

**REPORT OF THE
JOINT SUBCOMMITTEE STUDYING
SECTION 20-107
OF THE CODE OF VIRGINIA
TO
THE GOVERNOR
AND
THE GENERAL ASSEMBLY OF VIRGINIA**



HOUSE DOCUMENT NO. 21

**COMMONWEALTH OF VIRGINIA
RICHMOND
1982**

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**Report of the
Joint Subcommittee Studying Section 20-107
of the Code of Virginia**

**To
The Governor and the General Assembly of Virginia
Richmond, Virginia
January, 1982**

To: Honorable Charles S. Robb, Governor of Virginia
and
The General Assembly of Virginia

INTRODUCTION

Recognizing that problems relating to child support and support and maintenance of spouses have become increasingly complex, the 1981 Session of the General Assembly called for a study of § 20-107 of Title 20 of the Code of Virginia. House Joint Resolution No. 304 (See appendix A) authorized the creation of a joint subcommittee to review these problem areas. More particularly, the joint subcommittee was charged with examining and clarifying the lump sum payment provision added to § 20-107 in 1977 and determining whether the authority of the divorce court should be expanded to encompass determinations of property ownership and allocations of marital property.

J. Samuel Glasscock, a Delegate from Suffolk was selected to chair the joint subcommittee. Other members of the General Assembly chosen to serve on the subcommittee were, from the House, Ralph L. Axselle, Jr., C. Richard Cranwell, Thomas W. Moss, Jr., Ford C. Quillen and Mary Sue Terry and, from the Senate, Herbert H. Bateman, Edward M. Holland and William F. Parkerson, Jr. Additionally, several private attorneys with special expertise or interest in domestic relations were asked to serve on the subcommittee. They were Harry P. Anderson, Jr., of Richmond, Donald W. Lemons of Richmond and Betty A. Thompson of Arlington.

Being aware of the tremendous importance of this study to the citizens of the Commonwealth, the subcommittee took a number of steps to maximize input from the public and to receive the advice and opinions of as many interested groups and individuals as possible. Public hearings were held on June 24, July 22, September 10, October 5 and December 8. Also, all circuit court judges were invited to share with the subcommittee any written opinions interpreting § 20-107 of the Code. Guidance was requested from local, state and national bar associations, and research was conducted to determine the status of the law in other jurisdictions. Valuable assistance and information was received from William A. Perkins of the Family Law Section of the Virginia Bar Association and from Ingrid Hillinger, as assistant professor of law at the Marshall-Wythe School of Law in Williamsburg.

HISTORICAL BACKGROUND

Virginia is currently one of only three states in which the court is given no authority to distribute marital assets between the spouses upon their divorce. West Virginia and Mississippi share our common law approach whereby title to property determines its ownership unless the non-titled spouse can establish an interest through a constructive or resulting trust. The effect of this system is that generally a spouse can share in marital assets which are not jointly held and are not in his or her name only through the support award. This is the case irrespective of the contributions such spouse may have made over the years to the well-being of the family and to the acquisition of the marital property.

Unfortunately, using the support award as a vehicle for property compensation is defective in a number of ways. The death of an obligor spouse absolutely terminates the support obligation as does the remarriage of the obligee spouse. Also, marital fault serves as a total bar to support for a spouse who may otherwise have made sizeable contributions to the family wealth and prosperity. All too often, the spouse upon whom a support obligation has been placed refuses to comply, necessitating burdensome enforcement suits, assuming the defaulting spouse can be located.

The historical trend in this country has been to recognize the inequity inherent under the common law scheme and to provide for some form of equitable property distribution when a marriage is terminated. The fact that almost forty states (excluding eight community property states) have abandoned the Commonwealth's present approach and adopted some form of divorce settlement which acknowledges the partnership status of marriage is indicative of the strength of this movement.

EXECUTIVE SUMMARY

Following a thorough and comprehensive study of problems pertaining to (1) support and maintenance of spouses; (2) child support; (3) and the allocation of real and personal property in divorce proceedings, the joint subcommittee recommends in these respective areas:

1. That spousal support be barred absolutely by fault; that no provision be made for temporary or rehabilitative support; and that lump sum awards are simply a variant of spousal support subject to the same factors as period support.
2. That the court consider a number of relevant factors in determining child custody and the amount of child support; that there is no support obligation for children age eighteen or older; and that in custody cases the child's welfare is paramount with neither a presumption nor inference of law in favor of the father or mother.
3. That the court is to determine which property owned by the parties is property of the marriage (marital property); that the court is to value the marital property; that the court is empowered to grant monetary awards based on an equitable apportionment of the marital property; that the court may partition jointly titled marital property; that no power is given the court to affect the title to any property; that a monetary award may be made payable either in a lump sum or over a period of time in fixed amounts; that a lump sum may be satisfied, in whole or in part, by the conveyance of property with the court's consent; that there be no presumption in favor of an equal distribution of marital property; that the amount of the award be determined by the court after consideration of eleven stipulated factors; that fault be a consideration in determining the lump sum award, but not be a bar thereto; that spousal and child support are interrelated with the lump sum award and may be effected by such award; and that the divorce decree may affirm, ratify or incorporate a proper agreement between the parties.

