7-1975

Virginia Family Law: The Effect of The General Assembly's 1975 Revisions

Dulcey B. Fowler

DULCEY B. FOWLER

Virginia Family Law: The Effect of The General Assembly's 1975 Revisions

THE legislation concerning domestic relations enacted in the 1975 session of the Virginia General Assembly further liberalized grounds for dissolution of marriage, reorganized and redefined more logically many grounds for dissolution, and eliminated those vestiges of sexual discrimination remaining after the 1974 amendments. The big news is that the period of separation necessary for a no-fault divorce has been cut from two years to one year, and that women as well as men may now be required to pay not "alimony" but "support and maintenance to the spouse." The courts are to determine the level of any such support and maintenance for a spouse or children by taking into consideration six specifically enacted new factors actually derived from the prior case law on alimony and support.

Other developments are that former grounds for divorce which were based on conditions existing prior to marriage are now made impediments to marriage for which annulment rather than divorce may be decreed; that the legislation reflects a stricter attitude towards underage marriages by making them void rather than voidable; and that the Code will now for the first time explicitly ban marriages between individuals of the same sex.

Medical And Formal Requirements

Regarding medical and formal requirements for marriage, the new legislation makes few changes. Section 20-4 now requires the physician to submit a written report to the state whenever evidence of syphilis is found at the time of pre-marital serological testing. Section 20-27 is an example of the comprehensive changes throughout this new legislation in rendering sections sexually neutral in their application. It now permits the party celebrating a marriage to charge the parties, rather than the husband alone, a fee which can now be as much as $20 rather than the former

Dulcey Brown Fowler earned her J.D. (with honors) from George Washington University Law School in 1965. She held the Law School Trustees Fellowship and served as Associate Editor of the Law Review. After returning to this country from Canada where she worked for CCH, Canadian, Mrs. Fowler was admitted to the Virginia State Bar in 1970 and practiced law in Charlottesville from 1970 to 1972. She earned her LL.M. from the University of Virginia in 1973 and worked as a Staff Attorney with the Appellate Justice Project attached to the Virginia Supreme Court from 1973-74.

Mrs. Fowler is currently Assistant Professor of Law at Marshall-Wythe School of Law, College of William and Mary and teaches, among other courses, juvenile and family law.

$10. Meanwhile, Section 20-29 providing for a permissive certification to the Commonwealth of a Virginia resident's out-of-state marriage has been repealed.

Unlawful Marriages

The legislature has made major and beneficial changes to Chapter 3 covering unlawful marriages. The revision eliminates the confusion between grounds for annulment and grounds for divorce which has long been characteristic of legislation in Virginia and many other states.

(a) *Incest.*

First, Section 20-38 covering incestuous marriages has been repealed, and the long list of relatives among whom marriage was prohibited has now been replaced by Section 20-38.1(b) and (c) which apparently bar marriages only on the basis of blood relationship. The old legislation barred some marriages based on relationships created by affinity, but the new statute follows almost entirely the suggested wording of the Uniform Marriage and Divorce Act by declaring "prohibited" only marriages based on blood relationship, except for the special case of adoption. Accordingly, marriages are prohibited only between "an ancestor and descendant, or between a brother and sister, whether the relationship is by the half or the whole blood or by adoption"; and "an uncle and a niece or between an aunt and a nephew, whether the relationship is by the half or the whole blood." Both the decisions to omit from the prohibition the blood relationship between cousins and any relationship based on marriage may be due to doubts as to the justification for such prohibitions and perhaps in the latter case a desire to eliminate reflections of earlier sectarian influences on such legislation.[1]

(b) *Bigamy.*

New subsection 20-38.1(a)(1) also declares "prohibited" a marriage entered into "prior to the dissolution of an earlier marriage of one of the parties." While the term "prohibited" adopted from the Uniform Act might create some confusion as to whether bigamous and incestuous marriages are void absolutely or voidable only upon judicial decree, any question is removed by the retention of old Section 20-43 which makes bigamous marriages absolutely void and by new Section 20-45.1(a) which states that all marriages prohibited by 20-38.1 are void as well. These provisions indicate a stricter attitude on incestuous marriages, since formerly, under Section 20-45, incestuous marriages were merely voidable rather than void. However, new Section 20-38.1(b) makes legitimate the children of void marriages involving bigamy and incest.

