
Family Law

Separate Maintenance: Is it Extinct?

by Sarah L. Payne and Julie Curran Gerock

The history of separate maintenance, or alimony unrelated to a divorce case, dates back to colonial Virginia. Even though separate maintenance is well established in Virginia law, it is seldom used in modern practice. This article will address the roots of separate maintenance in Virginia, the elements of separate maintenance, and factors to consider in whether to file a separate maintenance action.

The roots of “separate maintenance”

Black’s Law Dictionary defines “separate maintenance” as “[m]oney paid by one married person to another for support if they are no longer living together as “husband and wife” and “is often mandated by court order.”¹ Although a separate maintenance order can determine spousal financial responsibility, it does not act to dissolve the marriage. Separate maintenance allows aggrieved spouses to benefit from support and maintenance without leaving the bonds of matrimony.

Its roots can be traced all the way back to 1699, when Mary Taylor sought support and maintenance from her husband due to the actions of her “cross and cruel” husband.² Virginia common law generally reflects the plight of the distressed wife who seeks to have the court require her husband to provide support and maintenance so that she may live independently from her husband without being divorced. In *Heflin v. Heflin*, 177 Va. 385 (1941), the Supreme Court of Virginia affirmed the idea that an unoffending wife can secure separate maintenance from her husband pursuant to his common law duty to support his wife. In examining the basis for separate maintenance, the Supreme Court of Virginia in *Heflin* noted that one of the earliest Virginia cases regarding separate maintenance was the case of *Purcell v. Purcell*, which established that courts in equity had jurisdiction in a case where a

deserted wife sought support from her husband.³ The common law action of separate maintenance under the court’s equity jurisdiction was further acknowledged when the General Assembly added separate maintenance to Va. Code Ann. §20-107.1 in 1994, “Upon the entry of a decree providing ... (iv) for separate maintenance, the court may make such further decree as it shall deem expedient concerning the maintenance and support of the spouses.”

Elements of separate maintenance

There are four general requirements to secure an order of separate maintenance: first, the party from whom support and maintenance is sought must be *at fault*; second, the party seeking support and maintenance must be *without fault*; third, the parties must be separated; and lastly, the parties must be married.

As to the first requirement, the party seeking an order for separate maintenance must show that the spouse from whom maintenance is sought is at fault. Courts have granted separate maintenance based on a husband’s desertion of his wife, and also when the husband’s conduct amounts to cruelty or constructive desertion. “[I]f the husband’s mistreatment of his wife has rendered the marital status unendurable - that is, if his conduct amounts to cruelty or constructive desertion - her right to depart and maintain an action for separate maintenance and support is not now open to question.”⁴ The requirement that the payor spouse be at fault is due to the fact that a court’s jurisdiction to grant separate maintenance stems from its equity jurisdiction. The Supreme Court of Virginia addressed this in *Heflin*, finding that the jurisdiction of a court sitting in equity to entertain a suit for alimony where no divorce was sought was based

upon the inadequacy of the legal remedy provided to the deserted wife to enforce a husband's duty of support.⁵

In *Heflin*, a wife sought support and maintenance from her husband, alleging that he deserted and abandoned her without justification for another woman. Initially, the trial court determined that the statutory code providing for divorce absolute and divorce from bed and board meant that the common law action for separate maintenance could no longer survive. The Supreme Court of Virginia reversed, holding that divorce statutes did not "modify or destroy the inherent jurisdiction of a court of equity to award alimony to a deserted wife," and further that the unoffending wife seeking an order of support and maintenance separate from divorce was entitled to it from her deserting husband.⁶ Moreover, a wife may be justified in leaving her husband and filing suit for support and maintenance where "she is subjected to treatment which affects her mind to such a degree as to destroy health or endanger life."⁷

The second requirement for a suit for separate maintenance is that the petitioning party be without fault. The right to separate maintenance is based upon a duty of a husband to support his unoffending spouse. This means that since separate maintenance derives from equitable principles, the party seeking support must have clean hands.

