

**REPORT OF THE  
FAMILY LAW SECTION OF THE  
VIRGINIA STATE BAR ON**

**REHABILITATIVE ALIMONY AND  
THE RESERVATION OF SPOUSAL  
SUPPORT IN DIVORCE  
PROCEEDINGS**

**TO THE GOVERNOR AND  
THE GENERAL ASSEMBLY OF VIRGINIA**



**HOUSE DOCUMENT NO. 55**

**COMMONWEALTH OF VIRGINIA  
RICHMOND  
1997**



## **MEMBERS OF COMMITTEE**

Lawrence D. Diehl, Esquire, Co-chairman  
David G. Weaver, Esquire, Co-chairman  
Richard J. Byrd, Esquire  
Ronald S. Evans, Esquire  
Laurie E. Forbes, Esquire  
Sandra I. Havrilak, Esquire  
Beverly Ann Hyde  
Renaë Reed Patrick, Esquire  
Carol Schrier-Polak, Esquire  
Betty A. Thompson, Esquire  
Winship C. Tower, Esquire  
Brett R. Turner, Esquire

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**Report of the  
Family Law Section of the Virginia State Bar Studying  
Rehabilitative Alimony  
To  
The Governor and the General Assembly of Virginia  
Richmond Virginia  
December, 1996**

**To: Honorable George Allen, Governor of Virginia  
and  
The General Assembly of Virginia**

**I. INTRODUCTION**

**Report of the Committee**

**This report is made pursuant to HR 69 (1996) relating to the issues of rehabilitative alimony and its relationship to the reservation of spousal support in divorce matters.**

**Indefinite and Rehabilitative Alimony**

Alimony awards can generally be divided into two separate types: periodic and lump sum. Lump sum alimony is a single payment which is generally made at the time of divorce; periodic alimony is a series of payments made after the divorce. Periodic alimony can further be divided into two subtypes: indefinite and rehabilitative. Both types of periodic alimony begin upon divorce, but each type ends at a different date. Indefinite alimony continues until the recipient dies or remarries. Rehabilitative alimony, by contrast, generally ends after a specified period of time or upon the occurrence of a specific event. For example, an award of rehabilitative alimony might terminate after three years, or upon the recipient's graduation from college or professional school. Rehabilitative alimony also terminates upon death or remarriage, just like indefinite alimony.

Indefinite alimony and rehabilitative alimony also differ in the conditions under which they can be modified. Indefinite alimony can be modified whenever there is a material change of circumstances which effects the financial situation of either the payor or the recipient. Where the court awards no alimony at all at the time of the divorce, it can still award indefinite alimony upon a later change of circumstances, as long as the divorce decree expressly reserved the right to grant such an award in the future, which is known as "granting a reservation". Such an award can be made months or even years after the date of the divorce decree.

Rehabilitative alimony, by contrast, can generally be modified only during the time period over which support payments are being made. Once the specific period ends or the specified event occurs, the support obligation terminates and the court cannot subsequently made any

further support award. A court which can award rehabilitative alimony can also grant a divorce decree which does not reserve the right to grant additional support in the future, therefore preventing the court from making an award after the divorce has become final.

### **Current Virginia Law**

Virginia law has always recognized the concept of indefinite alimony. The consensus of the family law bar and courts, however, is that present law does not permit the court to make an award of rehabilitative alimony. Present law also provides that the court must generally grant a reservation of the right to receive an award of alimony in the future. See, e.g., Bacon v. Bacon, 3 Va. App. 484, 351 S.E.2d 37 (1986).

In recent years, there has been substantial criticism of Virginia's refusal to recognize rehabilitative alimony. The refusal places Virginia in a distinct minority, as only one other state (Louisiana) follows the same rule. The other 48 states expressly permit the court to make an award of rehabilitative alimony as an alternative or in addition to an award of indefinite periodic or lump sum alimony.

### **The Current Study and Present Committee**

In 1995, Virginia's General Assembly enacted House Joint Resolution Number 439, authorizing the Family Law Section of the Virginia State Bar, along with other designated interest groups to study and report on the issue of whether a rehabilitative alimony statute should be enacted, to determine the conditions under which such an award should be made and its relationship to the issue of the continued reservation of spousal support to a spouse, and to determine the statutory changes necessary to grant courts authority to award rehabilitative alimony. As a result, in the spring of 1995, the Family Law Section formed a study committee (the "Committee") consisting of members of its Board of Governors, private family law practitioners, and representatives of other organizations interested in family law issues. During the ensuing months, the Committee conducted numerous meetings, held a public hearing, received and considered public comments, studied the law of other states, reviewed economic data compiled in states which allow rehabilitative alimony, and surveyed law review articles and academic studies of the issue.

Because of the complexity of issues involved, the Committee was not able to complete its study by the opening of the 1996 legislative session. In its 1996 legislative session, the General Assembly enacted House Joint Resolution 69, which continued the Committee and asked it to report its conclusions in the 1997 legislative session. See Appendix A. During 1996, the Committee held additional meetings and continued to solicit and to consider public comments on draft legislation.

Having thoroughly studied the many issues involved over the course of more than a year, the Committee recommends that the General Assembly enact the amendments to Sections 20-

107.1 and 20-109 set forth at **Appendix B** to this report. **Appendix C** to this report contains examples which illustrate the way in which the recommended amendments to the Virginia Code might be applied in various hypothetical examples.

