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CASTING STONES: THE ROLE OF FAULT IN VIRGINIA DIVORCE PROCEEDINGS

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The national trend is toward eliminating fault as a factor in many aspects of divorce,[1] and in some states it plays virtually no role at all.[2] However, Virginia is among those few remaining states where fault is potentially involved in every aspect of a divorce case.[3]

Although fault grounds for divorce have been entirely eliminated in some states in favor of no-fault grounds or some euphemistic grounds such as "irretrievable breakdown," "irreconcilable differences," or "incompatibility,"[4] fault grounds for divorce still exist in

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1. Freed & Walker, *Family Law in the Fifty States: An Overview*, 18 FAM. L.Q. 369 (1985) (nationwide family law survey as of August 1984). Many states have eliminated fault as a factor in various aspects of divorce in the last ten years. *See generally 1985 Survey of American Family Law*, 11 FAM. L. REP. (BNA) 3015 (May 7, 1985) [hereinafter cited as *1985 Survey*].

2. Seventeen states expressly or impliedly exclude marital fault from consideration in awarding alimony, maintenance or property distribution. Freed & Walker, *supra* note 1, at 394-95. Those states are: California, Colorado, Delaware, Illinois, Iowa, Maine, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Tennessee, Washington, West Virginia (excluded for property settlement, but not alimony), Wisconsin, and the Virgin Islands. *Id.*

3. *See* VA. CODE ANN. § 20-91 (Repl. Vol. 1983) (grounds for divorce from bond of matrimony); *id.* § 20-95 (grounds for divorce from bed and board); *id.* § 20-107.1 (Cum. Supp. 1985) (spousal support); *id.* § 20-107.2 (child custody and support); *id.* § 20-107.3 (equitable distribution of marital property).

4. In several states, irretrievable breakdown of the marriage or irreconcilable differences, and mental incompetence are the sole grounds for divorce. *See* ARIZ. REV. STAT. ANN. § 25-312 (1976 & Cum. Supp. 1985); CAL. CIV. CODE § 4506 (West 1976); COLO. REV. STAT. § 14-10-106 (1973); FLA. STAT. ANN. § 61.052 (West 1985); HAWAII REV. STAT. § 580-42 (Repl. Vol. 1976); IOWA CODE ANN. § 598.17 (West 1981); KY. REV. STAT. ANN. § 403.170 (Baldwin 1983); MICH. COMP. LAWS ANN. § 552.6 (West Cum. Supp. 1985); MINN. STAT. ANN. § 518-06 (West Supp. 1985); MO. ANN. STAT. § 452.305 (Vernon 1977); MONT. CODE ANN. § 40-4-104 (1985); NEB. REV. STAT. § 42-347 (1984); OR. REV. STAT. ANN. § 107.025 (1983); REV. CODE WASH. ANN. § 26.09.030 (Supp. 1986); WYO. STAT. ANN. § 20-2-104 (1977).

Virginia.[5] Those grounds are adultery, cruelty, wilful desertion or abandonment, reasonable apprehension of bodily hurt, sodomy or buggery outside of the marriage, and conviction of a felony which results in confinement for more than one year.[6] Virginia law also provides for a no-fault divorce which is based upon a required period of separation without cohabitation.[7]

Consequently, fault often is an issue in a Virginia divorce proceeding because it can materially affect the court's disposition of financial and custody issues in the case. First, the existence of fault is an absolute bar to entitlement to spousal support.[8] Second, fault is a statutory factor to be considered in the equitable distribution of marital property.[9] Last, certain circumstances of fault can affect the outcome of a child custody case.[10]

The consideration of fault in these aspects of a divorce creates numerous problems for the courts and the parties involved. Such problems include the avoidance of harsh and unfair results which

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5. *See* VA. CODE ANN. § 20-91(9)(a) (Repl. Vol. 1983).

6. *Id.* § 20-91 (grounds for divorce from bond of matrimony); *id.* § 20-95 (grounds for divorce from bed and board).

7. The Virginia statute provides that divorce may be granted when the parties have been separated for one year, or for six months when the parties have no minor children and have entered into a separation agreement. *Id.* § 20-91(9)(a). The longest period of separation required by any state allowing no-fault divorce is five years. *See* IDAHO CODE § 32-610 (1983). The shortest period is six months. *See, e.g.*, VT. STAT. ANN. tit. 15, § 551 (1974); *see also 1985 Survey, supra* note 1, at 3016.

8. VA. CODE ANN. § 20-107.1 (Cum. Supp. 1985) provides that "no permanent maintenance and support shall be awarded from a spouse if there exists in such spouse's favor a ground for divorce under any provision of § 20-91(1), (3) or (6) or § 20-95." *See infra* notes 11-60 and accompanying text.

9. VA. CODE ANN. § 20-107.3(E) (Cum. Supp. 1985) provides that the amount of an equitable distribution award shall be determined by the court after consideration of eleven factors, including: "The circumstances and factors which contributed to the dissolution of the marriage, specifically including any ground for divorce under the provisions of § 20-91(1), (3) or (6) or § 20-95 . . . ." *See infra* notes 51-63 and accompanying text.

10. VA. CODE ANN. § 20-107.2 (Cum. Supp. 1985); *see, e.g.*, Brown v. Brown, 218 Va. 196, 237 S.E.2d 89 (1977) (custody awarded to father who charged mother with adultery and proved she was illicitly cohabiting with a man while the child was in the home). *But see* Moore v. Moore, 212 Va. 153, 183 S.E.2d 172 (1971). In this case, the Virginia Supreme Court reversed the lower court's award of custody to the father where he had charged the mother with adultery and having an affair with a minister. Not finding sufficient evidence to prove adultery, the court observed that "[w]hile [the mother's] relationship with [the minister] was improper, it does not follow that she is not a good mother or that the children would be subjected to an immoral influence if [the mother] should marry [the minister]." *Id.* at 155, 183 S.E.2d at 174.

For an examination of Virginia's child support statute, see Comment, *Allocating the Fruits of a Marriage: A Look at Virginia's New Domestic Relations Statute*, 17 U. RICH. L. REV. 347, 358-63 (1983).

would bar spousal support based on marital fault and the uncertain role of fault in the equitable distribution of marital property. Whether Virginia should follow the trend in other states toward eliminating fault in some or all aspects of a divorce proceeding is a matter of public policy, as legislated by the Virginia General Assembly and interpreted by the courts.

