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## Proving the Validity of Marriage

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The importance of proving the validity of a marriage is not limited to the practice of family law, and has far-reaching social, legal, and economic implications in other areas of the law as well. For example, wrongful death statutes in Virginia limit recovery of a statutory beneficiary to the legal spouse rather than the *de facto* spouse.<sup>1</sup> Other areas of the law, including intestate succession and probate law,<sup>2</sup> real property law,<sup>3</sup> Social Security benefits,<sup>4</sup> worker's compensation statutes,<sup>5</sup> insurance benefits,<sup>6</sup> and marital property<sup>7</sup> and spousal support rights<sup>8</sup> are likewise directly affected by the validity or invalidity of a marriage.

Thus a Virginia practitioner, during the course of his or her legal career, must have a good understanding of Virginia state marital requirements, separate and apart from any divorce litigation.

#### • prima facie evidence and presumptions of a valid marriage

A valid marriage license, or a certified copy of the marriage record, will constitute prima facie evidence of such a marriage.<sup>9</sup> Upon receipt of a written request, the State Registrar shall issue a certified copy of the marriage record,<sup>10</sup> and the certified copy of this vital record shall be considered for all purposes to be the same as the original, and shall be prima facie evidence of the facts stated therein.<sup>11</sup>

Also, a presumption of marriage can be based upon marital cohabitation and community repute. This marital presumption based upon cohabitation and repute is "one of the strongest presumptions known to law" and can be overcome "only by cogent and satisfactory proof."<sup>12</sup> However, such cohabitation and repute does not constitute a valid marriage *per se* in Virginia. It is only evidence tending to raise the presumption of marriage, and this presumption--although a very strong presumption may be rebutted.

For example, in the case of *McClagherty v. McClagherty*,<sup>13</sup> the Virginia Supreme Court stated that "in the interest of morality and decency, the law

presumes marriage between a man and a woman when they lived together as man and wife, demeaning themselves toward each other as such, and that status in a society is recognized by their friends and relatives. While it is true, however, that cohabitation and repute do not constitute marriage, they do constitute strong evidence tending to raise a presumption of marriage, and the burden is on him who denies the marriage to offer countervailing evidence."<sup>14</sup>

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### validity of a formal statutory marriage under Virginia law

Marriage has been defined as the "voluntary union of a man and woman to the exclusion of all others"<sup>15</sup> and Virginia, like the vast majority of other American jurisdictions, prohibits same-sex marriage.<sup>16</sup> But unlike the majority of American states holding that marriage requirements are directory and require only substantial compliance for a valid marriage,<sup>17</sup> the requirements for a valid marriage contracted in Virginia are mandatory, and therefore require strict statutory compliance.<sup>18</sup>

To be validly married in Virginia, the parties must obtain a marriage license<sup>19</sup> and go through a marriage ceremony performed by an authorized religious or judicial officer.<sup>20</sup> Marriages between members of a religious society having no ordained minister may be solemnized in a manner prescribed by that society.<sup>21</sup> A marriage license in Virginia is valid for only 60 days from the date of issuance, and after that date must be renewed.<sup>22</sup>

The marriage license shall be issued by the clerk of court in the city or county where the parties, or either of them, usually reside, but if neither party is a resident of Virginia, then the license shall be issued by the clerk of any court authorized to issue marriage licenses in the state.<sup>23</sup> Unlike most other states, Virginia does *not* have a waiting period between the application and issuance of a marriage license.