As the divorce laws of this State embody equitable principles, a wife should not be allowed to claim the right to support if she has been guilty of such misconduct as to constitute cause for divorce. Nor in equity and good conscience is she entitled to separate maintenance and support if she has permanently left her husband for cause legally insufficient to be made the basis for a judicial proceeding for divorce.⁸

In *Williams v. Williams*, 188 Va. 543 (1948), a wife filed suit for separate maintenance alleging her husband committed cruelty and constructive desertion, and that he had intimately associated with another woman. The husband filed a cross-claim for a divorce from bed and board alleging the wife deserted him. The Supreme Court of Virginia found that the wife had condoned the husband's cruelty by continuing to live with him after he broke off relations with the other woman. Thus, her departure from the marital home after her condonation of husband's marital offenses caused the breakdown of the marriage and as such her separate maintenance action was denied.

In the article *When is Separate Maintenance Applicable?*,⁹ the authors advance the position that the party seeking an award of separate maintenance need not prove fault on behalf of their spouse, and further, that the moving party does not need to be free from fault to prevail. The authors argue

that the statutory scheme found in §20-107.1 now applies to separate maintenance actions since the General Assembly added "separate maintenance" to the opening paragraph of §20-107.1 in 1994. Thus, as concluded by said authors, desertion and cruelty no longer act as a bar to the entitlement to separate maintenance and furthermore, adultery also does not bar an award of separate maintenance, if the court finds the denial or bar of separate maintenance results in a manifest injustice. When the General Assembly added separate maintenance to § 20-107.1, it arguably intended for the full body of case law regarding fault and spousal support pursuant to a divorce action to also apply in cases of separate maintenance. However, there is at least one case decided after the 1994 amendments to § 20-107.1 where a Circuit Court denied a request for separate maintenance due to the seeking party's marital fault. See *Cutright v. Cunningham*.¹⁰ In light of this, best practice would be to advise clients of the role fault has historically played in separate maintenance determinations.

Third, the parties must be living separate and apart. Case law regarding separate maintenance in Virginia primarily focuses on that of the spouses living separate and apart in different residences, however, where the parties are living separate and apart under the same roof, case law related to the ground of desertion may prove helpful. For example, in *Jamison v. Jamison*, 3 Va. App. 644 (1987), the Court of Appeals found that the husband was entitled to a divorce on grounds of desertion where the parties remained under the same roof, and his wife had ceased performing all acts other than those of two people living in the same home, including a five-year period without sexual intercourse.

Lastly, for a separate maintenance action to survive, the parties must be married. In *Scott v. Scott*, 24 Va. App. 364 (1997), the Court of Appeals found that a separate maintenance order does not extend beyond entry of a final order of divorce. "The inherent nature of separate maintenance is based on the parties' status as a married entity. When a final decree of divorce terminates the marriage relationship and the trial court has the ability to properly address the issues of support, the proper forum to resolve the issue of spousal support is in the divorce case."¹¹ In *Scott*, a wife sought to enforce an order for separate maintenance against her former husband after a divorce decree had been awarded. The court found that because the parties were divorced, the wife's proper remedy was to litigate her request for spousal support beyond the divorce decree as part of the divorce case.

There is at least one instance where a Virginia court ordered separate maintenance after the parties were divorced, however the Virginia Supreme Court determined that the court in which the parties were divorced lacked personal jurisdiction

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over the wife who was seeking separate maintenance. In that case, *Newport v. Newport*, 219 Va. 48 (1978), a wife sought separate maintenance in a Virginia Court, while her husband simultaneously pursued a divorce action in Nevada. The Virginia Supreme Court determined that the Nevada court did not have personal jurisdiction over the wife and thus the husband's legal obligation to support his wife was not extinguished.

Why choose separate maintenance?

A suit for separate maintenance may be advantageous if special financial circumstances are involved or if the parties wish to remain married for religious reasons. For example, a client with strong religious convictions may not want to proceed with a divorce action. In addition, a client may simply be unsure whether he or she wants to proceed with an absolute divorce or the client may not have yet formed the intent to terminate the marriage, in which case a separate maintenance action may enable that client to live life independently from his or her spouse while still in the bonds of marriage.

