

Virginia's Equitable Distribution Act

By David E. Shipley

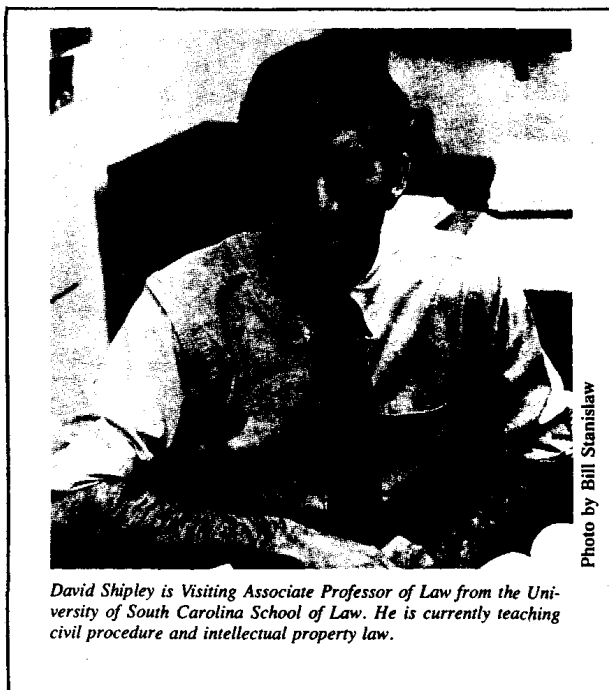


Photo by Bill Stanislaw

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For many years Virginia's laws dealing with the economic consequences of divorce lagged behind the pertinent legislation and case law in the vast majority of the states. Traditional alimony was the only form of reimbursement allowed to a divorced spouse and until 1982 Virginia was one of only three states following the common law title approach to the distribution of property upon divorce; his, hers or theirs depending on legal title. In contrast, most states had come to recognize marriage as a partnership and were distributing property upon dissolution in accordance with equitable principles or, in eight states, under a community property regime.

In 1977 the legislature attempted to ameliorate some of the difficulties resulting from this traditional approach to support and property division. It authorized the courts to award a lump sum payment to a spouse in appropriate cases after considering, among other factors, the monetary and nonmonetary contributions of each party to the well-being of the family. Although this recognition of homemaker services was laudable, the Virginia Bar was not satisfied with that legislation and many lawyers believed the adoption of an equitable distribution scheme was necessary. The General Assembly responded in its 1982 session by enacting a comprehensive new statute replacing section 20-107 with sections 20-107.1 to 107.3, which deal with spousal support, child custody and support, and the allocation of property on equitable distribution principles. The most dramatic change brought about by this legislation is contained in section 20-107.3—the

adoption of a form of equitable distribution of marital assets. The new law is commonly known as the "equitable distribution act" (EDA) and its passage revolutionized Virginia's domestic relations law and brought the Commonwealth into the mainstream.

Underlying the EDA is the belief that a spouse should have an interest in the assets accumulated during marriage which is not reflected or protected by the traditional approach to property which focuses on who holds legal title to the assets. The section recognizes marriage as a partnership and it allows the court, upon decreeing a final divorce or annulment, to enter a monetary award "[b]ased upon the equities and the rights and interests of each party in the marital property." It grants the courts broad discretion to effect greater justice and fairness between the spouses so as to make the economic incidents of divorce fair and equitable.

The EDA's rationale and objectives are easy to state but describing and understanding the new law's operation is another matter. Problems and pitfalls abound. Section 20-107.3 sets up a three step process by which the court, in its discretion, may make a monetary award for the distribution of marital property. First, the court must, if requested, identify all the real and personal property in issue and classify it as marital or separate property. Second, all the property must be valued. Experience in other equitable distribution jurisdictions shows that these steps often may be complex, time-consuming and very costly. Once the property is valued the third step requires the court to consider eleven factors to determine whether to make a monetary award. The EDA does not require an award—the grant and amount of the award is in the court's discretion. In addition, the law does not authorize the court to distribute the marital property. Rather, the court uses that property as the basis for making a monetary award. Virginia's EDA is a hybrid statute.

Among the eleven factors are the monetary and non-monetary contributions of each party to the well-being of the family and to the acquisition, care and maintenance of marital property (these factors call for recognition of a homemaker's contributions); the duration of the marriage; the ages and physical and mental conditions of the parties; the factors which led to the dissolution of the marriage (marital fault); tax consequences; how and when items of property were acquired; and, there is a catch-all provision, "[s]uch other factors as the court deems necessary or appropriate to consider in order to arrive at a fair and equitable monetary award." Some of the factors, in particular marital fault and the catch-all, are controversial and it is uncertain which ones are of the greatest importance. The statute does not assign particular weights so it is reasonable to assume that what constitutes equitable distribution will depend on the facts of each case. For instance, a court might be justified,

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after weighing all the factors, to make a fairly high monetary award to a 45 year old homemaker whose marriage to a successful lawyer is dissolved after 20 years, while a considerably smaller award may be appropriate for a similarly situated 45 year old homemaker whose marriage lasted only three years. It is important to remember that equitable does not mean equal and that the EDA allows courts the discretion and flexibility to fashion appropriate awards.

The practice of domestic relations law in Virginia has been dramatically affected by the EDA. It has been called a "Divorce Lawyer's Relief Act," while a similar statute in another jurisdiction was described as a lawyer's nightmare and a judge's ball and chain. The costs of divorce litigation may increase. Comprehensive discovery may become an absolute necessity. Tracing problems will be encountered. The courts will have to determine how spousal and child support should be affected by the

property distribution. Separation agreements should become much more common when the parties see that they may fare better through negotiation and compromise instead of leaving the distribution of their economic futures to the judge's broad discretion. Also, it is very likely that the courts will face a wide variety of tough questions on how the EDA should be construed and applied with regard to advanced degrees, established professional practices, partnerships, business licenses, retirement plans, pensions, and a host of other "property" interests. Although there is a steadily growing body of case law in many states to look to for guidance on these questions, the results on particular issues vary from state to state.

It will be impossible to assess the actual impact of the EDA on Virginia's domestic relations law and practice for several years because the bench and bar must have a chance to live and work with it. Notwithstanding these uncertainties and the statute's complexity, the EDA is a very important development and it should lead to greater fairness in the economic consequences of divorce.

*This article is based on a student comment at 17 Richmond Law Review 347 (1983) and an article by Sharon Henderson, Ingrid Hillinger and David Glazer published in 8 Virginia Bar Association Journal 4 (1982).