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Alimony, Property Division, and the Modern-Day Wife

HARRY L. SNEAD, JR.

Two Virginia cases prompt this note: In one the court was concerned with alimony and a working wife (*Baytop v. Baytop*, 199 Va. 388, 100 S. E. 2d 14 (1957)); the other involved a property settlement between a husband and a working wife who had used her inheritance to purchase real estate. (*Smith v. Smith*, 200 Va. 77, 104 S. E. 2d 17 (1958)).

Alimony and the Working Wife

In *Baytop v. Baytop*, *supra*, Lillian Baytop, age 40, and her husband, age 44, were schoolteachers. The parties had taught school before marriage and both continued to teach during the period of their marriage. However, husband and wife had never formed a common household because the wife taught in Virginia and the husband taught in Delaware and both maintained apartments in the locality of their respective jobs. This arrangement for separate households was mutually agreed upon for many years but the court found, from conflicting evidence, that toward the latter part of the marriage the wife attempted to have the husband establish a common household. The husband owned a small farm and had acquired some equity in a tractor. The marriage had existed about seven years when the wife instituted suit for divorce on the ground of cruelty.

The trial court found cruelty, decreed a divorce, and, because the wife had "resigned" her teaching job due to a nervous condition allegedly caused by the husband's cruelty, awarded the wife \$150.00 a month as alimony.

The Supreme Court of Appeals of Virginia, by a five to two decision, reversed that part of the decree awarding alimony and held that under the facts and circumstances existing at

the time of the appeal (the wife had "resumed" work) no alimony should be awarded.

It is hoped that this case will not be interpreted as standing for the proposition that because a working wife earns approximately as much as her husband she is not entitled to alimony. Properly interpreted, it does not. Some of the pivotal facts which enter into the complex question of whether the working wife should collect alimony are suggested by the observation of the majority justices that:

For many years she has earned a salary that is ample to maintain her in the station in life to which she has been accustomed, *both before and during her marriage*. 199 Va. 388, 395, 100 S. E. 2d 14, 19. (Emphasis added.)

The unique facts of absences of a common household and pooling of funds in *Baytop* caused no lowering of the living standard of the wife upon the dissolution of the marriage and would justify the court in denying alimony when, and if, lowering of the wife's living standard is the sole factor to be taken into account in fixing alimony.

A Wife Should Be Compensated In Divorce Proceedings For A Loss of Earning Capacity Caused by Certain Torts Of the Husband.

Justices do not always articulate what may have been the conscious or unconscious reasons for their conclusions. Speculation as to the underlying meaning of judges' conclusions, like speculation as to a poem's "real meaning", is hazardous business. This, however, is a risk the teaching profession finds attractive.

What is a possible explanation for the dissent in *Baytop* by Mr. Justice Buchanan, joined in by Mr. Justice Spratley? The opening sentence of that opinion is suggestive:

I disagree with the conclusion that there should not be an allowance of any alimony in this case. The court finds the facts to be that the husband never established a home for his wife; that he humiliated her, was rude and indif-

ferent to her and engaged in illicit relations with another woman; and that his conduct over a long period of time adversely affected her health and nervous system to the point where she was justified in leaving him because she had taken all she could take. 199 Va. 388, 395.

The mood conveyed is that of tort, of wrong for which compensation should be awarded, and it is submitted that upon divorce an injured wife or husband should be permitted to recover at least for loss of earning capacity caused by intentional wrongs or torts committed by the other spouse during the existence of the marriage relation. See *Abbott v. Abbott*, 67 Me. 304 (1877); *Shultz v. Christopher*, 65 Wash. 496; 118 P. 629 (1911) (in which the court held that damages to a former wife caused by the husband giving her a venereal disease were presumed to have been settled in the divorce suit when the court adjusted the property rights of the parties); McCurdy, *Torts Between Persons in Domestic Relations*, 43 Harv. L. Rev. 1030, 1041-50 (1930)).