This article examines the role of fault in spousal support and equitable distribution of marital property. It will discuss cases in which the court has appeared constrained to interpret the law so as to avoid barring spousal support. Concerning equitable distribution, the article will examine the role of fault under other states' statutes and its uncertain role under the Virginia statute. Finally, this article will suggest that many of the problems concerning the role of fault in spousal support awards and equitable distribution could be eliminated by the enactment of statutes that would merely clarify the role of fault in Virginia's marital law. If the legislative body is willing to go further, it could also eliminate some inequities in the present law of divorce, and some of those possible reforms are suggested here as well.

I. Fault as a Bar to Claims for Spousal Support

Virginia Code section 20-107.1 provides that "no permanent maintenance or support shall be awarded from a spouse if there exists in such spouse's favor a ground of divorce."[11] This provision places Virginia in a small minority of jurisdictions in which fault is a complete bar to a claim for spousal support[12] and is the reason that many divorces are so hotly contested. It also has resulted in some curious case law, in which the courts seem constrained to find a way to avoid the inequities that can result from this statute, par-

11. Va. Code Ann. § 20-107.1 (Cum. Supp. 1985).

12. In only seven of seventeen jurisdictions that include fault as a factor is some type of marital fault an outright bar to alimony or spousal support. Ga. Code Ann. § 19-6-1 (1982) (adultery and desertion); Idaho Code § 32-705 (1983) (rehabilitative maintenance for innocent spouse only); La. Civ. Code Ann. art. 160 (West 1952 & Supp. 1985) (adultery); N.C. Gen. Stat. § 50-16.6 (Repl. Vol. 1984) (adultery); P.R. Laws Ann. tit. 31, § 385 (1967) (alimony for innocent spouse only); S.C. Code Ann. § 20-3-130 (1976) (adultery); Va. Code Ann. § 20-107.1 (Cum. Supp. 1985) (all fault grounds regardless of ground on which divorce granted).

In Virginia, marital fault may extinguish a spousal support claim even if it occurs after the parties have separated. *See, e.g.*, Rosenberg v. Rosenberg, 210 Va. 44, 168 S.E.2d 251 (1969) (allowing amendment of husband's original bill to allege wife's adultery committed after filing of original bill).

ticularly in cases involving charges of desertion[13] and adultery[14] as fault grounds barring spousal support.

A. *Justification as a Defense to a Charge of Desertion*[15]

Perhaps out of concern for the harsh results of allowing fault to bar a claim for spousal support, the appellate courts of Virginia over the years have tempered the rule defining what constitutes justification for breaking off matrimonial cohabitation sufficient to defeat a charge of desertion.[16] The result is that a dependent spouse[17] still may be eligible for spousal support even if he or she cannot establish that statutory grounds for divorce existed in his or her favor at the time of departure from the marital abode.

The Virginia Supreme Court's concern with the forfeiture of spousal support was made evident in *Graham v. Graham*,[18] where the court stated: "To grant [the husband] a divorce we would have to find that [the wife] deserted her husband without justification and thereby forfeited her right to all maintenance or support from him. We cannot so find from the record before us."[19] The court in *Graham* avoided finding the wife guilty of desertion without finding that she had grounds for divorce against her husband. This was

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13. *See infra* notes 15-51 and accompanying text.

14. *See infra* notes 52-60 and accompanying text.

15. "Desertion is a breach of matrimonial duty, and is composed first, of the actual breaking off of the matrimonial cohabitation, and secondly, an intent to desert in the mind of the offender. Both must combine to make the desertion complete." Nash v. Nash, 200 Va. 890, 893, 108 S.E.2d 350, 352 (1959) (quoting Bailey v. Bailey, 62 Va. (21 Gratt.) 43, 47 (1871) and Miller v. Miller, 196 Va. 698, 700, 85 S.E.2d 221, 222 (1955)).

16. *See, e.g.*, Breschel v. Breschel, 221 Va. 208, 269 S.E.2d 363 (1980) (wife not entitled to divorce for constructive desertion, but was justified in leaving marital abode where she reasonably believed her life was in danger); Capps v. Capps, 216 Va. 382, 219 S.E.2d 898 (1975) (isolated incident of physical violence did not entitle wife to divorce for cruelty, but justified her departure from marital home); Rowand v. Rowand, 215 Va. 344, 210 S.E.2d 149 (1974) (husband's demand to "get out" did not constitute constructive desertion, but justified wife's departure from marital home); Brawand v. Brawand, 2 Va. App. ___, 2 V.L.R. 935 (1986) (wife not entitled to fault divorce but was justified in leaving "a failed marriage"). *But see* Rexrode v. Rexrode, 2 Va. App. ___, 2 V.L.R. 1143 (1986) (husband's extreme rudeness towards wife and her relatives did not entitle wife to divorce on ground of cruelty, nor did it justify her departure from marital home); D'Auria v. D'Auria, 2 Va. App. ___, 2 V.L.R. 1211 (1986) (Because wife's physical problems were caused by anxiety about divorce and not husband's behavior, departure constituted desertion, rather than justified departure.).

17. At this juncture in our social history, the wife is usually the dependent spouse. Therefore, for the sake of verbal economy, the "dependent spouse" will sometimes be referred to in the feminine gender in this article.

18. 210 Va. 608, 172 S.E.2d 724 (1970).

19. *Id.* at 616, 172 S.E.2d at 730.

accomplished by the way the court framed the question and answered it:

> We are therefore confronted with a narrow issue of fact: Are the admissions of [the husband] alone, or taken with the evidence of [the wife], sufficient to show legal justification for her desertion of him? In making this determination, it is proper that we consider his admissions. While no divorce may be granted on the uncorroborated testimony of the parties or either of them, and the cause shall be heard independently of the admissions of either party, . . . such testimony and admissions are admissible and competent as evidence to defeat a prayer for divorce.[20]

Without specifically stating what grounds for divorce the wife had established, observing only that "[t]he misconduct of [the husband] was serious,"[21] the court found that the wife was justified in leaving. She therefore was not guilty of desertion, and her entitlement to spousal support was preserved.[22]

Virginia case law has gradually liberalized the requirements of establishing justification as a defense to a charge of desertion. The justification issue usually arises when the dependent spouse, in most cases the wife, leaves the marital home and the other spouse then seeks a divorce on the ground of desertion. If the party seeking the divorce succeeds in proving this ground, he is freed of the obligation to support the dependent spouse.[23]

At one time, case law required the wife to establish justification for breaking off matrimonial cohabitation by establishing that grounds for divorce existed in her favor at the time she left the marriage.[24] She would file a cross-bill, alleging such grounds as cruelty, reasonable apprehension of bodily hurt, or adultery. If she was successful in proving her cross-claims, her departure was deemed to be justified and therefore was not considered deser-

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20. *Id.* at 610, 172 S.E.2d at 726 (citing Cralle v. Cralle, 79 Va. 182 (1884); Bailey v. Bailey, 62 Va. (21 Gratt.) 43 (1871); Tillis v. Tillis, 55 W. Va. 198, 46 S.E. 926 (1904)).

