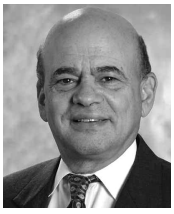
When is Separate Maintenance Applicable?

by Ronald R. Tweel and Elizabeth P. Coughter



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Very rarely do practitioners file a separate maintenance petition. Few of our clients have wanted to remain married and not file for divorce, even though they were in need of support. While it seems now that an action for separate maintenance, as opposed to a motion for spousal support pursuant to a divorce, is a distinction without a difference, at least one circuit court may have treated this claim as if the old common law applied. (*See Cutright v. Cunningham*, 19 Cir. 1C4479, 52 Va. Cir. 381 (2000), discussed below.) Today, the statutory scheme found in Virginia Code § 20-107.1 applies to both actions. Such similar treatment, however, was not always the law.

Prior to 1994, a separate maintenance action was not identified in state law. Va. Code § 20-107.1 reads:

> Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce, whether from the bond of matrimony or from bed and board, and upon decreeing that neither party is entitled to a divorce, the court may make such further decree as it shall deem expedient concerning the maintenance and support of the spouses. However, the court shall have no authority to decree maintenance and support payable by the estate of a deceased spouse.

In 1994, however, the opening paragraph was amended to specifically provide for separate maintenance.

> Upon entry of a decree providing (i) for the dissolution of a marriage, (ii) for a divorce, whether from the bond of matrimony or from bed and board, (iii) that neither party is entitled to a divorce, or (iv) for separate maintenance, the court may make such further decree as it shall deem expedient concerning the maintenance and support of the spouses. However, the court shall have no authority to decree maintenance and support payable by the estate of a deceased spouse. (emphasis added)

This means that all of the provisions, restrictions, and factors found in this statute now apply to separate maintenance actions.

Another important aspect of separate maintenance is that an action for separate maintenance could be maintained even after a divorce decree had been entered by a court of another state. In *Newport v. Newport*, 219 Va. 48, 245 S.E.2d 134 (1978), the wife, a Virginia resident, sought an award of support and maintenance in Virginia, while her husband pursued a divorce in Nevada. A Nevada divorce decree was entered prior to a ruling on the wife's action. The Nevada decree was entered without obtaining any personal jurisdiction over the wife.

The Supreme Court of Virginia in *Newport* gave full faith and credit to the Nevada decree, and recognized the "divisible divorce concept." *Id.* at 426. The Supreme Court in that case ruled that the legal obligation of the husband in *Newport* to support his wife was not extinguished by a court lacking personal jurisdiction over the wife. The Court reasoned:

> In summary, the duty of a husband to support his wife is a moral as well as a legal obligation; it is a marital duty, in the performance of which the public as well as the parties are interested; it is a duty which is an incident to the marriage state and arises from the relation of the marriage; and it is an inherent right which may be asserted in a divorce suit or in an independent suit therefore. See *Hughes v. Hughes*, 173 Va. 293, 4 S.E.2d 402 (1939); *Capell v. Capell*, 164 Va.

45, 178 S.E. 894 (1935); *Bray v. Landergren*, 161 Va. 699, 172 S.E. 252 (1934); *West v. West*, 126 Va. 696, 101 S.E. 876 (1920). *Id.* at 56.

The *Newport* Court further found that:

> The right of a wife to support is of such importance to the community, as well as to the parties, that it survives an absolute divorce obtained by her husband in an *ex parte* proceeding in another state. Thus we affirm that a decree of the lower court which accorded full faith and credit to the Nevada divorce decree insofar as that decree terminated the marital status of appellant and appellee; decreed that the Nevada court was without power to adjudicate the question of alimony; and held that the Nevada decree did not terminate appellee's right to support by appellant. *Id.* at 56.

See also, *Ceyte v. Ceyte*, 222 Va. 11, 278 S.E.2d 791 (1981). (A foreign divorce decree will be given full faith and credit on all issues when personal service has been obtained.)