Is the above suggestion at odds with settled Virginia law? Although as of 1955 fourteen states had repudiated the rule of inter-spousal immunity to tort actions (20 NACCA L. J. 118-119 (1958), *Furey v. Furey*, 193 Va. 727, 71 S. E. 2d 191 (1952) states, and *Vigilant Ins. Co. v. Bennett*, 197 Va. 216, 89 S. E. 2d 69 (1955) reaffirms, that in Virginia neither husband nor wife can recover for personal torts committed by one upon the other. The court purports to rest this rule on its construction of the Married Women's statute as not destroying the legal identity of husband and wife and hence no cause of action can exist. *Keister's Admr. v. Keister's Ex'ors.*, 123 Va. 157, 96 S. E. 315 (1918). This is no more than a statement of a conclusion.

However, for personal torts which are not insured against the Virginia rule stated above finds rational support in (1) the undesirability of dislocating the control of family financial matters by awarding the funds of one spouse to the other, and (2) a realization that for marriages to survive the partners must endure much conduct that would be tortious if directed toward a third party. See McCurdy, *op cit.*, at 1054-56.

For personal torts which are customarily insured against (usually the negligent torts) the Virginia rule finds rational support in a desire to thwart collusive suits by husband and wife for the purpose of milking insurance companies, and it also finds rational support in the wisdom of not allowing a wrongdoer to profit from his own wrong and thereby discouraging a high degree of care. *Cf. McCurdy, op. cit.*, at 1050-56. (In *Midkiff v. Midkiff*, 201 Va. 829, 113 S. E. 2d 875 (1960), it was held that an unemancipated infant may maintain a tort action against his unemancipated brother. The court said at page 833 of the Virginia report: "Fraud is never presumed. . . . Courts should never immunize tort-feasors because of the possibility of fraud and collusion. . . . If fraud and collusion do exist in an action between brothers, they may be ferreted out in the same manner in which courts and juries handle that situation in other cases." For obvious reasons fraud or collusion is much less likely between brothers than between a husband and wife who share both a common bed and many common purposes in life. The result in the cited case may rest upon this obvious distinction or it may presage the collapse of the Virginia rule of inter-spousal immunity. In the event Virginia retreats from inter-spousal immunity, an approach mid-way between presuming fraud and closing our eyes to realities may be appropriate: Where insurance is involved the claim should be viewed with suspicion and all pure facts proved by clear and convincing evidence; the ultimate "facts" of negligence, causation, and injury could remain subject to the preponderance rule.)

Rational bases for a rule denying the wronged spouse recovery for personal torts committed by the other are lacking where: (1) the recovery is sought upon dissolution of the marriage, and (2) the wrong is of a type which is typically not insured against, and (3) the wrong is so severe that it should not have to be tolerated even by the partners to a marriage.

Intentional, as distinguished from negligent, personal torts usually are not insured against; where the wrong has been so severe that it has reduced earning capacity it should not have to be tolerated even in marriage. But, to discourage hasty dis-

solutions of salvageable marriages by wives who might hope to use the action to acquire independent wealth, recovery could be limited to compensation for loss of earning capacity.

Of great significance here is the realization that if it is indeed tort damages to which the wife (or husband) is entitled then (1) such payments could and should be awarded to such a party even though his conduct furnished grounds for the divorce, and (2) payments of this kind, or portion, of "alimony" should survive re-marriage, and (3) the party whose earning capacity has been reduced should collect compensation even though he or she may be earning more than the other party. Compensation for such injuries could also be made by or in the property division between husband and wife. See *Shultz v. Christopher, supra*, and the latter portions of this note.

The following hypothetical case illustrates the justice of the above suggestions: A husband, earning \$5000 a year, without provocation shoots his wife in the hand thereby destroying her capacity to earn money as a court reporter; her earning capacity is reduced from \$6000 to \$5200 a year. The wife condones this cruelty but shortly thereafter commits adultery. When the husband sues for divorce is it not just to allow the wife some form of compensation for her loss of earning capacity?