Although Virginia marriage requirements are mandatory and not directory, there is a corrective or curative statute that will validate certain marriages if there is lack of authority of the marrying official, or an imperfection or defect in the marriage license "if the marriage be in all other respects lawful, and be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage."<sup>24</sup>

Capacity and intent to marry are also crucial factors in determining whether or not a marriage is legally valid. On one hand, same-sex marriage,<sup>25</sup> bigamous or polygamous marriage,<sup>26</sup> incestuous marriage<sup>27</sup> and underage marriage<sup>28</sup> are all void *ab initio* marriages in Virginia, and as legal nullities from their inception are incapable of possessing any marital consequences.<sup>29</sup> On the other hand, mental and physical incompetence,<sup>30</sup> marriage to a felon or prostitute,<sup>31</sup> a fraudulent marriage or marriage under duress,<sup>32</sup> a sham marriage<sup>33</sup> and a marriage in jest are only *voidable* marriages which are *valid* for all civil purposes unless annulled by the parties themselves within two years of the marriage.<sup>34</sup>

Even though residency requirements are not necessary for a valid marriage in Virginia, and even though Virginia residents may be married out-of-state, Virginia nevertheless has a "marriage evasion" statute<sup>35</sup> which prohibits out-of-state bigamous or incestuous marriages by Virginia residents, and provides that any such marriage shall be void in Virginia.

But other than same-sex, bigamous or incestuous marriages contracted out-of-state, Virginia courts normally will recognize most other sister state or foreign marriages under general conflict of laws doctrine that a marriage valid where celebrated is valid everywhere unless it is against Virginia's strong public policy.<sup>36</sup>

### validity of informal marriages under Virginia law

Although Virginia law will only recognize formal statutory marriages if they are contracted in Virginia,<sup>37</sup> Virginia law nevertheless *will* recognize certain informal marriages if these informal marriages are contracted in another jurisdiction that recognizes both formal and informal marriages.

For example, in approximately 13 jurisdictions,<sup>38</sup> a so-called common law marriage is legally recognized if contracted in that state. A common law marriage need not be formally solemnized, but there must be evidence of a present intent and agreement of the parties to enter into a matrimonial relationship, and this agreement may be inferred through cohabitation and community repute as husband and wife.<sup>39</sup> Although Virginia law will *not* recognize informal common law marriages if contracted in Virginia,<sup>40</sup> Virginia *will* recognize a common law marriage if contracted in one of the 13 common law jurisdictions.<sup>41</sup> This recognition in Virginia of common law marriages validly contracted in another state is justified under the generally accepted conflict of laws theory that a marriage valid where celebrated ought to be valid everywhere unless it would be against Virginia's strong public policy,<sup>42</sup> and that common law marriages which validate the marital expectations of the parties would not violate a sister state's strong public policy which is to promote and protect marriages generally.<sup>43</sup> Although some courts have held that a party claiming a common law marriage must have actually resided in the common law marriage state,<sup>44</sup> the better reasoned view is that visits of short duration to a common law marriage state—where the parties held themselves out as husband and wife—would suffice to create a legally valid common law marriage,<sup>45</sup> and thus validate the reasonable expectations of the parties in their marriage, as well as recognizing the strong state public policy of promoting and protecting marriages in general.<sup>46</sup>

A second type of informal marriage recognized in a minority of American jurisdictions<sup>47</sup> is a putative marriage. A putative marriage is an informal "curative" marriage when one or both of the parties was ignorant of an impediment that made their formal statutory marriage invalid. A putative marriage must be contracted with a good faith belief that the ceremonial marriage was valid, but unlike common law marriages, cohabitation of the parties is not always required.<sup>48</sup> Virginia has *not* adopted a putative marriage statute, but Virginia *would* arguably recognize a putative marriage from another state, if such a marriage were not against Virginia's strong public policy.<sup>49</sup> For example, Virginia law probably *would* recognize a putative marriage

based upon an imperfection in a marriage license or a marrying official since Virginia law has a similar curative statute.<sup>50</sup> However, Virginia law would *not* recognize a putative bigamous or polygamous marriage<sup>51</sup> or an incestuous putative marriage, because such marriage would be against Virginia's strong public policy.<sup>52</sup> It is also important to note that the federal government has adopted a putative spouse test for Social Security benefits.<sup>53</sup>