21. 210 Va. at 616, 172 S.E.2d at 730.

22. The court found that neither party was entitled to a divorce upon the evidence adduced at trial. *Id.*

23. Pursuant to VA. CODE ANN. § 20-107.1 (Repl. Vol. 1983 & Cum. Supp. 1985), the court may award spousal support to either party. However, neither party to a divorce has an automatic obligation to support the other. Bristow v. Bristow, 221 Va. 1, 267 S.E.2d 89 (1980).

24. Hoback v. Hoback, 208 Va. 432, 435-36, 158 S.E.2d 113, 116 (1967); Wimbrow v. Wimbrow, 208 Va. 141, 143-44, 156 S.E.2d 598, 601 (1967); Lawyer v. Lawyer, 207 Va. 260, 264, 148 S.E.2d 816, 819 (1966).

tion.[25] Further, because the wife was forced into the separation by the husband's actions, the separation was his fault; her leaving was construed as *his* act of desertion. Therefore, in addition to the grounds for divorce that she proved as justification for leaving, the wife also would be entitled to divorce on the ground of constructive desertion.[26]

The Supreme Court of Virginia began retreating from this precedent, however, in a series of cases in which it found that certain circumstances amounted to justification for breaking off matrimonial cohabitation, but did not amount to independent grounds for divorce. In *Rowand v. Rowand*,[27] the court held that the husband's demand that the wife "get out" did not amount to constructive desertion, a ground for divorce, but was sufficient justification for her to leave without being guilty of desertion.[28] Therefore, she was not barred from obtaining spousal support.[29]

The next year, in *Capps v. Capps*,[30] the court held that an isolated incident of physical violence did not constitute cruelty entitling the physically assaulted wife to divorce on that ground, but was justification for her departure. In that case, the husband had slapped the wife during an argument. Immediately afterwards, she left the marital home, and Mr. Capps filed suit for divorce on the ground of desertion. In her answer and cross-bill, Mrs. Capps asked for a divorce on the ground of cruelty, based on the single assault.[31] Noting its previous ruling in *Rowand*, the court reasoned that, while Mrs. Capps had failed to establish a ground for divorce, it did not necessarily follow that the husband was entitled to a divorce on the ground of desertion:

> Here the wife proved, by corroborated testimony, that her husband physically abused her and that this conduct was the provoking cause for her leaving the marital abode. Under these circumstances, we find that the husband's conduct did not entitle him to a divorce on the ground of wilful desertion since the wife left the home without legal fault. Therefore the husband's prayer for a divorce was prop-

25. *See, e.g., Wimbrow*, 208 Va. 141, 156 S.E.2d 598 (wife justified in leaving and not guilty of desertion where husband was guilty of cruelty in severely beating wife).
26. *See, e.g., Rowand*, 215 Va. 344, 210 S.E. 2d 149.
27. *Id.*
28. *Id.* at 346, 210 S.E.2d at 150.
29. *Id.* at 346, 210 S.E.2d at 151.
30. 216 Va. 382, 219 S.E.2d 898 (1975).
31. *Id.* at 383-84, 219 S.E.2d at 899.

erly denied by the chancellor.[32]

In a recent Virginia Supreme Court case, *Breschel v. Breschel*,[33] the wife was suffering from a serious debilitating disease, and her husband had a disrespectful and disobedient son living in the marital home.[34] The wife established that her stepson's presence and conduct in the home was a threat to her health and that her husband would neither discipline the child nor have him removed from the home as she had requested.[35] Based upon these circumstances, the wife asserted that she had been forced to leave the marital home to preserve her own health and safety.[36] Reversing the lower court's award of a divorce to the husband on the ground of desertion, the supreme court found that the wife was free from legal fault in leaving her husband where she reasonably believed her health was endangered by remaining in the household and had unsuccessfully taken reasonable measures to eliminate the danger without breaking off cohabitation.[37] The court reversed and remanded the case to the lower court to award spousal support.[38]

The Court of Appeals of Virginia[39] has gleaned a general rule from these three supreme court cases. In the recent case of *Brawand v. Brawand*,[40] the court stated:

> The holdings in *Rowand*, *Capps* and *Breschel* turn on the peculiar facts of those cases. Taken together they stand for the general proposition that if a wife leaves the marital abode for a cause other than to intentionally desert her husband, and the proof of such cause falls short of constituting constructive desertion on the hus-

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32. *Id.* at 385, 219 S.E.2d at 900-01.

33. 221 Va. 208, 269 S.E.2d 363 (1980).

34. *Id.* at 209-10, 269 S.E.2d at 364-65.

35. *Id.* at 211, 269 S.E.2d at 365.

36. *Id.*

37. *Id.* at 212, 269 S.E.2d at 366. *But see D'Auria*, 2 Va. App. ___, 2 V.L.R. 1211 (Because wife's physical problem was due to anxiety about divorce, and not her husband's behavior, her departure constituted fault ground of desertion, rather than justified departure.).

38. *Breschel*, 221 Va. at 212-13, 269 S.E.2d at 366.

39. The newly created Court of Appeals of Virginia became effective on January 1, 1985, and decided its first case on August 6, 1985. Because the appeal of domestic relations cases to that court is a matter of right, VA. CODE ANN. § 17-116.05(3) (Cum. Supp. 1985), it is anticipated that this new court will significantly increase the number of written appellate opinions in those cases. A decision in the court of appeals in a domestic relations case is subject to review by the Virginia Supreme Court if the case involves "a substantial constitutional question . . . or matters of significant predecential value." VA. CODE ANN. § 17-116.07(B) (Cum. Supp. 1985).

40. 2 Va. App. ___, 2 V.L.R. 935 (1986).