(By analogy, in *Mahnke v. Moore*, 197 Md. 61, 77 A. 2d 923 (1951), a father of a five year old girl shot and killed the child's mother in the presence of the child. The blast from the gun knocked a part of the mother's skull onto the kitchen table; the mother's body was bent backwards over a chair with both her head and feet resting in a pool of blood. The father kept the child in the presence of the mother's body for about six days and then took the child to another house where, in the presence of the child, the father committed suicide with a shotgun and in the process splattered the child with his blood and fragments of his body. The court allowed the child's action to recover for emotional distress, saying that the rule prohibiting a child from suing a parent could not logically

be applied where, as there, it would not unduly impair the discipline and harmony of the household.)

It is the conjecture of this writer that the above reasoning, along with a vague notion of property division, is what the dissenting justices in *Baytop* had in mind or were subconsciously reaching toward, and that the differences in the views of the majority and dissenting justices turned on the questions of causation and damages for loss of earning capacity: The lengthy record in *Baytop* contains evidence to support the conclusion that the wronged wife had always been of a nervous disposition and shortly before the divorce had suffered severe emotional shock because of the tragic, suicidal death of her mother. The majority of the court may have felt that causation was not sufficiently proved. (See *Bowles v. May*, 159 Va. 419, 438 166 S. E. 550 (1932) where the court states the strict rules applicable to proof of causation of physical injury resulting from emotional distress.)

As for damages, the majority of the court probably concluded that the wife had not suffered a meaningful loss of earning capacity because her period of disability, if any, occurred during the summer vacation when she, a schoolteacher, would probably not have been working even if not disabled.

If the Virginia court is willing to take the wife's loss of earning capacity into account in fixing "alimony" or settling property rights, then when the husband's "tort" which caused the loss does not involve a physical touching (and it did not in *Baytop*) the court must: (1) recognize and define the "torts" which are peculiar to the marriage relation, or (2) at least recognize the dictum in *Bowles v. May, supra* as being law for purposes of fixing "alimony" or settling property rights. That dictum is to the effect that where a wrong was wilful or wanton there need be no physical "contact" by the tortfeasor to enable the wronged party to recover for physical injury resulting from emotional distress. 159 Va. 419, 437, 166 S. E. 550 (1932).

Mr. Baytop's small farm and his equity in his tractor should not be forgotten; should Mrs. Baytop have an interest in the property acquired by her husband during marriage?

Property Rights and the Modern-Day Wife

In the *Smith* case, *supra*, the wife was also a working wife, and in addition, had inherited the sum of \$8,100.00 shortly before the divorce. The wife consistently had earned more money than the husband; the husband obtained an *a vinculo* divorce on the ground of adultery. By using the wife's inheritance the parties had purchased a home which was conveyed to them as tenants by the entirety; the wife contributed approximately \$8,100.00 for the down payment and incidental expenses, a \$4,500.00 deed of trust note for the balance owing had been curtailed in the sum of \$522.70 from the joint earnings of the parties. Further, husband and wife owned jointly a 1955 automobile in which they had an equity of \$1,020.00; this and an earlier automobile had been purchased from their joint earnings. However, it is clear that the wife contributed substantially more toward the purchase of the two cars than did the husband.

Writing for a unanimous court, Mr. Justice Spratley held that there should be an equal division of the property between the husband and wife and that this partition could be effected in the divorce suit.

On the facts in that case equal division of the property can be defended on at least three grounds: First, the desirability of security and certainty of executed transactions because of the difficulty, if not impossibility, of discovering the subjective intent of the donor of a gift that is absolute on its face; second, a growing belief that marriage is a more or less equal economic, as well as social, partnership; and, third, the informality and long duration of the marriage relation often renders a full and accurate accounting impossible, or at least impracticable. (In *Smith* the husband and wife, both salaried employees, had records of their earnings and records of their disbursements for hard goods. Even so, it took eighteen pages of testimony to establish a rough calculation as to their respective earnings and disbursements.)

What is more difficult to defend is the court's suggestion that division of property between husband and wife will take

place only when they have expressly agreed to hold the property jointly. (In other words, all the divorce court can do under Section 20-107, 1950 *Code of Virginia* is to *partition* property which husband and wife have previously agreed to hold jointly. 200 Va. 77 at 82, 104 S. E. 2d 17 at 22.)

