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THE NINTH GROUND FOR DIVORCE IN VIRGINIA: STATUTORY SEPARATION FOR THREE YEARS

D. A. HENDLER AND W. KENDALL LIPSCOMB

Virginia added a ninth ground for divorce *a vinculo* which took effect in 1960. The ground applies "on the application of either party if and when the husband and the wife have lived separate and apart without any cohabitation and without interruption for three years, and at the time of separation were each resident and domiciled in Virginia. Divorce on this ground shall not be granted where service of process is by publication."¹

This is not a unique ground for divorce, for many states have similar statutory provisions.² The purpose of granting a divorce after the lapse of a statutory period of separation can best be found in the expressions of the courts which have interpreted such a statute. The Nevada court stated:

The legislative concept embodied in the statute is that when the conduct of the parties in living apart over a long lapse of time without cohabitation has made it probable that they cannot live together in happiness, the best interest of the parties will be promoted by a divorce.³

The Louisiana court stated that it was a matter of public policy to grant a divorce after there has been separation for a statutory period because:

[I]t is better for spouses who have been living separately and apart for the statutory period and have found reconciliation to be hopeless to have an opportunity to re-marry and re-establish the family relationship.⁴

¹ VA. CODE ANN. § 20-91 (9) (Repl. Vol. 1960).

² Alabama, Arizona, Arkansas, Louisiana, Maryland, North Carolina, Rhode Island, Wyoming, Washington, and Washington, D. C. See also, 51 A.L.R. 763 and 138 A.L.R. 341.

³ George v. George, 56 Nev. 12, 41 P.2d 1059, 1060 (1935).

⁴ Otis v. Bahan, 209 La. 1082, 1083, 26 So.2d 146, 148 (1946).

To date there are no Virginia cases interpreting the new statute, but there are ample decisions from other jurisdictions to which the Virginia courts can look if and when interpretation becomes necessary.

An immediate question arising under the amendment is when does the three year statutory period begin to run. Will a person have to wait three years from the enactment of the amendment, or is it to apply retroactively so that any person who qualified at the time of the enactment will be able to avail himself of the remedy? This precise question was answered by the Arizona and Louisiana courts both holding the statute to be retroactive and not confined to rights and persons coming within its scope in the future.⁵ "The act is remedial in its nature, and it took effect upon people as it found them . . . (it gives) the remedy to those who have lived separate and apart for more than (the statutory period)." ⁶ In *Schuster v. Schuster*, the defense was offered that the persons must live apart for the full statutory period after the enactment of the statute. The Arizona court rejected this contention and said the statute included those years of separation prior to the enactment.

It is plain . . . from the language used . . . that the legislature intended it to apply to situations existing when it was passed, for it expressly states that a divorce may be granted the husband and wife *who have not lived* or cohabitated together (for the statutory period). This clearly refers to the past as well as to the future. [Emphasis added]⁷

The Virginia statute likewise provides relief where the persons "have lived separately" and should be interpreted so as to be given a retroactive application.

The Virginia statute gives relief upon "the application of either party," but is there an implication that the party making application must be without fault? At first glance, it would

⁵ *Dowie v. Becker*, 149 La. 160, 88 So. 777 (1921); *Schuster v. Schuster*, 42 Ariz. 190, 23 P.2d 559 (1933).

⁶ *Dowie v. Becker*, *supra*, note 5, at 779.

