

# How Can I Miss You If You Won't Go Away?



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## Methods for Achieving a "Separation" When Neither Spouse Will Leave Home

by Andrea R. Stiles

**I**ncreasingly, I hear my fellow family law practitioners voicing concerns about how difficult it has become to have a spouse ordered out of the marital residence when there is not a showing of actual or threatened physical violence. To complicate things, it seems more and more couples are refusing to separate because of child custody or economic issues.

Here is a commonplace scenario:

Linda, your new client, sits in front of you trembling uncontrollably. Tears are streaming from her eyes and she begs for your help as she describes the torment she suffers daily as a result of her husband Don's emotional and financial abuse. Don is self-employed and not earning any meaningful income. He refuses to get a "real job." The bill collectors are calling incessantly and foreclosure proceedings on the house have begun; but as usual, Don will con a friend to "borrow" the money to keep the house from being foreclosed. Linda is a schoolteacher and uses her meager income to buy food, clothe

the parties' two children, ages five and seven, and make her car payment. Don stopped paying the utility bills, resulting in the utilities being turned off and he stopped paying for day care—leaving Linda responsible for the family's daily living expenses.

Linda can't make it financially and wants her husband out of the house. Don refuses to leave. Both parties want custody of the children and neither party wants to pay child or spousal support. Both parties believe that the spouse leaving home will lose leverage in a custody battle. Neither party will budge, and each is doing his and her best to make life miserable for the other.

Your client is emotionally and physically disintegrating as a result of the marital stress. Recently, she was hospitalized for stress related to the marital discord. Antidepressants and antianxiety medications have been prescribed. Linda tells you that the children are not doing well and that their school work is being negatively

affected as a result of the arguing and tension in the home. Don keeps the kids up late and interferes with their homework time. There have not been any “intentional” acts of physical violence between the parties, but Don “accidentally” smashed the side door of Linda’s car with his vehicle after an argument over who was going to bring the kids home from day care.

These parties need a divorce. You file a Bill of Complaint for Divorce on the grounds of cruelty and constructive desertion, and petition the court to award Linda exclusive use and possession of the marital residence.

Pursuant to *Va. Code* § 20-103 (A) (vi), the court has discretion to award a spouse exclusive use and possession of the family residence during the pendency of the suit. Prior to 1994 amendments creating separate subparts for *Virginia Code* § 20-103, this code section required a party to show reasonable apprehension of physical harm as a prerequisite for obtaining exclusive use of the home. In 1994, the statute was revised and eliminated this stringent standard. The decision to award exclusive possession of the home rests solely within the trial court’s broad discretion. The code section does not require any specific type of evidence in order to obtain relief.

An instructive case with substantially similar facts to our hypothetical is *Smith v. Smith*, CH 04-264, Spotsylvania Circuit Court (2004). After hearing the evidence, the trial court held:

The parties are not separated . . . They live together with their two children at their marital home in Spotsylvania County. Simply put, Mrs. Smith wants Mr. Smith removed from the home because of the cruelty he allegedly inflicts on her, which is the basis of the divorce itself. Mrs. Smith offers the testimony of Dr. William A. Reese, her treating physician, in support of her claim that Mr. Smith’s cruelty is adversely affecting her health. Dr. Reese testified at depositions that Mrs. Smith suffered from “acute stress,

acute anxiety” directly related “to the problems she’s having with her relationship with her husband now as they are going through this divorce process; stress as it relates to the fact that they’re in the same house, that they’re in intimate contact with each other through this process.” He prescribed medication for her “to control anxiety” . . .

[A] next door neighbor testified that she was “scared” of Mr. Smith. She offered no concrete examples of frightening behavior and gave no reason for her feeling other than her observation that he seemed to be “very tense,” “very argumentative,” “has mood swings,” “does his own thing,” and “doesn’t pay attention to the kids or [Mrs. Smith].” She said that Mr. Smith was putting Mrs. Smith through a lot of stress by “living in that house.” “[He] needs to move out or he needs to allow [Mrs. Smith] to move out with the kids,” she opined.