What is the interplay between a separate maintenance action and a final decree of divorce? What happens to a separate maintenance order after a final decree of divorce? When personal jurisdiction has been obtained, a separate maintenance action is terminated upon entry of a final divorce decree. *Scott v. Scott,* 24 Va. App. 364, 482 S.E.2d 110 (1997). The Virginia Court of Appeals held in the *Scott* decision:

> [A] domestic divorce granted upon the wife's petition, or with personal jurisdiction over the wife, is held to terminate the wife's rights under an existing decree of separate maintenance. The reason seems to be that the wife has an opportunity to make a claim for alimony in the divorce action, and when she does not, or when her claim is decided against her, all rights that depend on the marriage are terminated. The rights under the separate maintenance decree are of that nature, although they are embodied in the decree. II Homer H. Clark, Jr., "The Law of Domestic Relations in the United States," § 17.4, p. 249, 250 (2d ed. 1987) (citing *Esenwein v. Esenwein*, 325 U.S. 279 (1945)). Despite arguments to the contrary, "there are cases which held that the separate maintenance decree is authorized (under the applicable statute) only when and so long as the parties are husband and wife. When the status ends, the maintenance order must end also." *Id.* at 251. This rationale applies with particular force to the instant case in which the wife was the moving party in both actions.

Counsel should be careful to inform the client of the impact of a subsequent divorce decree, but perhaps just as important, the precedential value of an order of separate maintenance.

What effect does fault have on a petitioner's request for permanent separate maintenance? Prior to the 1994 statutory amendment to Va. Code § 20-107.1, and the earlier amendments in 1988, fault was a **bar** to a request for separate maintenance. *Williams v. Williams*, 188 Va. 543, 50 S.E.2d 277 (1948); *Heflin v. Heflin*, 177 Va. 385, 14 S.E.2d 317 (1941). In *Williams*, the Supreme Court held:

> [The wife] cannot elect to depart from her husband's home and live separately from him and so destroy the matrimonial relations, and yet evoke the aid of equity to secure maintenance and support, unless such action on her part is based on conduct which would be grounds for release from the matrimonial status. To hold otherwise would relieve a wife of her matrimonial obligations and encourage the destruction of the marital relation where there were actually no grounds for divorce. *Williams* at 550.

The Court in *Williams* reversed the trial court's original award of separate maintenance in favor of the wife finding that she was not justified in leaving her husband.

Counsel should be careful to inform the client of the impact of a subsequent divorce decree, but perhaps just as important, the precedential value of an order of separate maintenance.

Before 1994, a separate maintenance action was an action in equity and common law. In the *Williams* case, the parties were married for approximately eleven years. After they separated, the wife filed a suit for separate maintenance. In her pleading she claimed that her husband was guilty of cruelty and constructive desertion and of

an illicit relationship with another woman. She alleged other misconduct that she claimed forced her to leave the marital home.

The husband denied the misconduct. The parties submitted allegations against each other. After weighing these allegations, the court held that a wife may, in a proper case, permanently leave her husband and recover separate maintenance without suing for divorce. This was to be based upon the common law duty of a husband to support his unoffending spouse. The court went on to hold that a wife may be decreed separate maintenance where she is living separate and apart from the husband without fault on her part. After a review of the evidence, the court found that although she had certain grounds to justify her leaving, that she, in fact, had condoned his actions and had resumed cohabitation. The court found that this condoning of his improper actions did not leave her in a position of being without fault. Consequently, the court held that she was barred from maintaining this equitable claim of separate maintenance. [*See also Heflin v. Heflin*, 177 Va. 385 (1941), 14 S.E.2d 317 (equity courts have jurisdiction to entertain suits for alimony on behalf of a deserted wife); *Wilson v. Wilson,* 178 Va. 427 (1941) (A court of equity has absolute power to award alimony either for a suit for divorce or suit for alimony alone.)]