(c) *Nonage and Incapacity.*

Section 20-45, which formerly made voidable those marriages involving incest, insanity, or incapacity from physical causes, has been repealed, and Section 20-45.1 has been substituted. It adds to the list of void marriages all marriages where one or both parties are under 18 and consent has not been obtained as provided by Section 20-48. Sections 20-48 and 20-49 have been revised to set the minimum age for both sexes for marriage at 16, with consent being required if either of the parties is under 18.[2] Consent may be given by either parent; a judge if there is no parent or the child has been adjudicated delinquent, dependent, or neglected; or the State Department of Corrections if the child has been committed to it, but not the Welfare Board as previously provided. The judge of the circuit court for the county or city where either party lives may consent, rather than just the judge of the court where the female resided, as formerly.

The previous age limits were 18 for boys and 16 for girls. However, while lowering the age limits, the state has now moved away from the majority rule elsewhere and taken a stricter attitude towards enforcement of age limits by making marriages between the ages of 16 and 18 void where there is no consent. Previous Virginia law had made underage marriages neither void nor voidable except by the underage party.[3] However, new section 20-45.1(b) retains the essential rule as to mental incapacity of old 20-45, which referred to "insanity," in providing that where one party is incapacitated because of "mental infirmity," the marriage is voidable only.

(d) *Homosexual Marriage.*

The new Section 20-45.2 declares "prohibited" marriages between individuals of the same sex, and, by analogy to the treatment of bigamous and in-

---

[1] Drinan, *The Loving Decision and the Freedom to Marry,* 29 Ohio St. L. J. 358, 370-71 (1968).

[2] However, if either party is under 16, the marriage will be valid if pregnancy is certified and appropriate consent obtained.

[3] Va. Code Ann. § 20-89 (1950); *Needam* v. *Needam,* 183 Va. 681, 686 (1943).

cestuous marriages, it seems clear that any such marriage would be absolutely void. Apparently, the inclusion of this Section was believed advisable because of the 1971 case of *Baker* v. *Nelson*,[4] in which the Supreme Court of Minnesota found that the absence of a statutory ban on same-sex marriages did not indicate that they were statutorily authorized.

Desertion And Nonsupport

Chapter 5 of the Code covering desertion and nonsupport has been revised with the primary purpose of rendering all provisions sexually neutral in their operation. Thus, the obligations as well as the benefits of support and maintenance of either the other spouse or children are extended to both sexes. For instance, Section 20-61 formerly made the husband responsible for the support and maintenance of his wife if she were in necessitous circumstances but the wife correspondingly liable only if the husband were incapacitated due to age or other infirmity. The Section now makes the parties equally liable in such circumstances. In addition to rendering several other sections sexually neutral, the word "alimony" has been deleted entirely and "support and maintenance for the spouse" substituted.

Section 20-88 concerning support of parents by children has also been revised. The age at which such duty arises has been raised from 17 to 18, and the obligations and benefits have been extended so that females as well as males are liable. Moreover, the father need not be "aged or infirm" in order to be entitled to such support. The section has also been changed so that the juvenile and domestic relations district courts are given exclusive jurisdiction of parent support cases pursuant to the 1973 reorganization of the state court system, and the child is now to be relieved of the duty of support of parents if the parent is "otherwise eligible for and is receiving public assistance or services under a federal or State program." This language replaces a previous awkward proviso that the child's financial resources should not be considered in determining his parent's eligibility for assistance.

As to the Revised Uniform Reciprocal Enforcement of Support Act, only Section 20-88.22:3 which provides for immunity of an obligor from criminal prosecution for refusal to answer a question during proceedings under the Act has been changed, and it has been made sexually neutral.

[4] *Baker* v. *Nelson*, 191 N.W.2d 185 (Minn. 1971).

Divorce, Affirmation And Annulment

(a) *Annulment.*

As indicated earlier, Chapter 6 covering divorce, affirmation and annulment has been extensively revised. Section 20-89, which provided generally that both void and voidable marriages might be decreed null but that an underage marriage could not be annulled except at the behest of the party underage at the time of marriage, has been repealed. It has been replaced by Section 20-89.1 which includes subsections (a) through (d). The Section must be read carefully to discover that subsections (a), (c), and (d) end with periods and are therefore independent of one another. However, subsection (b) ends with only a semicolon which indicates that it must be read together with subsection (c) in order that the latter be interpreted correctly.

