The Short "I Do"

Termination of Marriages of Brief Duration

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Although nearly every marrying couple vows to remain together "until death do us part," the reality is that many marriages can be measured in months instead of years. Whether through annulment or divorce, many people use the legal system to undo their "I do" early in the marital relationship. The reasons for ending a short marriage are varied, and the rights and responsibilities a person faces when doing so can depend on whether annulment is an option, and if it is not, then on the assets and liabilities the parties acquired during their time together and whether children were born to them.[1]

What Is a "Marriage of Brief Duration?"

Two statutes, which are fundamental to Virginia divorce law, mandate that a trial court hearing a divorce case must consider the length parties have been married. Both Virginia Code §20-107.1, the spousal support statute, and Virginia Code §20-107.3, the equitable distribution statute, include as factors which must be considered, "the duration of the marriage"[2].

Although a formal definition of "short marriage" does not exist in the Commonwealth's statutory or case law, Virginia's appellate courts have given guidance on when a marriage is considered short. The outside limit on a "short marriage" appears to be seven years, with a more common definition being under four years. Examples of this principle include *Keyser v. Keyser*, 7 Va. App. 405, 374 S.E.2d 698 (1988), in which a four-year marriage was labeled one of "relatively short duration," *Ferris v. Ferris*, Rec. No. 1617-94-2, 1996 Va. App. LEXIS 166 (March 5, 1996) (unpublished), in which the court remarked that the "duration of the marriage was only three-and-a-half years;" *Lightburn v. Lightburn*, 22 Va. App. 612, 472 S.E.2d 281 (1996), where the court called one-year marriage a marriage of "short duration;" *Bartlett v. Reiner*, Rec. No. 2639-95-4, 1996 Va. App. LEXIS 503 (July 16, 1996) (unpublished), in which a three-year marriage was a marriage of "short duration;" *Theismann v. Theismann*, 22 Va. App. 557, 471 S.E.2d 809 (1996), which includes the statement that a two-and-a-half-year marriage is a marriage of "short duration." On the briefest end of the scale *Bristow v. Bristow*, 221 Va. 1, 267 S.E.2d 89 (1980), called an eleven-month marriage one of "short duration;" and as an outside limit, *Cline v. Cline*, Rec. No. 0766-98-3, 1999 Va. App. LEXIS 403 (June 29, 1999) (unpublished) said that a marriage lasting six years and eight months was one of "short duration."

Annulment: When Is It An Option?

Any time a marriage fails early, the question arises whether the marriage can be annulled. Annulment is an option only in certain cases in which the marriage is either void or voidable. A void marriage does not even require an action of annulment to render it legally meaningless. Without obtaining an annulment, a party to a void marriage is free to marry again. On the other hand, a party to a voidable marriage must obtain an annulment through the legal process; otherwise, any subsequent marriage will be bigamous.[3]

Virginia Code §20-89.1 is the codification of annulment law in the Commonwealth, and it refers to several other statutes setting forth reasons why a marriage is either void or voidable.[4] The listed reasons are not, however, the only bases for annulment of a marriage. In *Pretlow v. Pretlow*, 177 Va. 524, 14 S.E.2d 381 (1941), the Virginia Supreme Court stated "[t]he fact that a statute enumerates certain grounds for annulment of a marriage does not imply that no other grounds exist." Nevertheless, the great majority of situations in which a marriage is void or voidable can be found enumerated within these statutes.

Kleinfield v. Veruki, 7 Va.App. 183, 372 S.E.2d 407 (1988), demonstrates a combination of the concepts of void and voidable marriage. Ms. Kleinfield married Mr. Veruki prior to the dissolution of an earlier "green card marriage." She contended that the first marriage was void *ab initio* because of its fraudulent nature. In ruling against her, Virginia's courts covered a quartet of important concepts. First, the law of the state in which the marriage took place determines its validity, so in this case, the

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court looked to New Jersey law to determine that a "green card marriage" is voidable, but not void, under that state's law. Second, in the absence of an annulment or other legal termination of a voidable marriage, any subsequent marriage is bigamous and therefore void. Third, a party to a void marriage cannot obtain "permanent" (that is, post-decree) spousal support. Fourth, and of great disappointment to Mr. Veruki, the trial court did not commit error in awarding Ms. Kleinfield *pendente lite* spousal support during the period that the status of her marriage was being determined.