The remainder of this report sets forth the findings and conclusions of the Committee with respect to the issues under its purview (Part II); describes the public policy considerations which informed and guided the Committee in reaching its conclusions (Part III); narrates in greater detail the work of the Committee in conducting its meetings and its public hearing, in its review and study of the laws of other states, and summarizes public comments (Part IV); and provides a section-by-section analysis of its recommended statutory amendments (Part V).

## **II. FINDINGS AND CONCLUSIONS**

A. The Committee concludes that it is desirable to allow judges, in their discretion, to award rehabilitative alimony or spousal support to a spouse, provided that in the exercise of that discretion, judges are required by statute to consider all relevant criteria and further provided that judges are required, in the exercise of that discretion, to set forth written findings and conclusions explaining the basis for the amount and duration of any rehabilitative alimony award.

B. The Committee concludes that any decision regarding a spousal support or alimony award should be made only after the court has considered each of the statutory criteria contained in the proposed statutory factors set forth in its recommended revisions.

C. The committee also concludes that written findings be required for all alimony cases, specifically setting forth the basis for the amount and duration of the award in rehabilitative alimony awards.

D. The Committee concludes that where a court awards rehabilitative alimony, the continued reservation of the right to petition for spousal support after the expiration of the period of the award would defeat the major purpose of rehabilitative alimony, namely, to give finality to the obligation of support. Accordingly, the Committee concludes that a continued reservation of the right to seek future support beyond the duration of the award is incompatible with an award of rehabilitative alimony.

E. The Committee concludes that the amendments to the Virginia Code which are set forth at **Appendix B** are necessary to provide authorization for judges to award rehabilitative alimony, consistent with the findings and conclusions of the Committee expressed herein.

F. Due to the fact that the recommended change in legislation will be a material change in the spousal support legislative scheme upon which parties and court have previously relied in rendering court orders or in entering property settlement agreements, your committee recommends that the statute contain a specific provision clarifying that its provisions shall only apply to suits filed on or after July 1, 1997, or for modification based upon suits filed on or after



July 1, 1997. It is the intent of the committee to not have this amendment apply to modification requests filed after July 1, 1997 based upon cases pending prior to that date, or for initial orders entered after July 1, 1997 for actions pending prior to that date.

### **III. PUBLIC POLICY CONSIDERATIONS**

In making its recommendations, the committee has been ever mindful of the compelling public policy considerations which underpin the law in Virginia relating to the making and modification of spousal support awards. On the one hand, it is the policy of the Commonwealth to support and encourage the institution of marriage. This policy recognizes the unquestionable social benefits which stem from the interdependence of the parties to a marriage, including their economic interdependence. The economic interdependence of marriage partners ensures the continued viability of a family unit which protects the most vulnerable members of society—children, the elderly, and the disabled. It also benefits the parties themselves. In particular, the law should support and not penalize a spouse who limits his or her employment during the marriage to concentrate on keeping a home or raising children.

On the other hand, Virginia's public policy favors reducing or eliminating the economic ties between the parties after the marriage ends. This latter policy recognizes that making divorce final reduces potential tension and disputes between former marital partners, promotes the forging of new relationships, and in many cases enhances both spouses' economic productivity. The difficult task faced by the committee was to consider both sides of these issues, and to draft recommendations which would accommodate both the need for interdependence during the marriage and the need for independence after the marriage.

The committee recommends that these competing needs be accommodated with a two-pronged approach to alimony legislation. Where the marriage is short or the dependent spouse is realistically employable, the court should consider making part or all of its alimony award rehabilitative in nature. Where the marriage is long or the dependent spouse is not realistically employable, traditional permanent alimony may be the better approach. This two-pronged approach has been implemented not only in the substantive rules of law created by the committee's proposed legislation, but also in a set of procedural rules very carefully crafted by the committee to help insure that rehabilitative alimony is awarded only in the right type of cases. The legislation drafted by the committee is intended to provide rehabilitative alimony only in cases where it actually fosters financial independence. The committee does not intend that rehabilitative alimony be awarded after long marriages in which the alimony recipient is not realistically employable.

The committee recognizes that rehabilitative alimony will not necessarily be appropriate in every case in which it is considered. In particular, a review of all of the statutory criteria may demonstrate a need for alimony even after the dependent's spouse's earnings have reached their realistic maximum. In these cases, the court may award permanent alimony sufficient to cover the

dependent spouse's needs at an attainable level of earnings. A rehabilitative alimony award based upon a foreseeable increase in earnings should be limited to the amount of that increase. If need for alimony remains even after such a rehabilitative award, as it will in many cases, the court can address that need with the additional award of permanent alimony.

The Committee believes that in some cases, rehabilitative alimony awards may provide the optimal means for resolving this policy conflict. Rehabilitative alimony can in appropriate circumstances enable an economically dependent spouse to overcome the need for support through education, training or on-the-job experience. Rehabilitative alimony awards would also allow divorcing spouses to meet the temporary needs of family members for a sustained level of care that would be incompatible with the caregivers' full employment outside the home. The Committee has concluded, however, that the grant of authority to the courts to make rehabilitative alimony awards must be accompanied by changes to the factors which judges are required to consider in deciding spousal support issues. Those changes will help ensure that judges continue to give proper weight to the many public policy considerations favoring the economic interdependence of marriage partners when they determine an appropriate support award for an economically dependent spouse whose marriage has ended in divorce.

