

The “Not So Separate” Separation: The Pitfalls of Living Separate and Apart in the Same Residence
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“Do you know what it means to come home at night to a woman who’ll give you a little love, a little affection, a little tenderness? It means you’re in the wrong house, that’s what it means.”

– Henny Youngman

Although Va. Code S20-91 (A)(9)(a) states specific grounds for divorce, the code does not consider today’s economic challenges facing many couples who wish to separate and divorce. Many such couples, quite simply, cannot afford to set up two households while awaiting the a divorce. In today’s economic climate, many divorcing couples try to remain in the same residence while “not cohabitating.”

To achieve a no-fault divorce, the statute requires that the husband and wife live separate and apart without any cohabitation and without interruption for one year or, if the parties have no minor children and have entered into a separation agreement, a divorce may be decreed on application if and when the husband and wife have lived separately and apart without cohabitation and without interruption for six months. Moreover, the separation period must be coupled with an intention of at least one of the parties at the time of separation, and continually ever since, to live separate and apart permanently. *Hooker v. Hooker*, 215 Va. 415, 417, 211 S.E. 2d 34 (1975)

While it may seem simple and financially advantageous to stay in the same residence, the decision to do so presents risks. The statute requires that proper evidence of separation must be presented to the court and be corroborated, and that evidence may be difficult to bring before the judge in such a situation. Once a judge hears the case, the couple may be ordered to live in separate residences for an additional year, resulting in extra litigation and household expenses, thus negating the savings from the previous year’s arrangement. Of course, one cannot ignore the risk of confusing minor children living in the home with two parents who no longer act married.

Case law related to divorce has generally supported the underlying assumption that cohabitation is a central tenet of marriage. As early as 1919, the court ruled that “the presumption of marriage from cohabitation apparently matrimonial is one of the strongest presumptions known to the law.” *Reynolds v. Reynolds*, 125 Va. 295, 307 (1919). Further, the Virginia Supreme Court has defined “cohabit” as meaning “to live together in the same house as married persons live together, or

in the manner of husband and wife." *Johnson v. Commonwealth*, 152 Va. 965, 970, 146 S.E. 289 (1929).

The Court of Appeals has stated that "the essential elements of 'cohabitation' are (1) sharing of familial or financial responsibilities and (2) consortium." Factors that may establish shared familial or financial responsibilities "include provisions for shelter, food, clothing, utilities, and/or commingled assets." In addition, features of consortium include "mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations." *Rickman v. Commonwealth*, 33 Va. App. 550, 557, 535 S.E. 2d 187 (2000). In *Bchara v. Bchara*, the court stated that determining whether and when the parties have lived separate and apart without cohabitation is a fact based inquiry that requires examining all of the circumstances before the court. *Bchara v. Bchara*, 38 Va. App. 302, 310, 563, S.E. 2d 398 (2002).

The appellate court made no decisions on whether it was possible to obtain a divorce on the grounds of living separate and apart while the parties lived under the same roof until 2002, and the circuit court decisions were split on the issue. For example, the judge granted a divorce in *Doggett* because the court recognized that financial hardship had prevented either party from moving out. Although the couple continued to occupy the same home, they did not spend time together or sleep in the same room. *Doggett v. Doggett*, 5 Va. Cir. 349, 1986 WL 401751 (1986). However, in another decision the court held that a husband and wife could not live separate and apart while in the same residence. *Yane v. Yane*, 8 Va. Cir. 336 (1987).

At times, even the parties seeking a divorce do not agree on whether they continued to cohabit or were living separate and apart. In *Bean v. Bean*, 2000 Va. Cir. LEXIS 143 (2000), the wife contended that the parties separated when the husband left the former marital residence, while the husband argued that they lived separate and apart while he remained in the home. The court found the testimony of the husband and his witness insufficient to prove his position, and in fact ruled that substantial evidence existed of shared marital responsibilities and activities.

In *Bchara*, the Court of Appeals looked for evidence of the wife's intent to establish a separate relationship and discontinue the relationship, even though she remained in the marital home. The court ruled that the wife had fulfilled the divorce statute by providing corroborated evidence of her intent. As evidence, she provided testimony that the couple did not have sex, attend social functions or church together, or live in the same room; she had also stopped depositing inheritance money into their joint account. Further, a friend testified that the wife moved her husband's clothes into the guest room after finding a tape of the husband having sex with another woman; the friend also visited the home regularly and observed them living separate and apart. Although the husband maintained the relationship with the other woman, he

opposed entry of the divorce. He tried to move his clothing back into the master bedroom and remove his wife's items and presented evidence that she had shopped and cooked for him. The court ruled that "continuing to share food and keep a clean house are not behaviors that, as a matter of law, require a finding that the parties were living together." [Emphasis added.] *Bchara v. Bchara*, 38 Va. App. 302, 310, 563, S.E. 2d 398 (2002) See *Chandler v. Chandler*, 132, Va. 418, 112 S.E. 856 (1922).

Yet in *Catalano v. Catalano*, a circuit court found that the husband's intent to end the marriage was not sufficient to grant a divorce, as the couple did not physically separate. "Although the parties slept in separate bedrooms, they did not live separately and apart, without cohabitation, while they remained under one roof." The parties continued to hold themselves out as a couple, attending events and sharing meals. In addition, the husband supported the family financially, and the wife cleaned the house. As a result, the court determined that "the parties continued to live together and carry out the mutual responsibilities of a marital relationship." *Catalano v. Catalano*, 19 Cir. 2004191537, 68 Va. Cir. 80 (Fairfax Co. 2005).

What recommendations does an attorney give a client who is considering remaining in the home while seeking a divorce? The guidelines that follow may help avoid a court ruling against a client seeking a divorce. One spouse should deliver a formal letter to the other stating the intention to live separate and apart as of a certain date. In establishing separate households to the extent possible, advise clients not to engage in the following activities: sexual relations, sharing food and a room, shopping or cooking for each other, cleaning up or doing another's laundry, or even giving gifts to one's spouse. Financially, clients should establish separate bank accounts and close joint bank accounts. Spouses should separate and secure computers and phones.

Since the court requires corroboration of a client's evidence, parties should let others know they are separated. They should not attend social or family functions together. They should have at least independent witness, such as a friend or family member who visits frequently, testify as to their living separate and apart. Lastly, attorneys should remind clients to be prepared to explain the reasons for living separately in the same residence.

Spouses seeking a divorce while staying in the same house face challenges in establishing the standard of living separate and apart without cohabitation. Ironically, most attempts to live separate and apart under the same roof require more planning and cooperation between the spouses than would have occurred prior to separation. The couple must agree on a division of costs, duties, and living arrangements far more detailed than practiced during the marriage. Case law demonstrates that the courts expect a thorough demonstration of evidence that the couple, although in the marital home, no longer hold themselves to be married. By adhering to the lifestyle of separated couples, it is possible, subject to the

tender discretion of the courts, to traverse the minefield of blending economic hardship with the requirements of the law.