FINDINGS AND CONSIDERATIONS

During the course of this study, the subcommittee directed its attention toward three broad areas of concern: (1) spousal support; (2) child custody and support; and (3) equitable apportionment of marital property.

A. Spousal Support

Section 20-107.1 of the proposed legislation (See Appendix B) basically recodifies, and expands much of the subject matter in current Code § 20-107. The subcommittee deliberated at some length as to whether fault should absolutely bar spousal support, should be only a factor to be considered in the court's determination, or should be of no consequence at all. A majority felt that fault should serve as an absolute bar to spousal support under § 20-107.1 in that a party legally responsible for the termination of a marriage should not receive benefit from his act to the detriment of the aggrieved party. The subcommittee also declined to exempt fault which occurs ninety days or more after the parties separated.

The subcommittee briefly considered and decided against specifically granting courts the power to order temporary or rehabilitative spousal support.

Much controversy arose after the 1977 amendment to § 20-107 authorized the court to "award a lump sum payment based upon consideration of the property interests of the parties. . ." Some authorities claimed this wording authorized the courts to, in effect, equitably apportion marital property. Others interpreted it as simply being an alternative method of awarding support which would otherwise be paid periodically. There was also a question as to what criteria were to be applied in arriving at a lump sum.

The subcommittee dealt with this issue by providing that "the court, in its discretion, may decree that support and maintenance of a spouse be made in periodic payments, or in a lump sum award, or both." The intent of this language is to provide for lump sum awards which are merely variants of spousal support subject to the same statutory factors as periodic support. (As a result, fault will also bar lump sum awards.) Thus a court is given the option, in appropriate cases, to

make support provisions which are not subject to the infirmities inherent in periodic payments.

In addition to the elements set forth in current § 20-107 which must be considered in determining the support award, the proposed legislation requires a court to take into account "provisions made with regard to the marital property under § 20-107.3." The subcommittee believed that support determinations, both spousal and child, and the division of marital assets are interrelated. A monetary award based on an equitable apportionment of the marital property may even obviate the need for support in many instances where economic self-sufficiency and equity are thereby achieved by each party.

Tax consequences to each party are also to be considered and income from pension, profit sharing and retirement plans is specifically to be included in the overall financial status of the parties.

B. Custody and Support of Minor Children

Section 20-107.2 would codify for the sake of uniformity, a number of factors which courts now use to determine both child custody and visitation and the amount of child support. Again, the provisions made with regard to the marital property under § 20-107.3 are considerations in providing for child support.

Language in the present law is incorporated to ensure visitation privileges for grandparents, stepparents, and other family members as the court may deem expedient.

The subcommittee declined to impose support obligations on divorced parents for their children beyond the age of majority who are full-time students. It was reasoned that such action would unreasonably, and perhaps unconstitutionally, subject divorced parents to a legal burden not shared by other parents. Members were not unsympathetic to the plight in which their decision might place a custodial parent, but they felt the obligation for educating one's children should be a moral one only, irrespective of whether or not a parent is divorced.

In awarding the custody of a child, the court is specifically instructed to give primary consideration to the child's welfare. As between the father and mother, the subcommittee directed that there should be neither a presumption nor an inference of law in favor of either.

C. The Monetary Award

Section 20-107.3 brings the Commonwealth into the mainstream of a "broad reform movement in this country to vest substantially greater descretion in the courts to reach equitable results than that which existed under the common law title system."

The primary thrust of this section is to recognize marriage as a partnership to which each party contributes, albeit not always equally, to the well-being of the family unit. These contributions, both monetary and nonmonetary, have value and should be weighed, along with other factors, in allocating marital assets or their dollar equivalent between the parties when they are divorced or their marriage is dissolved.

Under § 20-107.3, the courts are given three basic responsibilities: (1) to determine which property owned by the parties is property of the marriage (marital property); (2) to determine the value of all marital property; and (3) to decide upon an equitable apportionment of the marital property by using a monetary award.