> band's part, yet is sufficient to cause the wife to reasonably believe that her health or well being is endangered by remaining in the household, and, prior to her departure she has unsuccessfully taken whatever measures might be expected to eliminate the concern, then her departure is justified. In such cases the wife is not guilty of desertion because her intent is not to abandon her husband, but rather to shield herself from the cause of such concern.[41]

Noting that each such departure must be judged by the trial court on the facts of the case then before it,[42] the court upheld the trial court's finding in *Brawand* that the wife was justified in leaving[43] a "failed marriage."[44]

Now that the courts have abandoned the requirement that grounds for divorce be established as justification for breaking off cohabitation, it appears that perhaps even incompatibility could constitute justification for a spouse to leave the home and still obtain a spousal support award.[45] Thus, in order to demonstrate justification, the departing spouse must resort to presenting a case that casts the marriage in the worst possible light in order to convince the court that the parties were better off by separating and that the marriage was irretrievably broken.[46]

B. *The* Alls[47] *or* Plattner[48] *Rule*

The risk of failing to convince the court that leaving the home was justified, thereby raising desertions as a bar to spousal support, can be avoided if the spouse who plans to leave is aware of the law in Virginia with regard to filing suit prior to separation. The *Alls* or *Plattner* rule provides that a spouse is not guilty of legal desertion if he or she leaves the other spouse after the institu-

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41. *Id.* at ___, 2 V.L.R. at 940-41.
42. *Id.* at ___, 2 V.L.R. at 941.
43. *Id.*
44. *Id.* at ___, 2 V.L.R. at 936.
45. The possibility that incompatibility could constitute justification for desertion is the practical effect of the courts' efforts to reach equitable results regarding spousal support in these types of cases. The law of Virginia, however, is still that a *fault* divorce cannot be granted merely because a husband and wife are unable to live in peace and harmony. Coe v. Coe, 225 Va. 616, 303 S.E.2d 923 (1983).
46. *But see* Rexrode v. Rexrode, 2 Va. App. ___, 2 V.L.R. 1143 (1986) (husband's extreme rudeness towards wife and her relatives did not entitle wife to divorce on ground of cruelty, nor did it justify her departure from marital home; wife found guilty of desertion).
47. Alls v. Alls, 216 Va. 13, 216 S.E.2d 16 (1975).
48. Plattner v. Plattner, 202 Va. 263, 117 S.E.2d 128 (1960).

tion of a suit for divorce or during its pendency.[49] Therefore, if a wife wants to avoid a charge of desertion, she can file suit alleging some divorce ground, usually cruelty, prior to leaving the marital home. Thereafter, even on the same day, she may leave the marital home and then later have process served upon her husband; he will not know that he has been sued until she is gone.[50] She is not required to prove or even offer any evidence of the alleged grounds in order to justify her departure.[51] Of course, such planning may

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49. *Alls*, 216 Va. at 14, 216 S.E.2d at 17; *Plattner*, 202 Va. at 266, 117 S.E.2d at 130; *see also* Painter v. Painter, 215 Va. 418, 421, 211 S.E.2d 37, 39 (1975); Hudgins v. Hudgins, 181 Va. 81, 87, 23 S.E.2d 774, 777 (1943); Craig v. Craig, 118 Va. 284, 292, 87 S.E. 727, 730 (1916).

50. *See* Johnson v. Johnson, 213 Va. 204, 209, 191 S.E.2d 206, 210 (1972). In *Johnson*, the court said, "we attach no significance to the fact that [the wife] timed her trip so as to be absent from [her] home on the day process was served on [the husband]. Manifestly this was done to avoid what could have been another unpleasant and violent episode in the lives of the parties." *Id.*

51. The Virginia Supreme Court's view of the bad faith filing of suit for divorce under such circumstances has been expressed in dicta. In Roberts v. Roberts, 223 Va. 736, 292 S.E.2d 370 (1982), the court was confronted with this issue:

> Conceding that the law is settled on this point, [the husband] argues that some exceptions should be made to this rule in cases where the party filing the original suit continues to live in the marital abode for a long period of time, or where the original suit turns out to be frivolous, a mere sham created in order to permit the complainant to desert the defendant with impunity. [The husband] asks us to consider authorities from other jurisdictions in which similar limitations have been adopted. He argues that an excessively rigid application of the *Alls* rule would permit a wife who wishes to desert her husband, but also wishes to claim spousal support from him to institute a frivolous suit against him, based on charges for which she has no evidence, and thereafter to desert him. She could later amend her suit to claim a divorce on the ground of one year's separation, but he would be barred from asserting her desertion as a defense to her claim for spousal support.

223 Va. at 740-41, 292 S.E.2d at 372.

The court found, however, that the wife's bill of complaint was not frivolous. It found the case especially inappropriate for creating an exception to *Alls* because the husband himself had filed a cross-bill of complaint charging the wife with desertion at the time she moved out of the home. Leaving the home upon being sued for divorce always is considered justified. *Id.* at 741, 292 S.E.2d at 372. The court, while not creating an exception, did observe: "We recognize the force of this argument. Equitable rules should not be so inflexibly applied as to shield fraud or oppression. We do not, however, view this as a case in which the equities demand the creation of an exception to the *Alls* rule." *Id.* at 740-41, 292 S.E.2d at 373.

In Vardell v. Vardell, 225 Va. 351, 302 S.E.2d 41 (1983), the husband sought divorce from the wife for constructive desertion. She had had him evicted from the marital home pursuant to an injunction order entered *ex parte*. The court found no validity in his argument because "[i]n granting the initial injunction and subsequently extending its term, the trial court implicitly decided that the wife presented facts sufficient to demonstrate a reasonable likelihood that her health and safety would be endangered if the parties remained in the home together." 225 Va. at 354, 302 S.E.2d at 42. The injunction standing alone could not substitute for the wife actually proving the cruelty she alleged in her divorce complaint. But she had not acted in bad faith, nor had she constructively deserted her husband.

However, in a concurring opinion, Justice Russell observed:

not offer a practical solution to a spouse whose personal safety is jeopardized and who does not have time or resources to file a divorce suit before leaving the dangerous home.

C. *Adultery*

The apparent judicial concern over fault as a bar to spousal support has also created some perplexing decisions in divorce suits in which adultery is alleged. For example, the standard of proof required to prove adultery as a fault grounds barring spousal support appears to be greater than a preponderance of the evidence, as one dissenting justice has suggested.[52] The burden of proof is even greater than that which would be required to convict in a criminal adultery case.[53] Even where the evidence of adultery may be sufficient, procedural defects may be found to avoid a harsh result.[54]

> I think it worthy of note, however, that if the wife's claim for injunction had not been so fortified, a different result might obtain. It is hard to imagine a more drastic and complete withdrawal from the marital relationship than obtaining, without good cause, an *ex parte* injunction which evicts one's spouse from the marital home. An *ex parte* showing of equity would, in my view, be insufficient to shield the complaining spouse from a charge of constructive desertion, where such an eviction later proves to have been unfounded.

Id. at 356, 302 S.E.2d at 43 (Russell, J., concurring).

