

Separation (Property Settlement) Agreements

When is a Deal a Deal in a Divorce Case?

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Most divorcing husbands and wives in Virginia eventually resolve their differences by agreement rather than litigation. Inevitably, one party realizes that he or she is unhappy with the compromises reached, and some of these disgruntled parties ask the Courts to overturn their agreement. This article discusses Virginia's attitude toward agreements in divorce cases and reviews the arguments litigants have used in an attempt to invalidate signed agreements.

VIRGINIA'S ACCEPTANCE OF AGREEMENTS

Virginia Courts have made it very clear to divorcing parties that it favors marital property settlements. See *Parra v. Parra*, 1 Va. App. 118, 128, 336 S.E.2d 157, 162 (1985); *Cooley v. Cooley*, 220 Va. 749, 752, 263 S.E.2d 49, 52 (1980). The Virginia legislature supports this position by granting the Courts the authority to incorporate, ratify, and affirm valid agreements between the parties. Virginia Code §20-109.1. (Emphasis added)

Virginia has not imposed many restrictions on the form or types of agreements that its courts will accept. Agreements may be executed in triplicate on bonded paper with witnesses or handwritten on restaurant napkins as long as they are signed by the parties. The complexity, length, and amount of legalese included in an agreement has no bearing on its validity. When a marital agreement's validity is contested, the challenging party must prove that the agreement is invalid by clear and convincing evidence. See e.g. *Drewry v. Drewry*, 8 Va. App. 19, 25, 378 S.E.2d 12, 12 (1989); *Winn v. Aleda Constr. Co.*, 227 Va. 304, 308, 315 S.E.2d 193, 195 (1984); *Gill v. Gill*, 219 Va. 1101, 1106, 254 S.E.2d 122, 125 (1979).

BASIC REQUIREMENTS

The first step in determining the validity of a marital agreement is ensuring that it complies with Virginia Code §20-155. By incorporating the terms of Virginia Code §20-149, Virginia Code §20-155 requires all marital agreements to be in writing and signed by the parties.

The Supreme Court recently examined the validity of a marital agreement in *Flanary v. Milton*, 556 S.E.2d 767, 2002 WL 29355 (Va. January 11, 2002). In *Flanary*, the parties to a divorce case reached an oral agreement, which was recorded by a court reporter. Before the agreement could be reduced to a signed writing, the husband died. The Supreme Court held that agreements must be written and signed by both parties to be valid; otherwise they do not comply with the express language of Virginia Code §20-155.

While reviewing a marital agreement in the context of Virginia Code 20-109(C), the Court of Appeals found that the signature of a party's attorney may not be sufficient to bind the party. *Lane v. Lane*, 32 Va.App. 125, 129-30, 526 S.E.2d 773, 775-76 (2000). The ruling relied on the language of §20-109(C), which states, "[i]n suits for divorce, . . . if a stipulation or contract signed by the party to whom such relief might otherwise be awarded is filed . . . no decree or order . . . shall be entered except in accordance with that stipulation or contract." (Emphasis added). The Court of Appeals found that a Final Decree of Divorce, which had been signed by the parties' counsel, did not establish a non-modifiable stipulation or contract as contemplated by §20-109(C) because the actual party seeking relief had not signed the Decree.

The Court of Appeals reached a similar conclusion in *Walson v. Walson*, 37 Va.App 208, 556 S.E.2d 53 (2002), although the grounds for this ruling were quite different. In *Walson*, the Court held that an agreement signed by counsel for a wife was not enforceable because the attorney did not have the apparent authority to sign an agreement on the wife's behalf. Although the wife's attorney testified that he had received an e-mail from his client authorizing him to enter an agreement, the Court overturned the agreement. Based on the wife's previous involvement in all negotiations and insistence upon reviewing each proposal, the Court concluded that the attorney did not have the authority to sign an agreement for the wife, nor did the husband have the grounds to believe that the attorney had such authority.

The recent decisions in *Flanary*, *Lane*, and *Walson* effectively reverse *Richardson v. Richardson*, 10 Va.App. 391, 392 S.E.2d 688 (1990). For years many practitioners had followed the holding of *Richardson*, believing that agreements read into the record were valid and final. The Supreme Court has made it clear that this will no longer suffice, and the Court of Appeals has sent two very clear signals that agreements must be signed by the litigants themselves, not their attorneys. In response to these rulings, at least one Circuit Court permits litigants to read their agreements into the record, and then requires the parties to sign a statement confirming that the record accurately reflects their agreement.

