

DOMESTIC RELATIONS: DESERTION AND NONSUPPORT — DIVORCE, AFFIRMATION AND ANNULMENT — CUSTODY AND VISITATION ARRANGEMENTS — UNIFORM CHILD CUSTODY JURISDICTION ACT.

Authority to bring criminal prosecution during marriage for failure to support destitute spouse is not available when nonsupport occurs only after award of divorce decree. Parent does not desert child once divorce decree granting custody to other parent has been entered. Parent's failure to pay court-ordered child support may be addressed criminally, when nonpayment and child's destitution occur simultaneously, and civilly, through contempt powers of court responsible for enforcing support decree. No additional requirement that person's intent to evade spousal/child support payments by leaving Commonwealth be proven in order to facilitate extradition procedure.

The Honorable W. Edward Meeks III

Commonwealth's Attorney for Amherst County

December 15, 1998

You inquire regarding prosecution for failure to support a spouse or children, and use of the extradition process to bring the offending party across state lines. You request an interpretation of §§ 20-61 and 20-84 of the *Code of Virginia*¹ as they relate to the prosecution and extradition of individuals for nonsupport and desertion.

You understand that § 20-61 makes it unlawful for a spouse to desert or willfully neglect, refuse or fail to provide support and maintenance to a spouse or a child under eighteen when such spouse or child is in necessitous circumstances. You first ask whether § 20-61 permits the prosecution of an individual whose failure to support a destitute spouse occurs after the court has granted a divorce.

The Supreme Court of Virginia noted in a 1985 case that "§ 20-61 defines the crime of desertion and nonsupport, classifies it as a misdemeanor, and recites the punishments which may be imposed upon conviction. It has existed in various forms for many years. This is a criminal statute which provides no civil relief."² As early as 1941, the Court held that the desertion and nonsupport statutes compel a wife to have her husband adjudged guilty of a crime beyond a reasonable doubt, and the wife "must be destitute and in necessitous circumstances before she can receive the meager wages he earns from work on the road force.... If he is found guilty he may appeal, but no provision is made for the deserted wife's appeal if he is not found guilty."³

There are several principles of statutory construction applicable to your request. One such principle requires that statutes be read in accordance with their plain meaning and intent.⁴ Another dictates that statutes may be construed only where there is ambiguity.⁵ Otherwise, the clear and unambiguous words of the statute must be accorded their plain meaning.⁶ Finally, when a statute is penal in nature, it "must be strictly construed against the Commonwealth and in favor of an accused's liberty."⁷

The first sentence in § 20-61 begins with the phrase "[a]ny spouse who without cause deserts or willfully neglects or refuses or fails to provide for the support and maintenance of his or her spouse" is guilty of a misdemeanor and is punished upon conviction. The primary object in interpreting an act of the General Assembly is to ascertain and give effect to the legislative intent underlying the act. "The ascertainment of legislative intention involves appraisal of the subject matter, purposes, objects and effects of the [act], in addition to its express terms."⁸ The General

Assembly did not, however, define the term "spouse" as it is used in the statute. Therefore, unless a contrary legislative intent is manifest, words used in an act should be given their common, ordinary and accepted meanings in use at the time of the act.⁹ The term "spouse" is defined to mean "[o]ne's husband or wife";¹⁰ "either member of a married pair in relation to the other; one's husband or wife."¹¹ It is clear, then, that § 20-61 authorizes a spouse, during the course of the marriage, to bring a criminal prosecution for his or her nonsupport when such spouse is "in necessitous circumstances."

A "divorce," however, is "[t]he legal separation of man and wife, effected by the judgment or decree of a court, and either totally dissolving the marriage relation, or suspending its effects so far as concerns the cohabitation of the parties."¹² The courts have inherent equity jurisdiction to award alimony upon entry of a divorce decree or upon entry of a suit for separate maintenance when the spouse is neither destitute nor in necessitous circumstances.¹³ The subject of support of a former spouse following termination of the marriage is regulated by statute, since this form of relief did not exist at common law.¹⁴ Because one no longer is a "spouse" following entry of a divorce decree, one may not desert a "spouse" following the award of a divorce.