52. *See* Dooley v. Dooley, 222 Va. 240, 278 S.E.2d 865 (1981). The strict evidence standards for proof of adultery established by the majority opinion prompted this comment from Justice Poff in his dissent:

> When we review criminal convictions, we consistently apply the rules that circumstantial evidence may be sufficient to prove guilt beyond a reasonable doubt; that all conflicts in the evidence are resolved by the fact-finder; that the evidence and the reasonable inferences it raises are viewed in the light most favorable to the prevailing party; and that the trial court's judgment is presumed to be correct and is not to be disturbed unless plainly wrong. Presumably, we would apply these rules reviewing a conviction for the crime of adultery. By what curious logic do we ignore them when we review findings of fact based upon conflicting evidence of adultery in a civil case where the standard of proof is lower?

Id. at 247, 278 S.E.2d at 869 (Poff, J., dissenting).

53. *See id.*

54. *See* Roberts v. Roberts, 223 Va. 736, 292 S.E.2d 370 (1982). In this case, the court deftly avoided the inequitable result in an interesting factual and procedural situation. The commissioner had announced from the bench a final decision awarding the wife a divorce and spousal support. The wife allegedly committed adultery after the decision, but before the attorneys could agree on a draft of a final decree to present to the commissioner for entry. The husband then charged her with adultery. Apparently, had he been allowed to proceed with the adultery claim, the wife would have lost the spousal support already awarded to her, but not yet formally reduced to writing. However, the supreme court affirmed the trial court's denial of the husband's motion to file an amended bill alleging adultery because he had filed the motion three days before the first act of adultery allegedly occurred:

> The court was free to conclude that [the husband's] motion was made in good faith,

Such a harsh result was avoided in *Wallace v. Wallace*,[55] a recent decision by the Virginia Court of Appeals, which involved the issue of whether post-separation adultery would bar the wife's spousal support claim. Because the husband had first been guilty of adultery and desertion that caused the separation, the court in *Wallace* stated that he had come into equity with unclean hands; he was therefore precluded from establishing that the wife had subsequently committed adultery, which would have barred her claim for spousal support.[56]

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but was merely an effort to avoid the spousal support previously awarded, in the hope that evidence of adultery might later be found. In these circumstances we can not say that the trial court abused its discretion in denying the husband's motion.

Id. at 742, 292 S.E.2d at 373.

55. Wallace v. Wallace, 1 Va. App. 183, 336 S.E.2d 27 (1985). The facts of this case certainly commanded some judicial gymnastics to save the wife's support claim. The parties had been separated fifteen years since the husband had abandoned the family, during which time he had been paying child and spousal support pursuant to a juvenile court order. Also during this time, the husband had been living with another woman. The wife's alleged adultery occurred after the fifteen-year separation and following the institution of divorce proceedings.

56. Because Virginia is one of the few remaining states in which adultery is a criminal offense, Mrs. Wallace was entitled to assert her fifth amendment privilege against self-incrimination when asked if she had committed adultery. *See* VA. CODE ANN. § 18.2-365 (Repl. Vol. 1982). However, such criminal offenders are seldom prosecuted. Roe v. Roe, 228 Va. 722, 727-28, 324 S.E.2d 691, 694 (1985).

The court has traditionally used two methods to approach this constitutional claim. One method is to allow the assertion of the privilege, which protects the party's right against self-incrimination in a separate criminal proceeding; then, the court makes a finding of fact in the civil divorce proceeding, drawing an inference from the assertion of the privilege that the party has committed adultery. This inference is based on the fact that if the truthful answer to the question were in the negative, the party would have so stated.

The other method of dealing with the assertion of the privilege is the "sword and shield doctrine." As applied, this equity principle means that a party may not seek the sword of relief in equity and at the same time use the fifth amendment privilege as a shield to protect himself from inquiries that may be pertinent to awarding appropriate relief. For example, if a party is seeking spousal support, he or she must allow the court to make a finding as to the existence of fault which may potentially bar his or her entitlement to such support. A more glaring example would arise in a custody case. If a party wants the court to consider awarding custody of a child to him or her, that party must be willing to let the court inquire into fitness, which may include inquiry into the area of morality.

In *Wallace*, the district court refused to use the sword and shield doctrine against Mrs. Wallace because Mr. Wallace himself had caused the disintegration of the marriage; therefore, he had not come into equity with clean hands. 1 Va. App. at 185, 336 S.E.2d at 28. On the facts in that case, it does not appear that this brought about an inequitable result. In 1985, however the Virginia General Assembly enacted VA. CODE ANN. § 8.01-223.1 (Cum. Supp. 1985), which provides: "In any civil action the exercise by a party of any constitutional protection shall not be used against him." This provision apparently means that a court can neither draw an inference from the assertion of the fifth amendment privilege nor use the sword and shield doctrine against the party invoking it. Since a party's right against self-incrimination in a criminal case can be preserved by its assertion, no useful purpose can

While reaching what was unquestionably a just result, the court never squarely confronted the plain wording of Virginia Code section 20-107.1, which does not merely bar spousal support for "fault causing the separation"[57] or "misconduct entitling the husband to a divorce."[58] Rather, the statute provides that no support is to be awarded where a ground of divorce "*exists*."[59] Thus, a simple read-

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be served by allowing a party to assert that privilege in a civil proceeding with impunity. A court should, in appropriate circumstances, particularly in custody cases, be given the power to draw inferences or invoke the sword and shield doctrine. It seems that the only result to be achieved by the new statute is to protect an adulterous spouse in a divorce proceeding. It would better serve the ends of justice if the private matter of adultery were left to divorce proceedings and removed from the criminal law.

In Boswell v. Boswell, 209 Va. 819, 166 S.E.2d 927 (1969), the Virginia Supreme Court confronted the question whether a wife forfeited her right to spousal support where she had been adjudged guilty of desertion, but the husband was found to be guilty of subsequent acts of adultery. The trial court had held that she was barred from spousal support because of the existence of fault. The wife argued on brief, *inter alia*, that this was a case of recrimination because the grounds for divorce against her husband were more serious than those against her. The wife relied upon VA. CODE ANN. § 20-117 (Repl. Vol. 1983) (divorce from bond of matrimony after divorce from bed and board), arguing that the court should consider the relative degree of the parties' misconduct when deciding whether to award alimony. *See* Brief for Appellant at 10, Boswell v. Boswell, 209 Va. 819, 166 S.E.2d 927 (1969). Because the supreme court was equally divided on the issue on appeal, the decree of the lower court was affirmed without opinion. 209 Va. 819, 166 S.E.2d 927.

57. Blevins v. Blevins, 225 Va. 18, 21, 300 S.E.2d 743, 745 (1983) (court referred to "fault causing separation" rather than "existence of fault grounds"); Brooker v. Brooker, 218 Va. 12, 13, 235 S.E.2d 309, 310 (1977) (same).