However, if the client cannot prove fault on the part of his or her spouse, an alternative option may be to file for temporary spousal support in the Juvenile and Domestic Relations District Court if the parties are living separate and apart.¹² Juvenile courts have "exclusive original jurisdiction ... over all cases, matters and proceedings involving ... [a]ny person who seeks spousal support after having separated from his spouse."¹³ The amount of spousal support the juvenile court awards is likely to be determined according to presumptive guidelines set forth in Va. Code Ann. §16.1-278.17:1.

In addition to the options of filing a suit for spousal support in the juvenile court or a suit for separate maintenance in the circuit court, there is the option of filing for a divorce *a mensa et thoro* or divorce from bed and board, also filed in the circuit court. Pursuant to Va. Code Ann. §20-116:

In granting a divorce from bed and board, the court may decree that the parties be perpetually separated and protected in their persons and property. Such decree shall operate upon property thereafter acquired, and upon the personal rights and legal capacities of the parties, as a decree for a divorce from the bond of matrimony, except that neither party shall marry again during the life of the other.

Courts may grant a divorce *a mensa et thoro* on grounds of cruelty, reasonable apprehension of bodily hurt, willful desertion, or abandonment.¹⁴ Both a divorce *a mensa et thoro* and separate maintenance require fault grounds. Both actions allow for the award of support and maintenance. The key difference between divorce *a mensa et thoro* and separate maintenance is in a divorce *a mensa et thoro*, the court can determine property rights. "The Court has a right under this section to

settle the rights of each party in respect to property of the other, and if need be to extinguish them."¹⁵ "Separate maintenance refers to support provisions for a spouse while the couple, though married is living separate upon a final decree of divorce."¹⁶ Another important distinction between a suit for separate maintenance and divorce *a mensa et thoro* is that a separate maintenance order terminates upon a final order of divorce, but a divorce *a mensa et thoro* can be merged into a divorce *a vinculo matrimonii* (absolute divorce). One year after a divorce *a mensa et thoro* has been granted, the court may merge said order into a divorce absolute (*a vinculo matrimonii*) if (1) reconciliation has not taken place, nor is probable, and (2) the parties have continued to live separate and apart from the time of the bed and board divorce.¹⁷

Conclusion

As shown, there are many benefits to filing for separate maintenance and every client has the right to consider their options when faced with the breakdown of the marital relationship. A client with allegations of fault against his or her spouse, who him or herself is free from fault, and who is separated, should not only be presented with the option of filing for divorce but also with the option to file a suit for separate maintenance, particularly a client who is opposed to divorce but is in need of financial support.

Endnotes

1. *Black's Law Dictionary* 1039 (9th ed. 2009).
2. Arthur W. Calhoun, *The American Family in the Colonial Period* 302 (2004).
3. *Heflin*, 177 Va. at 390, citing *Purcell v. Purcell*, 14 Va. 507 (Va. Super. Ch. 1810).
4. *Williams v. Williams*, 188 Va. 543, 549 (1948).
5. *Heflin*, 177 Va. at 396.
6. *Id.*
7. *Williams*, 188 Va. at 543.
8. *Id.* at 550.
9. Ronald R. Tweel and Elizabeth P. Coughter, "When is Separate Maintenance Applicable?", *Virginia Lawyer*, February, 2012, at 48-51, 56.
10. *Cutright v. Cunningham*, 52 Va. Cir. 381 (2000).
11. *Scott*, 24 Va. App. at 372.
12. Va. Code Ann. §16.1-241.
13. Va. Code Ann. §16.1-241.
14. Va. Code Ann. §20-95.
15. *Gum v. Gum*, 122 Va. 32, 32 (1917).
16. *Scott v. Scott*, 24 Va. App. 364 (1997).
17. Va. Code Ann. §20-121.