties, (see also *Harp v. Harp*, 43 Wash. 2d 821, 264 P. 2d 276 (1953).

The minority view adopts the notion that when "voluntary" is expressly stated or when the courts read into the statute that the separation be voluntary, it must be such as to both spouses. In short, there must be a separation by mutual agreement, *Campbell v. Campbell*, 174 Md. 229, 198 A. 414 (1938). (The court held a separation is not voluntary if a wife leaves her husband because of his cruelty.) *Beck v. Beck*, 180 Md. 321, 24 A. 2d 295 (1942). (Voluntary connotes an "agreement" and the statute is not applicable in favor of a wife where the husband has left her.)

All the states adhering to this minority view, with the exception of Maryland, *Nichols v. Nichols*, 181 Md. 392, 30 A. 2d 446 (1943), (the fact that the wife had previously sought divorce on the ground of desertion, was enough to convince the court that the separation was not voluntary), presume that a prolonged separation is voluntary as to both parties, and that the burden of proving its involuntary nature rests with the defendant, *Buford v. Buford*, 156 F. 2d 567 (D. C. Cir. 1946); *Sanders v. Sanders*, 135 Wis. 613, 116 N.W. 176. Thus, this limited application of the requirement is in accord with the real purpose of the separation statutes. Yet in these jurisdictions a definite, expressed attempt at reconciliation by the defendant during the period of separation renders the separation involuntary, *Butler v. Butler*, 154 F. 2d 203 (D. C. Cir. 1946); *Kline v. Kline*, 179 Md. 10, 16 A. 2d 924 (1940).

The North Carolina statute reads: "Marriage may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for two years," N. C. Gen. Stat. Sec. 50-5(4)-6 (1950). It will be noted that the term "voluntary" does not appear. Yet the court takes the view that in order to satisfy the statutory requirement of separation there must be present at least an element of mutuality, *Young v. Young*, 225 N. C. 340, 34 S.E. 2d 154 (1945). The court said there can be no voluntary separation sufficient to form a basis for divorce without the conscious act of both parties, and there must be an agreement express

or implied. North Carolina seems to be the only state among the minority whose statutes do not expressly contain the word "voluntary" to hold this view. But there is an indication that North Carolina may be departing from it.

In *Mallard v. Mallard*, 234 N. C. 654, 68 S.E. 2d 247 (1951), the court remanded for new trial a case in which the facts were not clear as to whether the husband left home because of the necessity of his job or with the intent to sever the marital bond. The court in a dictum said there must be at least an intention on the part of one of the parties to cease cohabitation.

Will the Virginia courts require mutuality for a divorce under our new statute? One of the main purposes behind separation statutes is to grant a divorce when there appears to be little chance of reconciliation. To require mutuality of intent would only be limiting this purpose. When the Virginia bill to amend Sec. 20-91 of the Virginia Code was presented, it contained the word "voluntary" in describing living separate and apart. On final passage of the bill the word "voluntary" was struck out. Thus, it seems that our legislature was aware that mutuality of intent to sever the marriage relationship has been implied whenever the word "voluntary" was used in a state statute. It is suggested they did not desire this; hence, the word was deleted.

### *Effect of Insanity*

What will be the effect of insanity of a spouse during the three year period? In the majority jurisdictions which allow a divorce on the ground of separation if it was voluntary as to one spouse but involuntary as to the other or against the latter's wishes, one might logically assume that if a sane spouse leaves the other there is a statutory separation regardless of whether the other is or later becomes insane. Most jurisdictions so hold, 111 A.L.R. 873; 19 A.L.R. 2d 162. However, some of the majority jurisdictions recede from this position in insanity cases and hold that the separation has to be voluntary as to both spouses, *Serio v. Serio*, 201 Ark. 11,

143 S.W. 2d 1097; Anno. 19 A.L.R. 2d 166, (1940). *Camire v. Camire*, 43 R. I. 489, 113 Atl. 748 (1923). And, of course, in law, an insane spouse does not have the capacity to intend to sever the marital bond.