58. Thomas v. Thomas, 217 Va. 502, 504, 229 S.E.2d 887, 889 (1976) (court referred to "misconduct entitling [husband] to divorce" rather than "existence of fault grounds").

59. VA. CODE ANN. § 20-107.1 (Cum. Supp. 1985) (emphasis added). Earlier cases had allowed the introduction of adultery grounds that arose after separation and even after the filing of suit for divorce. The supreme court had reasoned that introduction of such grounds was consistent with the policy of the legislature that the waiting period between the separation and final decree "is designed primarily to give the parties an opportunity to reconcile and to determine if they desire the separation to be final. The commission of adultery during that period by either party to a marriage in trouble is the one act most likely to frustrate and prevent a reconciliation." Coe v. Coe, 225 Va. 616, 620, 303 S.E.2d 923, 925-26 (1983) (alleged adultery committed nine months after separation but prior to any testimony being taken in the case); *see also* Rosenberg v. Rosenberg, 210 Va. 44, 168 S.E.2d 251 (1969) (alleged adultery committed after original complaint filed).

In Roberts v. Roberts, 223 Va. 736, 292 S.E.2d 370 (1982), had the husband sought to properly file his amended pleading in good faith, the court might even have allowed the introduction of evidence of adultery, allegedly committed after its final ruling but before the decree itself was formally entered. *See supra* note 54.

Further, it is not necessary that a divorce be awarded on fault grounds to bar the right to spousal support. Brooker v. Brooker, 218 Va. 12, 13, 235 S.E.2d 309, 310 (1977) (husband would not be obligated to support wife after no-fault divorce if separation caused by wife's misconduct of constituting fault grounds).

VA. CODE ANN. § 20-99 (Cum. Supp. 1985) sets out the burden of proof requirement necessary to establish the *existence* of grounds for divorce. It provides that a divorce shall not be granted on the uncorroborated testimony of either or both parties. This statutory require-

ing of the statute would require the denial of spousal support whenever a fault ground *exists* against the dependent spouse, even if the divorce was awarded under the no-fault provisions.

This uncertainty in the statute could be removed by a clear expression of intent by the legislature. However, the Virginia General Assembly must first decide if the public policy in Virginia is to terminate the spousal support rights of a spouse who, though faultless in destroying the marriage, has not remained celibate during the separation while awaiting the entry of a divorce decree.[60]

II. Fault as a Factor in Equitable Distribution

When section 20-107.3[61] was enacted in 1982, Virginia joined the mainstream of jurisdictions which have adopted equitable distribution of marital property as an integral part of their divorce law.[62]

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ment is not intended as a standard of proof in a divorce case, but rather to prevent divorces by collusion. Forbes v. Forbes, 182 Va. 636, 640, 29 S.E.2d 829, 831 (1944). Where it is apparent that there is no collusion, the corroboration need only be slight. Martin v. Martin, 202 Va. 769, 774, 120 S.E.2d 471, 474 (1961); Graves v. Graves, 193 Va. 659, 662-63, 70 S.E.2d 339, 340 (1952).

Thus, it would seem that little or no corroboration is necessary to prove the existence of fault barring spousal support where divorce is not sought on those grounds. For example, if a party were to admit to committing adultery, that admission alone would be sufficient to prove by a preponderance of the evidence that fault exists even though the corroboration necessary to obtain a divorce on those grounds may be lacking. This is consistent with the approach taken by the Virginia Supreme Court in Graham v. Graham, 210 Va. 608, 610, 172 S.E.2d 724, 726 (1978), where it was held that the admissions of a party alone and without corroboration are admissible and competent as evidence to defeat a prayer for divorce.

60. In the 1986 session of the Virginia General Assembly, Senate Bill 11 was passed by the Senate, but was passed by indefinitely by the House of Delegates Courts of Justice Committee. This bill proposed retention of only adultery as a bar to spousal support. Other fault grounds would be considered as *factors* in determining support and maintenance for a spouse under VA. CODE ANN. § 20-107.1 (Repl. Vol. 1983). To the factors the court considers in awarding spousal support, the bill would have added: "8a. The circumstances and factors which contributed to the dissolution of the marriage, specifically including any ground for divorce under the provisions of § 20-91(1), (3) or (6) or § 20-95 . . . ."

Had this bill been enacted, the issue of post-separation adultery as a bar to spousal support would have remained, and the problem word "exists" would have been retained. For a discussion of Virginia legislators' views on the bill, see Richmond Times Dispatch, Feb. 21, 1986, at A6, col. 4.

61. VA. CODE ANN. § 20-107.3 (Cum. Supp. 1985).

62. "Section 20-107.3 brings the Commonwealth into the mainstream of a 'broad reform movement in this country to vest substantially greater descretion [sic] in the courts to reach equitable results than that which existed under the common law title system.' " REPORT OF THE JOINT SUBCOMMITTEE STUDYING SECTION 20-107 OF THE CODE OF VIRGINIA TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA, H. DOC. No. 21, at 7 (1982) (quoting Auerbach & Jenner, *Historical and Practical Notes* to ILL. ANN. STAT. ch. 40, § 503 (Smith-Hurd 1980)) [hereinafter cited as JOINT SUBCOMMITTEE REPORT].

The basic philosophy underlying equitable distribution is that marriage is an economic partnership, and consequently upon divorce each spouse should receive a fair share of what was accumulated during the marriage.[63]

The Virginia statute sets forth a scheme for identifying and distributing marital property.[64] In determining the division of marital property, the court is directed to consider eleven statutory factors.[65] Perhaps as a reflection of Virginia's basically conservative approach towards divorce,[66] the legislature specifically included marital fault as one of those factors. The statute directs the court to consider the circumstances and factors which contributed to the dissolution of the marriage, specifically including any ground for divorce.[67]

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63. JOINT SUBCOMMITTEE REPORT, *supra* note 62, at 7; *see, e.g.*, Blickstein v. Blickstein, 99 A.D.2d 287, 472 N.Y.S.2d 110 (1984).

64. Virginia is one of only two states that does not vest the court with the power to directly order the distribution of property. The court must instead make a monetary award based upon the inequitable ownership of marital property. *See* MD. FAM. LAW CODE ANN. § 8-205 (1984); VA. CODE ANN. § 20-107.3(C), (D) (Cum. Supp. 1985).

The court begins by determining which property is marital property and the ownership thereof. After ownership, classification and values have been established, the court is directed to consider eleven enumerated factors to determine a fair distribution.