Competing public policy considerations also arose in connection with the Committee's consideration of the reservation of the right to receive spousal support in the future, both where a judge determines that an award of support is not appropriate in light of the parties' circumstances at the time of the divorce and where a judge grants a rehabilitative alimony award. Under current law, a judge must, upon the request of a party, reserve jurisdiction to consider a future support award should that party's circumstances change, regardless of whether that party has demonstrated any need for support at the time of divorce. This aspect of Virginia's domestic relations law has, in effect, made divorcing spouses the insurers of one another's continued economic viability and runs directly counter to the goal of reducing the economic ties between former marital partners once they divorce. However, the public policy of the Commonwealth favors protecting those who are at demonstrable risk of financial reversals due to declining health or other circumstances.

The Committee believes that allowing judges discretion on whether to reserve the right of a party to ask for future support, and creating a presumption which would base the length of the period of the reservation to the length of the marriage, provides the best means of resolving the competing public policies in this area. Where an award of rehabilitative alimony is made, however, the Committee has concluded that the public policy objective of giving finality to the support obligation greatly outweighs any competing consideration; therefore, the Committee recommends against reserving any right to seek spousal support beyond the period of an award of rehabilitative alimony.

#### **IV. COMMITTEE PROCEDURES AND EFFORTS**

The Committee included representatives of the Board of Governors of the Virginia State

Bar's Family Law Section (David G. Weaver of Roanoke, Virginia as Chair, and Lawrence D. Diehl of Hopewell, Virginia), family law practitioners with extensive experience (Richard S. Byrd of Fairfax, Virginia; Ronald S. Evans of Richmond, Virginia; and Carol Schrier-Polak of Arlington, Virginia), and representatives of other interest groups and organizations (Betty A. Thompson of the Virginia Trial Lawyers Association; Sandra L. Havrilak of the Virginia Women Attorneys Association; Winship C. Tower of the Virginia Bar Association; Beverly Ann Hyde of the Family's Alimony Income Reform; Renae Reed Patrick of the Virginia Poverty Law Center; Laurie E. Forbes of the American Association of University Women--Virginia; and Brett R. Turner of the National Legal Research Group, Inc.).

During the 1995 year, the Committee spent countless hours in meetings, studying case law and statutes of other states, analyzing the specific language and factors used by other states in determining spousal support awards, and studying research on the economic impact of such types of spousal support on former spouses. Brett Turner provided detailed research memoranda summarizing the statutes of every state in the country that allow rehabilitative alimony awards, as well as providing the Committee with copies of numerous law review articles and academic studies commenting on rehabilitative alimony and drawing conclusions as to what factors made the case law and implementation of such a statute more successful in some state than in others.

On August 17, 1995, after providing proper notice, the Committee held a public hearing in the General Assembly Building in Richmond, Virginia. At the hearing, the Committee received comments from representatives of such organizations as the National Organization of Women ("NOW") and the Coalition for Children's Rights, as well as from numerous private citizens. Those comments ranged from an outright objection to the enactment of a statute allowing rehabilitative alimony, to the outright favoring of such a statute. The majority of comments raised issues about the specific statutory criteria that should be considered by the court in determining whether to award rehabilitative alimony. Several common themes emerged from those comments, including concerns about protecting women in long-term marriages, the need to recognize the benefits to young children of having a parent as full-time caregiver, the post-separation impact of the decision made by a spouse not to be employed outside the home during the marriage, and the need to have some finality to the financial relationship between former spouses.

After careful consideration of all of the research, as well as the public comments, the Committee concluded that the factors set forth in Virginia Code Section 20-107.1 for determining spousal support awards should be revised. The Committee extensively debated such issues as whether and in what circumstances to require judges to make written findings regarding spousal support awards, what specific statutory criteria should be set forth for determining spousal support awards, the circumstances under which the court should reserve a party's right to seek future spousal support, and what factors should be considered by the court in determining whether to modify an award once made.

Numerous drafts of proposed legislation were circulated for consideration by Committee

members in 1995. In October, 1995, the Committee voted to recommend a specific legislative proposal. However, the Board of Governors of the Virginia State Bar rejected that proposal. The Committee then concluded that there was a lack of consensus among its members and that it could not arrive at a consensus in time to deliver a report for the 1996 legislative session. Subsequently, the General Assembly enacted HJR 69, which extended the work of the Committee for a second year and the Committee continued its efforts to resolve the issues upon which its members still disagreed. In early 1996, the Committee received and circulated for public comment a suggestion for proposed legislation which incorporated the concept of rebuttable presumptions for or against rehabilitative alimony based upon the length of the marriage.

Again, as a result of the majority vote of the committee, and the specific findings and conclusions of the committee as hereinafter set forth in this report, the committee recommended the enactment of an amendment to Sections 20-107.1 and 20-109 in the form attached as **Appendix B**.

## **V. RECOMMENDED CHANGES TO THE VIRGINIA CODE**

Set forth below is a detailed discussion of the Committee's reasoning with respect to recommended changes to each section of the Virginia Code provisions relating to spousal support.