Failure of a husband and wife to express an intent for joint ownership should not be conclusive. For example, if a husband's and a working wife's relationship evolved into one in which the wife paid all the bills for food and clothing (or other expendibles) and the husband used his funds to purchase stocks, bonds, or realty and placed them in his name, should we conclude that upon dissolution of the marriage the wife had no interest in the property which stood in the husband's name? Section 20-107, 1950 *Code of Virginia* states that the court ". . . shall make such decree as it shall deem expedient concerning the estate . . . of the parties of either of them. . . ." "Expedient" means "apt and suitable to the end in view". However, as the court appeared to interpret it in *Smith*, an "expedient" division of the property meant only "such division as the parties to the marriage have agreed upon at the time they acquired the property." The language of Section 20-107 is presently broad enough to enable Virginia courts to adopt the principles for property division subsequently suggested in this note and this writer is confident that many trial judges have felt tempted upon dissolving a marriage to work some division of property other than that owned jointly.

For those readers who feel that no opinion as to the interpretation of a statute is legally noteworthy unless the interpretation be made by solemn men in black robes the writer offers the decision in *Philips v. Philips*, 106 W. Va. 105, 144 S. E. 875 (1928). In that case the court interpreted a West Virginia statute containing the same language as Section 20-107, 1950 *Code of Virginia* as permitting a trial court to make an equitable division of real estate between husband and wife. As a later West Virginia case expressed it, the statute "gave the court almost unlimited control of the property of the parties in a divorce proceeding." *Selvy v. Selvy*, 115 W. Va. 338, 177 S. E. 437 (1934). (So far as this writer can determine the

Philips case has never been cited to or by the Virginia court although the reasoning employed in the case seems irrefutable: The West Virginia statute speaks of dissolution of marriage as well as divorce. Dissolution refers to annulment. Dower, curtesy, and other marital rights do not exist in a void marriage. Therefore, the purpose of the statute must have been to give trial courts authority to make an equitable division of *all* of the estate of the parties, not merely dower or curtesy interests.)

Later West Virginia cases appear to cast doubt on the *Philips* case and an amendment to the West Virginia statute compelled the court to change the interpretation which emerged from the *Philips* case. The rise and fall of the doctrine of equitable division in West Virginia can be pegged out by scanning the following cases: *Tuning v. Tuning*, 90 W. Va. 457, 111 S. E. 139 (1922); *Philips v. Philips, supra*; *Burdette v. Burdette*, 109 W. Va. 95, 153 S. E. 150 (1930); *Smith v. Smith*, 110 W. Va. 82, 157 S. E. 37 (1931); *Games v. Games*, 111 W. Va. 327, 161 S. E. 560 (1931); *Selvy v. Selvy, supra*; *Wood v. Wood*, 126 W. Va. 189, 28 S. E. 2d 423 (1943); *State v. Worrell*, 106 S. E. 2d 521 (W. Va.) (1958).

It is submitted that *Gum v. Gum*, 122 Va. 32, 94 S. E. 177 (1917), *Barnes v. American Fertilizer Co.*, 144 Va. 692, 130 S. E. 902 (1925), and *Smith v. Smith* (the Virginia case *supra*) do not stand firmly in the way of the Virginia court coming to the conclusion that Section 20-107, 1950 *Code of Virginia*, permits the trial courts to make an equitable division of the property of husband and wife in a divorce or annulment proceeding. Any statements to the contrary in each of the above cited Virginia cases are but dicta—dicta which had their origin in the fact that there is no statute extinguishing dower or curtesy upon divorce from bed and board (except where the decree makes the separation perpetual and then only as to after-acquired property) and the court in *Gum* found it necessary to use what is now Section 20-107 to extinguish dower when awarding a divorce from bed and board. There is also evident in some of the Virginia cases an overeagerness to confuse *division* of property with the *transfer* of property

as a means of paying alimony. (The latter is prohibited in Virginia.) The two ideas are certainly interrelated, but yet distinct: alimony is for future support; property division is in recognition of the past efforts of the spouse claiming a share of the property which is nominally owned by the other party to the marriage. Confusing these two ideas seems to have been one of the things that started the retreat from the *Philips* case in West Virginia. (*Burdette v. Burdette, supra.*)

Is there any rational basis to support a belief that the Virginia court should give Section 20-107 its natural meaning and allow trial courts to attempt an equitable division of property upon divorce or annulment?