⁷ *Schuster v. Schuster*, *supra*, note 5, at 562.

seem that fault would be immaterial, but some states have declared that absence of fault is implied in such a statute. There are conflicting opinions among those jurisdictions adopting separation as a ground for divorce as to whether recrimination is a good defense. On the one hand, the Louisiana statute gives the court no discretion, but states that "a divorce *shall* be granted on proof of the continuous living separate and apart of the spouses . . ." [Emphasis added].⁸ On the other hand many statutes give the court room to exercise discretion in granting the divorce. The Virginia statute is prefaced "a divorce . . . *may* be decreed . . ." [Emphasis added]. This leaves the granting of the divorce to the discretion of the court. This does not necessarily mean that the court has discretion to consider fault. In Nevada the trial court is given discretion to grant the divorce for the statutory separation, however, in *George v. George*,⁹ the Nevada court held immaterial defendant's allegation that the plaintiff failed to introduce sufficient evidence upon which the court could exercise its discretion. The court interpreted the defendant's allegation to mean that the trial court must have evidence of the marital conduct of the spouses so that it may determine which party was the guilty party. The judge said that this is not what the court must consider to exercise its discretion, but it is "the probability of their being able to live together in such a manner as to be for their best interests and the best interests of society."¹⁰ The Rhode Island court, on the other hand, has held that good or bad conduct is admissible to aid the court in exercising its discretion, however the conduct of the plaintiff is not decisive of the question, In *Smith v. Smith* it stated as follows:

It is evident that the conjugal life and the family life of the parties are permanently disrupted. There is no inclination for and no prospect of a reconciliation. Nothing is left of the marriage relationship but the legal tie. Respondent contends that regardless of these facts, petitioner should be punished for his misconduct by a refusal of the trial justice to dissolve the marriage. If it appeared that

⁸ LA. REV. STAT. § 9:301 (1950).

⁹*Supra* note 3.

¹⁰ *Id.* at 1060.

there was any advantage to the family or to the state in continuing the marital status, the divorce might well be denied. But no such advantage is apparent. On the contrary, it is plain that to compel the parties to continue in their present status would be prejudicial to the parties and their children.¹¹

In reality, Rhode Island, as Nevada, held that the discretion is based on the best interest of the parties and society and not on the fault of the parties.

Kentucky's statute¹² expressly states that where the parties live separate and apart for the statutory period they are entitled to a divorce regardless of who is at fault with regard to the separation. The Arizona and Wyoming provisions are slightly different from the Virginia provision, but their courts' handling of the problem of recrimination might be helpful to the Virginia courts.

The Arizona statute provides: ". . . when *for any reason* [Emphasis added] the husband and wife have not lived or cohabited together for the statutory period . . ." ¹³ they may get a divorce. This revised provision omitted "on application of the aggrieved party" which appeared in the 1913 code.¹⁴ Under the revised section the court rejected the defendant's argument that the omitted clause should be implied so that the offending party could not take advantage of his own wrong.¹⁵

The Wyoming court, under a statute which was very much like the one in Virginia, had held that it did not matter whose fault brought about the separation. The Wyoming legislature added an amendment which read:

. . . but not upon such grounds if such separation has been induced or justified by cause chargeable in whole or material

¹¹ *Smith v. Smith*, 54 R.I. 236, 172 Atl. 323, 324 (1934).

¹² KY. REV. STAT. ANN. § 403.020 (1943).

¹³ ARIZ. CODE ANN. § 27-802(9) (1939).

¹⁴ ARIZ. REV. STAT., para. 3859 (1913).

¹⁵ *Rozboril v. Rozboril*, 60 Ariz. 247, 135 P.2d 221 (1943).

part to the party seeking divorce upon such grounds, in the action.¹⁶

Even with this proviso, the Wyoming court adopted a very liberal interpretation.¹⁷ It held that the plaintiff merely has to show that there was a living apart to create a *prima facie* presumption that he is the injured party and entitled to a divorce. It should be noted that this is not a conclusive presumption, and the defendant may show who in fact is the injured party and by so doing preclude the divorce.

Virginia would have no reason to adopt such an interpretation under its statute which does not have such a proviso, but it could find authority to do so in other state decisions. The North Carolina court in *Sanderson v. Sanderson*,¹⁸ reversed an earlier decision which had held that the subsection providing for separation as grounds¹⁹ was separate from the main part of the statute which provided that only the injured party could bring the suit. This interpretation, of course, makes the North Carolina statute different from Virginia's statute. The North Carolina courts are as liberal as possible within the restrictions of their statute. In *Long v. Long*,²⁰ it was held that the applicant for the divorce need not be the injured party.