For a guide to the practical usage and application of Virginia Code § 20-107.3, see Marchant, *Virginia's Equitable Distribution Statute: What Does It Really Mean and Where Do I Start?*, VA. B.A.J. 10 (Spring 1985).

65. 1. The contributions, monetary and nonmonetary, of each party to the well-being of the family;
2. The contributions, monetary and nonmonetary, of each party in the acquisition and care and maintenance of such marital property of the parties;
3. The duration of the marriage;
4. The ages and physical and mental condition of the parties;
5. The circumstances and factors which contributed to the dissolution of the marriage, specifically including any ground for divorce under the provisions of § 20-91 (1), (3) or (6) or § 20-95;
6. How and when specific items of such marital property were acquired;
7. The debts and liabilities of each spouse, the basis for such debts and liabilities, and the property which may serve as security for such debts and liabilities;
8. The present value of pension or retirement benefits, whether vested or nonvested;
9. The liquid or nonliquid character of all marital property;
10. The tax consequences to each party; and
11. Such other factors as the court deems necessary or appropriate to consider in order to arrive at a fair and equitable monetary award.

VA. CODE ANN. § 20-107.3(E) (Cum. Supp. 1985).

66. "The trend is to minimize the importance of marital fault as a factor in litigation." Freed & Walker, *supra* note 1, at 394.

67. VA. CODE ANN. § 20-107.3(E)(5) (Cum. Supp. 1985). Arguably, misconduct that occurs after the parties' separation cannot be considered the cause of marital breakdown and should not affect the distribution of marital assets.

The joint subcommittee created to study § 20-107 recommended the inclusion of fault:

Virginia's approach to including fault as a factor differs from that used in many other states. In some states, marital fault is not specifically listed as a factor as it is in Virginia, but instead may be considered under the "wild card" or "catchall" factor, which empowers the court to consider any other factor which it deems appropriate to reach a fair result.[68] In some of those states and in some states whose statutes contain neither a "catchall" factor nor any reference to fault, there are only limited circumstances in which fault can affect equitable distribution.[69] In several other

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> The members, after lengthy discussion, decided that to allow fault to serve as an absolute bar to the monetary award would defeat the equitable purpose of this section. However, to avoid unreasonable results in situations involving fault, the circumstances contributing to the dissolution of the marriage, specifically including any ground for divorce, have been included among the factors for consideration in the court.

JOINT SUBCOMMITTEE REPORT, *supra* note 62, at 8.

68. *See, e.g.*, VA. CODE ANN. § 20-107.3(E)(11) (Cum. Supp. 1985) ("[s]uch other factors as the court deems necessary or appropriate to consider in order to arrive at a fair and equitable monetary award"); *see also* Reich v. Reich, 235 Kan. 339, ___, 680 P.2d 545, 547 (1984) (under equitable distribution statute which has catchall factor but is silent as to fault, marital fault may be considered). *But see In re* Marriage of Willcoxson, 250 N.W.2d 425 (Iowa 1977) (under statute which contains catchall factor, fault no longer relevant to equitable distribution). In New York, relevance of fault to equitable distribution is not settled. *Compare* Giannola v. Giannola, 109 Misc. 2d 985, 441 N.Y.S.2d 341 (Sup. Ct. Spec. Term. 1981) (statute contains catchall factor under which marital fault may be considered) *with* M.V.R. v. T.M.R., 115 Misc. 2d 674, 454 N.Y.S.2d 779 (Sup. Ct. 1982) (fault is irrelevant, difficult to determine, and as a matter of law may not be considered).

The equitable distribution statutes of many states do not have a catchall factor and are silent as to marital fault. The courts of several of these states have held marital fault to be a relevant consideration. *See, e.g.*, Ross v. Ross, 103 Idaho 406, 648 P.2d 1119 (1982) (marital fault may be considered); Ripley v. Ripley, 112 Mich. App. 219, 315 N.W.2d 576 (1982) (cause of divorce may be considered); Ebbert v. Ebbert, 123 N.H. 252, 459 A.2d 282 (1983) (evidence of fault admissible when fault grounds pleaded); Rust v. Rust, 321 N.W.2d 504 (N.D. 1982) (marital fault relevant to equitable distribution); *see also infra* note 69.

69. In some states, where the equitable distribution statutes contain a catchall factor, fault may be considered only in limited circumstances, such as one spouse's outrageous behavior. *See, e.g.*, Blickstein v. Blickstein, 99 A.D.2d 287, ___, 472 N.Y.S.2d 110, 113-14 (1984) (although as general rule marital fault not relevant to equitable distribution, it might be one pertinent factor in cases involving conduct which "shocks the conscience"). Such limited consideration of fault is also permitted in states with neither a catchall factor nor statutory mention of marital fault. *See* D'Arc v. D'Arc, 164 N.J. Super. 226, 395 A.2d 1270 (Ch. Div. 1978) (husband's evil and outrageous behavior in attempting to arrange wife's murder considered), *modified on other grounds*, 175 N.J. Super. 598, 421 A.2d 603 (App. Div. 1980), *cert. denied*, 451 U.S. 971 (1981).

The statutes of sixteen states require consideration of economic fault, such as the dissipation or secreting of marital assets by one spouse. *See* Freed & Walker, *supra* note 1, at 394-95. Economic misconduct has also been held to be relevant in other states without such statutory directive. *See, e.g.*, *Blickstein*, 99 A.D.2d 287, 472 N.Y.S.2d 110 (court may consider marital misconduct that "shocks the conscience" and, as a general rule, economic fault as well); Smith v. Smith, 314 N.C. 80, 331 S.E.2d 682 (1985) (court may consider economic

states, fault is not a factor to be considered at all.[70]

In states in which fault is not a permissible factor for the courts to consider, the underlying rationale is that equitable distribution involves the dissolution of an economic partnership.[71] As such, fault or misconduct which is not related to the economic conditions of the partnership should not be a factor in dividing up its assets.[72] Rather, the court should confine itself to consideration of such factors as economic contributions to the marriage, contributions to the family's well-being, and the overall economic conditions of the partnership and of each party.[73]

In jurisdictions that include fault as a factor, one commentator has postulated that such inclusion is based on the belief of legislators and judges that a "bad" person should not be rewarded.[74] However, consideration of fault in property distribution also may be based on sound and traditional principles of contract. Where two parties enter into a marriage contract to last until the death of either party and one party breaches that contract by an earlier termination of the marriage, general contract principles dictate that the breaching party bear the economic loss. Of course, divorce law is not pure contract law, but neither is it purely the law of partnership.

