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DIVORCE DENIED: HAVE MENTAL CRUELTY,  
CONSTRUCTIVE DESERTION AND REASONABLE  
APPREHENSION OF BODILY HARM BEEN ABOLISHED IN  
VIRGINIA?

*Sylvia Clute\**

I. INTRODUCTION

In a turmoil of emotional distress and in fear of the outcome of an already deteriorating pregnancy, she fled the marital home with only her small son and a suitcase full of clothes. This woman's husband had publicly and privately bullied, berated, belittled and browbeat her throughout their marriage, but since she became pregnant she feared that his campaign to keep her in a constant state of emotional disequilibrium would also harm the child she carried. Her husband controlled her by keeping a tight grasp on the family finances providing her with meager spending money and forcing her to produce receipts for every penny she spent. He punished her by taking her checks, credit cards and car keys. In front of their child, he cursed and demeaned her until she was reduced to tears. However, he never hit her in front of witnesses and the few incidents of physical abuse were not recent.

When this woman escaped her marital home, she did so only to protect her emotional stability and the health of her baby, which she nonetheless lost shortly thereafter. She hoped that this drastic step would cause her husband to recognize the need for change. Instead, the husband filed for divorce claiming that she had deserted the marital home without cause. Though the court found her justified in leaving and therefore innocent of desertion, it refused to grant her a divorce on the grounds of cruelty, reasonable apprehension of bodily harm, or constructive desertion. In short, the court denied her a divorce on any fault grounds.

Under Virginia law, this couple must remain married until they have lived separate and apart for at least one year, when they will

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qualify for a "no-fault" divorce.<sup>1</sup> In the meantime, the husband, who has vowed to give the wife nothing, has complete control of the former marital home, the automobiles that are titled in his name and the family business where the wife had been a part-time employee. The wife was awarded a modest amount of temporary spousal and child support. The husband noted an appeal which assures him at least an additional year in control of the marital property.

Unfortunately, this domestic scenario is not uncommon in Virginia. In most cases, the standard of proof required in fault divorces based on cruelty, reasonable apprehension of bodily harm or constructive desertion demands that severe physical abuse occur within the marriage. Circuit courts are wary of awarding bed and board divorce decrees<sup>2</sup> on grounds other than extreme physical cruelty because Virginia case law does not appear to support any grounds short of this extremely high standard. Family law attorneys, as a result, are faced with the dilemma of either advising clients to remain in abusive situations until the abuse becomes extreme, or risk the adverse financial consequences that may occur if the spouse must wait for a no-fault divorce or if the spouse is found guilty of desertion.

Section 20-95 of the Virginia Code states "[a] divorce from bed and board may be decreed for cruelty, reasonable apprehension of bodily hurt, willful desertion or abandonment."<sup>3</sup> Though the list of grounds seems clear, court decisions consistently blur the syntactical boundaries of reasonable apprehension of bodily hurt. By so

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1. VA. CODE ANN. § 20-91(9)(a) (Repl. Vol. 1990). This section states that a divorce may be decreed:

On the application of either party if and when the husband and wife have lived separate and apart without any cohabitation and without interruption for one year. In any case where the parties have entered into a separation agreement and there are no minor children either born of the parties, born of either party and adopted by the other or adopted by both parties, a divorce may be decreed on application if and when the husband and wife have lived separately and apart without cohabitation and without interruption for six months.

*Id.*

2. A bed and board divorce decree terminates most marital rights but does not permit remarriage. It must be merged into a final divorce decree before one can remarry. *See* 6A MICHIE'S JUR. Divorce & Alimony § 4 (1985).

3. VA. CODE ANN. § 20-95 (Repl. Vol. 1990). The Virginia Code also sets out the comparable grounds for absolute divorce: "Where either party has been guilty of cruelty, caused reasonable apprehension of bodily hurt, or willfully deserted or abandoned the other, such divorce may be decreed to the innocent party after a period of one year from the date of such act." *Id.* § 20-91(6).

doing, courts have effectively abolished two of the three causes from the statute. This article will first trace how the sort of abusive behavior associated with reasonable apprehension of bodily hurt has been reduced from a grounds for divorce to a mere justification against a charge of desertion. Second, this article will demonstrate how the courts have narrowed the evidence which constitutes proof of cruelty to include only acts of severe physical abuse. Finally, the article will outline a statutory remedy to the dilemma in which spouses subjected to abusive behavior are placed by a standard at odds with a contemporary view of family life.

## II. PERMISSIBLE LEVELS OF ABUSE WITHIN MARRIAGE

At one time, the common law allowed a husband to impose "moderate personal chastisement" on his wife.<sup>4</sup> The concept that there are permissible levels of abuse within a marriage is not condoned by modern society. Virginia case law, however, does not reflect the modern view toward spouse abuse.