Subsection (a) provides generally that when a marriage is alleged to be void or voidable for any of the statutorily specified causes or by virtue of fraud or duress, either party may institute a suit for annulment. The subsection thus parallels fairly closely the repealed section except that references to new sections are incorporated and fraud and duress explicitly introduced into the Code for the first time as marital impediments.

However, subsections (b) and (c) together accomplish the incorporation into this annulment section of former grounds for divorce which covered conditions prior to marriage and were therefore more properly cognizable in annulment suits. Thus, grounds for divorce formerly listed as subsections 20-91(2), (4), (7), and (8) dealing with impotence, prior conviction, pregnancy of wife by another man, and previous prostitution of the wife, have not only been transferred to the annulment section but rendered sexually neutral in the process. Accordingly, annulment can now be decreed where the husband, without knowledge of the wife, has fathered a child born to another woman within ten months after the date of the marriage or where either party has been, without the other's knowledge, a prostitute.

In keeping with the prior treatment of these impediments as grounds for divorce, subsection (d) provides that there shall be no annulment on the basis of any of these four impediments if the party seeking annulment has cohabited with the other after knowledge of the relevant facts or in any case where the annulment is not sought within a two year period after the marriage. This subsection has obviated the

need for old Section 20-92 covering the same subject when these impediments were treated as divorce grounds, and it has been repealed.

Subsection (d) of 20-89.1 raises a question of interpretation. In line with the old section 20-89, it provides that an annulment on the grounds of nonage cannot be granted to the party who was of the proper age at the time of the marriage. This provision was logical under the old legislation where the marriage was treated as valid until and unless the party underage at the time had it nullified by court decree. However, new Section 20-45.1 makes such marriages void as noted earlier. If the term is intended to be used in the usual sense of absolute invalidity, then the party marrying an underage person is prohibited from obtaining a judicial declaration that his supposed marriage never in fact existed at all. Since this party could validly marry another person it would seem to be in his and the public's interest to allow judicial clarification of his supposed marriage as in the case of all other void marriages as provided by subsection 20-89.1(a).

(b) *Divorce and Support and Maintenance.*

Section 20-91 which enumerates grounds for absolute divorce has been clarified by the deletion of the former grounds now made impediments to marriage and incorporated into Section 20-89.1. Other than those deletions, there are four rather important changes. The first ground which includes adultery, sodomy, and buggery now has been modified to include only sodomy and buggery committed outside the marriage. This change is in line with the general philosophy that sexual conduct between spouses should not be a matter for state concern.

Subsection (3) concerning penitentiary confinement subsequent to marriage has also been clarified so that it now requires conviction of a felony, more than one year's sentence, and subsequent confinement without cohabitation after knowledge of such confinement. In subsection (6), cruelty and reasonable apprehension of bodily hurt are for the first time introduced into this Section covering grounds for absolute divorce. Previously, they were named only as grounds for a divorce *a mensa* but were judicially treated as "constructive desertion" after the lapse of the statutorily prescribed one year waiting period. Such constructive desertion was thus held a ground for absolute divorce under this subsection which formerly covered explicitly only desertion or abandonment.

The new wording of subsection (6) provides that an absolute divorce may be decreed "after a period of one year from the date of such act [of either desertion or cruelty]." Obviously, it was intended to legislatively overrule the former case law that held that desertion must be continuous for the required statutory period and that the offending party had a right to return during the waiting period which return would bar a divorce.[5] Such legislative intent is consistent with the judicial interpretation of the last ground for divorce listed in subsection 20-91(9), *i.e.* separation for one year or no-fault divorce. The judicial interpretation of legislative intent as to the separation ground has been that fault is not to be considered a factor and that a divorce should be granted after the statutorily prescribed period even if the original separation was not mutually voluntary but in fact amounted to desertion.[6] Both the cruelty and desertion ground and the separation or no-fault ground now require only one year's living apart. Thus, consistency requires the overturning of the old case law on desertion, since a spouse who alleges desertion as grounds should not be required to take the offender back during the statutory period if there is no such requirement in the case of separation.