The precise role which fault is to play in equitable distribution is difficult to determine. Fault does not lend itself to ready calculation to the same degree as some economic factors.[75] In Virginia, as

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fault, but not marital fault unless it is related to the economic condition of the marriage).

70. Consideration of marital fault in equitable distribution is specifically precluded by the statutes of Alaska, Arizona, California, Colorado, Delaware, Illinois, Kentucky, Minnesota, Montana, New Mexico, Oregon, Pennsylvania, South Dakota, Tennessee, Washington, West Virginia, Wisconsin and the Virgin Islands. *Fault as a Factor in Equitable Distribution*, 1 EQUITABLE DISTRIBUTION J. 57, 58-59 (1984); Freed & Walker, *supra* note 1, at 393-402.

The courts in some states whose statutes are silent as to whether fault is a permissible factor have held that marital fault is irrelevant to the division of marital assets. *See, e.g.*, Boyd v. Boyd, 421 A.2d 1356 (Me. 1980) (fault should not normally be considered, especially when divorce granted on no-fault ground); Campbell v. Campbell, 202 Neb. 575, 276 N.W.2d 220 (1979) (noting that no case has held that the grant, denial, or reduction of alimony or the division of property should be punitive); Chalmers v. Chalmers, 65 N.J. 186, 320 A.2d 478 (1974) (focus on marital fault would be incompatible with basic philosophy underlying equitable distribution).

71. *See, e.g.*, Smith v. Smith, 314 N.C. 80, 331 S.E.2d 682 (1985).

72. *Id.*

73. *Id.*

74. J. GOLDEN, EQUITABLE DISTRIBUTION OF PROPERTY 255 (1983).

75. It would certainly be easier to quantify debts and liabilities of each spouse, or perhaps the value of a pension plan, than to place a monetary value on one spouse's adulterous

of this writing, there are no reported appellate cases which give any guidance to the trial courts in determining the weight to be given the fault factor.

In fact, no specific weight should be assigned to fault as a statutory factor. Even if one party is legally at fault in bringing about the termination of the marriage, many other circumstances leading up to that final separation may have contributed to it; the blame for those circumstances may be laid at the feet of the other party or both of them.[76] As one court noted, "fault may be merely a manifestation of a sick marriage. The spouse [whose conduct provides] . . . grounds for divorce may not be responsible for the breakdown of the marriage and may merely be reacting to a situation which is not of his or her making."[77] In such a case, the court may find that fault, in the sense of the final act of misconduct constituting the grounds for divorce, should be given no weight. Perhaps it should be offset by a consideration of earlier instances of misconduct in the marriage which the party presently at fault may have forgiven or endured.[78] Thus, the uncertain role assigned to fault under the Virginia equitable distribution statute actually may benefit the parties and the courts by providing maximal flexibility in reaching a truly equitable property distribution.

III. Recommended Role of Fault under Virginia Divorce Law

In Virginia at least, fault will likely be a part of divorce jurisprudence for some time to come, and perhaps it does have its place. In determining issues of custody, support, or property division, and in trying to reach an equitable result, certainly there are circumstances where fault should be considered to some degree.

In order to achieve an equitable distribution of the marital assets, it seems unrealistic to totally ignore fault as a factor as some states do. The Virginia approach seems preferable as long as the fault factor is not used to clobber the wrongdoer. When the court can consider all of the facts and circumstances which contributed to the dissolution of the marriage in combination with the other statutory factors, it can fashion a more equitable division of the

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conduct. *See generally* Va. Code Ann. § 20-107.3(E) (Cum. Supp. 1985).

76. *See, e.g.*, Chalmers v. Chalmers, 65 N.J. 186, ___, 320 A.2d 478, 482 (1974).

77. *Id.*

78. Such an offset could achieve equitable results in a case with a factual situation similar to Roberts v. Roberts, 223 Va. 736, 292 S.E.2d 370 (1982). *See supra* note 54.

marital assets. Otherwise, "equitable" distribution is a misnomer, and the division would be better left to appraisers and accountants instead of lawyers and judges.

However, fault seems to play too great a role in Virginia's divorce law. The rule that creates an absolute bar to spousal support serves only to deprive the court of sufficient discretion to reach an equitable result in a divorce case. Faced with having to apply such a rigid rule, it is inevitable that the court will look for a way around the rule, as it has, even if that means resorting to an artificial interpretation of the statute's plain wording to render a fair meaning and application in a particular case. However, it is the legislature, and not the courts, that should address this issue as a matter of public policy.

Rather than having an inflexible rule under which the existence of grounds for divorce is an absolute bar to spousal support, the Virginia General Assembly could borrow from language in the equitable distribution statute[79] to amend the spousal support provisions to provide: "The amount of spousal support to be awarded, if any, shall also be determined by the circumstances and factors which contributed to the dissolution of the marriage, specifically including any ground for divorce under any provision of § 20-91(1), (3) or (6) or § 20-95." With such discretion, the court could still find under certain circumstances that the conduct of the dependent spouse was such that he or she should receive no support from the other. However, where, for example, the economically dependent spouse has been good and dutiful for many years of marriage and may have endured and forgiven many acts of misconduct on the part of his or her spouse over the years, the dependent spouse should not be absolutely barred from spousal support simply because he or she was guilty of the last transgression. It seems unnecessarily restrictive and rigid to take away from the court its discretion to consider all of the circumstances in making this determination.

Given the modern state of the marriage institution, the legislature also should consider whether having archaic grounds for divorce serves any beneficial purpose. Although the court should maintain the policy of considering and giving appropriate weight to the circumstances and factors contributing to the dissolution of the marriage when it makes determinations regarding custody,

79. VA. CODE ANN. § 20-107.3 (Cum. Supp. 1985).

support, and property division, it is not necessary for the divorce decree itself to be a scarlet letter on the forehead of the wrongdoer. Virginia presently has a statute which provides for a no-fault divorce after a six-month period of separation when the parties have no minor children and have entered into a property settlement agreement.[80] The legislature should consider treating all married couples equally by removing those qualifications for a six-month divorce. This shortened separation period would eliminate collusive divorce suits brought on the grounds of adultery and initiated because the parties want to obtain a divorce without having to wait for a year of separation. Further, the required six-month period of separation would afford all marriages a cooling-off period, regardless of the circumstances that brought about the separation.

Any change in the divorce law should not be made merely for the purpose of putting Virginia into the mainstream. Rather, it should be made to empower the courts to consider each case on its individual facts and circumstances without being bound by inflexible and archaic rules.

80. *Id.* § 20-91(9)(a) (Repl. Vol. 1982). The required separation period for other couples is one year. *Id.*