### A. *Fruits of the Unwise Choice*

"[C]ourts of justice do not pretend to furnish cures for all the miseries of human life," wrote the Supreme Court of Virginia more than a century ago in *Latham v. Latham*.<sup>5</sup> This sentiment has echoed through the decades. In 1926, the court repeated the caveat in *Butler v. Butler*.<sup>6</sup> In 1958, a version appeared in *Hoffecker v. Hoffecker*.<sup>7</sup> In 1986, the Virginia Court of Appeals repeated it twice for good measure in *Zinkhan v. Zinkhan*<sup>8</sup> and in *McLaughlin v. McLaughlin*.<sup>9</sup> In over one hundred years, the words changed very little:

Well established principles governing the granting of a divorce for fault hold that the law does not permit courts to sever marriage bonds and to break up households merely because husband and wife, through unruly tempers, lack of patience and uncongenial na-

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4. See *Stedman, Right of Husband to Chastise Wife*, 3 Va. L. Reg. (n.s.) 241, 241-42 (1917). The "moderate personal chastisement" rule applied in criminal battery cases, not in divorce, and was repudiated before 1917. *Id.* The courts apparently never accepted the rule that the husband could use a switch not thicker than his thumb. *Id.*

5. 71 Va. (30 Gratt.) 307, 321 (1878).

6. 145 Va. 85, 88, 133 S.E. 756, 757 (1926).

7. 200 Va. 119, 125-26, 104 S.E.2d 771, 776 (1958).

8. 2 Va. App. 200, 209, 342 S.E.2d 658, 663 (1986).

9. 2 Va. App. 463, 467, 346 S.E.2d 535, 537 (1986).

tures, live unhappily together. It requires them to submit to the ordinary consequences of human infirmities and unwise selections, and the misconduct which will form a good ground for legal separation must be very serious and such as amounts to *extreme cruelty*, entirely *subversive* of family relations, rendering the association *intolerable*.<sup>10</sup>

The question is whether the public policy of preserving the family unit is well served by placing the liability for "unwise selections" in juxtaposition with a strict standard for "extreme cruelty" which requires evidence of bodily hurt. The plain language of the statute does not set the threshold of actual physical abuse but provides the court with an opportunity to grant a fault divorce to a spouse who reasonably apprehends bodily harm *before* it actually occurs.

## B. *Blurred Fault Standards*

Inconsistency in Virginia's case law makes finding a clear standard of proof for any of the fault grounds for divorce difficult. Judicial decisions in divorce cases tend to be fact oriented and are now decided by a three judge panel. Therefore inconsistency may be unavoidable.

### 1. Violent Outbursts of Temper

In *Graham v. Graham*,<sup>11</sup> the Supreme Court of Virginia found that the "misconduct of [the husband] was serious. The cursing, the abuse, the violent outbursts of temper, the physical assaults, the destruction of furniture and his indifference constituted conduct subversive of the family relations."<sup>12</sup> Moreover, the court found the cumulative quality of the abuse significant: "[the husband's actions] finally accumulated to the point where Mrs. Graham feared for her life, and was no longer physically or mentally able to stand more."<sup>13</sup> The court could not force Mrs. Graham to forfeit "her right to all maintenance or support" by finding her guilty of "desertion without justification,"<sup>14</sup> as Mr. Graham had

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10. *Zinkhan*, 2 Va. App. at 209, 342 S.E.2d at 663 (emphasis added).

11. 210 Va. 608, 172 S.E.2d 724 (1970).

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

13. *Id.*

14. *Id.* See generally *Capps v. Capps*, 216 Va. 382, 219 S.E.2d 898 (1975) (spouse is free of legal fault in breaking off cohabitation even though he or she cannot establish the other's

charged. Where there was almost continuous discord, jealousy, arguments, coarse and abusive language, violent outbursts of temper, a spouse was deemed to have a right to abandon the marital home without being accused of desertion.<sup>15</sup> The court refused however, to find that the same behavior rose to a level justifying a divorce due to cruelty and constructive desertion as Mrs. Graham alleged.<sup>16</sup>

Cases such as the often-cited *Graham* decision compel trial courts to reduce reasonable apprehension of bodily hurt and even mental cruelty from actual grounds for divorce to mere "justification" for a marriage partner leaving the marital home. Since 1970, Virginia courts have been willing to give only this limited recognition to the existence of reasonable apprehension of bodily hurt within the plain language of both sections 20-91(6) and 20-95 of the Code of Virginia as a justification to a charge of desertion.<sup>17</sup>

## 2. Threats and Indirect Injury

"I ought to kill you," said the husband in *Brawand v. Brawand*, another example of the court's continued blurring of fault grounds.<sup>18</sup> The wife had threatened to call the police after her husband had disciplined their oldest son. Following this incident, though still living in the same house, the couple gradually became estranged. The wife had a separation agreement drawn up which the husband rejected as unfair. One day while objecting to his wife's talking on the telephone, the husband tore the telephone from the wall and threw it to the floor with such force that the receiver bounced back and struck the wife. Though she took two weeks to leave after the telephone incident, she "asserted that she

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conduct as grounds for fault divorce); *Rowand v. Rowand*, 215 Va. 344, 210 S.E.2d 149 (1974) (a single incident of cruelty is enough to free the spouse of legal fault even if it is not grounds for fault divorce in itself).