### **A. Changes to Virginia Code Section 20-107.1**

1. Section 20-107.1 C. This language grants explicit authority to the court to award periodic spousal support for a defined duration. The court would have the flexibility to combine a defined period award with an indefinite award, so as to reduce but not completely eliminate support at some future time. The defined period may be determined either by reference to specific dates or with reference to events. The Committee believes that tying the award to events would allow more flexibility when the court might have difficulty predicting exactly when those events would occur, especially where the event in question might require some action by a third party and thus not be within the ability of either spouse to control.

2. Section 20-107.D. This language would permit, but not require, the court to reserve a party's right to seek support in the future, whether or not the party was initially awarded spousal support. The Committee also recommends a rebuttable presumption limiting the time during which the right would be reserved to fifty percent of the duration of the marriage, measured from the date of the marriage to the date of separation.

3. Section 20-107.E.

The Committee recommends extensive revisions to the factors to be considered by the court in awarding spousal support as an indispensable component of any statutory change

granting courts authority to award periodic support for a defined duration. The Committee believes that the recommended revisions will provide specific guidance so that judges can better understand how the General Assembly intends for them to exercise the discretion which the statute will now give them to limit the duration of periodic spousal support. Moreover, the Committee has found that case law from states whose statutes contain similar specific criteria governing the award of rehabilitative alimony demonstrated more consistency with regard to spousal support awards.

Studies that were reviewed by the committee from other states have shown that in the absence of appropriate specific safeguards, or specific statutory criteria, courts do tend to overestimate the employability of dependent spouses after long marriages, resulting in an unfairly high number of rehabilitative awards. *See, e.g.,* Bell, "Alimony and the Financially Dependent Spouse in Montgomery County, Maryland," 22 Fam. L. Q. 225 (1988); Garrison, "Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes," 57 Brooklyn L. Rev. 620 (1991); McLindon, "Separate But Unequal: The Economic Consequences of Divorce For Women and Children," 21 Fam. L. Q. 351 (1987). The same problem also exists with regard to recipients with custody of young children after marriages of medium length. In these marriages, an award of rehabilitative alimony can force the custodial parent to leave the home, thus working against the best interest of the children.

The committee found it significant that none of the studies cited above recommended the complete repeal of rehabilitative alimony; instead, they supported the concept, but recommended imposition of additional safeguards to limit rehabilitative alimony to appropriate cases. *E.g.,* Garrison, *supra*, 57 Brooklyn L. Rev. at 735 ("Except for the woman who has been economically disadvantaged by long-term child care and homemaking responsibilities, the concept of durational alimony enjoys widespread support").

The specific changes to the factors for the court's consideration are as follows:

a. "Earning capacity" has been deleted from current subsection 1. However, new subsections 9, 11, and 12 (discussed in greater detail below) require the court to consider various aspects of the parties' earning capacities.

b. Current subsection 2, dealing with the parties' education and training, is eliminated. However, new subsections 9 and 10 (discussed in greater detail below) incorporate factors relating to the parties' education and training.

c. Subsection 4 under the proposed amendments (subsection 5 under the current statute) has been expanded to include consideration of special circumstances of the family, in addition to the age and physical and mental condition of the parties. Inclusion of special circumstances would make clear the legislative intent to allow judges to look beyond the circumstances of the parties themselves and include the circumstances of the entire family in determining the appropriate amount and duration for an award of spousal support.

d. Subsection 5 under the proposed amendments would explicitly permit judges to consider the needs of a child or children of the parties in setting spousal support awards. Inclusion of this factor reflects the consensus of the Committee that the law should not mandate imputation of income to a parent where the needs of a child may require that the parent remain at home as a full-time caregiver. The Committee also favors a change to Virginia Code Section 20-108.1 B.3 to ensure that post-divorce parenting arrangements can best meet the needs of young children (although the Committee acknowledges that changes to the child support statutes are beyond its specific mandate as set forth in HJR 439 and HJR 69). Such a change would significantly lessen the adverse impact of divorce upon children in the Commonwealth, which should be one of the most important goals of Virginia's domestic relations law.

e. Subsection 9 under the proposed amendments provides additional guidance to judges in evaluating the parties' earning capacities, emphasizing the need to examine present employment opportunities in evaluating the earning capacities of the parties.

f. Subsection 10 under the proposed amendments provides the basis for a detailed analysis of employment opportunities, and the related issues of education and training which would enhance the earning potential of a marital partner.

g. Subsection 11 of the proposed amendments deals with decisions made during the marriage which might have an adverse impact upon the earning capacity of a marital partner. This factor has been added to help ensure that marital partners who divorce share on an equitable basis the long-term economic consequences of career sacrifices made by either partner during the course of the marriage.

h. Subsection 12 of the proposed amendments requires examination of the contributions by one partner to the earning capacity of the other partner. Inclusion of this factor will help ensure that marital partners who divorce share on an equitable basis any enhancement to either partner's earning capacity which occurred during the marriage.

4. Section 20-107.1.F.

This section establishes a requirement for written findings and conclusions by a judge as to the basis for the judge's decisions regarding spousal support. Where the court awards periodic spousal support for a defined duration, the findings must specifically identify the reason for the nature, amount and duration of the award.