A third type of informal marriage is a marriage by proxy, or an attempt to comply with statutory marriage requirements by designating a "stand-in" who appears on behalf of the absent prospective spouse, or where the absent party "participates" in the ceremony via telephone. The validity of a marriage by proxy is governed by the law of the jurisdiction where the ceremony takes place.<sup>54</sup> There are no Virginia statutes or case law decisions either recognizing or prohibiting a marriage by proxy in Virginia, and there is a split of authority in other states as to whether or not such a marriage by proxy ought to be recognized as a valid marriage.<sup>55</sup> The better reasoned view, once again, is to recognize a marriage by proxy to validate the parties' marital expectations, and promote rather than discourage marriage in general.<sup>56</sup>

#### validity of a so-called "marriage" by estoppel

A so-called "marriage" by estoppel most frequently occurs when a husband or wife has obtained an invalid divorce from a prior spouse and then remarries. Since the prior divorce is legally invalid, so is the second bigamous marriage. But if the parties knew about or had participated in the invalid prior divorce and subsequent remarriage, then they may be estopped by their conduct from questioning the validity of the subsequent marriage. Thus, the parties are "married" by estoppel principles, even though they are not legally married. Not surprisingly, this unique legal defense of "marriage" by estoppel has been persuasively—and creatively—argued in a number of legal disputes, and the concept of "marriage" by estoppel has been discussed and analyzed in a number of legal articles<sup>57</sup> and illustrative cases.<sup>58</sup>

For example, in the case of *McNeir v. McNeir*,<sup>59</sup> a wife traveled from Richmond, Virginia, to Reno, Nevada, for the purpose of obtaining a migratory Nevada divorce, and her husband submitted to Nevada's jurisdiction by filing an answer to the divorce complaint and by being represented by counsel. In a subsequent Virginia action the ex-wife, in order to obtain more favorable marital property interests from the ex-husband, argued that the Nevada divorce decree should be declared null and void by the Virginia court since the wife had established a sham domicile in Nevada, and since the Nevada divorce had been obtained through "false and fraudulent misrepresentations and testimony."<sup>60</sup> The Virginia Supreme Court, however, held that even though the Nevada divorce might in fact be null and void, nevertheless the wife's "own conduct brought the conditions of which she now complains" and "she is estopped to assert a different set of facts."<sup>61</sup>

#### the last-in-time marriage presumption

Suppose that a husband [or wife] has unexpectedly died, and the surviving spouse is in the process of bringing a legal proceeding which might include a wrongful death action, a probate action, a suit for Social Security or worker's compensation benefits or an action for life insurance benefits. During the pendency of this legal claim, however, a prior wife [or husband] comes forward, claiming that she [or he] has never been divorced from the deceased spouse and that she [or he], rather than the subsequent spouse, should therefore recover in any legal proceedings as the decedent's legal spouse. Which spouse should prevail?

Under the last-in-time marriage presumption, in order to validate the present marital expectations of the parties, a subsequent marriage raises a very strong—but rebuttable—presumption that the prior marriage was terminated by divorce, and the *prior* spouse has the burden of proving that there was *no* divorce.<sup>62</sup>

How can a prior spouse rebut this last-in-time marriage presumption? If the spouse who remarried is now deceased, then legal counsel for the prior spouse must search all the divorce records where the deceased spouse resided or *might have resided* in order to obtain a divorce. Otherwise the last-in-time marriage presumption will not be rebutted.<sup>63</sup> However, if the prior spouse does in fact successfully present evidence that no divorce proceeding was instituted in any jurisdiction where the deceased spouse might reasonably have pursued it, then the last-in-time marriage presumption would be rebutted.<sup>64</sup> Alternately, if the husband [or wife] who remarried is still alive and admits under oath that he [or she] never obtained a divorce from the prior spouse, then the last-in-time marriage presumption would also be rebutted.<sup>65</sup>

#### conclusion

In many legal disputes in Virginia where the validity of a marriage is contested, a Virginia lawyer is *not* necessarily limited to presenting evidence of the existence or nonexistence of a formal statutory marriage. Various informal marriages, presumptions of marriage, and the creative defense of a "marriage" by estoppel, may also be persuasively argued in court in support of your client—and perhaps to the surprise of opposing counsel.