15. *Graham*, 210 Va. at 616, 172 S.E.2d at 730.

16. *Id.*

17. VA. CODE ANN. §§ 20-91(6), -95 (Repl. Vol. 1990). Prior to the *Graham* decision, the standard for justified leaving of the marital home, under the rule of *Hoback v. Hoback*, 208 Va. 432, 158 S.E.2d 113 (1967) was "conduct . . . sufficient to establish a foundation of a judicial proceeding for divorce." 208 Va. at 435-36, 158 S.E.2d at 116. In 1980, the court limited the rule in *Breschel v. Breschel*, 221 Va. 208, 269 S.E.2d 363, (1980) to exclude allegations of constructive desertion. "A spouse may not break off cohabitation and successfully claim constructive desertion unless the other's conduct is sufficient to establish a foundation for a divorce proceeding." 221 Va. at 211, 269 S.E.2d at 365.

18. 1 Va. App. 305, 308, 338 S.E.2d 651, 652 (1986).

was terrified.”<sup>19</sup>

The court was adamant that the evidence did not establish grounds for the wife’s request for a fault divorce. The court did find the evidence of the husband’s behavior adequate to defend the wife from a charge of desertion. “Husband engaged in violent, verbal outbursts and spoke language which reasonably could be interpreted as threatening. The cumulative effect of these incidents and other marital strife provided her ample justification or excuse to leave.”<sup>20</sup>

### 3. Commands to “Get Out”

Demands that a spouse “get out” may constitute a defense to a charge of desertion. In *Rowand v. Rowand*,<sup>21</sup> the wife refused to deposit her paycheck in a joint account held by her and her husband after they had experienced financial difficulties. “The husband told the wife: ‘Well, if you’re not going to put your check in, then get out.’ The husband telephoned the wife’s parents, stating he was ‘kicking her out’ and inquiring whether they had a place she ‘could sleep.’”<sup>22</sup> The wife relented and gave the husband her check. Less than a month later, the wife insisted on buying shoes and clothing for herself and shoes and medicine for the child before contributing to the joint account. The husband again told the wife, “[w]ell, if that is the way you are going to be about it, get out.”<sup>23</sup> This time, the wife left. Because there had been no witnesses to corroborate the evidence, the husband’s punctuation of the remark by grabbing the wife’s arm and throwing her toward the front door was not considered. In *Rowand*, the Virginia Supreme Court found the wife was justified in leaving, but would not find that she had established grounds for constructive desertion.<sup>24</sup>

#### C. Intolerability to What Degree?

Fleeing spouses may now offer evidence of intolerable conditions in the marital home to justify the decision to break the marital

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19. *Id.* at 310, 338 S.E.2d at 652.

20. *Id.*

21. 215 Va. 344, 210 S.E.2d 149 (1954).

22. *Id.* at 345, 210 S.E.2d at 150.

23. *Id.*

24. *Id.* at 346, 210 S.E.2d at 151.

relationship.<sup>25</sup> The same fleeing spouses, however, are unlikely to be granted a divorce on grounds of the same intolerable conditions no matter how much those conditions may cause apprehension of bodily hurt. The willingness of the courts to accept such suffering as a defense to desertion in the form of "justification," has allowed them to gloss over the fact that the "reasonable apprehension of bodily hurt" grounds for divorce has effectively been written out of the Code of Virginia.

### 1. Courts Second-Guess the Fleeing Spouse

To be justified in leaving, a fleeing spouse is forced to assess, at a moment of great emotional turmoil, whether the abusive situation in the marital home is sufficient to constitute apprehension of severe physical harm. Regardless of the fleeing spouse's perspective, the courts, in a calm moment months later, will second-guess the fleeing spouse's assessment. If the court agrees with the fleeing spouse that the situation in the marital home had deteriorated to the point of imminent and serious physical danger, then the charge of desertion is neutralized. If the court disagrees, the fleeing spouse becomes the culprit and suffers the possible loss of marital rights.<sup>26</sup>

### 2. Abuse Not Contributing to Fear for Physical Safety

Reasonable apprehension of bodily harm, in its reduced status as "justification" in defense of a charge of desertion, does not seem to include circumstances that a fleeing spouse may consider merely intolerable. These circumstances must directly contribute to fear for physical safety.