In addition to bigamous unions, other marriages are void:

1. *A marriage not licensed and solemnized according to Virginia law is void.*[5] But a marriage that is validly formed in another state, such as a common law marriage created in a state that recognizes those marriages, is one that Virginia will recognize even though common law marriage does not exist in this state.[6]

2. *Close relatives cannot marry.* A marriage is void if it unites an ancestor and descendant, or brother or sister, whether the relationship is by half or whole blood or by adoption. Similarly, a marriage between an uncle and niece or aunt and nephew —whether by whole or half blood—is void.[7]

3. *With some exceptions, parties under 18 years of age cannot contract a valid marriage.* With parental consent, teenagers at least 16 years of age may marry, and a pregnant female under age 16 may, with such consent, validly marry.[8]

4. *Marriage between parties of the same sex is void.* Though that was probably true under Virginia's common law anyway because of the definition of marriage, Virginia Code §20-45.2 expressly states, "A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable."

An action for annulment is essential to end a voidable marriage. Marriages can be voidable under Code § 20-89.1 by reason of certain specific named frauds or fraud generally.

Marriages solemnized when either of the parties lacked the capacity to consent to the marriage at the time the marriage was solemnized, because of mental incapacity or infirmity, are voidable.[9] An insane person, for example, cannot validly contract to marry another.[10]

A marriage induced by fraud or duress is voidable. For example, one who marries never intending to have sex may face an annulment. "If one of the parties to a marriage goes through the ceremony with an intention not to consummate the marriage by marital intercourse, and persists in such intention, an annulment will be granted upon the application of the other party on the ground of fraud."[11] As with any case of fraud, the fraud must be pleaded with particularly, and the evidence establishing the fraud must be clearly proved.[12] By contrast, a marriage cannot be annulled simply because of lies about one party's wealth, citizenship and ancestry, number of prior marriages, or one's refusal to practice the religion that was the foundation of the marriage, but lying about one's strong religious beliefs might be the basis for an annulment.[13]

A party's sexual behavior prior to the marriage can lead to an annulment, and a party's lack of sexual behavior afterward may yield the same result. Marriages in which a party is physically impotent are voidable.[14] On the other end of the sexual spectrum, one may annul a marriage in which the wife did not know that the husband fathered a child born to a woman within 10 months of the marriage, or in which the husband did not know the wife was pregnant with the child of another man, or in which one party did not know at the time of the marriage that the other had been a prostitute.[15] A marriage in which one party failed to disclose to the other a felony conviction is also voidable.[16]

As these examples suggest, a good rule of thumb for distinguishing between void and voidable marriages is to assess who is offended by the conduct. If the Commonwealth's laws and public policy would be offended, the marriage is void. If the basis for annulling the marriage is predicated more upon the misconduct of one of the parties, then the marriage is more likely voidable.

From a strategic standpoint, a litigant must consider whether an annulment can be obtained, because annulment eliminates exposure to equitable distribution or spousal support (except, as noted in *Kleinfield v. Veruki*, *pendente lite* spousal support).[17] Annulment, however, is not an option if the party who wishes to seek the annulment cohabits with the other party after knowledge of the facts giving rise to what otherwise would have been grounds for annulment,[18] or if the parties remain married for a period of two years prior to the institution of a suit for annulment.[19] Also, annulment is not an option for the person whose conduct would otherwise be the basis for voiding the marriage. The party capable of consenting to the marriage cannot later assert that the other party lacked capacity, nor can the party at fault (or "fault") seek the annulment in cases of impotency, felony conviction, pregnancy by another, or fathering a child by another.[20]

Any voidable marriage can also be terminated by a divorce action should the innocent party deem that to be a more advantageous path to follow. In that event, the statutes that apply to marriages of any length apply to these short marriages. In short marriages, however, the same statutes predictably produce different results.

Divorce and Short Marriages

When divorcing parties litigate issues arising after a short union, two seemingly contradictory propositions find support. First, the small becomes huge. In other words, the parties can recall and recreate every detail of every argument, the records of every check or credit card charge, and every item of personal property. Second, the huge becomes small. Serious fault, flagrant adultery, and even major economic misdeeds may have little consequence when the parties have not had time to amass a significant marital estate or to truly become economically intertwined. Therefore, divorces that come early present unique problems for the attorneys handling them.

Equitable Distribution in Short Marriages

The appellate courts have not given much express guidance on the importance to be given in equitable distribution to the factor found at Virginia Code §20-107.3(E)(3), "the duration of the marriage." Duration of the marriage, by itself, means little. When the marriage is brief, however, the monetary contributions of each party and the titling of assets may have more appeal to a trial court as factors than they would in a marriage of more years.