UNCONSCIONABILITY

An unconscionability claim asserts that an agreement is so one-sided that it should not be enforced in a court of equity because it does not lead to an equitable result. When faced with this argument, Virginia courts have adhered to a two prong standard set forth by the Court of Appeals in *Derby v. Derby* 8 Va.App. 19 (1989). First, the court must analyze the value received by the parties to determine whether or not there is a gross disparity. Second, if the court finds a gross disparity, it must then ascertain whether one party overreached or used oppressive behavior to obtain the agreement. If a gross disparity and overreaching or oppressive behavior exist, the parties' agreement will be declared invalid and unenforceable.

Practitioners must beware that gross disparity does not mean that one party got a better deal than the other. The difference between what the parties received pursuant to the

agreement must be substantial. Virginia Courts are not in the business of protecting competent parties from entering into agreements, even if they are ill-reasoned, ill-advised, or inequitable. *Drewry v. Drewry*, 8 Va.App. 469, 383 S.E.2d 16 (1989). "Courts cannot relieve . . . the consequences of a contract merely because it was unwise" . . . [or] "rewrite a contract simply because the contract may appear to reach an unfair result." *Pelfrey v. Pelfrey*, 25 Va.App. 239, 245, 487 S.E.2d 281, 284 (1997) (quoting *Rogers v. Yourshaw*, 18 Va.App. 816, 823, 448 S.E.2d 884, 888 (1994)). Following this reasoning, Virginia Courts have repeatedly refused to find a gross disparity in agreements that favor one party, but do not shock the conscience of the court. See e.g. *Jennings v. Jennings*, 12 Va.App. 1187, 409 S.E.2d 8 (1991), *Pillow v. Pillow*, 13 Va.App. 271, 410 S.E.2d 407 (1991), *Grow v. Grow*, 2000 WL 84438 (Va.App. January 27, 2000). A gross disparity will be found when one party waives his or her right to essentially all of the marital property. See e.g. *Derby v. Derby*, 8 Va.App. 19 (1989); *Rahnema v. Rahnema*, 2000 WL 251679 (Va.App. March 7, 2000); *Plogger v. Plogger*, 1997 WL 191303 (Va.App. April 22, 1997). In *Derby*, the parties' only significant asset was real estate which became the sole property of the wife under the terms of the parties' agreement. The *Rahnema* Court found a gross disparity when wife received all of husband's property including everything he had earned in thirty years of professional life, even though the parties were only married for four years. *Rahnema v. Rahnema*, 2000 WL 251679 (Va. App. March 7, 2000). In *Plogger*, the court also found a gross disparity because the husband was required to pay \$1,200 per month in spousal support when he only earned \$1,386 per month. *Plogger v. Plogger*, 1997 WL 191303 (Va. App. April 22, 1997).

If only a gross disparity exists and there are no attendant oppressive influences, the case must be extreme to justify equitable relief. *Derby* (citing *Smith Bros. v. Beresford*, 128 Va. 137, 169-70, 104 S.E. 371, 381-82 (1920)). In a Fairfax County Circuit Court case, *Blosser v. Blosser*, Judge Annunziata determined that an agreement was unconscionable on its face without examining the circumstances under which the agreement was reached. *Blosser v. Blosser*, 1992 WL 884599 (Va.Cir.Ct. March 22, 1992). The *Blosser* agreement required the husband to transfer virtually every marital asset to wife, and also to pay her monthly support and a substantial lump sum.

If no gross disparity exists, the court is not required to reach the second prong of the *Derby* test. See e.g. *Grow v. Grow*, 2000 WL 84438 (Va.App.); *Pelfrey v. Pelfrey*, 25 Va.App. 239, 487 S.E.2d 281 (1997), stating "Because he did not prove by clear and convincing evidence a great disparity in value, Mr. Pelfrey failed to satisfy the initial threshold required for further judicial scrutiny. Thus, we need not examine the circumstances surrounding the adoption of the agreement to determine whether there existed 'oppressive influences.'"

In *Drewry v. Drewry*, the Court of Appeals refused to find that a gross disparity existed when the parties reached an agreement based at least in part on an agreed-upon value for an unimproved lot. Two weeks after executing the agreement, the husband sold the unimproved lot for significantly more than the parties thought it was worth when negotiating the agreement. The husband stated that there was no sale in the works when he signed the agreement, and the court had no evidence that either party thought the

property had a higher value. Basing its decision on the parties' knowledge when the agreement was signed, the Court of Appeals did not find a gross disparity. *Drewry v. Drewry*, 8 Va.App. 469, 383 S.E.2d 16 (1989).