The Committee recognizes that requiring written findings for every case requiring a determination of spousal support will add to the administrative burden on courts and on judges. Reports reviewed by the committee concluded, however, that rehabilitative alimony has been abused in states which lack a findings requirement. Further, an award of

rehabilitative alimony is often based upon a finding that a specific future increase in the recipient's income is reasonably likely. If the court does not state the basis for that assumption on the record, the appellate courts cannot review the correctness of the assumption, and there is no way to test whether future circumstances have made the assumption inaccurate. Finally, the requirement for written findings will minimize the risk of inconsistent decision-making on all alimony issues. Since the review of these awards upon motions for modification, as well as the requirement of a thoughtful process in making the initial award, all require a careful understanding of the basis of the award, your committee recommends that any statute on the issue contain a requirement that any order granting, denying or reserving a request for spousal support be accompanied by written findings and conclusions of law identifying the factors supporting the court's order.

If written findings are required only for rehabilitative alimony awards, there will be in practice a strong reluctance to make such awards because of the additional burdens they will entail for judges. The committee notes that when North Carolina enacted a rehabilitative alimony statute in 1995, it likewise required written findings in all cases. See N.C. General Statutes Section 50-16.3A(c)(1995).

5. Section 20-107.1.G.

This section establishes rebuttable presumptions in favor of defined period awards for marriages of fewer than five years' duration and in favor of indefinite period awards for marriages of longer than twenty years' duration, with no presumption for marriages of between five and twenty years duration. The advisability of establishing presumptions was one of the most hotly debated issues of any addressed by the Committee. The Committee recognizes that the mere existence of such presumptions in the law can have a detrimental effect on marriages, by focusing both partners' attention at certain points in the marriage on whether or not they wish to remain married. Moreover, some members had concerns that presumptions might in some instances influence a victim of domestic violence to remain in a dangerous situation in order to gain the economic benefit of a favorable presumption. Nonetheless, the Committee concluded that the presumption in favor of a defined period award where the marriage lasts twenty years would provide a necessary safeguard for partners in long-term marriages. Additionally, the presumptions will engender greater consistency with regard to spousal support awards in courts throughout the Commonwealth.

The statute defines "date of separation" for purposes of determining the length of the marriage as requiring both separation and the intent on the part of one of the parties that the separation be permanent. This definition conforms to the requirement for a "no fault" divorce that at least one of the parties have the intent that the separation be permanent throughout the applicable statutory period.

**B. Section 20-109.**

This statute governs petitions for modification of spousal support awards. The recommended amendments to this statute are a vital component of the legislative proposal which the Committee has formulated.

1. Subsection 20-109.A. The Committee recommends including modifications to the duration of a spousal support award as one of the ways a court may later modify an award of spousal support.

2. Subsection 20-109.B.

The Committee recommends addition of a new section to the current statute to address specifically the circumstances under which a defined duration award may be modified. The new section permits modification upon a petition filed within the time period of payment of the award. The time limitation specified would eliminate any reservation of right to receive support after the award ends.

The Committee recognizes that the complete elimination of any possibility of support after the end of the defined period potentially places a party who receives a defined period award in a worse position than a party who receives no award whatsoever but is granted a reservation of right. A party who receives a defined period award could never seek support even in event of financial catastrophe, whereas a party who receives no initial award but is granted a reservation of right would have some recourse to alleviate extreme financial hardship during the period of the reservation, which theoretically could last much longer than the defined period of the award. The consensus of the Committee was that to allow a reservation of right to a recipient of a defined period award beyond the period of the award would defeat one of the primary purposes in defining the period of spousal support in the first place, namely to give finality to the divorce.

The new section grants authority to modify a defined period award not only upon a showing of change in circumstance, but also upon the nonoccurrence of an anticipated event outside the support recipient's ability to control. Current law allows modification of a support award only upon a showing of a material change in circumstance. However, the Committee recognizes that in many cases, a defined period award may need modification precisely because the recipient's circumstances have not changed and hence the recipient requires an extension of the period of the award. Coupled with the requirement in proposed Section 20-107.1 that a judge make written findings explaining the basis for the duration of the award, this change to section 20-109 will help ensure that the support recipient will have a means of redress should a judge's prediction about the recipient's potential for enhanced earning capacity prove inaccurate.

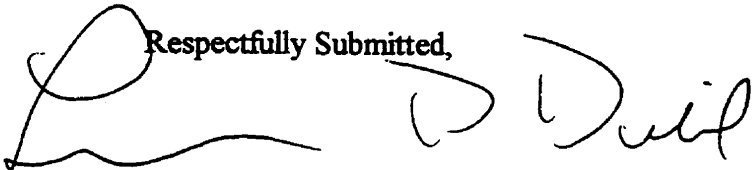


3. Subsection 20-109.C. The deletion of the word "however" is recommended to preserve the sense of the sentence, given the change to the immediately preceding text.

**C. Enactment Clause**

Due to the fact that the recommended change in legislation will be a material change in the spousal support legislative scheme upon which parties and court have previously relied in rendering court orders or in entering property settlement agreements, your committee recommends that the statute contain a specific provision clarifying that its provisions shall only apply to suits filed on or after July 1, 1997, or for modification based upon suits filed on or after July 1, 1997. It is the intent of the committee to not have this amendment apply to modification requests filed after July 1, 1997 based upon cases pending prior to that date, for initial orders entered after July 1, 1997 for actions pending prior to that date.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "L. Diehl", written over a horizontal line.

Lawrence D. Diehl, Esquire, Co-Chairman

1996 SESSION  
ENGROSSED

APPENDIX A

965883492

HOUSE JOINT RESOLUTION NO. 69

House Amendments in [ ] —February 1, 1996

Requesting the Family Law Section of the Virginia State Bar to continue to study the issue of the award of rehabilitative alimony and the reservation of spousal support after the entry of a final decree of divorce.

