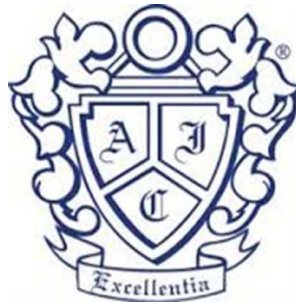


# George Mason Inns of Court



## Developments in the Law of Spousal Support

Family Law Presentation  
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1. **Virginia Spousal Support Statute**

- A. Review of VA spousal support statute and factors for determining support. Va. Code § 20-107.1.
- B. Meaning and effect of 2016 amendments to subparagraphs A and E(13). (Amendments italicized below.)
- C. Amendment to subparagraph A was precipitated by *Wroblewski v. Russell*, 63, Va. App. 468 (2014). Wife failed to prove her grounds for divorce and Husband prevailed on a Motion to strike her Complaint. Because the Complaint was struck, wife's claim for alimony was also stuck and she was denied support.

**§ 20-107.1. Court may decree as to maintenance and support of spouses.**

A. Pursuant to any proceeding arising under subsection L of § 16.1-241 or 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, the court may make such further decree as it shall deem expedient concerning the maintenance and support of the spouses, *notwithstanding a party's failure to prove his grounds for divorce, provided that a claim for support has been properly pled by the party seeking support*. 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 § 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 the provisions of subdivision A (1) of § 20-91. 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 in any combination thereof.

D. In addition to or in lieu of an award pursuant to subsection C, the court may reserve the right of a party to receive support in the future. In any case in which the right to support is so reserved, there shall be a rebuttable presumption that the reservation will continue for a period equal to 50 percent

of the length of time between the date of the marriage and the date of separation. Once granted, the duration of such a 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 subdivision A (3) or (6) of § 20-91 or § 20-95. In determining the nature, amount and duration of an award pursuant to this section, the court shall consider the following:

1. The 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 standard of living established during the marriage;
3. The duration of the marriage;
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 the 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 § 20-107.3;
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 for, ability of, 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 have 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
13. Such other factors, including the tax consequences to each party ***and the circumstances and factors that contributed to the dissolution, specifically including any ground for divorce***, as are necessary to consider the equities between the parties.

## 2. History and Public Policy of Spousal Support in Virginia

- I. Divorces were originally granted by the Virginia legislature beginning in 1803. In 1850, the legislature stopped granting divorces altogether and turned the matter entirely over to the Virginia chancery courts. Riley, G., 1991, "Legislative Divorce in Virginia, 1803-1850", *The Journal of the Early Republic*, Vol. 11/1, pp. 51-67, doi:1; Retrieved from <http://www.jstor/stable3123311>.
  - A. In or around 1849-50, Virginia legislators adopted a provision of the code that authorized the court to provide for the maintenance of either of the parties or both in the event of divorce.
    - 1) The court in term or the judge in vacation, may, at any time pending the suit, make any order that may be proper to compel the man to pay any sums necessary for the maintenance of the woman and to enable her to carry on the suit or to prevent him from imposing any restraint on her personal liberty, . . . or to preserve the estate of the man, so that it be forthcoming to meet any decree which may be made in the suit. . . Va. Code Ch. CIX, Of Divorces, Sec. 10 (1849; 1860; 1874).
    - 2) Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce, whether from the bond of matrimony or from bed and board, the court may make such further decree as it shall deem expedient, concerning the estate and maintenance of the parties or either of them. . . Va. Code Ch. CIX, Of Divorces, Sec. 12 (1849; 1860; 1874).
  - B. In 1887, the Virginia legislators enacted provisions that enabled the court, in its discretion, to continue to provide for maintenance of the parties (woman) during the pendency of the suit as well as upon dissolution. Notably, the court provides for the man to pay any sums necessary for [the woman] to carry on the suit.
    - 1) The court in term of the judge in vacation may, at any time, pending the suit, in the discretion of such court or judge, make any order that may be proper to compel the man to pay any sums necessary for the maintenance of the woman and to enable her to carry on the suit, or to prevent him from imposing any restraint on her personal liberty, or to provide for the custody and maintenance of the minor children of the parties during the pendency of the suit, or to preserve the estate of the man, so that it be forthcoming to meet any decree which may be made in the suit, or to compel him to give security to abide such decree. Va. Code Sec. 2261 (1873).

2) Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce, whether from the bond of matrimony or from bed and board, the court may make such further decree as it shall deem expedient concerning the estate and maintenance of the parties, or either of them and the care, custody and maintenance of their minor children. . .Va. Code Sec. 2263 (1873).

a) Where a wife is compelled to seek a divorce from her husband on account of his misconduct, in fixing the amount of her alimony, the earnings of the husband may be taken into the account, if necessary, as well as his property. 1 Abram C. Eby, *Citations to the Code of Virginia* 157 (1895)(citing Bailey v. Bailey, 21 Grat. 43 (June 1871)).

C. Alimony may be granted under some circumstances independently of a divorce or application for one. Va. Code Sec. 5111 (1919), citing Purcell v. Purcell, 4 Hen. & M. 507.

1) The general rule with respect to alimony is that the wife is entitled to a support corresponding to her condition in life and the fortune of her husband. Id., citing Bailey v. Bailey, 21, Grat. 43, 57 (1871).

II. An award of alimony and/or spousal support, an obligation to support the other spouse, evolved from the moral and legal obligations arising from the marital relationship.

A. (Chief Judge Koontz, concurring and dissenting in Reid v. Reid, 419 S.E. 2d 398, 409-410 (1992):

The marital relationship is unique in both its importance to the human experience and to society. The obligations that flow from this relationship are founded on natural, moral and societal concepts. From the inception of the marital relationship, the parties are bound morally and legally. Each party is responsible for the primary care and support of the other.

Where support is established, it is in society's interest that a needy spouse not be required to seek public assistance to satisfy those needs unless necessary. Thus, it has been held that spousal support obligations flow from the marital relationship and are not contractual rights and obligations. . . (see Brown v. Brown, 361 S.E.2d 364, 368 (1987). . . similarly, spousal support is awarded to protect society's interests in the incidents of the marital relationship. (quoting Jacobs v. Jacobs, 254 S.E.2d 56, 57 (1979)).

The statutory provisions reflect a public policy based upon the uniqueness of the marital relationship, that the support obligations created with the marital

relationship commend at the inception of the relationship and continue until and unless judicially terminated.

The parties as society has an interest in the orderly resolution of obligations that flow from the marital relationship. The orderly resolution of these obligations ensures that the primary obligation for support of a needy spouse remains with the other spouse through the proceedings and until that obligation is terminated.

- III. The policy of this Commonwealth encourages marriage and the interdependence of marriage partners. Economic interdependence of marriage partners ensures the protection and viability of the family unit.  
Fam. Law Sec. of Va. State Bar, Report: Rehabilitative Alimony and the Reservation of Spousal Support in Divorce Proceedings, House Doc. No. 55 (1997).

A. Virginia's public policy favors reducing or eliminating the economic ties between the parties after the marriage ends. Id.

- IV. Grounds for divorce, such as adultery, serves as a bar to spousal support unless to NOT award such would create a manifest injustice.

A. Va. Code 20-107.1(B):

No permanent maintenance and support shall be awarded from a spouse if there exists in such spouse's favor a ground of divorce under the provisions (1) of § 20-91. 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.

B. There is the narrow exception that requires a finding of manifest injustice on clear and convincing evidence based on two factors.

1) Respective degrees of fault of the parties during marriage;

2) Relative economic circumstances of the parties. Giraldi v. Giraldi, 771 S.E.2d 687, 691(2015)(quoting Congdon v. Congdon, 578 S.E.2d 833,839(2003).

C. The public policy behind the manifest injustice exception is to prevent leaving a spouse destitute as a result of an act of adultery. In re Mundy, 66 Va. App. 177, 184, 783 S,E,2d 535 (2016).

- 1) It would be manifest injustice to require a faultless spouse to pay support to a work-capable, millionaire spouse, guilty of repeated acts of adultery with several co-respondents. Id.

### 3. **Spousal Support Nationwide**

- A. Summary of spousal support laws in all 50 States. See Exhibit A attached to this outline.
- B. Comparison of varying State laws regarding:
  - (1) Eligibility requirements for receiving support;
  - (2) Methods and factors for determining the amount of support; and
  - (3) Methods and factors for determining the duration of support awards.
- C. National trends and developments in the law of spousal support.