What will be Virginia's position concerning insanity arising during the statutory period of separation? First, it is interesting to note that out of the nineteen states with separation statutes, only five do not have incurable insanity as a ground for divorce. Of these five, four states (Arizona excepted, since Arizona's separation statute expressly states that the living apart may be for any reason, Ariz. Code Ann. Sec. 27-802(9)—Texas, Rhode Island, Louisiana, and Arkansas—follow the minority view, not allowing their separation statute to apply whenever there is insanity of either spouse during all or part of the separation period.

In the case of *Serio v. Serio*, *supra*, the husband attempted to obtain a divorce after his wife had been committed to an insane asylum during part of the three year statutory period. Even though the Arkansas statute, Ark. Stat. Ann. Sec. 34-1202(7), expressly provides that such a separation may be by the voluntary act of only one party, the court refused the divorce, stating that to hold otherwise was tantamount to holding that insanity continuing for the period of three years was a ground for divorce, and insanity was no longer a ground for divorce in Arkansas.

In *Camire v. Camire*, *supra*, the Rhode Island court denied the divorce upon essentially the same facts. Answering the contention of the petitioner that the statutory provision is without qualification and that a voluntary act by only one party was all that was necessary, the court pointed out that it could be said that the statutory provision making extreme cruelty and adultery grounds for divorce are equally unqualified, yet the proof of acts of extreme cruelty and adultery by an insane spouse do not constitute a cause for divorce in favor of the petitioning spouse.

These decisions no doubt illustrate a strong feeling in these states that it is against public and moral policy to allow divorce whenever insanity is involved. Virginia, also, will

not admit even the most incurable insanity, if occurring after marriage, as a ground for divorce. To many this is a shocking result—but nevertheless it remains unchanged. At first blush, it would appear that Virginia would probably follow the minority and not permit the statute to apply whenever a spouse is insane during all or part of the separation period.

But before a prediction is made, the desertion side of the picture as a ground for divorce in Virginia should be examined. The great weight of American authority holds that if, in a desertion case, the deserting spouse was sane when he deserted the plaintiff, but before the expiration of the statutory period he became insane, the insanity precludes the granting of a divorce, Anno. 19 A.L.R. 2d 167—on the reasoning that the deserting party could not maintain a rational intention to desert for the full statutory period. But by statute in Virginia it is expressly stated that it shall be no defense that the guilty or abandoning party had been adjudged insane during the one year period necessary for desertion, Va. Code Ann. Sec. 20-93. Virginia by this statute is indirectly permitting insanity as a ground for divorce.

Because of these two conflicting approaches that Virginia has taken on the issue of insanity, it would seem to be a matter of pure conjecture how Virginia will hold concerning the voluntary nature of our separation statute when insanity is involved.

### *Recrimination*

The majority of states with separation statutes permit either party to maintain the action, irrespective of who was at fault, *Jolliffe v. Jolliffe*, 278 P. 2d 200 (Idaho, 1954); *Finnegan v. Finnegan*, 285 P. 2d 488 (Idaho, 1955); *York v. York*, 280 S.W. 2d 553 (Ky., 1955); *Richards v. Garth*, 223 La. 117, 65 So. 2d 109 (1953); *Vanderhuff v. Vanderhuff*, 144 F. 2d 509 (D. C. Cir. 1944); 23 Texas L. Rev. 194. Prior to 1962 only two of these states, Washington and Alabama, had statutes expressly providing that divorce should be granted without regard to fault, Wash. Rev. Code Sec. 26.08.020(9); Ala. Code tit. 34, Sec. 22.