When there is a gross disparity, but it does not reach a level as shocking as in *Blosser v. Blosser*, the court must find that overreaching or oppressive behavior was evident in order to overturn the agreement on the grounds of unconscionability. The Derby Court identified numerous factors that should be considered when it stated, "[w]hen the accompanying incidents are inequitable and show bad faith, such as concealments, misrepresentations, undue advantage, oppression on the part of the one who obtains the benefit, or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like, on the part of the other, these circumstances, combined with inadequacy of price, may easily induce a court to grant relief, defensive or affirmative." *Derby*, citing *Pomeroy*, *Equity Jurisprudence* §928 (5th ed. 1941).

In *Derby*, the Court specifically noted the wife's misrepresentations regarding a possible reconciliation. Simultaneously, she misled her husband by telling him that she was not having an adulterous affair, she presented the agreement to her husband when she knew he could not consult with his attorney, and the Court believed that the wife took advantage of the husband's willingness to do anything for his wife. The husband also proclaimed that he had undergone a religious experience that convinced him to sign the agreement. The court in *O'Bryan v. O'Bryan*, 1992 WL 441907 (Va.App. July 28, 1993) declared an agreement unconscionable when the husband testified that he signed it without an attorney and, that "his wife had suffered 'several ... nervous breakdowns,' and he had acquiesced only to avoid a 'fight' and 'make the way ... smooth' for her." In *Plogger*, the Court noted that the agreement was drafted by the wife's attorney and the husband did not read the agreement before signing it. The court further noted that the parties did not negotiate the terms of the agreement; the wife simply presented the agreement. Knowing the husband's financial situation she prepared the agreement in a manner that left him virtually penniless. *Plogger v. Plogger*, 1997 WL 191303 (Va.App. April 22, 1997)

Even though the *Drewry* and *Pillow* Courts did not find a gross disparity, and therefore did not reach the second prong of the *Derby* test, both opinions shed light on what behavior would not be sufficient to support a finding of oppressive influences or overreaching. *Drewry v. Drewry*, 8 Va.App. 469, 383 S.E.2d 16 (1989); *Pillow v. Pillow*, 13 Va.App. 271, 410 S.E.2d 407 (1991). The *Drewry* and *Pillow*, cases, and *Jennings v. Jennings*, 12 Va.App. 1187, 409 S.E.2d 8 (1991), all stated that the lack of an attorney was not sufficient grounds to constitute overreaching. The Courts cited active negotiation by the parties and the professional acumen of the party seeking to overturn the agreement as important factors.

The *Drewry* and *Jennings* courts faced situations in which a party claimed incompetence at the time the agreement was signed. The wife in *Drewry* claimed that she suffered from a mental illness, and the husband in *Jennings* claimed that he was drunk. Both decisions rejected these claims on the basis of testimony by lay witnesses who observed the parties'

behavior at or about the time the agreement was signed. In *Drewry*, the testimony of lay witnesses as to the wife's lucidity overcame the testimony of the wife's treating psychiatrist, who had previously hospitalized the wife.

FRAUD

Fraud requires actual misrepresentation, concealment, or deceit, as well as a "breach of legal or equitable duty which, irrespective of moral guilt, is declared by law to be fraudulent because of its tendency to deceive others or violate confidence. *Wells v. Weston*, 229 Va. 72, 77, 326 S.E.2d 672, 675-76 (1985), quoting *Nuckols v. Nuckols*, 228 Va. 25, 38, 320 S.E.2d 734, 741 (1984)). The elements for constructive fraud are less stringent, thereby making it a more common claim. "To establish constructive fraud one must prove the following by clear, cogent and convincing evidence: that there was a material false representation, that the hearer believed it to be true, that it was meant to be acted on, that it was acted on, and that damage was sustained." *Webb v. Webb*, 16 Va.App. 486, 431 S.E.2d 55 (1993), quoting *Nationwide Ins. Co. v. Patterson*, 229 Va. 627, 629, 331 S.E.2d 490, 492 (1985). For constructive fraud to exist, the party seeking to avoid a contract need not show that there was an actual "intent to deceive" by the other party, but it is necessary to prove that "there has been a material misrepresentation." *Drewry* citing *Moore v. Gregory*, 146 Va. 504, 523, 131 S.E. 692, 697 (1925).