A long line of cases in a related area might be of help in providing an answer: The overwhelming weight of authority is to the effect that if a man and woman live together under a mistaken, but bona-fide, belief that they are husband and wife, upon separation they are entitled to an equitable division of the property accumulated by them while living together—regardless of who holds the “legal title” to the property. To reach this result the courts apply “principles of equity,” or deem the arrangement a “partnership,” or engage in other palpable fictions or distortions of law. (The cases are collected and analyzed and references to related annotations are found in “*Rights and Remedies in Respect of Property Accumulated by Man and Woman Living Together in Illicit Relations or Under Void Marriage*,” Annot., 31 A. L. R. 2d 1255 (1953).)

That such unanimity of result is reached in the various jurisdictions probably stems from a growing realization that present day men and women living together are both economic and social partners and from the realization that the supposed wife or husband has lost “something” because of the lack of a legal marriage. In terms of property, that “something” the “husband” or “wife” has lost is his or her contingent marital rights in the property of the other upon the death of the other, and the right to support. The right to a share of the husband’s estate upon his death is one of the very rights which a wife loses when divorced in Virginia but the Virginia

court, as yet, is not willing to recognize that Section 20-107 enables trial courts to recompense the wife for her loss by making an equitable division of the property of husband and wife in the divorce proceeding.

Does it not appear strange that a man and woman "innocently living in sin" are more likely to be justly treated by the courts than a legally married couple?

A further basis for the spreading realization that even the "non-working" wives have an interest in property accumulated during the marriage is that the value and cost of the type of personal services performed by an industrious housewife (and particularly mothers of young children) have increased tremendously in the last decade. To obtain comparable services a husband (in the low and middle income brackets) would often have to expend far greater sums than are spent in maintaining the wife. With what is perhaps feminine logic, it can be said that the money thus "saved" represents a contribution by the housewife toward the acquisition of the family's property. It must be admitted, however, that the argument stated here rests in part on the assumption that the acquisition and maintenance of a household ranks equally on the scale of values of the husband and wife; it is doubtful that this is often the case since women probably derive more psychic satisfaction from the intangible values associated with "household" than do men.

What Would Constitute An Equitable Division of the Property Acquired During the Marriage?

It is not anticipated that the suggestion that a wife is entitled to property division upon divorce or annulment will be sympathetically received by many male members of the community. However, in testing this proposal on a few members of the bar this writer was surprised to find that most of them (after turning down their wives' hearing aids) agreed that a wife "should" be entitled to property division; their greatest concern was that there be some degree of certainty as to the portion to which the wife was entitled. One lawyer stated

that he would like to be able to advise his clients in advance as to their rights when they acquire property and suggested a solution of each party being entitled to a one-third interest in the property of the other unless the property was conveyed to them jointly in which event each would take one-half.

Most non-community property states that give their courts statutory authority to make an equitable division in divorce proceedings follow a rule of thumb of transferring to the wife one-third of the property acquired during the marriage. *27B C. J. S. Divorce*, §295 (6) (1959); variations from the rule of thumb are made according to a variety of circumstances, including the ratio of contributions. *27B C. J. S. Divorce*, §295 (2) (1959).

Similar solutions can be reached in Virginia either by new legislation or by an understanding interpretation of the present language of Section 20-107. The legislative solution could adopt a rule of one-third except where the property was owned jointly, saving for further adjustment situations where there was fraud, mutual mistake, or a true resulting trust. Arbitrary though this division may be in some cases, it would have the advantage of certainty and would enable parties to adjust their methods of property acquisition to more accurately reflect their ratio of contributions.