Property which is deemed to belong to the parties individually and which is totally excluded from the allocation process is called separate property. Such *** ERROR *** INVALID PAGE PARAMETER property consists of:

- (1) All property acquired before the marriage by either party;
- (2) All property acquired during the marriage by gift (from someone other than the spouse), inheritance or survivorship; and
- (3) All property acquired during the marriage in exchange for or from the proceeds of sale of

- (1) All property titled in the name of both parties jointly; and
- (2) All other property acquired by each party during the marriage which is not separate property.

There is a presumption that any property acquired during the marriage by either party is marital property in the absence of satisfactory evidence that it is separate property.

The subcommittee was aware that the determination of which property is separate and which is marital will, in some instances, lead to complex tracing problems. However, the members felt the inherent fairness of the proposed system far outweighs any burden such problems might impose.

To avoid numerous suits, the divorce court is authorized to partition marital property which is jointly titled in the names of the parties. It should be noted that this power specifically does not extend to any separate property or to marital property not jointly titled. Put another way, the court is given no power to affect the title to any property.

For the purpose of maximizing judicial flexibility and minimizing any burden placed on either party under § 20-107.3, the monetary award, if any, may be made payable either in a lump sum or over a period of time in fixed amounts. Subject to the approval of the court, the party against whom a monetary award is made may satisfy the award, in whole or in part, by the conveyance of property.

The subcommittee voted against any presumption in favor of an equal distribution of marital property. Instead the court is to decide the amount of the award (and the method of payment) after consideration of eleven factors deemed relevant to this determination (See § 20-107E). A catch-all provision is included to give the court reasonable discretion to look at any other circumstances it feels are appropriate in a given case.

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.

Part F of § 20-107.3 pertains to the interrelationship of determinations made by the court. The amount of the monetary award is to be decided without regard to spousal or child support. After, or at the time of this determination, upon motion by either party, the court is directed to consider whether a support order should be entered or, if already entered, whether it should be modified or vacated.

The subcommittee felt it important to expressly provide that an agreement between the parties pursuant to § 20-107 or 20-109.1 could be affirmed, ratified or incorporated in a divorce decree.

Respectfully submitted,

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APPENDIX A

HOUSE JOINT RESOLUTION NO. 304

Requesting the establishing of a joint subcommittee of the Committees for Courts of Justice of the House of Delegates and Senate to study § 20-107 of Title 20 of the Code of Virginia.

Agreed to by the House of Delegates, February 20, 1981

Agreed to by the Senate, February, 17, 1981

WHEREAS, the problems pertaining to child support, support, and maintenance of spouses, and allocation of real and personal property in divorce proceedings have become increasingly complex ; and

WHEREAS, certain amendments, particularly that of 1977 pertaining to lump sum payments, have given rise to the need for clarification ; and

WHEREAS, a study is needed to determine whether the authority of the court in such divorce proceedings should be expanded insofar as the determination of ownership and allocation of real and personal property is concerned; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, that the Committees for Courts of Justice of the House of Delegates and Senate are hereby requested to establish a joint subcommittee to study the status and present state of the law concerning support and maintenance of parties as set forth in § 20-107 of Title 20 of the Code of Virginia; and, be it

RESOLVED FURTHER, That the joint subcommittee shall report its findings and recommendations, if any, for suggested legislation to the Governor and the 1982 General Assembly.

The cost of conducting this study shall not exceed five thousand dollars.

APPENDIX B

A BILL to amend the Code of Virginia by adding sections numbered 20-107.1, 20-107.2, and 20-107.3 and to repeal § 20-107 of the Code of Virginia, the amended and repealed sections providing for decrees of support and maintenance of parties to a marriage and children, custody and property of the parties.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding sections numbered 20-107.1, 20-107.2, and 20-107.3 as follows:

§ 20-107.1. Court may decree as to maintenance and support of spouses.—Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce, whether from the bond of matrimony or from bed and board, and upon decreeing that neither party is entitled to a divorce, the court may make such further decree as it shall deem expedient concerning the maintenance and support of the spouses. However, the court shall have no authority to decree maintenance and support payable by the estate of a deceased spouse. Any maintenance and support shall be subject to the limitations set forth in § 20-109, and no permanent maintenance and support shall be awarded from a spouse if there exists in such spouse's favor a ground of divorce under any provision of § 20-91 (1), (3) or (6) or § 20-95. The court, in its discretion, may decree that maintenance and support of a spouse be made in periodic payments, or in a lump sum award, or both.