The mere fact that the parties are husband and wife does not mean that one has a fiduciary duty toward the other. See e.g. *Grow v. Grow*, 2000 WL 84438 (Va.App.); *Barnes v. Barnes*, 231 Va. 39, 340 S.E.2d 803 (1986). However, as explained below, the *Webb* Court found that there was a "special relationship" between the parties when one spouse was an attorney. That spouse's failure to fully disclose the value of certain material assets made it impossible for the wife to enter the agreement knowingly and voluntarily. In *Webb*, the Court of Appeals overturned an agreement on the grounds that the husband had procured it through constructive fraud. The husband, an attorney, offered his wife advice on their divorce, and discouraged her from retaining an independent attorney. He had handled the major financial transactions during the marriage, which gave him a superior knowledge of the parties' finances. The wife testified that she relied on the husband to "do the right thing." On top of all this, the husband and wife were living together and sleeping in the same room for much of the negotiations.

The Court of Appeals distinguished *Webb* in *Fields v. Fields*, 1996 WL 79674 (Va.App. February 27, 1996). As in *Webb*, the husband in *Fields* did not disclose the value of his retirement accounts. However, unlike in *Webb*, it was clear that the wife in *Fields* knew that such accounts existed, and her husband was not an attorney. The Court of Appeals held that without a finding that the parties had a "special relationship," there was no fraud. "The duty by which conduct is measured to determine fraud is established by the relationship and circumstances which exists between parties." *Drewry v. Drewry*, 8 Va. App. 460, 469, 383 S.E.2d 12, 16 (1989) citing *Blum v. Blum*, 59 Md. App. 584, 594, 477 A.2d 289, 294 (1984).

"Fraud is generally determined by reviewing the conduct of the parties in relation to their legal and equitable duties to one another; unconscionability is more concerned with the intrinsic fairness of the terms of the agreement in relation to all attendant circumstances, including the relationship and duties between the parties." *Derby v. Derby*, 8 Va. App. 19, at 28 (1989). The Court of Appeals has refused to characterize behavior by a party that misled the other party into believing that a reconciliation was possible as fraudulent, but will review this behavior when considering potential attendant circumstances. See, e.g. *Derby, Id.*; *Grow v. Grow*, 2000 WL 84438 (Va. App. January 27, 2000). While the circumstances may not rise to the level of fraud, they may be important factors in an unconscionability argument.

DURESS

In *Pelphrey*, the Court of Appeals stated, "Duress may exist whether or not the threat is sufficient to overcome the mind of a man of ordinary courage, it being sufficient to constitute duress that one party to the transaction is prevented from exercising his free will by reason of threats made by the other and that the contract is obtained by reason of such fact. Unless these elements are present, however, duress does not exist. . . . Authorities are in accord that the threatened act must be wrongful to constitute duress." *Pelphrey v. Pelphrey*, 25 Va.App. 239, 246, 487 S.E.2d 281, (1997) (citing *Norfolk Division of Social Services v. Unknown Father*, 2 Va.App. 420, 435, 345 S.E.2d 533, 541 (1986) (quoting 6B *Michie's Jurisprudence Duress and Undue Influence* §§ 2-3 (Repl.Vol.1985)). Thus "threats" of custody litigation or attorney withdrawal, for example, do not make for duress. This author was unable to locate a single reported case in Virginia in which a marital agreement was overturned because it had been procured by duress. Although the Court in *Pelphrey* did not find that the husband signed the agreement under duress, the Court appears to outline one scenario that might merit consideration. The wife threatened to kill herself if the husband did not sign the property agreement, and there is also some indication that the husband had been under a doctor's care when the suicide threats were made. *Pelphrey* did not find that the husband signed the agreement under duress, since he signed the agreement nine months after the threats, at a time when he was not under a doctor's care and was living with his girlfriend. The opinion does seem to suggest that perhaps the outcome would have been different if the husband had signed the agreement under those conditions.

In *Grow*, the Court of Appeal rejected the wife's claim that she signed an agreement under duress. The wife argued that the husband informed her that the matter would have to be settled in court and he would raise his allegations that she had abused the children if she did not sign the agreement. The husband's statement that he would pursue his claims in court did not amount to duress.

CONCLUSION

Virginia courts strongly favor agreements that resolve marital issues. In general, litigants have found it very difficult to convince courts to overturn agreements. The courts require complaining parties to meet a high burden. Proof that the agreement is not a good deal for

one side is nowhere near enough to persuade a court to overturn an agreement. A deal is almost always a deal in divorce cases.