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25. In 1988, the Virginia Court of Appeals clearly stated the standard for abusive behavior as a defense to desertion in *Kerr v. Kerr*, 6 Va. App. 620, 371 S.E.2d 30 (1988).

[A] party to a marriage may now, for reasons that do not constitute grounds for divorce, terminate marital cohabitation without necessarily committing desertion.

. . . .

. . . Although these cases express no fixed formula for determining when justification exists, they recognize the underlying premise that leaving the marital home is justified when a spouse's conduct creates conditions so intolerable that the other spouse cannot reasonably be expected to remain in the home.

*Id.* at 624, 371 S.E.2d at 33.

26. See VA. CODE ANN. § 20-107.3(E)(5) (Repl. Vol. 1990). This section states that the circumstances of the marital breakdown is one factor to be considered in the equitable distribution of marital property. *Id.*



a. Non-Participation in the Marriage

In *Reid v. Reid*,<sup>27</sup> the court found "Mrs. Reid bore the major responsibility for raising the children," including one hyperactive child, "and maintaining the home," while Dr. Reid worked day and night throughout the marriage.<sup>28</sup> Lack of intimacy, the husband's excessive work habits, and his failure to assist in disciplining the children, caused the slow deterioration of the nineteen year marriage and resulted in Mrs. Reid's decision to leave. Dr. Reid's failure to "understand what his wife was trying to get through to him"<sup>29</sup> was, in the commissioner's opinion, what caused her to leave. Her claim of justification was denied by the Virginia Court of Appeals and she was found to have deserted her husband.

b. Gradual Breakdown or Delay to Act

Nor have the Virginia courts been sympathetic to allegations of gradual breakdown of a marriage. In the case of *Sprott v. Sprott*,<sup>30</sup> the trial court found that "the separation resulted from a 'gradual breakdown in their relationship' and that '[t]he blame for that separation rests with both parties but does not rise to the level of a willful desertion.'"<sup>31</sup> The Supreme Court of Virginia disagreed and found that the wife had built a "psychological wall" between herself and her husband. "After each perceived affront, she added another brick to the wall."<sup>32</sup> The court thus exonerated the husband's conduct and removed her defense to desertion.<sup>33</sup>

In *McLaughlin v. McLaughlin*,<sup>34</sup> the time-frame of the abusive behavior which finally drove the spouse from the marital home was found to be significant. If the abusive behavior "occurred only during an approximate thirty day period immediately prior to the time she left the marital abode,"<sup>35</sup> neither cruelty nor justification could be found.

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27. 7 Va. App. 553, 375 S.E.2d 533 (1989).

28. *Id.* at 558, 375 S.E.2d at 536.

29. *Id.* at 561, 375 S.E.2d at 538.

30. 233 Va. 238, 355 S.E.2d 881 (1987).

31. *Id.* at 240, 355 S.E.2d at 881.

32. *Id.* at 241, 355 S.E.2d at 882.

33. *Id.* at 242, 355 S.E.2d at 883.

34. 2 Va. App. 463, 346 S.E.2d 535 (1986).

35. *Id.* at 467, 346 S.E.2d at 537.

### c. Habitual Drunkenness

In twenty jurisdictions, habitual drunkenness or drug abuse is an independent ground for divorce.<sup>36</sup> In Virginia, however, leaving an alcoholic spouse does not even provide a defensive justification. In *Seehorn v. Seehorn*,<sup>37</sup> the wife gave an ultimatum to her husband, “[e]ither stop drinking or I would leave and he chose to continue drinking, so I did leave.”<sup>38</sup> Mrs. Seehorn’s evidence of her husband’s excessive use of alcohol was not enough to protect her from a charge of desertion and she lost her claim to alimony.

Even the mitigating evidence that the parties had entered a written agreement which provided for temporary spousal support and that they had lived apart for more than one year when she filed for a “no-fault” divorce did not protect Mrs. Seehorn from the cross-bill for desertion. The court “conclude[d] that the evidence of excessive consumption of alcohol did not as a matter of law render cohabitation unsafe by endangering life or health.”<sup>39</sup>

### III. WHAT IS CRUELTY IN THE COMMONWEALTH?

In 1967, the Supreme Court of Virginia suggested that bodily harm or the apprehension of bodily harm were not required elements in establishing cruelty. In *Hoback v. Hoback*,<sup>40</sup> the court wrote:

We have recognized that evidence of violence or apprehension of bodily harm are not indispensable ingredients in divorce suits charging cruelty, and that mental anguish, repeated and unrelenting neglect and humiliation may be visited upon an unoffending spouse in such degree as to amount to cruelty in the sense the term is used in the law of divorce.<sup>41</sup>

In 1986, however, the Virginia Court of Appeals in *Zinkhan v.*

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36. See e.g., ARK. STAT. ANN. § 25.24.050 (1990); GA. CODE ANN. § 19-503 (1990); ME. REV. STAT. ANN. tit. 19, § 691 (1990); MASS. GEN. LAWS ANN. ch. 208, § 1 (1990); NEV. STAT. § 641A.310 (1989); N.J. REV. STAT. § 2A:34-2 (1990).