#### notes

- 1 See, e.g. *Hewitt v. Firestone Tire & Rubber Co.*, 490 F.Supp. 1358 (E.D. VA. 1980) (applying Va. law).
- 2 See, e.g. *Va. Code Ann.* 64.1-13 to 64.1-16.4 (Michie 1991). See generally Gray, *Virginia's Augmented Estate System: An Overview*, 24 U. Rich. L. Rev. 513 (1990).
- 3 See, e.g. *Va. Code Ann.* Section 55-21 (recognizing tenancy by the entirety). See also *Vasilion v. Vasilion*, 192 Va. 735, 66 S.E.2d 599(1951). See generally Swisher, Diehl & Cottrell, *VIRGINIA FAMILY LAW* Section 4-3 (1991).
- 4 See, e.g. 42 U.S.C. Sec. 416.
- 5 See, e.g. *Va. Code Ann.* Section 65.1-66(1) and (2). See also *Caudle-Hyatt Inc. v. Mixon*, 220 Va. 495, 260 S.E.2d 193 (1979) and *Parker v. American Lumber Co.*, 190 Va. 181, 56 S.E.2d 214 (1949). See generally Swisher, Diehl & Cottrell, *VIRGINIA FAMILY LAW* Section 1-6 (1991).

- 6 Compare *DeRyder v. Metropolitan Life Ins. Co.*, 206 Va. 602, 145 S.E.2d 177 (1965) (last-in-time wife recovered insurance proceeds as husband's beneficiary) with *Chitwood v. Prudential Life Ins. Co.*, 206 Va. 314, 143 S.E.2d 915 (1965) (the alleged wife of a deceased husband could not recover any proceeds after she admitted that she had never obtained a valid divorce from her husband before marrying the deceased, and this was held to constitute a material misrepresentation that could void the insurance policy at the option of the insurer.) See generally Swisher, Diehl & Cottrell, VIRGINIA FAMILY LAW Sections 1-6, 1-8 (1991).
- 7 See *Va. Code Ann.* Section 20-107.3. See also Swisher, Diehl & Cottrell, VIRGINIA FAMILY LAW, Chapters 4 and 11 (1991).
- 8 See, e.g. *Va. Code Ann.* Sections 20-61 (support obligations during marriage), 20-103 (pendente lite support orders), 20-107.2 (spousal support and maintenance on divorce). See generally Swisher, Diehl & Cottrell, VIRGINIA FAMILY LAW, Chapters 4 and 9 (1991).
- 9 See generally *Va. Code Ann.* Sections 32.1-267 and 32.1-268.
- 10 See *Va. Code Ann.* Section 32.1-272(A).
- 11 See *Va. Code Ann.* Section 32.1-272(B).
- 12 See, e.g. *McClagherty v. McClagherty*, 180 Va. 51, 21 S.E.2d 761 (1942), *Reynolds v. Adams*, 125 Va. 295, 99 S.E.2d 695 (1919), and *Eldred v. Eldred*, 97 Va. 606, 34 S.E.2d 477 (1899).
- 13 180 Va. 51, 21 S.E.2d 761 (1942).
- 14 *McClagherty v. McClagherty*, 180 Va. 51 at 60. See generally Swisher, Diehl & Cottrell, VIRGINIA FAMILY LAW Section 1-9 (1991).
- 15 *Hyde v. Hyde*, L.R. 1 P & D 130 (1866).
- 16 See *Va. Code Ann.* Section 20-45.2.
- 17 See, e.g. *Picarella v. Picarella*, 20 Md. App. 499, 316 A.2d 826 (1974).
- 18 See *Va. Code Ann.* Section 20-13.
- 19 See *Va. Code Ann.* Section 20-14 to 20-20.
- 20 See *Va. Code Ann.* Sections 20-23, 20-28.
- 21 See *Va. Code Ann.* Section 20-26. See also *In re Ginsburg*, 236 Va. 165, 372 S.E.2d 387 (1988) (applied to the Society of Friends, or Quakers).