The court, in determining support and maintenance for a spouse, shall consider the following:

1. The earning capacity, obligations, needs, and financial resources of the parties, including but not limited to income from pension, profit sharing, or retirement plans;

2. The education and training of the parties and the ability and opportunity of the parties to secure such education and training;

3. The standard of living established during the marriage;

4. The duration of the marriage;

5. The age and physical and mental condition of the parties;

6. The contributions, monetary and nonmonetary, of each party to the well-being of the family;

7. The property interests of the parties, both real and personal, tangible and intangible;

8. The provisions made with regard to the marital property under § 20-107.3; and

9. Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

§ 20-107.2. Court may decree as to custody and support of minor children.—Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce, whether from the bond of matrimony or from bed and board, and upon decreeing that neither party is entitled to a divorce, the court may make such further decree as it shall deem expedient concerning the custody and support of the minor children of the parties, and concerning visitation rights of the parents and visitation privileges for grandparents, stepparents, or other family members. The court shall have no authority to decree support of children payable by the estate of a deceased party.

1. The court, in determining custody and visitation of minor children, shall consider the following:

a. The age and physical and mental condition of the child or children;

b. The age and physical and mental condition of each parent;

c. The relationship existing between each parent and each child;

d. The needs of the child or children;

e. The role which each parent has played, and will play in the future, in the upbringing and care of the child or children;

f. Such other factors as are necessary to consider the best interests of the child or children.

In awarding the custody of the child or children to either parent, the court shall give primary consideration to the welfare of the child or children, and, as between the parents, there shall be no presumption or inference of law in favor of either.

2. The court, in determining the amount of support of the minor child or children, shall consider the following:

a. The age and physical and mental condition of the child or children;

b. The independent financial resources, if any, of the child or children;

c. The standard of living for the family established during the marriage;

d. The earning capacity, obligations and needs, and financial resources of each parent;

e. The education and training of the parties and the ability and opportunity of the parties to secure such education and training;

f. The contributions, monetary and nonmonetary, of each party to the well-being of the family;

g. The provisions made with regard to the marital property under § 20-107.3; and

h. Such other factors as are necessary to consider the equities for the parents and children.

§ 20-107.3. Court may decree as to property of the parties.—A. Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce from the bond of matrimony, the court, upon motion of either party, shall determine the legal title as between the parties, and the ownership and value of all real and personal property of the parties and shall consider which of such property is separate property and which is marital property.

1. Separate property is (i) all property, real and personal, acquired by either party before the marriage; (ii) all property acquired during the marriage by gift from a source other than the other party, by inheritance, or by survivorship; and (iii) all property acquired during the marriage in exchange for or from the proceeds of sale of separate property, provided that such property acquired during the marriage is maintained as separate property. Income received from, and the increase in value of, separate property during the marriage is separate property.

2. Marital property is (i) all property titled in the names of both parties, whether as joint tenants, tenants by the entirety or otherwise, and (ii) all other property acquired by each party during the marriage which is not separate property as defined above. All property acquired by either spouse during the marriage is presumed to be marital property in the absence of satisfactory evidence that it is separate property.

B. For the purposes of this section only, both parties shall be deemed to have rights and interests in the marital property; however, such interests and rights shall not attach to the legal title of such property and are only to be used as a consideration in determining a monetary award, if any, as provided in this section.

C. The court shall have no authority to order the conveyance of separate property or marital property not titled in the names of both parties; however, in the final decree of divorce the court may partition marital property which is titled in the names of both parties.

D. Based upon the equities and the rights and interests of each party in the marital property, the court may grant a monetary award, payable either in a lump sum or over a period of time in fixed amounts, to either party. The party against whom a monetary award is made may satisfy the

award, in whole or in part, by conveyance of property, subject to the approval of the court.

Any marital property, which has been considered or ordered transferred in granting the monetary award under this section, shall not thereafter be the subject of a suit between the same parties to transfer title or possession of such property.

E. The amount of the award and the method of payment shall be determined by the court after consideration of the following factors:

- 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. Vested pension or retirement rights and the expectation of nonvested pension or retirement rights;*
- 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.*

F. The court shall determine the amount of any such monetary award without regard to maintenance and support awarded for either party or support for the minor children of both parties and shall, after or at the time of such determination and upon motion of either party, consider whether an order for support and maintenance of a spouse or children shall be entered or, if previously entered, whether such order shall be modified or vacated.

G. Nothing in this section shall be construed to prevent the affirmation, ratification and incorporation in a decree of an agreement between the parties pursuant to §§ 20-109 and 20-109.1.

2. That § 20-107 of the Code of Virginia is repealed.

¹. Auerbach and Jenner, *Historical and Practical Notes* , Smith-Hurd III, Ann. Stat., pp 458-59 (1980).