Virginia should not consider fault of the applicant in reaching its decision. The majority of the jurisdictions do not²¹, and of those which do many are forced to do so because of the wording of their statutes. It should be noted also that the latter jurisdictions are as liberal as they are permitted to be under the expressed restrictions of the statutes. Virginia's statute has no such expressed restrictions. The legislature set up no barriers, and the courts should not create their own. It is hoped that the Virginia court will remember:

¹⁶ Wyo. Session Laws 1941, ch. 2, § 35-108 (now WYO. COMP. STAT. § 35-3905 (1945)).

¹⁷ *Dawson v. Dawson*, 62 Wyo. 519, 177 P.2d 200 (1947).

¹⁸ 178 N.C. 339, 100 S.E. 590 (1919).

¹⁹ N. C. Consol. Stat., ch. 30, § 5 (now N. C. GEN. STAT. ANN. § 50-6 (Repl. Vol. 1950)).

²⁰ 206 N.C. 706, 175 S.E. 85 (1934).

²¹ 111 A.L.R. 870 and 166 A.L.R. 503.

The basis for a divorce on the grounds of living separate and apart . . . is not the wrongdoing of one of the parties. It is the policy of the state, where the husband and wife have, for so long a time, failed to become reconciled not to compel them to continue in a marital status which is ostensible rather than real.²²

NATURE OF THE SEPARATION

One of the mandatory requirements of the Virginia statute is that the parties must have lived separately for the entire statutory period. The Virginia courts will be asked to decide the nature of the separation. This question has come up often in the several states which allow divorce for mere separation and has become a very important element in deciding the cases. One case holds that:

. . . the separation of the married persons referred to in the statute means more than mere living apart. Business and other necessities may require the husband to live in one place and the wife in another. A separation of this character is not within the meaning of the statute. The separation intended . . . is a separation by which the marital association is severed. It means the living asunder of the husband and wife. It is a voluntary act and the separation must be with the intent . . . to live apart, because of their mutual purpose to do so, or because one of the parties with or without the acquiescence of the other intends to discontinue the marital relationship.²³

This point can be illustrated by a case in which the husband was inducted into the navy in January of 1943.²⁴ His wife remained at the marital domicile until May of 1943 then also left the home. The husband petitioned the court for an absolute divorce in February of 1945 on the grounds of statutory separation under the statutory period of two years. The divorce was denied because the separation was not voluntary. He did not leave the marital domicile by his own free will, but was required to do so by the induction. Further, he had failed to

²² *McKenna v. McKenna*, 53 R. I. 373, 166 Atl. 822, 823 (1933).

²³ *Supra* note 4, at 148.

²⁴ *Id.* at 146.

show he intended to abandon the marriage when he departed. The action would however have lain two years from the date on which the wife left the marital domicile with the intent of discontinuing the marriage. On the other hand where the separation took place prior to the induction, the Louisiana court held²⁵ that the statutory period kept running through the years in service and in this case the period was sufficient. The latter case presented another question, which in law is not settled. Must the separation be voluntary for the full statutory period or will a bona fide request for reconciliation or an intervening involuntary confinement stop the running of the period and dissolve the ground for divorce? The Washington, D. C. statute²⁶ expressly states that the separation must be "voluntary." The courts interpret²⁷ this to mean that the separation must be voluntary for the full statutory period and not only at the inception. The burden, however, was placed on the defendant to show that the separation was no longer voluntary.

This problem most often arises where there is insanity of one of the parties during the required period. The courts have treated insanity as a special situation. This can be seen in the case of *Camire v. Camire*²⁸ where the Rhode Island court refused to grant a divorce when one party was in an insane asylum for a part of the statutory period, even though there was no provision requiring the separation to be voluntary. From the cases that have passed on this point, the majority rule is apparently that a person should be in a normal state of mind for the full period²⁹. The contrary view holds that the right attaches immediately upon separation and is completed at the end of the statutory period and the intervention of

²⁵ *Davis v. Watts*, 208 La. 290, 23 So.2d 97 (1945).