Patron—Woodrum

Referred to Committee on Rules

WHEREAS, rehabilitative alimony is generally known as a type of spousal support awarded for a defined or limited term or event without a further reservation of support after payment of such award; and

WHEREAS, although Virginia case law and § 20-107.1 of the Code of Virginia do not recognize the authority of the trial court to award rehabilitative alimony without a continued reservation of spousal support, the great majority of case law or statutes of other states provide courts with the authority to award rehabilitative alimony as an alternative or in addition to an award of permanent periodic spousal support or an award of lump sum spousal support; and

WHEREAS, House Joint Resolution No. 439 (1995) directed the Family Law Section of the Virginia State Bar to study the desirability of allowing judges, in their discretion, to award rehabilitative alimony or spousal support to a spouse, to determine the conditions under which such an award should be made and its relationship to the issue of the continued reservation of spousal support to a spouse, and to determine the amendments necessary to the Code of Virginia to provide language granting such authorization; and

WHEREAS, following considerable deliberation, the Section has reached a consensus that there are certain circumstances in which rehabilitative alimony should be awarded, but has thus far been unable to reach a consensus on specific statutory recommendations; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Family Law Section of the Virginia State Bar be [ directed to continue to study the desirability of allowing judges, in their discretion, to award rehabilitative alimony or spousal support to a spouse, to determine the conditions under which such an award should be made and its relationship to the issue of the continued reservation of spousal support to a spouse, and to determine the amendments necessary to the Code of Virginia to provide language granting such authorization; and, be it requested to continue to study the issue of the award of rehabilitative alimony and the reservation of spousal support after the entry of a final decree of divorce. The Section shall (i) consider the desirability of allowing judges, in their discretion, to award rehabilitative alimony or spousal support to a spouse; (ii) examine the conditions under which such an award should be made and its relationship to the issue of the continued reservation of spousal support to a spouse; and (iii) determine the amendments necessary to the Code of Virginia to provide language granting such authorization; and, be it ]

RESOLVED FURTHER, That representatives of the Virginia Women's Attorneys Association and such other interest groups deemed appropriate by the Family Law Section of the Virginia State Bar continue to participate in the study.

The Family Law Section of the Virginia State Bar shall complete its work in time to submit its findings and recommendations to the Governor and the 1997 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

# REHABILITATIVE SPOUSAL SUPPORT PROPOSAL

*WILL to amend and reenact Sections 20-107.1 and 20-109 of the Code of Virginia relating to spousal support and the modification of spousal support.*

Be in enacted by the General Assembly of Virginia:

1. That Sections 20-107.1 and 20-109 of the Code of Virginia as they may become effective are amended and reenacted and that the Code of Virginia is amended as follows:

**Sec. 20-107.1. Court may decree as to maintenance and support of spouses. - A.** Upon the entry of a decree providing (i) for the dissolution of a marriage, (ii) for a divorce, whether from the bond of matrimony or from bed and board, (iii) that neither party is entitled to a divorce, or (iv) for separate maintenance, or pursuant to any proceeding arising under subdivision L of Sec. 16.1-241, the court may make such further decree as it shall deem expedient concerning the permanent 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.

**B.** Any maintenance and support shall be subject to the ~~provisions of limitations set forth in~~ Sec. 20-109, and no permanent maintenance or support shall be awarded from a spouse if there exists in such spouse's favor a ground of divorce under the provisions of Sec. 20-91(1). However, the court may make such an award notwithstanding the existence of such ground if the court determines from clear and convincing evidence, that a denial of support and maintenance would constitute a manifest injustice, based upon the respective degrees of fault during the marriage and the relative economic circumstances of the parties.

**C.** The court, in its discretion, may decree that maintenance and support of a spouse be made in periodic payments for a defined duration, or in periodic payments for an undefined duration, or in a lump sum award, or both, in any combination thereof. The term "defined duration" as used herein and in Sec. 20-109 shall mean a period of time with a specific beginning and ending date, or one specified in relation to the occurrence or cessation of an event or condition, other than death or termination pursuant to Sec. 20-110.

**D.** In addition to or in place of such an award, the court may reserve the right to receive such support in the future. In any case granting a reservation of right to an award of spousal support, there shall be a rebuttable presumption that such reservation shall continue for a term equal to fifty percent of the length of the marriage. The length of the marriage is defined as the length of time between the date of the marriage and the date of separation. Once granted, the duration of such reservation shall not be subject to modification.

**E.** The court in determining whether to award support and maintenance for a spouse, shall consider the circumstances and factors which contributed to the dissolution of the marriage, specifically including adultery and any other ground for divorce under the provisions of Sec. 20-91(3) or (6) or Sec. 20-95. In determining the nature, amount and duration of such award, the court shall consider the following:

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

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

3. ~~2.~~ The standard of living established during the marriage;

4.3. The duration of the marriage;

5.4. The age and physical and mental condition of the parties and any special circumstances of the family;

5. The extent to which the age, physical or mental condition, or special circumstances of any child of the parties would make it appropriate that a party not seek employment outside of home;

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 Sec. 20-107.3; and

9. The earning capacity, including the skills, education and training of the parties and the present employment opportunities for persons possessing such earning capacity;

10. The opportunity, ability, and the time and costs involved, for a party to acquire the appropriate education, training and employment to obtain the skills needed to enhance his or her earning ability;

11. The decisions regarding employment, career, economics, education, and parenting arrangements made by the parties during the marriage and their effect on present and future earning potential including the length of time one or both of the parties has been absent from the job market;

12. The extent to which either party has contributed to the attainment of education, training, career position or profession of the other party; and

9-13. Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

F. Any order granting, reserving or denying a request for spousal support must be accompanied by written findings and conclusions of the court identifying the factors in subsection E which support the court's order. In the event that the court awards periodic support for a defined duration, such findings shall identify the basis for the nature, amount and duration of such award.