More recent cases have made it clear that spousal support may be awarded to a spouse who has deserted the marriage.

Additionally, in *Montgomery v. Montgomery*, 183 Va. 96, 31 S.E.2d 284 (1944), the Supreme Court of Virginia recognized the general rule that a husband who has committed no breach of his marital duties is under no obligation to provide separate maintenance for his wife. Furthermore, the wife cannot claim separate maintenance if she is guilty of a marital misconduct. *Id*. at 100. In *Montgomery*, the Virginia Supreme Court reversed the trial court's award of alimony in favor of the wife. *See also*, *Haynor v. Haynor*, 112 Va. 123, 70 S.E. 531 (1911). (A wife who voluntarily abandons her husband should not be awarded separate maintenance unless her abandonment of him was without fault.)

When Va. Code § 20-107.1(B) was amended in 1988, the existence of a fault ground for divorce under Va. Code § 20-91(3) or (6), was considered a factor in determining whether to award support, and no longer a conclusive bar to such a support award. Prior to 1988, spousal support was statutorily barred if the payee was guilty of a marital fault, including cruelty and desertion, as well as adultery.

More recent cases have made it clear that spousal support may be awarded to a spouse who has deserted the marriage. This reasoning is consistent with Va. Code § 20-107.1(E) which makes the existence of a divorce fault ground a factor to be considered by the court. In *Lee v. Lee*, 13 Va. App. 118, 408 S.E.2d 769 (1991), the wife was found to be guilty of desertion and the court of appeals remanded the case to the trial court to determine how the wife's desertion should be considered in determining an award of spousal support.

As referenced above, in the year 2000, however, the Circuit Court of Fairfax County in *Cutright v. Cunningham*, 19 Cir. 164479, 52 Va. Cir. 381 (2000), denied the husband's request for a permanent award of separate maintenance in view of the fact of the husband's marital fault. The husband was found to be guilty of cruelty in placing his wife in reasonable apprehension of bodily harm. The court reasoned that under those circumstances, the husband's fault was a bar to him receiving permanent separate maintenance. This decision is curious since it appears that the trial court considered cruelty to be a bar to the husband's request for separate maintenance despite the change in Va. Code § 20-107.1. As shown below, the statutory scheme itself may have been the reason for this court's decision. Va. Code Ann. § 20.107.1(B).

The court of appeals has made it clear that Va. Code § 20-107.1 requires consideration by the trial court of 13 enumerated factors in determining a final support obligation. *Wright v. Wright*, 38 Va. App. 394, 564 S.E.2d 702 (2002). In *Wright* the wife was found guilty of post-separation adultery. She, however, was awarded spousal support. The court of appeals found that Va. Code § 20-107.1 characterized the method by which a final support obligation should be determined. The "manifest injustice" provisions of the statute applied. In that case, the wife suffered from a very serious bipolar disorder and was in a desperate situation, thus warranting the award of spousal support. The two pronged test found in the statute of 1) respective degrees of fault during the marriage

and 2) the relative economic circumstances of the parties was applied. Va. Code Ann. § 20-117(B); *Congdon v. Congdon*, 40 Va. App. 255, 578 S.E.2d 833 (2003).

One should not ignore a very important word in this statute when it provides:

> The Court, in determining whether to award support and maintenance for a spouse, shall consider the circumstances and factors which contributed to the dissolution of the marriage, specifically including adultery and any other ground for divorce under the provision of subdivision (3) or (6) of §20-91 or §20-95.
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> Va. Code Ann. § 20-107.1(B)

These two sections refer to conviction of a felony (3) and cruelty, caused reasonable apprehension of bodily hurt, or willful desertion (6). Consequently, a claim can be made (perhaps with no success) that a cruel or deserting spouse may be barred from spousal support.