²⁶ D. C. CODE § 16-403 (1940).

²⁷ *Bowers v. Bowers*, 143 F.2d 158 (D.C. Cir. 1944).

²⁸ 43 R. I. 489, 113 Atl. 748 (1921).

²⁹ 111 A.L.R. 872. Where the jurisdiction holds that the separation must be by consent of both parties, it is held that if one of the parties is insane at the time of separation or during the period of separation, the divorce must be denied since the insanity prevents the giving of the required consent.

insanity is immaterial. Louisiana and Kentucky³⁰ allow a divorce when the separation is voluntary at its inception even though insanity intervenes, but they will not grant a divorce when the defendant was insane at the time of the separation. In the latter situation, the separation is not considered to be voluntary.

The Kentucky court rejected the idea that the separation should continue to be voluntary throughout the statutory period. In *Colston v. Colston*³¹, the parties voluntarily separated in 1932. The plaintiff was later confined to prison from 1936-1942. He brought an action for divorce on grounds of statutory separation. The defense that the separation was not voluntary during the statutory period was rejected. The court allowed the inclusion of the period of imprisonment, even though the action was brought by the prisoner. The judge concluded that:

... no reason or purpose behind the statute is to be served by holding that the period of confinement may not be considered as a living separate and apart within the meaning of the statute. No such exclusionary language appears in the statute and none should be read into it, when it is clearly unnecessary to do so to effectuate the legislative intent.³²

There is strong disagreement among the courts as to whether there must be mutual consent of the parties. The majority of the courts have held it sufficient if the separation is voluntary as to only one of the parties and that mutual consent is not required.³³ There are few cases which adopt this view expressly, but it is certainly implied in those jurisdictions holding that the fault of the plaintiff does not preclude a granting of divorce. The wording of the Virginia statute lends itself to either interpretation. The Kentucky court rejected³⁴ the idea of mutual consent as a prerequisite. A

³⁰ *Galiano v. Monteleone*, 178 La. 567, 152 So. 126 (1933); *Andrews v. Andrews*, 120 Ky. 718, 87 S.W. 1080 (1905).

³¹ 297 Ky. 250, 179 S.W.2d 893 (1944).

³² *Id.* at 894.

³³ 17 AM. JUR., *Divorce and Separation* § 181 (1957).

³⁴ *Davis v. Davis*, 120 Ky. 440, 43 S.W. 168 (1897).

wife was given a divorce from her husband who spent the statutory period in prison. The separation certainly was not entered into by a mutual agreement to break the marriage vows. It was brought about by the husband's involuntary incarceration and the wife's desire to end the marriage. As the Kentucky court announced:

. . . where a husband is serving a life sentence . . . the wife should not be denied a divorce for abandonment upon the grounds that the separation is without fault on his part.³⁵

The Arkansas statute expressly provides that divorce be given ". . . regardless of whether the separation was the voluntary act or by the mutual consent of the parties."³⁶ In *Brooks v. Brooks*³⁷, this statute was declared to mean that the divorce should be granted the husband even though the wife claimed the separation was not voluntary on her part and that she was in fact coerced into the separation. This decision was not rendered without dissent in spite of the expressed statutory provision.

The minority view requiring mutual agreement is adopted by Maryland, whose statute,³⁸ unlike Virginia, provides for "voluntary separation." Voluntary separation means that the two persons acted willingly and without coercion in the act of separating. "'Voluntary' connotes agreement. Unless the parties agree to live apart the separation can not be voluntary."³⁹ The same court has held that the statutory separation was not applicable when the husband voluntarily left home without justification and the wife did not consent,⁴⁰ or when the wife consistently expressed a desire to continue the marital relationship.⁴¹ The Maryland court⁴² felt itself bound to this view because it was set by the legislature in

³⁵ *Ibid.*

³⁶ Ark. Acts 1939, § 2-7 (now ARK. STAT. ANN. § 34-1202) (1947).