37. 7 Va. App. 375, 375 S.E.2d 7 (1988).

38. *Id.* at 379, 375 S.E.2d at 9.

39. *Id.* at 378-79, 375 S.E.2d at 8-9; see also *Hoffecker v. Hoffecker*, 200 Va. 119, 125, 104 S.E.2d 771, 775-77 (1958).

40. 208 Va. 432, 158 S.E.2d 113 (1967).

41. *Id.* at 436, 158 S.E.2d at 116; see also *Baytop v. Baytop*, 199 Va. 388, 392, 100 S.E.2d 14, 17 (1957); *Bisel v. Bisel*, 197 Va. 636, 90 S.E.2d 779 (1956).

*Zinkhan* stated the standard for "cruelty" as misconduct "entirely subversive of the family relations rendering the association intolerable."<sup>42</sup> Therefore, the century old standard, established in *Latham v. Latham*<sup>43</sup> "that what merely wounds the feelings without actually being accompanied by bodily injury or actual menace . . . does not amount to legal cruelty"<sup>44</sup> remains the only clear standard for cruelty in the Commonwealth. For all practical purposes, as a grounds for divorce, abusive behavior is subsumed into a category requiring actual bodily hurt. Mental cruelty, in fact, may not even rise to the level of a justification for fleeing the marital home.

#### A. *Psychiatric Impact of Cruelty Overlooked*

In *Rexrode v. Rexrode*,<sup>45</sup> the court recounted testimony as to incidents of a husband's behavior "which can best be characterized as *extreme rudeness* toward [his] wife and her relatives. [She] was humiliated and embarrassed by these incidents and consequently found the marital home to be an increasingly difficult environment in which to live."<sup>46</sup> Although the court conceded Mrs. Rexrode was humiliated by the rudeness, it discounted her distress as being rooted in fear concerning how she would care for herself should her marriage dissolve.<sup>47</sup> However, testimony of Mrs. Rexrode's psychiatrist, under whose care she was placed during two weeks of hospitalization clearly tied her distress to the marriage. "[H]er main problem seemed to be a feeling of hopelessness and being overwhelmed in the marriage, that she described as being one in which she seemed to be very much victimized and she had a feeling of powerlessness. . . ."<sup>48</sup> Though the physician advised Mrs. Rexrode not to resume her marital relations with her husband, the court disregarded expert assessment of the relationship between the husband's cruelty and her symptoms. Instead, the court determined that the physician's "testimony is equivocal . . . and supports the chancellor's conclusion that her emotional difficulties 'arose not from anything that occurred during the marriage, but from her

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42. 2 Va. App. 200, 209, 342 S.E.2d 658, 663 (1986).

43. 71 Va. (30 Gratt.) 307 (1878).

44. *Id.* at 321.

45. 1 Va. App. 385, 339 S.E.2d 544 (1986).

46. *Id.* at 387-88, 339 S.E.2d at 546 (emphasis added).

47. *Id.* at 389, 339 S.E.2d at 547.

48. *Id.* at 388, 339 S.E.2d at 546.

fears concerning her ability to care for herself should she leave Mr. Rexrode and suffer adverse legal consequences.’”<sup>49</sup> The struggle that Mrs. Rexrode faced in choosing between the economic security which her husband provided and freedom from his abuse was lost on the court.

### B. *Burden to Take Remedial Measures Placed on Victim*

The *Rexrode* decision also placed the burden of taking remedial measures on the victimized spouse. Citing *Breschel v. Breschel*,<sup>50</sup> the court stated that using the principle of cruelty as a defense to desertion requires that the victimized spouse show that “she has unsuccessfully taken whatever reasonable measures that might eliminate the danger without breaking off cohabitation.”<sup>51</sup> Because Mrs. Rexrode could show no “reasonable efforts” to abate the source of the marital discord which forced her into a psychiatric hospital, the court found her guilty of desertion and denied any award of spousal support.<sup>52</sup>

Following the *Rexrode* decision, an attorney now takes a risk by telling a client not to return home when a physician so advises unless there is evidence of severe physical cruelty. Consequently a victimized spouse may be forced to choose between two unattractive alternatives: (1) the further deterioration of health or (2) the adverse financial consequences which may befall a spouse found guilty of desertion.

The unclear standards upon which the *Rexrode* court depended are illustrated in *Breschel v. Breschel*,<sup>53</sup> the 1980 case upon which the *Rexrode* opinion was grounded. In *Breschel*, the wife suffered from multiple sclerosis that had stabilized during the first year of her marriage. Once her condition was stable, her husband brought his seven-year-old son by a previous marriage into the household. The child proved to be unmanageable and Mrs. Breschel’s health deteriorated.<sup>54</sup> She was not allowed to bring help into the household. When attempts to bring social welfare services into the situation failed, Mrs. Breschel left the marital home, “going to her

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49. *Id.* at 389, 339 S.E.2d at 547.