### 4. **2016 Seminal Cases**

- A. ***Luttrell v. Cucco*, 291 Va. 308 (2016). Same sex couples may “cohabit” within the meaning of Va. Code § 20-109.**

Issue: The cohabitation provision of Va. Code § 20-109, which provides:

Upon order of the court based upon clear and convincing evidence that the spouse receiving support has been habitually cohabiting with another person in a relationship analogous to a marriage for one year or more, the court shall terminate spousal support and maintenance unless (i) otherwise provided by stipulation or contract or (ii) the spouse receiving support proves by a preponderance of the evidence that termination of such support would be unconscionable.

#### Procedural and Factual Background:

Husband (Luttrell) and Wife (Cucco) were married for approximately 15 years before they separated and signed a Property, Custody, and Support Settlement Agreement (“Agreement”), which was incorporated into their November 6, 2008, Final Order of Divorce.

The Agreement required that Husband would pay Wife spousal support for a term of 8 years, terminating upon: “the death of either party, the remarriage of the wife, or as a result of action by the Court taken pursuant to § 20-109 of the 1950 Code of Virginia, as amended, relative to cohabitation.”

In July 2014, Husband filed to terminate spousal support alleging that Wife was engaged and had been living with her fiancée for a least one year. Husband also sought for a refund of spousal support paid for one year. Wife alleged that she was not cohabitating within the meaning of § 20-109 because her fiancée was a woman. The Circuit of Fairfax County agreed with Wife and denied Husband's Motion. This was affirmed by the Court of Appeals. Husband appealed to the Supreme Court.

Analysis:

The Court of Appeals reasoned in its opinion that the legislature, in enacting § 20-109 in 1997, intended the habitual cohabitation requirement to only apply to a man and woman, since same-sex marriage was not permitted in Virginia in 1997. The Supreme Court of Virginia disagreed.

The language of § 20-109(A) is gender neutral, thus can be applied to either same-sex or opposite-sex relationships. The Court also examined the relevant case law relied upon by the Court of Appeals and found that the Agreements entered into by the parties which allowed for the termination of support pursuant to a cohabitation clause specifically defined that cohabitation with a member of the opposite sex.

Practice Tip:

**MAKE SURE YOUR AGREEMENTS ARE WRITTEN GENDER NEUTRAL FOR COHABITATION.**

The Court further reviewed the legislative history and found the General Assembly had clearly intended the statutory language to apply beyond opposite-sex marriage because they deliberately omitted "of the opposite sex" from the statute. The fact that same-sex marriage was not legal in 1997 was not relevant to the Court's analysis since the cohabitation clause deals with a relationship analogous to a marriage, not an actual marriage.

**B. *Mundy v. Mundy*, 66 Va. App. 177 (2016). Spousal support denied to spouse who was guilty of adultery.**

Issue: The manifest injustice exception of Va. Code § 20-107.1(B), which provides:

No permanent maintenance and support shall be awarded to a spouse who is guilty of adultery. However, the court may make such an award notwithstanding the adultery 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.

Factual Background:

- 24 year marriage



- Husband was 54, Wife was 55
- Parties resolved the division of their property by agreement. Wife received assets with a total value of over \$1,800,000; Husband received assets with a total value of \$980,000.
- Husband was a chartered financial analyst and had annual income in excess of \$850,000.
- Wife has a Bachelor of Science Degree in mechanical engineering and was employed as a field technical expert in marketing with Exxon Company, USA, when the parties married. The Wife had not been employed outside of the home since 1990, but had extensive and high level volunteer experience with professional organizations.
- Wife was guilty of multiple adulteries with two gentlemen during the marriage.
- Husband was not guilty of any fault in the marriage.
- Husband made nearly all of the monetary contributions to the well-being of the family, and he made significant and consistent non-monetary contributions. He dedicated virtually all of his non-working hours to his family. He was involved in the daily care of the children and made substantial contributions to their upbringing. He did nearly all of the cooking, renovated their homes and built much of the furniture in the marital residence. Husband also doted on the Wife, made extensive efforts to please her and was proactive in taking steps to nurture and strengthen the marital relationship.
- The trial court found that the Wife's adultery was the primary reason for the destruction of the marriage and further found that:
  1. The revelation of the adultery had a substantial negative impact on the marriage;
  2. The Wife was resistant to ending her involvement with the rock band even though her paramour was a member of that band;
  3. The Wife was not completely forthcoming regarding her extramarital behavior; and
  4. Had there been no adultery it is very likely the parties would not be divorcing.
- The trial court found that the Wife was capable of earning \$27,500-\$33,000 a year.