³⁷ 201 Ark. 14, 143 S.W.2d 1098 (1940).

³⁸ MD. CODE ANN. art. 16, § 33 (1951).

³⁹ *France v. Safe Deposit & Trust Co. of Baltimore*, 176 Md. 306, 4 A.2d 717, 726 (1939).

⁴⁰ *Miller v. Miller*, 178 Md. 1, 11 A.2d 635 (1940).

⁴¹ *Kline v. Kline*, 179 Md. 10, 16 A.2d 924 (1940).

⁴² *Lloyd v. Lloyd*, 202 Md. 352, 104 A.2d 595 (1954).

adopting the language "voluntary separation."⁴³ The Virginia statute does not contain the word "voluntary" and the Maryland court's "forced" interpretation of its statute is not controlling authority in the interpretation of the Virginia statute. It can not be denied that such an interpretation could be rendered from the Language of the Virginia statute, although it would seem to defeat the intent of the statutory scheme. Such an interpretation was made by the North Carolina court⁴⁴ under a statute⁴⁵ without the word "voluntary" (it now appears in the 1950 code) which held that the word "separation" as applied to the legal status of a husband and wife means more than "abandonment"—it means "a cessation of cohabitation of husband and wife, by mutual agreement."⁴⁶ This was reiterated in *Williams v. Williams*⁴⁷ in 1944, and *Pearce v. Pearce*⁴⁸ in 1945.

Virginia also has a statutory ground for divorce for desertion⁴⁹ when the separation is without the consent and against the wishes of one of the parties. Since the deserted party has grounds for divorce when the separation is for one year and without his consent, it should follow that he would have grounds when the separation is for three years without his consent.

In *Pearce v. Pearce*,⁵⁰ a husband and wife signed a separation agreement and after the statutory period elapsed the husband petitioned for divorce, and the wife claimed the agreement was obtained by fraud and therefore was not by mutual consent. The court decided that the husband must show that the separation was "voluntary" at the inception and that if his wife's consent was obtained by fraud or deceit

⁴³ *Supra* note 38.

⁴⁴ *Oliver v. Oliver*, 219 N.C. 299, 135 S.E.2d 549 (1941).

⁴⁵ N. C. Consol. Stat., ch. 30, § 5 (now N. C. GEN. STAT. ANN. § 50-6 (Repl. Vol. 1950)).

⁴⁶ *Supra* note 44, at 551.

⁴⁷ 224 N.C. 91, 29 S.E.2d 39 (1944).

⁴⁸ 225 N.C. 571, 35 S.E.2d 636 (1945).

⁴⁹ VA. CODE ANN. § 20-91(b) (Repl. Vol. 1960).

⁵⁰ *Supra* note 48.

it was not voluntary within the meaning of the law. In this case, however, the defendant (wife) did not show that she was ordered out or that the agreement was in fact induced by fraud. She merely showed that he bargained and persuaded her to sign an agreement, and the court held that this would not prevent the divorce.

Regardless of what rule the Virginia court may adopt as to the nature of the separation required, it would be in the public interest if it would adopt the rule that allows the divorce even though the separation is not voluntary at its inception, if it later becomes so, and the three years elapse from that time. This rule is adopted in all states whether they require the separation to be voluntary as to one or to both spouses.⁵¹ The intent to disrupt the marital relationship "... may begin at any time, contemporaneously with or during the physical separation . . . (I)t may begin any time after the physical separation, but in that event it must continue without interruption (for the statutory period) from the time of the agreement"⁵² to separate.