- 22 See *Va. Code Ann.* Section 20-14.1.
- 23 See *Va. Code Ann.* Section 20-14.
- 24 See *Va. Code Ann.* Section 20-31.
- 25 See *Va. Code Ann.* Section 20-45.2.
- 26 See *Va. Code Ann.* Sections 20-38.1(a)(1) and 20-45.1.
- 27 See *Va. Code Ann.* Sections 20-38.1(2) and (3) and 20-45.1.
- 28 See *Va. Code Ann.* Section 20-45.1(a) which apparently overrules by statute the earlier cases of *Needham v. Needham*, 183 Va. 681, 33 S.E.2d 288 (1945) and *Kirby v. Gilliam*, 182 Va. 111, 28 S.E.2d 40 (1943). See also *Va. Code Ann.* Sections 20-48 and 20-49.
- 29 See generally Swisher, Diehl & Cottrell, VIRGINIA FAMILY LAW Sections 2-4 to 2-8 (1991).
- 30 See *Va. Code Ann.* Section 20-45.1(b). See also *Cornwall v. Cornwall*, 160 Va. 183, 168 S.E. 439 (1933).
- 31 See *Va. Code Ann.* Section 20-89.1(b).
- 32 See *Va. Code Ann.* Section 20-89.1(a).
- 33 See, e.g. *Kleinfield v. Veruki*, 7 Va. App. 183, 186-189, 372 S.E.2d 407 (1988).
- 34 See *Va. Code Ann.* Section 20-89.1(c). And for voidable marriages generally see Swisher, Diehl & Cottrell, VIRGINIA FAMILY LAW Sections 2-4, 2-9 to 2-14 (1991).
- 35 See *Va. Code Ann.* Section 20-40.
- 36 See, e.g. *Heflinger v. Heflinger*, 136 Va. 289, 118 S.E. 316 (1923) (the general rule is that a marriage valid where performed, is valid everywhere, but there are two exceptions: (1) a marriage deemed contrary to the laws of nature such as bigamy, polygamy, and incest; and (2) a marriage that is forbidden by statute as contrary to the public policy of Virginia.) See also Restatement, Conflict of Laws, Sections 121 to 123 (1934) and Restatement (Second) Conflict of Laws Section 283(2) (1971).
- 37 See footnotes 18-34, supra, and accompanying text.
- 38 Alabama, Colorado, Georgia, Idaho, Iowa, Kansas, Montana, Ohio [Ohio statutorily repealed common law marriage in 1991], Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and the District of Columbia. See generally Green & Long, MARRIAGE AND FAMILY LAW AGREEMENTS 80-86 (1984).
- 39 See, e.g. *Richard v. Trousdale*, 508 So.2d 260 (Ala. 1987) and *In re the Estate of Fischer*, 176 N.W.2d 801 (Iowa, 1970).
- 40 See, e.g. *Vanderpool v. Ryan*, 137 Va. 445, 119 S.E. 65 (1923) and *Heflinger v. Heflinger*, 136 Va. 289, 118 S.E. 316 (1923).
- 41 See, e.g. *Metropolitan Life Ins. Co. v. Holding*, 293 F.Supp. 854 (E.D. Va. 1968) (applying Va. law) and *Toler v. Oakwood Coal Co.*, 173 Va. 425, 4 S.E.2d 364 (1939).
- 42 See footnote 36, supra, and accompanying text.
- 43 Id.
- 44 See, e.g. *Hesington v. Estate of Hesington*, 640 S.W.2d 824 (Mo. App. 1982) and *Kennedy v. Damron*, 268 S.W.2d 22 (Ky. 1954)
- 45 See, e.g. *Metropolitan Life Ins. Co. v. Holding*, 293 F.Supp. 854 (E.D. Va. 1968) (applying Va. law) and *Renshaw v. Heckler*, 787 F.2d 50 (2d Cir. 1986) (applying N.Y. law).