Most important, subsection 9 covering the separation or no-fault ground has been revised so that the statutory period has been cut from two years to one year, as stated previously. Also, the three paragraphs of the subsection have been newly labeled (a), (b), and (c), and new paragraph (c) formerly providing that reliance on this ground for divorce could not in any way lessen any obligation of support to a wife has been made sexually neutral as to the possibility of such support.

Several less important changes have been made in succeeding sections. Section 20-94 covering the effect of cohabitation after knowledge of adultery has been extended to apply to sodomy and buggery as well and to bar action by the party alleging such act rather than "the plaintiff" as formerly, provided procurement or connivance can be shown. Section 20-95 covering divorces *a mensa* now specifies "wilful" desertion in line with similar changes in Section 20-91. Section 20-99 now extends the requirement of corroboration of the parties' testimony to suits for annulment and affirmation as well as for divorce. Section 20-101 requiring that the divorce decree show the race of the parties has been repealed, and changes to 20-102 make it no longer necessary to prove an offer of recon-

[5] *Wright* v. *Wright*, 125 Va. 526 (1919).

[6] *Canavos* v. *Canavos*, 205 Va. 744 (1965).

ciliation in a divorce suit for "wilful" desertion. Furthermore, Section 20-103 granting the court authority to order support payments pending suit has been made sexually neutral, and Section 20-104 regarding orders of publication against nonresident defendants has been extended to make such service available in suits for affirmance of marriage.

However, major revision has occurred regarding Section 20-107. Generally, this section providing that the court may decree regarding the estate and maintenance of the parties, custody of children, and resumption of a former name has been rendered sexually neutral. The word "alimony" has again been replaced by "support and maintenance of the spouse" throughout. Moreover, new language appended to the section lists six specific factors for courts to consider in determining support and maintenance either for the other spouse or children. These are as follows:

> (1) the earning capacity, obligations and needs, and financial resources of the parties;
>
> (2) the education and training of the parties and the ability and opportunity of the parties to secure such education and training;
>
> (3) the standard of living established during marriage;
>
> (4) the duration of the marriage;
>
> (5) the age, physical and mental condition of the parties;
>
> (6) such other factors as are necessary to consider the equities between the parties.
>
> Provided, however, that no permanent support and maintenance for the spouse shall be awarded by the court from a spouse if there exists in his or her favor a ground for divorce under any provision of §§ 20-91 (1) through (8) or 20-95 [fault grounds for either divorce *a mensa* or *a vinculo*].

This language is in accord with the prior state case law regarding the award of alimony and support and appears to be sufficiently comprehensive.

Several other sections have been revised to reflect the new support and maintenance terminology as applied to the spouse, including Sections 20-109 regarding changes in support and 20-110 covering cessation of such payments upon remarriage. Section 20-112, regarding notice when proceedings are to be reopened, has been made applicable to support for a spouse as well as children, and now explicitly states that reopening may be for the purpose of increasing, decreasing, or terminating any such payments.

Other sections which have been rendered sexually neutral and have substituted the term maintenance and support for the spouse in place of alimony include: §§ 20-113 (respondent fails to perform order for support and maintenance); 20-114 (recognizance may be required for compliance with order); 20-115 (commitment and sentence for failure to comply); and 20-122 (advertising offer to obtain divorce). In addition, Sections 20-121, (merger of divorce *a mensa* with divorce *a vinculo*) and 20-121 (decree *a vinculo* without divorce *a mensa*) have been revised to reflect the new explicit requirement of "wilful" desertion.

Significantly, Section 20-119 has been repealed. It formerly permitted courts to restrain a party guilty of adultery from remarrying where adultery was the ground of the divorce. This change goes along with the general liberalization of grounds for divorce occurring in recent years in the successive shortening of the statutory periods for divorce and the nation-wide trend away from fault ideas regarding marital breakdown.[7]

In general, the Virginia General Assembly should be congratulated for having accomplished this year a comprehensive and progressive revision of the domestic relations law of the state.

---

[7] One-third of the states have adopted no-fault grounds for divorce based on "irretrievable breakdown" or "irreconcilable differences" between 1970 and 1974.