## The 2016 Amendment to Virginia Spousal Support Law

Here is the new subsection (E)(13) in the Virginia statute on spousal support:

13. Such other factors, including the tax consequences to each party *and the circumstances and factors that contributed to the dissolution, specifically including any ground for divorce*, as are necessary to consider the equities between the parties.

The change is that the highlighted words now affect the amount and duration of spousal support.

## Did the 2016 Virginia Spousal Support Amendment Open Pandora's Box?

Ever since the 1960's American divorce law has moved away from focusing on the reasons why marriages ended, and has instead taken more account of the partnership aspects of marriages. Virginia's 1982 equitable distribution statute, §20-107.3(E)(5), included language very similar to that highlighted above. The Court of Appeals then substantially limited the scope of that provision in its decision in *Aster v. Gross*, 7 Va. App. 1 (1988). Not many years later, the Court of Appeals created a doctrine of "negative nonmonetary contributions" based on harm to the marital partnership in *O'Loughlin v. O'Loughlin*, 20 Va. App. 522 (1995).

"Circumstances and factors" has been in Virginia's spousal support statute since the major amendments of 1998, but not in that part of subsection E that sets forth the criteria to determine the amount and duration of support. Prior to the 2016 amendment, which took effect on July 1, 2016, "circumstances and factors" were relevant only to the issue of whether spousal support is to be granted. Once that decision was made, "circumstances and factors" as such were no longer relevant. Now arguably that is changed to the extent that the equities are affected.

Under the law prior to the amendment, if a recipient spouse committed adultery, but a denial of spousal support would be deemed to be a manifest injustice, the adultery would not be relevant to the amount or duration of such support. Arguably the 2016 amendment does make it relevant, at least if it contributed to the dissolution of the marriage and otherwise affected the equities between the parties. Perhaps the same effect could result even if it was an emotional affair that never became physical.

"Circumstances and factors that contributed to the dissolution" includes marital fault, but now also has the potential to include lots of other situations and events. While these may not fit the conventional definitions of fault, it could suffice that they caused or contributed to the end of the marital partnership.

## More on Virginia's 2016 Spousal Support Amendment

Larry Diehl is generally regarded as the leading authority on issues of Virginia family law. He responded to last week's Newsletter (which is forth above) with a

memorandum as to why the change took place with his thoughts on the probable effects of the change. Larry doesn't believe that Pandora's box has been thrown open and he gives a thoughtful analysis at to why the amendment may not make a substantial change in Virginia law.

**"Circumstances and Factors that Contributed to the Dissolution"**

Ever since the major revisions in the Virginia spousal support statute that took place in 1998, the court could consider C&F, and especially the adultery of the payee spouse, to deny spousal support unless that would be a "manifest injustice" under the total circumstances. In practice, courts often find manifest injustice, especially in longer-term marriages. As to cases filed after July 1, 2016, C&F are also relevant to the amount and duration of spousal support.

Let me pose a few hypothetical situations where C&F might lead to somewhat different results. These include the following: (1) whether C&F can be used to increase as well as decrease the amount and/or duration; (2) whether the conduct of the payee can be used to decrease the amount and/or duration based on C&F that do not constitute marital fault as conventionally defined; and (3) whether the fact that a party initiated the separation can in itself be a sufficient factor to affect the amount and/or duration.

The words of the amendment certainly do not in themselves limit the scope of C&F to the traditional fault grounds. The only express limit is that any consideration of the C&F must relate to the "equities of the parties." Nothing says that C&F cannot be used to increase as well as to decrease the amount and duration of support. As an attorney who has mediated and litigated many hundreds of spousal support cases, I can assure you that there are many clients who would welcome the chance to test out the potentially broader meanings of the language.