50. 221 Va. 208, 212, 269 S.E.2d 363, 366 (1980).

51. *Rexrode*, 1 Va. App. at 390, 339 S.E.2d at 547.

52. *Id.*

53. 221 Va. 208, 269 S.E.2d 363 (1980).

54. *Id.* at 209, 269 S.E.2d at 364.

mother's until her health got better.'"<sup>55</sup> The court took the evidence of "significant deterioration of her physical condition," confirmed by her physician, along with evidence that she had sought counseling and other assistance as enough to "compel a conclusion that she was without legal fault in breaking off cohabitation."<sup>56</sup> Attempting to determine whether a trial court will apply the *Breschel* reasoning or the *Rexrode* reasoning is an extremely difficult call for a family law attorney to make.

The decision in *DeMott v. DeMott*,<sup>57</sup> suggests that even inflicting actual physical harm may not be enough to establish grounds for divorce under cruelty or constructive desertion. The Supreme Court of Virginia found that a single act of physical cruelty, by itself, was not enough to constitute grounds for divorce.<sup>58</sup> When Mrs. DeMott criticized her husband for allowing their child to go barefoot, he "became angry, grabbed her, threw her against the wall, struck her and threatened her with a butcher knife."<sup>59</sup> Though the court termed the assault "reprehensible and unwarranted," it dismissed the incident as not doing "her serious bodily harm or caus[ing] her reasonable apprehension of serious danger in the future."<sup>60</sup>

#### IV. QUALITY OF FAMILY LIFE IN VIRGINIA

The standards required by the courts for what must be endured in a marriage before a spouse is justified in seeking a divorce are grounded in the law of an age pre-dating the heightened consciousness over the plight of the dependent spouse. These standards overlook several decades of research on family violence, spousal abuse, stress and other scientific data now available to family law decision-makers. Throughout society, major shifts have occurred in perceptions of what is appropriate familial conduct. Yet, these shifts are not reflected in Virginia's domestic relations case law.

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

56. *Id.* at 212, 269 S.E.2d at 366.

57. 198 Va. 22, 92 S.E.2d 342 (1956).

58. *Id.* at 28, 92 S.E.2d at 346.

59. *Id.* at 27, 92 S.E.2d at 345.

60. *Id.* at 28, 92 S.E.2d at 346.

### A. *Financial Stalemate*

The bizarre result of the judicial overlay on the Commonwealth's statutory grounds for divorce can result in marriages which are non-existent except on paper. No equitable distribution can take place because no final divorce can occur until one year after the couple's separation, when they will qualify for a no-fault divorce.<sup>61</sup> In the meantime, it is conceivable that one spouse may have exclusive use of the marital assets, often controlling the family residence from which the dependent spouse fled. Further the spouse in control may have exclusive access to the financial resources which were the family's sole support during the marriage. Such a combination of circumstances does not advance the public policy of preserving the marital state.

### B. *Impact on Children*

Virginia courts should address the implications on social policy that are produced by forcing couples into a limbo where neither can obtain a divorce by law. Often such a situation occurs where the spouse has suffered from verbally abusive behavior and even reasonable apprehension of bodily harm but is not found to have experienced severe bodily harm. Consideration ought to be given to situations where much of the abusive behavior takes place in the presence of children. Sections 20-95 and 20-91(6) of the Code of Virginia do not state *who* must suffer the required harm.<sup>62</sup>

Studies of the behavioral development of abusive men reveal that abusive behavior directed toward family members is a *learned* behavior.<sup>63</sup> While these studies deal specifically with physical abuse, at least one researcher has suggested that the patterns of learning are the same for verbal abuse.<sup>64</sup> A fine line exists between the acted-out rage of a verbal abuser and the use of fists, feet or

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61. If a property settlement has been achieved and there are no minor children, a divorce may be decreed after a six month separation. See VA. CODE ANN. § 20-91(9)(a) (Repl. Vol. 1990).

62. *Id.* § 20-91(6), -95.

63. See generally Post, Willett, Franks, House & Back, *Childhood Exposure to Violence Among Victims and Perpetrators of Spouse Battering*, 6 VICTIMOLOGY 156 (1981). Cf. Kurtz, *The Effects of Victimization on the Acceptance of Aggression and the Expectations of Assertive Traits in Children as Measured by the General Social Survey*, 9 VICTIMOLOGY 166 (1984).