G. In any case involving a marriage the duration of which is five years or less from the date of the marriage to the date of the separation, there shall be a rebuttable presumption that an award of spousal support, if any, shall be in the nature of periodic payments for a defined duration, a lump sum award or any combination thereof. In any case involving a marriage the duration of which is more than five years from the date of the marriage to the date of separation, but less than twenty years from the date of the marriage to the date of separation, there shall be no presumption of periodic payments for a defined duration, periodic payments for an undefined duration or a lump sum award, if any spousal support should be awarded. In any case involving a marriage the duration of which is more than twenty years from the date of the marriage to the date of separation, there shall be a rebuttable presumption that an award of spousal support, if any, shall be in the nature of periodic payments for a undefined duration, a lump sum award, or any combination thereof. The term "date of separation" shall mean the earliest date at which the parties are physically separated and at least one party intends such separation to be permanent, provided such separation remains continuous thereafter.

**Sec. 20-109. Changing maintenance and support for a spouse; effect of stipulations as to maintenance and support for a spouse; cessation upon remarriage or death.-A.** Upon petition of either party, the court may increase, decrease or terminate the amount or duration of any spousal support and maintenance that may thereafter accrue, whether previously or hereafter awarded, as the circumstances may make proper.

**B. (1)** With respect to an award of spousal support for a defined duration, the court may consider a modification of such award upon the petition of either party filed within the time period of payment of such award. If the court finds that there has been a material change in the circumstances of the parties, not reasonably in the contemplation of the parties when the award was made or if an event anticipated by the court to occur during the period of the payment of the award does not in fact occur, which event was significant in the making of the original award, and which non-occurrence was not as a result of the fault or inaction of the party seeking relief, then based on the factors set forth in Sec. 20-107.1E, the court may increase, decrease, or terminate the amount or duration of the award.

**(2)** In any case filed pursuant to this Subsection, the court shall apply the presumptions set forth in Sec. 20-107.1G.

**C.** ~~However,~~ In suits for divorce, annulment and separate maintenance, and in proceedings arising under subdivision A3 or L of Sec. 16.1-241, if a stipulation or contract signed by the party to whom such relief might otherwise be awarded is filed before entry of a final decree, no decree directing the payment of support and maintenance for the spouse, suit money, or counsel fee or establishing or imposing any other condition or consideration, monetary or nonmonetary, shall be entered except in accordance with such stipulation or contract. Upon the death or remarriage of the person receiving support, spousal support shall terminate unless otherwise provided by stipulation or contract. If such stipulation or contract is filed after entry of a final decree and if any party so moves, the court shall modify its decree to conform to such stipulation or contract.

**2.** That the provisions of this act shall apply only to suits filed on or after July 1, 1997. The provisions of this act shall specifically apply only to suits for initial spousal support orders filed on or after July 1, 1997 or to suits for modification of spousal support orders arising from suits for initial spousal support orders filed on or after July 1, 1997. This act shall not apply to the determination of an initial spousal support award entered on or after July 1, 1997 arising from a suit filed prior to July 1, 1997 or to the modification of any order of spousal support arising from any suit filed prior to July 1, 1997.

## APPENDIX C -EXAMPLES

The Committee offers the following examples of how the proposed statutory amendments might be applied in specific cases:

**Example 1.** At the time of divorce after a seven-year marriage, both marital partners are employed full time. The husband earns approximately twice as much as the wife. The wife has been working towards an academic degree by attending night school and anticipates at least a fifty percent increase in her salary once she obtains the degree in three years' time. However, without some supplement to her current income, the wife cannot continue her education. Although there is no statutory presumption to guide the court in deciding on the duration of a spousal support award, these circumstances might justify an award of rehabilitative alimony to the wife for a three-year period so that she can complete her degree.

**Example 2.** Two years after the divorce, the wife in Example 1 suffers an illness which causes her to miss an academic semester and reduce her course load the following semester. As a result, she will not complete her degree until one year after the graduation date anticipated at the time of the divorce. These circumstances might justify the continuation of the defined period award for one additional year.

**Example 3.** At the time of divorce after a twelve-year marriage, the wife is a senior military officer and the husband is currently unemployed despite active efforts to obtain employment. The husband's sporadic employment history, which is the result of disruptions caused by the wife's overseas assignments, has adversely affected his ability to obtain any but the most menial employment. Rather than accept a low-paying job, the husband wants to concentrate his efforts on obtaining employment commensurate with the professional position which he left in order to accompany the wife overseas. In these circumstances, although there is no statutory presumption in favor of either defined period or indefinite support award, a defined period award might be appropriate to enable the husband to devote himself full-time to his job search, if the court has a reasonable basis for concluding that the search will ultimately be successful and ~~eliminate~~ lessen his need for support.