There are several court of appeal cases which are important for practitioners to know when attempting to bar a spouse from support/maintenance. The case of *Watkins v. Watkins*, UNP, Record No. 3066-06-02 (Ct of App 11/13/07), dealt with the appeal by a wife who was barred from spousal support by the circuit court. The wife appealed the trial court's finding where she claimed that the court erred in finding she deserted and constructively deserted the marriage and failed to consider the economic circumstances of the parties as required by Va. Code Ann. § 20-107.1(E). The court began its analysis by citing the quote from the statute which is set forth above. The trial court in *Watkins* found that an award of spousal support to a wife was not warranted because of the following:

a. Her false accusations against the husband of committing adultery with ten women and one man, sexually molesting a former roommate,
b. Sexually abusing the parties' son,
c. Directing the husband to move out of the marital bedroom, and
d. Her assault of the husband.

The court found that this caused the dissolution of the marriage and amounted to desertion and constructive desertion. However, desertion is not a bar to support as adultery is, but falls within the "whether" provision of this statute (manifest injustice as exception to adultery). This is where that important word "whether" comes into play. In this case in the trial court, there was discussion between the court and counsel for the husband and counsel for the wife. The trial court made it clear that it agreed with the counsel for the wife that the statutory scheme of "whether" to award support must first require an examination of desertion or cruelty. The *Watkins* court concluded that the two step process is:

1. The trial judge has to consider the circumstances and factors which contributed to the dissolution of the marriage, specifically any fault based grounds for divorce in order to determine whether support was warranted.
2. If, and only if, the judge determined that support was warranted, the judge then had to consider the economic circumstances of the parties and all the other factors enumerated in Va. Code Ann. § 20-107.1(E) in order to determine the nature, amount, and duration of the award.

The court of appeals concurred with the trial court that finding that the spouse was unwarranted because of the wife's desertion, he did not need to perform the second step. (*See Davis v. Davis*, 8 Va. App. 12, 17, 377 S.E.2d 640 (1989); *Dukelow v. Dukelow*, 2 Va. App. 21, 25, 341 S.E.2d 208, 210 (1986*); Blevins v. Blevins*, 225 Va. 18, 21, 300 S.E.2d 743, 745 (1983).)

However, the practitioner needs to be mindful that most of the circuit courts with which we are familiar will rarely bar spousal support for a spouse upon the grounds of desertion or cruelty. It has to be quite severe in order for this to occur. One must also be familiar with the concept of "justification" which many courts use in order to justify an award of support for a spouse who leaves the marital residence. *Breschel v. Breschel*, 221 Va. 208, 269 S.E.2d 363 (1980); *Rowand v. Rowand*, 215 Va. 344, 210 S.E.2d 149 (1974); *Lee v. Lee*, 13 Va. App. 118, 408 S.E.2d 769 (1991); *Gottlieb v. Gottlieb*, 19 Va. App. 77, 448 S.E.2d 666 (1994). Justification is where the spouse is justified in leaving the marital residence, but not for reasons that amount to an independent claim for divorce. The impact of a justification is that support will not be barred.

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The bottom line is that one needs to apply the full body of spousal support law contained in § 20-107.1 when handling a separate maintenance action. The dichotomy between separate maintenance and spousal support no longer exists and perhaps some of our circuit judges may need to be educated to this fact, just as we were.

What are, therefore, some valid reasons for filing a motion or petition for separate maintenance?

1. No grounds for divorce exist;
2. Your client does not wish to pursue a divorce for religious or familial reasons;
3. The effect of a divorce action on the date of determining property/valuation issues;
4. Defendant may be moving out of state;
5. Not allowing defendant to engage in "divorce planning" with income or property; and
6. Client has moved out of the marital residence.

In conclusion, an action for separate maintenance may be appropriate. An award may be made based upon the same facts and law as if it was pursuant to a divorce action. The award will terminate, however, upon entry of a final decree of divorce. One should consider using this now statutory provision in the proper circumstance.