Ruling at Trial:

- The trial court found by clear and convincing evidence that the Wife had committed multiple adulteries with two separate individuals during the marriage, and Husband was awarded a divorce on the grounds of adultery.
- Notwithstanding the Wife's adultery, the trial court held that the denial of spousal support to the Wife would constitute a manifest injustice pursuant to Va. Code § 20-107.1(B). The basis for finding manifest injustice was the great disparity in earning capacity between Husband and Wife.
- The Wife was awarded spousal support in the amount of \$10,000 per month for the period of April through September, 2015, and then \$8,000 per month beginning October 1, 2015, and continuing thereafter for an undefined duration.
- Husband appealed.

### Argument on Appeal:

- Husband argued the statutory requirements of the manifest injustice exception had not been met.
- Va. Code § 20-107.1(B) is a bar to spousal support, and thus the rule in cases of adultery is that the offending party shall not be awarded support. The manifest injustice provision is a *narrow* exception to the stated rule.
- Application of the manifest injustice exception requires: (1) that the evidence must rise to the level of clear and convincing proof; (2) that there must be a finding that the denial of support would be a manifest injustice; and (3) that the determination is based on both (i) the respective degrees of fault of each party and (ii) the relative economic circumstances.

### Holding:

- Husband prevailed on appeal. The award of spousal support was reversed and dismissed.
- Statutory Interpretation: The two factors are conjunctive, not disjunctive; neither requires proof by clear and convincing evidence independently. It is the confluence of both streams of evidence – of fault and of relative economic circumstances – that must rise, by the clear and convincing standard, to constitute manifest injustice.
- Legislative Intent: The legislative impulse behind the manifest injustice exception is to prevent leaving a spouse destitute as a result of an act of adultery
- Limitations on what constitutes a manifest injustice: It would be a manifest injustice to require a faultless spouse to pay support to a work-capable, millionaire spouse, guilty of repeated acts of adultery with several co-respondents. The disparity in earning capacity on these facts is not sufficient to rise to the level of a manifest injustice

### Practice Tips from Mundy v. Mundy:

- Standard of Review on Appeal. The standard of review in spousal support cases is “abuse of discretion,” but Husband argued for a less deferential standard of review, which the Court of Appeals adopted. “The findings of a trial court after an *ore tenus* hearing should not be disturbed on appeal unless they are plainly wrong or without evidence to support them. A trial court's conclusion based on undisputed evidence, however, does not have the same binding weight on appeal. Moreover, a fact finder may not arbitrarily disregard uncontradicted evidence that is not inherently incredible.” *Stroud v. Stroud*, 49 Va. App. 359, 372 (2007) (quoting *Schweider v. Schweider*, 243 Va. 245, 250 (1992)).
- Don't overlook factual analysis of case law. What constitutes a manifest injustice is an issue of fact within the discretion of the trial court (assuming the statute is correctly applied). The Husband's brief in the Mundy case provided an extensive comparison of the relevant case law in order to establish benchmarks for manifest injustice. Husband was able to establish that there is not a single published or

unpublished Virginia appellate case where the court invoked the manifest injustice exception in any of the following circumstances:

1. Where the wife had greater assets than the husband (wife's assets are valued at nearly double the assets of the husband in the Mundy case);
  2. Where the value of the wife's assets came even remotely close to the \$1.8 million dollars received by Mrs. Mundy; or
  3. Where the wife's adultery was the reason for dissolution of the marriage and the husband was found to be without fault, as is true in the instant case.
- Policy Argument/Legislative Intent. When you have an issue that can be interpreted broadly (i.e. what constitutes a manifest injustice) or conflicting case law, research the legislative history and public policy arguments. These can be powerful arguments.
  - Narrow the issues for the court. This keeps your evidence and arguments at trial focused.