In 1957, the question of recrimination arose for the first time under Maryland's statute which allows an absolute divorce on the ground that the parties had voluntarily lived separate and apart, without cohabitation, for three years, Md. Ann. Code art. 16, Sec. 33. In the case of *Matysek v. Matysek*, the husband, defendant, set up recrimination, based on the wife's adultery, as a defense, 212 Md. 44, 128 A. 2d 627 (1957). The Maryland Court of Appeals granted the wife a divorce stating "the statute authorizing a granting of divorces in cases of voluntary separation established a non-culpatory ground for divorce and thus introduced a new social policy into our law of divorce. The Legislature by this statute manifested an intention to permit the marriage relationship to be terminated in law, as well as in fact, without regard to fault."

The court would not read into the statute a limitation which was not there expressed and which seemed inconsistent with its general purpose.

The one theme which seems to run throughout all the majority decisions is based on the proposition that when a husband and wife have lived apart for a long period of time, with no intention of resuming conjugal relations, the best interests of society and of the parties themselves will be promoted by a dissolution of the marital bond.

As has been seen, this question has been put to rest in Virginia by the 1962 amendment to Code section 20-91 expressly providing that recrimination "shall not be a bar to either party obtaining a divorce on this ground."

### *Probability of Reconciliation*

The Virginia separation statute as originally proposed ended with the phrase "and such separation is beyond any reasonable expectation of reconciliation." This phrase was deleted when the statute was put in its final form. A similar phrase now appears in Virginia's "merger" statute. (This statute states that a bed and board decree may be merged into an absolute divorce, *if* the court should be of the opinion that

no reconciliation has taken place or is probable.) Under the "merger" statute, the courts have placed the burden of proof on the applicant to show that "there is no probable expectation of a reconciliation." Not only is this burden of proof at times difficult to sustain, but this phrase leaves a certain amount of discretion to the court as to whether the final decree shall be issued. In deleting this phrase from our separation statute, it is suggested that the legislature intended that the three year separation in itself was proof enough of impossible reconciliation and that possibly it did not intend that the courts should be given even the limited amount of discretion which the phrase implies. For instance, a conservative court, endowed with this discretion, could restrict many divorces which might normally be allowed under our separation statute.

### *Alimony*

When should alimony be awarded? Although the fault of the parties is not generally considered under most separation statutes, the courts properly and often do consider the element of fault when determining the question of alimony and adjudicating the property rights involved. Only the Arkansas statute, Ark. Stat. Ann. Sec. 34-1202(7), expressly states that fault is relevant only to property division or alimony.

There have been numerous cases in which the plaintiff husband has obtained the divorce decree, but the wife has proved her innocence and has been awarded alimony. *Larsen v. Larsen*, 207 Ark. 543, 181 S.W. 2d 683 (1944); *Lloveras v. Reichert*, 197 La. 49, 200 So. 817 (1941); *Sandlin v. Sandlin*, 289 Ky. 290, 158 S.W. 2d 635 (1942).

### *Conclusion*

Another advantage of our separation statute is that it will, to a degree, preserve the alienability of property. In cases where the wife refuses to obtain a divorce in an effort to tie up her spouse's realty, a public service would result in re-

quiring her vengeance, her concern for children, or other intentions, to take, after the lapse of three years, the form of alimony under a divorce, and not a dower interest used as if it were a sword.

Generally, Virginia's divorce laws have been strict, only allowing divorces in the more serious cases. To get around these harsh results it is suspected that much fraud has been worked on the courts. Many mutual separation suits go uncontested and fraudulent testimony to get the required corroboration necessary for divorce is probably prevalent. Of the small number of divorces that are contested, perhaps the real reason is not to re-establish the home, but personal vengeance and personal gain. Our present statute should eliminate a great deal of this.

Virginia has shown definite signs of liberalizing its divorce laws in certain areas, some of which already have been mentioned. Another great step has been taken with the enactment of our 1960 separation statute. With its 1962 amendment the statute clearly indicates that divorce is available to either party without reference to fault. It appears to be mandatory in terms and few restrictions can or will be read into it without frustrating the obvious purpose of the legislature.