Mrs. Smith described Mr. Smith’s behavior as “emotional abuse.” She said “it dates back to even before we got married.” She said that he badgered her and used manipulative tactics that some people would refer to as “bullying.” The emotional abuse progressed as the years went on, she continued. She described his financial problems and his pattern of inattentiveness toward her and the children. She also testified about an incident

In the early cases, cruelty was defined as violence or conduct that caused reasonable apprehension of bodily harm. The definition was later expanded to include conduct that caused serious nervous or mental illness. Most recently, it is described more broadly as any conduct that renders cohabitation unsafe; that involves danger of life, limb or health; or that is so abusive as to imply “malice,” giving rise to endangerment of life or health. See *Sollie v. Sollie*, 202 Va. 855 (1961). Thus, the modern view is that violence and apprehension of bodily harm are not indispensable ingredients of cruelty. Mental anguish, repeated and unrelenting neglect and humiliation may be as bad as physical wounds and bruises, and may be visited upon a spouse in such a degree as to amount to cruelty. *Ringgold v. Ringgold*, 128 Va. 485 (1920); see also Swisher, Diehl and Cattrell, *Virginia Family Law*, (2<sup>ND</sup> Ed.) § 7-3(a).

On the other hand, financial irresponsibility and difficulties arising from extravagance do not amount to legal cruelty. *Upchurch v. Upchurch*, 194 Va. 990 (1953). A single act of physical cruelty does not suffice unless it is so severe and atrocious as to endanger life or health or cause reasonable apprehension of future violence. *DeMott v. DeMott*, 198 Va. 22 (1956). Further, austerity of temper, petulance of manner, rudeness, want of civil attention, or even occasional sallies of

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that occurred on April 1, 2004, at the children’s day-care center. That occurrence gave rise to a temporary protective order that was dismissed after a hearing in juvenile court.

passion that do not threaten harm, although they may be high offenses against morality, do not amount to legal cruelty. *Beers v. Beers*, 198 Va. 682 (1957).

Considering these principles and their application here, it is possible that in due course, during the litigation, cruelty can be established by corroborated evidence as alleged in the bill of complaint. At this juncture, however, the court finds the evidence insufficient.

while the family is intact. It follows that Mrs. Smith's requests for such *pendente lite* relief must also be denied.

After a ruling like this, you can expect the trial court to announce: "The court is not in the business of breaking up marriages. If it gets bad enough, someone will leave."

***... by the time the client comes to you for help, if the one-year period has not already passed, most divorcing spouses are unable to remain in the same home for an entire year before seeking relief.***

It is a drastic step to oust a spouse/parent from the marital home *pendente lite*. Exigent circumstances must exist—violence, threats of violence, acts that create genuine danger or reasonable apprehension of harm—for a court to take such action before all the evidence has been developed and presented. This is especially true where, as here, a lower court has already heard testimony about the alleged act of violence (the day-care center incident) and declined to grant a protective order.

The fact that Mrs. Smith is suffering from stress and anxiety related to her living with Mr. Smith and going through a divorce, as explained by Dr. Reese, is an inadequate basis for a court to remove Mr. Smith from the home. All contested divorces are stressful. Anecdotal evidence indicates that divorce is the most stressful event in a person's life except the death of a close relative. Courts would be on a slippery slope if they ousted a spouse from the marital home upon testimony that the other spouse finds the arrangement stressful.

This court has consistently refused to make awards of custody and support

While *Virginia Code* § 20-103 provides courts with the power to separate the parties, courts are hesitant to do so unless they feel circumstances within the house pose a significant threat to a party or the children. If the court believes the marital discord boils down to economic disagreements or simply an inability to get along with each other, your client will probably not succeed on a motion for exclusive use of the marital home. So how are you going to get your client divorced if neither party is willing to move out of the house and you just lost your *pendente lite* motion?