Clearly, a trial court cannot simply decline to make any equitable distribution decisions on the ground that the marriage was brief. The record must show that the trial court considered all factors, not just one.[21] This does not mean, however, that after a short marriage, all property classified as marital will necessarily be divided equally. For example, a division of property which gave the husband 80% and the wife 20% of the marital property was upheld in a three-year marriage when the evidence proved that the husband had made the greater financial contributions.[22]

A long sexual relationship that includes a marriage does not afford a means of claiming a longer "duration of the marriage," but it is not completely meaningless, either. When parties cohabit prior to marriage and subsequently marry, their contributions to the acquisition and maintenance of property that later becomes marital property may be considered. This is different from merely treating the period of cohabitation as a period to be added on to the marital duration, because it focuses on asset-specific, and largely monetary, contributions. Cohabitation alone is not an appropriate consideration.[23]

Perhaps because financial records are more likely to be available and therefore more precise financial analysis can be conducted, litigants tend in short-marriage divorces, to emphasize the source of funds and title to assets in attempting to resolve property issues. In settlement of such cases, the temptation to conclude "what's yours is yours and what's mine is mine" is greater, because the parties themselves often still give credence to that idea. After twenty years of marriage, the idea that one spouse should take the bulk of the assets merely because the assets are in her name or because he earned more money during the marriage would not gain ready acceptance. The fact that the same idea is reasonable after a two-year marriage, even though the law on the books is precisely the same in both situations, shows the underlying attitude that short marriages do not ultimately confer as many rights to the assets and money acquired through the other person's efforts, notwithstanding their marital classification.

The case of *Lightburn v. Lightburn*[24] shows the interrelationship among short marriages, equitable distribution, and spousal support. In her one-year marriage, Mrs. Lightburn closed her counseling practice and moved to another county. In this case, the trial court found the short duration of the marriage weighed in the wife's favor because her life had been entirely uprooted, and she received a monetary award in equitable distribution. The Court of Appeals reversed and remanded, holding that the division of property had to be based on consideration of all factors, and the hardships of one party do not necessarily play a role in the division of property. The Court of Appeals suggested that the wife's hardships might be better suited for consideration in spousal support. On remand, the trial court in effect restructured its monetary award into a lump sum spousal support award, this time surviving appeal.

Spousal Support In Short Marriages

In a real sense, the law of how spousal support in short marriages should be handled changed entirely in 1998 with the adoption of spousal support of defined duration—so called "rehabilitative spousal support." At the time this article was researched, there were no appellate decisions on the proper use of this kind of support award. While development of a body of case law affecting rehabilitative spousal support will be important, existing case law has not lost all of its importance in evaluating how that issue is resolved in situations of short marriages. Duration of the marriage was a factor both before and after the 1998 revisions to Virginia Code §20-107.1.

It is clear from cases decided under the pre-1998 amendments to the spousal support statute that duration of the marriage, alone, cannot be the basis upon which spousal support is denied. Even before Virginia Code §20-107.1 existed and §20-107 was applied, the Virginia Supreme Court reversed a trial court for denying alimony by citing the shortness of the marriage and stating the other factors, "I really don't get to those grounds."[25] The court of appeals subsequently confirmed its view that a marriage's short duration, standing alone, is insufficient as grounds to deny a spousal support award.[26] The short duration of a marriage, standing alone, likewise cannot be the sole basis for the denial of a reservation of spousal support.[27]

Indecision about marriage can have curious legal consequences.

The short duration of the marriage does, however, make a difference when properly considered as one of several factors. For example, the fact that a marriage was short in effect canceled

out a wife's claim for substantial spousal support at the end of a marriage in which the standard of living was high, because the wife has had only a limited time to become dependent on the parties' high standard of living.[28] And as long as it is just one of the whole pattern of factors given meaningful and substantive consideration, the short duration of the marriage can properly be made the most important factor in determining the amount, and presumably now the duration, of the support award.[29]

Indecision about marriage can have curious legal consequences. In the situation of parties who cohabit prior to marrying, the period of time relevant to the consideration of the "duration of the marriage" factor is just that: The period of time that the parties were married and together. The period of nonmarital cohabitation counts for nothing when considering spousal support.[30] Conversely, spousal support was awarded in a case in which the parties married, lived together for about three years, and remained separated but not divorced for a much longer period. This ruling did not arise from a purely technical interpretation of the separation period as being "during the marriage." Instead it came because during the years of separation, the parties still held themselves out as married and entertained thoughts of reconciliation.[31]

Custody and Short Marriages

Short marriage increases the likelihood that the divorcing parties will be childless, but if they have a child, it generally insures that the child will be young. "Duration of the marriage" as such is not a named factor for consideration in the statute setting forth the factors for consideration of an award of custody,[32] and no correlation between the length of time parents were married and the outcome of a custody case is evident.