By reference to statutes and common law in related areas, our court, if willing to concede that Section 20-107 authorizes an equitable property division, could discover a rule of thumb which would entitle the wife (or husband) to "one-third" interest in the property of the other: (1) Common law dower recognizes that even a non-working wife's share is a life estate in one-third of the realty and the wife forfeits this right upon divorce. The increased legislative respect for the property interests of a wife, as evidenced by moving her to the second class of descent (Va. Code Ann., §64-1 (1950) as amended), coupled with some probability that the estate of the husband upon divorce will not be as large as his estate at the time of death, provides some basis for reasoning that the wife's interest upon divorce should be one-third in fee rather than a commuted life interest based upon the life expectancy

of both parties. Section 64-11, 1950 *Code of Virginia*, giving a surviving wife a one-third interest in fee in the husband's personalty is further evidence that the legislature presently regards one-third as being the proper share even of a non-working wife in property standing in the name of the husband. (Compare the above reasoning process with that in *School Board v. School Board*, 197 Va. 845, 851, 91 S. E. 2nd 654, 659 (1956)). However, where husband and wife have expressly agreed to acquire property jointly, in the interest of certainty of executed transactions where the actual intent of the parties is difficult to determine, and to reduce the probability of the court having to attempt an accounting between husband and wife, the court could retain the rule adopted in *Smith v. Smith*, *supra*, namely: Where husband and wife have expressly agreed to own property jointly they will be deemed equal tenants in common without regard to the ratio of contributions.

Whether to give a greater interest to the working wife or to one who has made contributions from her own funds is perplexing. To take her contributions into account and thus depart from the suggested one-third principle works against certainty of outcome and compels an attempt at accounting between the parties. Failure to take her monetary contributions into account could result in the grossest kind of personal injustice as where, in the example earlier given, the wife paid living expenses and the husband used his funds to purchase property in his own name. As stated before, most courts which attempt such equitable division do consider the ratio of contributions in determining the proper share of each party, and this, it is submitted, is probably a more just attitude.

All of the above suggestions are subject to the qualification that the court continue to be ready to relieve against fraud, mutual mistake, or impose a resulting trust when warranted by established principles.

It might be added that fault in causing the divorce should not be controlling in making such property division as the property to be divided is usually acquired by the efforts of

husband and wife prior to time the ground for divorce arises. That fault usually will have little or no bearing on property division will become apparent to our trial judges as they are plagued by the alimony and property division questions arising in divorce cases based upon Virginia's new ground for divorce, separation for three years. Va. Code Ann. §20-919 (1950) as amended. See also *Adjudication of Property Rights of Spouses in Action for Separate Maintenance, Support, or Alimony Without Divorce*, Anot., 74 A.L.R. 2d 316 (1961).

If the suggestions in this note are adopted the proper order for disposing of property rights upon divorce will be: First, adjudicate that each party holds as his or her separate property that which was owned separately before the marriage unless there has been an express agreement to hold such property jointly; second, make an equitable division of the property acquired during the marriage, including property jointly owned; and, third, determine according to previously established principles the amount of alimony, if any, the wife now requires. (See Ritz, *Economic Liquidation of Bankrupt Marriages*, *Lectures Presented at the 1957 Legal Conference of the Virginia State Bar Association and the Virginia State Bar*.)

Of course there is a strong probability that the work load on courts will be increased if these suggestions are adopted, but there is also a strong probability that after a spate of cases interpreting the statute more husbands and wives will adjust their property rights upon divorce by contract. At the present time the usual bargaining levers a wife has in negotiating a property settlement are her right to alimony, if any, and her right to share in jointly owned property. Placing the parties in a more equal bargaining position, one in which the question of who held legal title to property was not controlling, could increase property settlements, particularly if there were some degree of certainty as to the respective rights of each party in the property standing in the other's name.

All of the above has been by way of suggestion and is addressed to lawyers and judges; if ignored by them, then

some advice should be offered to the married persons who have to live under the law made by judges and lawyers: Assuming that you have your selfish interest in mind, make certain that the legal title to all property you buy is put in your name and, if you are a working woman, make your husband buy the groceries while you accumulate the property. Our judges are baffled when you individually hold the "legal title" to property acquired during the marriage.