**The Long, Hard Road to Divorce—Separation under the Same Roof**

*Virginia Code* § 20-91(9)(a) provides that a divorce may be decreed upon application by either party after the "husband and wife have lived separate and apart without any cohabitation and without interruption for one year." The intent to live separate and apart does not need to be mutual, but must be possessed by one party.<sup>1</sup>

It is possible to live separate and apart under the same roof for purposes of obtaining a "no fault" divorce under *Virginia Code* § 20-91(9)(a). In *Bchara v. Bchara*,<sup>2</sup> the Court of Appeals affirmed the trial court's ruling that the wife had established that the parties lived separate and

apart even though they resided in the same home. The wife established that the following events occurred more than a year before the hearing requesting that the final decree be entered:

- After discovering a video tape of her husband having sex with another woman, the wife moved all of her husband's personal effects into the guest bedroom where he slept.
- The wife announced to her husband that she intended to live separate and apart.
- The wife announced to friends and neighbors that she and her husband were no longer a couple.
- The wife stopped depositing money in the joint account.
- The wife ceased having sexual intercourse with her husband.
- The wife's friend who visited weekly testified that she observed the parties living separate and apart in the home.
- The wife stopped accompanying her husband to church and family functions.
- The husband openly continued a sexual relationship with another woman.

The husband's evidence in opposition to entry of the decree—that his wife bought food for the family and cooked for him—did not persuade the court that the parties were still living together as a couple. "Continuing to share food and keep a clean house" are not behaviors that, as a matter of law, require a finding that the parties were living together.<sup>3</sup>

If your client has a number of factors that point toward living separately under the same roof, you may be able to bifurcate the divorce and have a final decree entered reserving equitable distribution. One way to start the clock ticking and develop evidence is to have your client deliver a letter to the other spouse citing your client's intention to live separate and apart under the same roof as of a date certain.

Realistically, however, by the time the client comes to you for help, if the one-year period has not already passed, most divorcing spouses are unable to remain in the same home for an entire year before seeking relief. There is simply too much tension, stress and unhappiness. You may need to search for other options.

### Fault-Ground Divorces

A spouse may immediately obtain a final decree of divorce upon establishing adultery, sodomy or buggery committed outside the marriage.<sup>4</sup> If any of these grounds exists, no waiting period is required.

A bed-and-board decree may be obtained on the grounds of cruelty, reasonable apprehension of bodily hurt, willful desertion or abandonment.<sup>5</sup> The purpose of a bed-and-board decree is to decree that the parties shall be perpetually separated; however, neither can remarry until such time as a final decree of divorce is entered.

Obtaining relief on any fault ground requires substantial evidence and requires more of the court's time than typically allotted for a *pendente lite* hearing.<sup>6</sup> You will need to request adequate time for the trial court to hear testimony of the parties and multiple witnesses.

### Bed-and-Board Decrees— Cruelty or Reasonable Apprehension of Bodily Hurt

Cruelty can be established by any conduct that makes continuation of the marriage unsafe or intolerable.<sup>7</sup> Cruelty does not have to take the form of physical violence. Purely verbal conduct can constitute cruelty.

[T]here may be cases in which the husband, without violence, actual or threatened, may render the marriage state impossible to be endured. There may be angry words, coarse and abusive language, humiliating insults, and annoyances in all forms that malice can suggest which may as effectually endanger life or health as personal violence, and which, therefore, would afford grounds for relief by the court. But it is obvious that what merely wounds the feelings without being

accompanied by actual bodily injury or actual menace—mere austerity of temper, petulance or manner, rudeness of language, want of civil attention and accommodation, or even occasional sallies of passion that do not threaten harm, although they be high offenses against morality in the married state, does not amount to legal cruelty. *Latham v. Latham*, 71 Va. (30 Gratt.) 307, 321 (1878).

Verbal cruelty must be extreme. In *Baytop v. Baytop*, 199 Va. 388, 100 S.E. 2d 14 (1957) the Supreme Court of Virginia recognized that there may be a cause of action for cruelty where there is no evidence of physical abuse or apprehension of bodily hurt. In *Ringgold v. Ringgold*, 128 Va. 485, 104 S.E. 836 (1920) the court held:

The husband has never offered any physical abuse or violence, and the wife has not claimed to have ever had any reason to apprehend bodily hurt. But violence and apprehension of bodily hurt, though nearly always appearing in suits for divorce on the ground of cruelty, are not indispensable ingredients of that offense. The authorities generally, including those in our own state, wisely allow for exceptional cases in which there may be extreme cruelty without the slightest violence. *Mental anguish, repeated and unrelenting neglect and humiliation, may be as bad as physical wounds and bruises, and may be visited upon an unoffending spouse in such degree as to amount to cruelty* even in the very strict sense in which that term ought always to be used in the law of divorce. (emphasis added)