64. See Peltoniemi, *Family Violence: Police House Calls in Helsinki, Finland in 1977*, 5 VICTIMOLOGY 213, 213-14 (1980).

instruments to express that same rage.<sup>65</sup>

Male children growing up in a household where an adult male constantly uses abusive behavior to assert his dominance learn to accept that behavior. Eventually, these male children equate such abusive behavior with the appropriate role of an adult male.<sup>66</sup> Female children learn the role of victim by seeing their mother victimized.<sup>67</sup> Thus, the next generational link in what sociologists and psychologists now called the "Cycle of Family Violence" is forged.<sup>68</sup>

## V. LEGISLATING A NEW STANDARD

The time has come for Virginia to lay aside the concept of fault in divorce. The relevance of fault to any significant issue has been greatly diminished by the 1982 adoption of equitable distribution of marital property. Equitable distribution of marital property lists fault grounds for divorce as merely one of many considerations.<sup>69</sup> Moreover in 1988, the General Assembly eliminated fault grounds as a bar to an award of spousal support in all cases, except adultery.<sup>70</sup>

### A. *Fault Loses Its Financial Impact*

In that same year, in *Aster v. Gross*,<sup>71</sup> the Virginia Court of Appeals decided that in Virginia, only fault which has an economic impact upon the family assets, such as spending family funds to have adulterous affairs, had any relevance to property division.<sup>72</sup> In *Aster*, the wife moved to introduce evidence that the husband had committed adultery with seven different persons.<sup>73</sup> The husband "conceded that he was at fault in the marriage's dissolution" and that the wife was free of fault, but objected to evidence being in-

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65. See R. GELLES, *THE VIOLENT HOME* 25 (1987).

66. See Wolfe, Jaffe, Wilson & Zak, *Multivariate Investigation of Children's Adjustment to Family Violence*, *FAMILY ABUSE AND ITS CONSEQUENCES* 228-29 (1988).

67. *Id.*

68. *Id.*

69. VA. CODE ANN. § 20-107.3E(5) (Repl. Vol. 1990).

70. *Id.* § 20-107.1; see also Butler, *Domestic Relations: Annual Survey of Virginia Law*, 22 U. RICH. L. REV. 565, 568 (1988).

71. 7 Va. App. 1, 371 S.E.2d 833 (1988).

72. *Id.* at 5-6, 371 S.E.2d at 836.

73. *Id.*

roduced concerning the extent of his wrongdoing.<sup>74</sup> The court held:

[A] court must consider all circumstances that led to the dissolution of the marriage insofar as those circumstances are relevant to a monetary award. Equitable distribution is predicated upon the philosophy that marriage represents an economic partnership requiring that upon dissolution each partner should receive a fair portion of the property accumulated during the marriage. . . . Therefore, circumstances that affect the partnership's economic condition are factors that must be considered for purposes of our equitable distribution scheme. Circumstances that lead to the dissolution of the marriage but have no effect upon marital property, its value, or otherwise are *not relevant to determining a monetary award*, need not be considered.<sup>75</sup>

The court concluded that the alleged "marital misconduct bore no relation to the value of the parties' marital assets . . . . Fault in the dissolution of the marriage represent[ed] only one of the factors listed in § 20-107.3 and should not be used to punish economically either of the parties to the marriage."<sup>76</sup>

Thus, since it appears the issue of fault has lost most of its power to alter the outcome of a divorce proceeding, one must ask why the Commonwealth forces couples into the guessing game of whether their circumstances constitute cruelty, reasonable apprehension of bodily hurt, desertion, or some hybrid of the three. The rule in Virginia that evidence in a divorce suit must be corroborated by a third party merely induces litigating couples to draw family members into the direct line of fire, especially children who have witnessed and often been subjected to the abuse as well.

Critics have suggested that fault grounds in divorce actions protect the dependent spouse.<sup>77</sup> In Virginia, however, the current inconsistent application of the fault grounds for bed and board divorce imposes a serious hardship on spouses who flee the marital home for reasons short of actual physical abuse. These dependent spouses must choose between being cut off from their homes and losing access to their marital property until they qualify for a di-

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74. *Id.*

75. *Id.* (emphasis added).

76. *Id.* at 6, 371 S.E.2d at 836-37.

77. *See, e.g.,* L. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL & ECONOMIC CONSEQUENCES FOR WOMEN & CHILDREN IN AMERICA* (1985).



voiced on the grounds of living separate and apart for one year or waiting until the abusive conduct becomes severe enough to qualify as cruelty. Even then, their evidence of such occurrences may be found insufficient to justify their decisions.

### B. *Irretrievable Breakdown or Incompatibility*

Thirty-three states have adopted some form of irretrievable breakdown of the marriage or incompatibility as grounds for divorce.<sup>78</sup> Virginia should follow Oregon<sup>79</sup> and Rhode Island<sup>80</sup> which have abolished the entire concept of fault grounds in the dissolution of a marriage except in determinations of child custody. Furthermore, South Dakota allows the court to continue a proceeding if there appears to be a chance of reconciliation, but not for longer than thirty days.<sup>81</sup> New Hampshire maintains traditional fault

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78. See H. CLARK, 2 THE LAW OF DOMESTIC RELATION IN THE U.S. § 14.6 at 37 (1988).