Conclusion

When representing a party to a short marriage, an attorney must assess whether annulment is an option, and if so, whether that option is more or less likely to accomplish the client's objectives than a more conventional divorce. That choice will in turn determine whether issues of spousal support and property division even enter into the process of negating the marital vows. If a divorce is the chosen route, either because annulment is not available or because divorce offers more relief, the practitioner must weigh the effect that the brevity of the marriage will likely have on alimony and equitable distribution. Short marriages ordinarily present unattractive cases for anything beyond short term spousal support, and the source of funds for assets acquired during the brief marriage is likely to be more important than in longer unions. As with any proposition in family law, however, the specific facts of a specific case must be analyzed on their own merits, and significant changes in the position of one party, as for example closing a business and moving to a new location, may well overcome these general attitudes. ⚖

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ENDNOTES

1 This article does not deal with the situations in which the parties whose short marriage is ending signed an antenuptial agreement. In such cases, the unique terms of a valid and enforceable prenuptial agreement would supersede and replace many of the considerations described herein in the event of a divorce.

2 Virginia Code §20-107.1(E)(3) and Virginia Code §20-107.3(E)(3).

3 Virginia Code §20-45.1.

4 The other statutes relevant to the analysis of whether a marriage is void or voidable and mentioned in Virginia Code §20-89.1 are Virginia Code §§20-13, 20-38.1, and 20-45.1.

5 Virginia Code §20-13.

6 *See, e.g., Kelderhaus v. Kelderhaus*, 21 Va.App. 721, 467 S.E.2d 303 (1996), in which the parties failed to prove a valid common law marriage from another state.

7 Virginia Code §20-38.1.

8 Virginia Code §20-45.1(a), referring to §§20-48 and 20-49.

9 Virginia Code §20-45.1(a).

10 *See, Counts v. Counts*, 161 Va. 768, 172 S.E. 248 (1934).

11 *Pretlow v. Pretlow*, 177 Va. 524 at 545-46, 14 S.E.2d 381 at 386 (1941).

12 *Jacobs v. Jacobs*, 184 Va. 281, 35 S.E.2d 119 (1945).

13 *See*, Margaret F. Brinig & Michael V. Alexeev, *Fraud in Courtship: Divorce and Annulment*, 2 Eur. J. Law & Econ. 45 (1995); Peter N. Swisher, et al., *Virginia Family Law* § 2-11 (2d ed. 1997).

14 Virginia Code §20-89.1(b).

15 Virginia Code §20-89.1(b).

16 Id.

17 *See, e.g., Kleinfield v. Veruki*, 7 Va. App. 183, 372 S.E.2d 407 (1988); *Somers-Shiflet v. Shiflet*, 29 Va. Cir. 206 (Fairfax Co., Oct. 14, 1992); *Fulton v. Fulton*, 3 Va. Cir. 263 (Fairfax Co. Dec. 28, 1984).

18 Virginia Code §20-89.1(c)(a).

19 Virginia Code §20-89.1(c)(b).

20 A party who, at the time of such marriage as is mentioned in § 20-48 or § 20-49 [governing marriage of minors], was capable of consenting with a party not so capable, shall not be permitted to institute a suit for the purpose of annulling such marriage. Va. Code Ann. § 20-89.1(d). *Cf. Pifer v. Pifer*, 12 Va. Cir. 448 (Frederick Co., August 23, 1975) (holding that a minor female *who was at fault* could not bring a suit to annul the marriage).

21 *Keyser v. Keyser*, 7 Va. App. 405, 374 S.E.2d 698 (1988).

22 *Ferris v. Ferris*, Rec. No. 1617-94-2, 1996 Va. App. LEXIS 166 (March 5, 1996) (unpublished).

23 *Floyd v. Floyd*, 17 Va. App. 222, 436 S.E.2d 457 (1993).

24 *Lightburn v. Lightburn*, 22 Va. App. 612, 472 S.E.2d 281 (1996).

25 *Bristow v. Bristow*, 221 Va. 1, 267 S.E.2d 89 (1980).

26 *Keyser v. Keyser*, 7 Va.App. 405, 374 S.E.2d 698 (1988).

27 *Cline v. Cline*, Rec. No. 0766-98-3, 1999 Va. App. LEXIS 403 (June 29, 1999) (unpublished).

28 *Baer v. Baer*, Rec. No. 2278-94-1, 1996 Va. App. LEXIS 73 (Feb. 6, 1996) (unpublished).

29 *See, e.g., Hurt v. Hurt*, Rec. No. 0111-96-2, 1997 Va. App. LEXIS 15 (Jan. 21, 1997) (unpublished).

30 *Brown v. Brown*, 34 Va. Cir. 34 (City of Richmond, May 3, 1994).

31 *Phelps v. Phelps*, Rec No. 1155-98-1, 1998 Va. App. LEXIS 671 (Dec. 22, 1998) (unpublished).

32 Virginia Code §20-124.3.