Announcing a New Virginia "Civil" Union: The Marriage of Chancery and Law

by Simon H. Scott III and W. Everett Lupton

A marriage may be made in heaven, but it has to be lived out on earth. —Anonymous.

Hopefully the above quotation will not be an epithet for Virginia's January 1, 2006, "marriage" of chancery and law. Theoretically, the marriage is a step forward and should simplify Virginia civil procedure. In practice, however, as in some marriages, there may be many headaches and arguments before everyone adjusts to the new system. Just remember: this marriage was carefully arranged by our General Assembly and blessed by our Judicial Council.[1]

First, a bit of history: The concept of "law" as opposed to "equity" is in many ways an accident. "Law courts" or "courts of law" enforced the king's laws in medieval times in England. Around the turn of the thirteenth and fourteenth centuries, under pressure from a nobility no longer distracted by the Crusades, courts of law restricted the types of claims they would hear and tightened the procedure that governed the hearing of those claims. Because the range of legal claims at that time was quite narrow, legal procedures were excruciating in their technicality. Jurors were regularly offered bribes. Many meritorious plaintiffs were denied relief.[2]

Another avenue to remedies could be accessed through filing a petition with the king by throwing oneself upon the mercy or conscience of the monarch. As time passed, the responsibility for resolving such petitions passed to the chancellor, a member of the King's Council. The chancellor was usually a clergyman and the king's confessor, and as such he was the keeper of the king's conscience. The Chancery began to resemble a judicial body and became known as the "Court of Chancery." The High Court of Chancery developed from the lord chancellor's jurisdiction. Unlike the common law courts, which were based on written precedent, the lord chancellor had jurisdiction to determine cases on behalf of the king according to equity or fairness rather than according to the letter of the law. The Office of the Lord Chancellor was responsible for issuing all writs. Through the centuries, Chancery developed its own set of rules while at the same time holding onto many of its distinctions.[3]

In modern practice, law and equity offer different remedies: the most common remedy a court of law can award is money damages. Equity, however, enters injunctions or decrees directing someone either to act or to forbear from acting. Often this form of relief is more valuable to a litigant.

Another of equity's distinctions is the unavailability of a jury. Equitable remedies can only be dispensed by a judge, as it is a matter of law and not subject to the intervention of the jury as trier of fact. The distinction between "legal" and "equitable" relief is an important aspect of common law systems, including the American legal system. The right of jury trial in civil cases is guaranteed by the Seventh Amendment of the United States Constitution, but only in cases that traditionally would have been handled by the law courts at common law. The question

of whether a case should be determined by a jury depends largely on the type of relief the plaintiff requests. If a plaintiff requests damages in the form of money or certain other forms of relief, such as the return of a specific item of property, the remedy is considered legal, and the Constitution guarantees a right to a trial by jury. On the other hand, if the plaintiff requests an injunction, declaratory judgment, specific performance, modification of contract or other nonmonetary relief, the claim would usually be one in equity.

Equity courts largely disappeared in the northeastern United States by the late 1700s. They remained for some time in mid-Atlantic and southern states. Federal courts retained the law/equity separation until the promulgation of the Federal Rules of Civil Procedure in 1938.[4] Prior to January 1, 2006, Virginia was one of few states maintaining separate divisions for legal and equitable matters in a single court. Chancery courts traditionally handled wills and probate, adoptions, guardianships, marriage and divorce, and corporate law.

In arranging the marriage of law and chancery, Virginia's General Assembly has made many small changes to the *Code of Virginia* in advance of the upcoming 2007 recodification.[5] The following is an example:

> Previous § 51.5-46. Remedies.
> A. Any circuit court having chancery jurisdiction and venue pursuant to Title 8.01, on the petition of any person with a disability, shall have the right to enjoin the abridgement of rights set forth in this chapter and to order such affirmative equitable relief as is appropriate and to award compensatory damages and to award to a prevailing party reasonable attorneys' fees, except that a defendant shall not be entitled to an award of attorneys' fees unless the court finds that the claim was frivolous, unreasonable or groundless, or brought in bad faith. Compensatory damages shall not include damages for pain and suffering. Punitive or exemplary damages shall not be awarded.
>
> New § 51.5-46. (Effective January 1, 2006) Remedies.
> A. Any circuit court having jurisdiction and venue pursuant to Title 8.01, on the petition of any person with a disability, shall have the right to enjoin the abridgement of rights set forth in this chapter and to order such affirmative equitable relief as is appropriate and to award compensatory damages and to award to a prevailing party reasonable attorneys' fees, except that a defendant shall not be entitled to an award of attorneys' fees unless the court finds that the claim was frivolous, unreasonable or groundless, or brought in bad faith. Compensatory damages shall not include damages for pain and suffering. Punitive or exemplary damages shall not be awarded.

Most allusions to the word "chancery" are being deleted from the *Code*. Some vestiges are being retained for lack of an alternative. For example, references to commissioners in chancery (for those jurisdictions that still use them) are being retained pursuant to Code § 8.01-609.1.

The General Assembly enacted a single form of pleading for law and chancery cases by modifying multiple *Code* sections. All legal and equitable pleadings filed in a circuit court after January 1, 2006, are named "civil." The *Code* changes have created a single form of pleading for civil actions. A single action will be able to incorporate both law and equitable issues, with the judge and jury deciding their respective matters. Multiple suits, transfers from law to equity and vice versa, or stays of one court's action to pursue the other exclusively are no longer necessary. Although pleadings are now uniform between law and equity, it is important to remember that legal and equitable claims will remain distinct and the substantive law unchanged by the marriage.

The Supreme Court of Virginia has followed the General Assembly's lead and modified the Virginia Rules of Court. The Court has repealed the entirety of both Rules 2 and 3, reserving Rule 2 for future use and enacting a "new" Rule 3. According to the "new" Rule 3:1, "[t]here shall be one form of civil case, known as a civil action. These Rules apply to all civil actions, in the circuit courts, whether the claims involved arise under legal or equitable causes of action, unless otherwise provided by law." Although the rules look similar, many of the terms for pleadings have changed. For example, "new" Rule 3:2. *Commencement of Civil Actions* states, "[a] civil action shall be commenced by filing a complaint in the clerk's office." Notice the nomenclature previously seen only in federal procedure; the quaint Virginia terms "bill of complaint" and "motion for judgment" appear now to be relics of our procedural past. Respondents to previous bills of complaint and defendants named in the obsolete motions for judgment are now defendants filing an answer.[6] Under the "old" Rules 2 and 3, respondents in chancery (or defendants at law) were required to file responsive pleadings within twenty-one days of service of the subpoena in chancery (notice of motion for judgment and motion for judgment). Under the "new" Rule 3, defendants still must file responsive pleadings within twenty-one days of service of the summons and complaint.[7] Subpoenas in chancery are another relic of the past. Process in all civil cases will be by a "summons" not a "subpoena in chancery" or "notice of motion for judgment."[8]

For many common law pleadings, however, the more things change, the more they stay the same. The entrenched demurrer as well as motions to dismiss, pleas in bar, motions for a bill of particulars, bills of particulars, and motions craving oyer all survive the marriage.[9] As previously mentioned, the time limits for filing responsive pleadings remain the same. Although the rules regarding counterclaims, cross-claims, replies as to new matters, commissioners of chancery, and the joinder of additional parties have been renumbered, each remains substantively the same as each "old" rule with only minor changes.[10] The third-party practice rule now explicitly allows a third-party defendant to assert both counterclaims against any plaintiff and cross-claims against any other third-party defendant.[11] According to "new" Rule

3:15, any interpleader proceeding brought pursuant to statute is governed by all of the provisions of Rule 3.[12] "New" Rule 3:16—General Provisions as to Pleadings is devoid of language allowing a party to file a motion for a bill of particulars amplify particular allegations of negligence or contributory negligence.[13]