79. Title 11, Chapter 107 of the Oregon Code reads:

(1) The doctrines of fault and of in pari delicto are abolished in suits for the annulment or dissolution of a marriage or for separation.

(2) The court shall not receive evidence of specific acts of misconduct, excepting where child custody is an issue and such evidence is relevant to that issue or excepting at a hearing when the court finds such evidence necessary to prove irreconcilable differences.

(3) In dividing, awarding and distributing the real and personal property (or both) of the parties (or either of them) between the parties, or in making such property or any of it subject to a trust, and in fixing the amount and duration of the contribution one party is to make to the support of the other, the court shall not consider the fault, if any, of either of the parties in causing grounds for the annulment or dissolution of the marriage or for separation.

(4) Where satisfactory proof of grounds for the annulment or dissolution of a marriage or for separation has been made, the court shall not award a decree to either party but shall only decree the annulment or dissolution of the marriage or for separation.

OR. REV. STAT. § 107.036 (1989).

80. Title 15, Chapter 5 of the General Laws of Rhode Island reads:

A divorce from the bonds of matrimony shall be decreed, irrespective of the fault of either party, on the ground of irreconcilable differences which have caused the irretrievable breakdown of the marriage. In any pleading or hearing for divorce under this section, allegations or evidence of specific acts of misconduct shall be improper and inadmissible except . . . where child custody is in issue and such evidence is relevant to establish that parental custody would be detrimental to the child or at a hearing where it is determined by the court to be necessary to establish the existence of irreconcilable differences. Upon hearing of an action for divorce under this section, the acts of one party shall not negate the acts of the other nor bar the divorce decree.

R.I. GEN. LAWS § 15-5-3.1 (1989).

81. S.D. CODIFIED LAWS ANN. § 25-4-17.2 (Supp. 1990).

grounds<sup>82</sup> but adds the grounds of irreconcilable differences<sup>83</sup> as does the state of Idaho.<sup>84</sup>

Virginia should follow these states and replace sections 20-91, 20-93, 20-94 and 20-95 of the Code of Virginia with the following provision:

(1) A divorce from the bond of matrimony shall be decreed (a) irrespective of the fault of either party, on the ground of irreconcilable differences which have caused the irretrievable breakdown of the marriage and no reasonable prospect of reconciliation exists or (b) where the parties have lived separate and apart without cohabitation and without interruption for a period of twelve months and no reasonable prospect of reconciliation exists.

(2) In any pleading or hearing for divorce under this section, allegations or evidence of specific acts of misconduct shall be improper and inadmissible except (a) where child custody is in issue and such evidence is relevant to establish that parental custody would be detrimental to the child or (b) at a hearing where it is determined by the court to be necessary to establish the existence of irreconcilable differences and the prospects of reconciliation.

(3) In an action for divorce under this section, the acts of one party shall not negate the acts of the other nor bar the entry of a divorce decree. The court may find that the marriage is irretrievably broken even though one party claims it is not.

## VI. CONCLUSION

Modern society recognizes injustice in requiring men, women and children to be subjected to unruly tempers, lack of patience

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82. N.H. REV. STAT. ANN. § 458:7 (1983).

83. Title 43, Chapter 458 of New Hampshire Revised Statutes reads:

A divorce from the bonds of matrimony shall be decreed, irrespective of the fault of either party, on the ground of irreconcilable differences which have caused the irremediable breakdown of the marriage. In any pleading or hearing of a libel for divorce under this section, allegations or evidence of specific acts of misconduct shall be improper and inadmissible [sic], except where child custody is in issue and such evidence is relevant to establish that parental custody would be detrimental to the child or at a hearing where it is determined by the court to be necessary to establish the existence of irreconcilable differences. If, upon hearing of an action for divorce under this section, both parties are found to have committed an act or acts which justify a finding of irreconcilable differences, a divorce shall be decreed and the acts of one party shall not negate the acts of the other nor bar the divorce decree.

N.H. REV. STAT. ANN. § 458:7-a (1983).

84. IDAHO CODE § 32-603 (1983).

and uncongenial natures. Modern society recognizes injustice in forcing spouses to submit to the ordinary consequences of human infirmities and unwise selections. Injustice, too, is found in holding back the grounds for divorce unless the cruelty is so extreme that it is entirely subversive of family relations, rendering the association intolerable. Yet these are the tests by which broken marriages in Virginia are now measured. Waiting until the cruelty becomes so extreme as to be subversive of family relations does not preserve the family unit as was once believed. When the legitimate objects of matrimony have been destroyed, for whatever reason, public policy is not served by a divorce denied.