Virginia has recognized that alcohol and substance abuse can be considered as factors in establishing an overall pattern of abuse sufficient to constitute cruelty. *Hoffecker v. Hoffecker*, 200 Va. 119, 104 S.E. 2d 771 (1958). But abuse of drugs or alcohol alone, will probably not warrant a finding of cruelty. *Seeborn v. Seeborn*, 7 Va. App. 375, 375 S.E. 2d 7 (1988).

Engaging in unprotected sex can provide grounds for a cruelty finding. The Virginia Court of Appeals in an unpublished decision held:

The chancellor did not plainly err in finding husband guilty of cruelty and constructive desertion. By engaging in sexual intercourse with multiple paramours without any form of protection against sexually transmitted diseases, and then continuing to have sex with his unsuspecting wife, husband rendered “cohabitation unsafe” for cruelty purposes [*Zinkban*, 2 Va. App. At 208, 342 S.E. 2d at 662 (citation omitted)], and palpably “intolerable” for constructive desertion purposes, *Gottlieb*, 19 Va. App. At 82, 448 S.E. 2d at 669 (citation omitted). To deny wife a divorce on this ground would be tantamount to placing upon her the legal duty to remain married (subject to conjugal obligations) to a man who, through numerous adulteries, put her at risk of sexually contracted diseases and whose behavior—based on his own admission—strongly suggested he would continue to do so in the future. Knowingly placing a spouse at risk of an HIV infection or some other sexual contagion is a cruelty the law does not require the innocent spouse to tolerate. *Shaffer v. Shaffer*, 2003 WL 21739039 (Va. Ct. App. Unpublished 2003).

The *Shaffer* ruling is a sign of the times. If a spouse engages in acts that threaten the health or safety of your client, you likely have a foundation for a cruelty claim.

### Desertion

Desertion is the termination of matrimonial cohabitation coupled with one spouse's intent to terminate the marital relationship.<sup>8</sup> Desertion usually occurs in connection with a physical separation of the parties. However, desertion can occur while the parties continue to reside under the same roof. In *Jamison v. Jamison*,<sup>9</sup> the Virginia Court of Appeals held that intentional withdrawal of sexual contact

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**Separation** *continued from page 29*

without just cause, coupled with the willful neglect of other marital duties constituted desertion even though the parties resided in the same home. A claim for desertion often is accompanied by a claim for cruelty.

**Conclusion**

Requests for bed-and-board relief diminished over the years, but it may be time to revive this form of relief as more divorcing couples refuse to separate. Dockets clogged with these motions may cause the pendulum to swing back to a time when courts awarded *pendente lite* exclusive use of the home to a spouse upon a showing that the parties were not going to reconcile and no good could come of the parties' stalemate to remain together in the home. ☞

Endnotes:

- 1 *Hooker v. Hooker*, 215 Va. 415, 417, 211 S.E. 2d 34, 36 (1975).
- 2 *Bchava v. Bchava*, 38 Va. App. 302, 563 S.E. 2d 398 (2002).
- 3 *See Chandler v. Chandler*, 132 Va. 418, 112 S.E. 856 (1922).
- 4 *Va. Code* § 20-91(1)
- 5 *Va. Code* § 20-95
- 6 Many courts only permit 30 minutes for *pendente lite* hearings. *See* Suggested Guidelines & Practices in Domestic Relations cases for the 12th, 13th, and 14th Circuits.
- 7 *Sollie v. Sollie*, 202 Va. 855, 120 S.E. 2d 281 (1961). *See also*, Peter N. Swisher, Lawrence D. Diehl and James R. Cottrell, *Virginia Family Law: Theory of Practice* §§ 7-3 (2004).
- 8 *Petachenko v. Petachenko*, 232 Va. 296, 350 S.E. 2d 600 (1986).
- 9 *Jamison v. Jamison*, 3 Va. App. 644, 352 S.E. 2d 719 (1987).



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