**Example 4.** Prior to the expiration of the defined period award, the husband in Example 3 concludes that it will be impossible for him to obtain employment commensurate with his previous position and so he accepts employment at a salary much lower than that which he previously earned and much lower than the wife's salary. Under these circumstances, it might be appropriate to modify the defined period award to a somewhat lower award which would continue indefinitely.

**Example 5.** Assume the same facts as in Example 3, except that the family unit includes three children. The youngest child has severe allergies which necessitate visits to a physician at frequent but unpredictable intervals and have often required hospitalization. The husband was the full-time caregiver for the children throughout the marriage and is awarded primary physical custody of the children in the divorce. Although there is no presumption in favor of an indefinite award, these circumstances ~~would~~ **might** make it inappropriate to limit the spousal support award to a defined period because the needs of the parties' child ~~would~~ **may** preclude

**the husband's obtaining employment outside the home in the foreseeable future. The Court, among other factors, could consider the parenting arrangements between the parties during the marriage affecting Husband's ability to obtain \_\_\_\_\_ employment.**

**Example 6.** At the time of divorce after a twenty-year marriage, both parties are employed with roughly equivalent incomes. The husband is HIV-positive but shows no present symptoms of AIDS. These circumstances might justify a reservation of right for the husband to seek future support even though the court did not award either party spousal support at the time of divorce. The time period for the reservation could be determined with reference to the time an HIV-positive individual could be expected to develop AIDS; if the court were unable to draw a conclusion on that issue based upon the evidence submitted at trial, the statutory presumption for a ten-year reservation would apply.

**Example 7.** The wife has held no paid employment during her four years of marriage. It is the second marriage for both parties; the wife's first marriage ended in divorce after twenty-five years, most of which the wife spent at home rearing children. During the course of her present marriage, the wife devoted herself to home pursuits, including lavishly entertaining the husband's clients and accompanying the husband on his frequent business trips. When the parties married, the wife was employed at an annual salary approximately one-fifth that of the husband's current annual income and she also received alimony from her first husband. Because the marriage lasted less than five years, there is a presumption in favor of a defined period award. However, the facts of this case, in particular, the wife's age, low earning potential and her relinquishment of alimony from her first husband upon her remarriage, would **might** justify an indefinite award of spousal support.

**Example 8.** Assume the same facts as in Example 7, except that in three years' time the wife will begin receiving a monthly benefit from her first husband's pension plan. In these circumstances, it might be appropriate to order a reduction in the level of support which would occur at the time of the wife's receipt of the pension benefit. The court could accomplish that result by combining an indefinite award (which would continue even after the pension payments to the wife commenced) with a defined period award (which would end at the date that the pension payments began).

**Example 9.** When a couple separates after a twenty-five year marriage, the husband is a retired foreign service officer who has a part-time job and is in his second year of law school. After graduation, the husband plans to pursue a career in international law utilizing the many contacts he developed while in the foreign service. The trial court awards each party a share of the husband's pension benefit. The parties' incomes at the time of divorce are roughly equivalent. Assuming that the trial court does not find the husband to be voluntarily underemployed, these circumstances **would might** make it appropriate for the court to decline make a present spousal support award, but to reserve the wife's right to seek spousal support in the future, once the husband has achieved the enhanced earning capacity which his law degree, in combination with the experience and contacts he acquired during the marriage, will afford him. Then **would further** be a presumption that the \_\_\_\_\_ would be limited to a period of not in excess of twelve and one half (12½) years.

## APPENDIX C -EXAMPLES

The Committee offers the following examples of how the proposed statutory amendments might be applied in specific cases:

**Example 1.** At the time of divorce after a seven-year marriage, both marital partners are employed full time. The husband earns approximately twice as much as the wife. The wife has been working towards an academic degree by attending night school and anticipates at least a fifty percent increase in her salary once she obtains the degree in three years' time. However, without some supplement to her current income, the wife cannot continue her education. Although there is no statutory presumption to guide the court in deciding on the duration of a spousal support award, these circumstances might justify an award of rehabilitative alimony to the wife for a three-year period so that she can complete her degree.

**Example 2.** Two years after the divorce, the wife in Example 1 suffers an illness which causes her to miss an academic semester and reduce her course load the following semester. As a result, she will not complete her degree until one year after the graduation date anticipated at the time of the divorce. These circumstances might justify the continuation of the defined period award for one additional year.

**Example 3.** At the time of divorce after a twelve-year marriage, the wife is a senior military officer and the husband is currently unemployed despite active efforts to obtain employment. The husband's sporadic employment history, which is the result of disruptions caused by the wife's overseas assignments, has adversely affected his ability to obtain any but the most menial employment. Rather than accept a low-paying job, the husband wants to concentrate his efforts on obtaining employment commensurate with the professional position which he left in order to accompany the wife overseas. In these circumstances, although there is no statutory presumption in favor of either defined period or indefinite support award, a defined period award might be appropriate to enable the husband to devote himself full-time to his job search, if the court has a reasonable basis for concluding that the search will ultimately be successful and ~~eliminate~~ lessen his need for support.

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**the husband's obtaining employment outside the home in the foreseeable future. The Court, among other factors, could consider the parenting arrangements between the parties during the marriage affecting Husband's ability to obtain \_\_\_\_\_ employment.**

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