- 46 See generally Swisher, Diehl & Cottrell, VIRGINIA FAMILY LAW Section 1-3 (1991).
- 47 E.g. California, Louisiana, Illinois, Minnesota, Texas, and Wisconsin.
- 48 See, e.g. *Robouche v. Anderson*, 505 So.2d 808 (La. App. 1987) and *In re Foy's Estate*, 240 P.2d 685 (Cal. App. 1952).
- 49 See footnote 36, supra, and accompanying text.
- 50 See *Va. Code Ann.* Section 20-31.
- 51 See, e.g. *In re Dalip Singh Bir's Estate*, 188 P.2d 499 (Cal. App. 1948).
- 52 See *Heflinger v. Heflinger*, 136 Va. 289, 118 S.E. 316 (1923). And c.f. *Hager v. Hager*, 3 Va. App. 415, 349 S.E.2d 908 (1986). See generally Swisher, Diehl & Cottrell, VIRGINIA FAMILY LAW Section 1-4 (1991).
- 53 42 U.S.C. Section 416(h)(1)(B).
- 54 See Comment, *Validity of a Proxy Marriage*, 25 S. Cal. L. Rev. 181 (1952) and Annot. 170 A.L.R. 947 (1947).
- 55 Compare *Respole v. Respole*, 70 N.E.2d (Ohio, 1946) (refusing to recognize a marriage by proxy) with *Torres v. Torres*, 336 A.2d 713 (N.J. Super. 1976) (recognizing a marriage by proxy).
- 56 See, e.g. *Barrons v. United States*, 191 F.2d 92 (9th Cir. 1951). See generally Swisher, Diehl & Cottrell, VIRGINIA FAMILY LAW Sec. 1-5 (1991).
- 57 See, e.g. Clark, *Estoppel Against Jurisdictional Attack on Decrees of Divorce*, 70 Yale L.J. 45 (1960); Rosenberg, *How Void is a Void Decree, or the Estoppel Effect of Invalid Divorce Decrees*, 8 Fam. L. Q. 207 (1974); and Swisher, *Foreign Migratory Divorces: A Reappraisal*, 21 J. Fam. L. 9, 37-48 (1982-83). See also Annot. 81 A.L.R. 3d 110 (1977).
- 58 See, e.g. *Mayer v. Mayer*, 66 N.C. App. 522, 311 S.E.2d 659 (1984) appeal denied 311 N.C. 760, 321 S.E.2d 140 (1984), and *Weber v. Weber*, 200 Neb. 659, 265 N.W.2d 436 (1978).
- 59 178 Va. 285, 16 S.E.2d 632 (1941).
- 60 *McNeir v. McNeir*, 178 Va. 285 at 293 (1941)
- 61 *McNeir v. McNeir*, 178 Va. 285 at 293 (1941.) See generally Swisher, Diehl & Cottrell, VIRGINIA FAMILY LAW Sec. 1-7 (1991).
- 62 See generally Annot. "Presumption as to the Validity of a Second Marriage," 14 A.L.R.2d 7 and Later Case Service. See also Swisher, Diehl & Cottrell, VIRGINIA FAMILY LAW Section 1-8 (1991).
- 63 See, e.g. *DeRyder v. Metropolitan Life Ins. Co.*, 206 Va. 602, 145 S.E.2d 177 (1965) and *Hewitt v. Firestone Tire & Rubber Co.*, 490 F.Supp. 1358 (E.D. Va. 1980) (applying Va. law).
- 64 See, e.g. *Davis v. Davis*, 521 S.W.2d 603 (Tex. 1975).
- 65 Cf. *Chitwood v. Prudential Life Ins. Co.*, 206 Va. 314, 143 S.E.2d 915 (1965) (the "wife" of a deceased husband in a life insurance dispute could not recover any insurance proceeds after she admitted that she never obtained a valid divorce from her first husband before marrying the deceased.)



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