"New" Rule 3:19 (Default) has several changes. Absent is any provision that a party in default waives objections to the admissibility of evidence. Notable additions: Rule 3:19(b) and Rule 3:19(d) are default defendant "escape hatches." Subsection (b) explicitly enshrines what has been a common practice of allowing a party in default to file a late responsive pleading with leave of court and good cause shown.[14] Subsection (d) explicitly permits the court within twenty-one days of entry of the order to relieve a party of the default judgment provided the satisfaction of certain predicate conditions.[15]

Two "new" rules attempt to answer one of the major marriage concerns, "to jury or not to jury?" Although "new" Rules 3:21 (Jury Trial of Right) and 3:22 (Trial by Jury or the Court) set forth jury demand procedure, the constitutional and statutory rights to trial by jury and the established practice of a judge deciding equitable claims remain unchanged.[16] A party may demand trial by jury on any issue "triable of right by a jury" in the complaint or in writing, filed with the court, and served on all parties after the date of filing and no longer than ten days after service of the last pleading directed to the issue."[17] A party can demand a jury trial on all of the issues or specify certain issues only for a jury trial. For these qualified jury demands, any other party can demand a jury trial on any or all of the remaining issues within ten days of filing the initial demand.[18] Rule 3:22(c) deals with the right to a statutorily authorized advisory jury on certain equitable issues and a statutorily authorized binding jury on certain equitable claims by a defendant.[19] Rule 3:22(d) allows the court with the consent of all parties to order an advisory or binding jury on any claim or issue.[20]

Rules 3:21 and 3:22 pertaining to jury practice bring up another valid point—the potential need for local rules to be supplemented and/or amended to be congruent with the "new" Rule 3. Although the statewide rules have changed, individual circuit courts will need to modify their local rules. A particular example that a coauthor of this article has experienced is one party demanding a trial by jury three days before scheduled trial date. Should the court grant the demand? If so, what conditions or consequences should be ordered? Another obvious need: each circuit must determine if pleadings will be rejected for "style" errors or to what extent and how long that circuit will accept errantly titled motions for judgment. When deciding this issue, circuit courts might bear in mind the maxim of the General Assembly in enacting the changes: to simplify matters for pro se litigants and attorneys who may occasionally revert to old habit of usage.[21]

Circuit court clerks have been preparing for the marriage for several months. Many decisions about operations have been made; others still need to be determined. Many of the clerks' offices will change their staffing, the physical appearances of their offices and their Web sites. Clerks have attended regional conferences to ease the transition. As deputy clerks receive and read attorney's filings, a concise, specific cover letter will be even more critical in determining how the clerk processes the filing. According to Bevill M. Dean, clerk of the Richmond Circuit Court, one of the most troublesome aspects may be fee assessments for new filings under the combined "civil" system.[22] Some circuits have already decided to allow mistitled pleadings for a yet-undetermined time.[23] Hopefully, circuit courts will not uniformly reject pleadings filed after January 1, 2006, with the headings "Motion for Judgment" or "Bill of Complaint." Effective January 1, 2006, all civil actions, both law and equitable, will be assigned a case number beginning with a "CL-" prefix. There will no longer be files assigned a case number beginning with "CH-". Reinstatements of equitable cases filed prior to January 1, 2006, will be assigned a new "CL-" number and cross-referenced with the old "CH-" number.

It seems reasonable to the authors to conclude that the creation of a civil division within the courts of general jurisdiction was meant to bring Virginia into line with the federal courts and the vast majority of the states. A single set of rules will no doubt simplify things for practitioners and pro se litigants. In short, the marriage is a good thing, and it should last. ⚖

Simon H. Scott III is a graduate of Norfolk State University and the University of Virginia School of Law. He is a principal at Sams & Scott PC, where he practices in the areas of civil litigation, trusts and estates, and criminal defense. Scott and his wife have three children and live in Norfolk.

W. Everett Lupton is a graduate of Old Dominion University and the University of Richmond T.C. Williams School of Law. He has tried numerous cases to verdict, and his practice emphases are motor vehicle collisions, premises injuries and the Railroad/Federal Employers Liability Act. Lupton also serves as an adjunct faculty member at Tidewater Community College and has written and lectured extensively on litigation issues. He practices at Rutter-Mills LLP in Norfolk.