The Virginia statute provides that the parties live separate and apart without cohabitation for three years. The question might arise as to what is meant by "separate and apart". Apparently from the few cases on the subject, living under the same roof is not living separate and apart.⁵³ This is true even where a spouse is denied his conjugal rights. In a Washington case⁵⁴ the husband failed to prove he lived separate and apart when he failed to deny he lived in the same house as his wife during the statutory period. His defense that he was denied sexual intercourse did not strengthen his case, for "denial of conjugal rights may be a basis for divorce, but it cannot be established under an allegation that the parties have lived separate and apart for more than (the statutory period)."⁵⁵ Likewise, the fact that the parties lived in separate

⁵¹ 27A CJS *Divorce* § 42 (1959).

⁵² *Supra* note 39, at 726.

⁵³ *Supra* note 51.

⁵⁴ *McNary v. McNary*, 8 Wash.2d 250, 111 P.2d 760 (1941).

⁵⁵ *Id.* at 761.

rooms (in this case it was the wife's boarding house) and had no sexual relations, would not be living separate and apart under the Alabama court's interpretation.⁵⁶

The word "separation" means more than refraining from sexual intercourse; it means the absence of the total marital relationship. In *Dudley v. Dudley*,⁵⁷ a North Carolina decision, a husband was denied divorce although he pleaded he had not cohabitated for the statutory period and should be granted a divorce although he lived in the same house with his wife. Quoting from *American Jurisprudence*,⁵⁸ the court gave this definition to the phrase "living separate and apart":

The discontinuance of sexual relations is not in itself a living 'separate and apart' within the meaning of some statutes, and a divorce will be denied where it appears that during the period relied upon the parties had lived in the same house. It has been said that what the law makes a ground for divorce is the living separately and apart of the husband and wife continuously for a certain number of years. This separation implies something more than a discontinuance of sexual relations. It implies the living apart for such a period in such a manner that those in the neighborhood may see that the husband and wife are not living together.

The Court continues:

[O]ur statute contemplates a living separate and apart from each other, the complete cessation of cohabitation (the parties) must hold themselves out as separated to the whole world. Separation should not depend on evidence which must be sought for behind the closed doors of the marital domicile.⁵⁹

One case⁶⁰ took the opposite view in 1946 and granted a divorce where wife and husband lived in the same house but

⁵⁶ *Rodgers v. Rodgers*, 258 Ala. 471, 63 So.2d 807 (1953).

⁵⁷ 225 N.C. 83, 33 S.E.2d 489 (1945).

⁵⁸ 17 AM. JUR., *Divorce and Separations* § 185 (1957).

⁵⁹ *Supra* note 57, at 491 (1945).

⁶⁰ *Boyce v. Boyce*, 153 F.2d 229 (D.C. Cir. 1946).

in separate rooms on separate floors and did not eat together. The Washington, D. C. court said that "The essential thing is not separate roofs but separate lives."⁶¹

That the separation must continue uninterrupted for three years is self explanatory. If the marital relationship is resumed at any time before the lapse of three years, it will stop the running of the period. Depending upon the direction Virginia takes, other acts that might interrupt the three year period are insanity, request to continue the marriage, or a reconciliation. In North Carolina it was held⁶² that the fact the husband was supporting his wife is not such an interruption to preclude him from getting the divorce. If he failed to support her he would not be able to get his divorce, for in that state he must be free from fault. If he had failed to provide support he would have been guilty of abandonment.

It should be noted that no other reason for the separation need be given than that the parties wish to end the marriage. In *Thompson v. Thompson*,⁶³ a divorce was granted on grounds of statutory separation and the parties separated for no other reason than incompatibility and want of affection.

Conclusion

The new ground in Virginia is a liberal amendment to its divorce laws, and it will be in the best public interest if the amendment is liberally construed. The court should allow a divorce where two persons are no longer "married" in the full sense of the word. It would be better for the State, the parties, and society if the courts do not try to force a shell of a marriage upon two persons who no longer wish to be man and wife.

⁶¹ *Ibid.*

⁶² *Byers v. Byers*, 222 N.C. 298, 22 S.E.2d 902 (1942).

⁶³ 53 Wis. 153, 10 N.W. 166 (1881).