The value of Larry Diehl's memo is that it is an authoritative review of the legislative history and a persuasive argument for cautious interpretation of the new language. The problem is that the new language adds a further level of uncertainty to what is already the most discretionary and contextual area of Virginia family law. When the legislature sets forth a list of criteria for the trial judge, as it does in §§ 20-107.1, 20-107.3 and 20-124.3, it is with the expectation that the judge will apply the words in accordance with their common meaning to the particular facts at hand. Subsection F of the §20-107.1 requires the trial judge to review in writing the support for the ruling in terms of the list of criteria in subsection E of the statute.

A final question is whether the 2016 amendment overrules *Baytop v. Baytop,* 199 Va. 388, 394-395 (1957). In that case, the Court stated: "The allowance of alimony, if any, and if awarded, in what amount, are matters within the sound discretion of the court. In exercising his discretion, the chancellor should not award alimony as punishment to a transgressor husband or as a reward to a wronged wife.

Here is Larry Diehl's memorandum:

**Legislative History and Proposed Interpretations of the 2016 Amendment to Virginia Code §20-107.1**

By Lawrence D. Diehl

Let me explain the background as to how this statute was enacted and to show why there is no "Pandora's Box" and no need to panic over this. The Virginia Bar Coalition was initially asked to comment on a bill that would have completely barred spousal support in the event of a conviction of assault or domestic violence. The Coalition properly responded by stating this was bad policy since there could be many circumstances where a spouse assaults the other spouse, but perhaps in response to aggression by the other spouse, or where a spouse has had a long history of emotional abuse and finally reacts to it. To prevent a spouse based on the initial draft without looking at the overall background of the marriage and other factors was just bad policy since the statute made it a complete bar- that was it.

So the current language was agreed to as a compromise, but remember it is only a factor as to the amount and duration. Nothing has changed as to the threshold parts of the statute that affect the entitlement to support (bar based on adultery unless manifest injustice or in deciding to award support, the court can consider fault)

But as a practical matter, this really adds very little if anything to the case law and statute already in place if one takes the time to research the issue. Under some of the factors, the court under 20-107.1 (E) can already consider negative non-monetary factors in a marriage as a factor in deciding spouse support issues. Actually if properly read, *Aster v. Gross* only addressed the equitable distribution factor number 5 which is the consideration of the cause of the dissolution of the marriage or the grounds of divorce. But the latter case which we are all familiar with what *O'Loughlin v. O'Loughlin* said that in fashioning the amount or terms of equitable distribution, the court can consider the negative non-monetary contribution to the well-being of a family- factor 1 and a distinct factor from what was considered in *Aster*- a lot of lawyers miss that significant difference- and have looked at fault under that factor 1 only and those standards in Ed cases. If you will look at my treatise on Family Law, Chapter 11:29- you will see voluminous numbers of cases using fault as a factor under the non-monetary factor section in making the ED award.

So since the same language of considering negative non-monetary items is already in the spousal support statute in 20-107.1 (E)- I have successfully argued in a number of cases that the same factor can be considered in making a spousal support award since the negative language is the same for both statues. Let me repeat that- the non-monetary contribution statutory factors are the same for both ED and spousal support. So why shouldn't it be used the same way and fault in a divorce considered in making the spousal support award? Again, it has been in many cases in which I have been involved. But as it turns out and to confirm what I have just said- there have been many cases in the Court of Appeals affirming trial court's ruling in considering fault in fashioning a spousal support award considering fault and grounds- not as a threshold to

permit it, but in fashioning the award. It has already been done. So there is really no Pandora's Box- See Chapter 9:4 of my treatise containing these cases.

So in the end the addition of this as a general factor really only restates the use of non-monetary negative contribution consideration of fault already done by courts in both ED and spousal support cases and really does not add anything significantly.

Now- whether that is good policy or not is another question for another day- and I favor the statute since the laws should encourage the preservation of marriages as a policy and the use this as an incentive to avoid a break up is, in my personal opinion, a good policy. One should not be rewarded with spousal support – or the extent or duration thereof- if they have caused the break up or there is fault significant enough to be a factor. Courts have already got it based on appellate case law, so again this is really nothing new or earth shattering.