I am, therefore, of the opinion that § 20-61 does not authorize the prosecution of any individual whose failure to support a destitute former spouse occurs only after the award of a divorce decree.

You next ask whether a parent deserts a child after a decree has been entered granting custody to the other parent. In your written opinion,¹⁵ you conclude that you do not believe the act of desertion occurs once a court grants physical custody of a child to some other person.

The term "desertion" is defined as

[t]he act by which a person abandons and forsakes, without justification, or unauthorized, a station or condition of public, social, or family life, renouncing its responsibilities and evading its duties. A willful abandonment of an employment or duty in violation of a legal or moral obligation.^[16]

Section 20-107.2¹⁷ provides that, upon entry of a divorce decree, "the court may make such further decree as it shall deem expedient concerning the custody or visitation and support of the minor children of the parties as provided in Chapter 6.1 (§ 20-124.1 et seq.) of Title 20, including an order that either party provide health care coverage." This provision is remedial and is construed liberally to effectuate the plain intention of the legislature to empower courts to discharge the function of a guardian in the protection of the rights and interests of a minor child.¹⁸

In addition, § 20-108 gives the circuit court continuing jurisdiction to change or modify its divorce decree concerning the custody and maintenance of minor children. In exercising this power the court may revise and alter its decree if a material change in condition and circumstances has occurred.¹⁹ Both parents of a child owe that child a duty of support during minority. In allocating this burden between parents, § 20-108.1(B)(11) requires the court to consider the "[e]arning capacity, obligations and needs, and financial resources of each parent."

The circuit court has ample power to enter a divorce decree providing for the support of minor children and to modify the decree to meet changing conditions.²⁰ In addition, the court has ample power through contempt proceedings to enforce its order in a divorce decree providing for the support of minor children.²¹ Consequently, I must conclude that a parent does not desert, as that

term is used in § 20-61, a child once a divorce decree granting custody to the other parent has been entered.

Your third inquiry concerns a child who becomes in necessitous circumstances when the parent providing court-ordered child support fails to make payments. You ask whether the parent's failure to pay court-ordered child support, if willful, becomes a criminal event when the nonpayment and necessitous circumstances occur simultaneously. Moreover, you inquire whether this crime may occur subsequent to entry of a custody and support order.

A Virginia divorce court has continuing jurisdiction over the modification and enforcement of its custody decrees. "The court may, from time to time . . . , revise and alter [its] decree concerning the care, custody, and maintenance of the children and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children may require."²² In addition, "[t]he court shall have the continuing authority and jurisdiction to make any additional orders necessary to effectuate and enforce [custody and visitation orders]."²³

A party must obey an existing custody order until a modification order supersedes it. "[T]he custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law."²⁴ The court's authority to enforce its decrees includes the ability "to punish as contempt of court any willful failure of a party to comply with the provisions of the order."²⁵ "A trial court 'has the authority to hold [an] offending party in contempt for acting in bad faith or for willful disobedience of its order."²⁶ A proceeding for civil contempt "is remedial and for the benefit of the injured party."²⁷ The focus of a proceeding for a criminal contempt is to enforce the dignity of the court itself. "The power to punish for contempt is inherent in, and as ancient as, courts themselves. It is essential to the proper administration of the law, to enable courts to enforce their orders, judgments and decrees."²⁸

Section 20-61, however, imposes *criminal*, as opposed to *civil*, liability on parents to enforce their legal and moral duty to support dependent minor children.²⁹ Section 20-61 is not applicable in adjudging claims for civil liability.³⁰ "The fact that [the child] could prosecute her father, and the judge of the juvenile court could send him to jail, does not satisfy the pangs of hunger or protect the body from the cold of winter."³¹ Section 20-61 provides "an additional and quick remedy, in cases arising under it, to punish the guilty [parent] for his offense."³² Consequently, the crime of nonsupport may occur simultaneously with the violation of a court-ordered child support requirement, and be addressed both by means of the contempt powers of the court responsible for enforcing its support order, and criminally under § 20-61, each independent of the other.

It is my opinion, therefore, that, when a child becomes in necessitous circumstances because the parent fails to pay the court-ordered child support, such nonpayment also may be a criminal event under § 20-61 when the nonpayment and necessitous circumstances occur simultaneously. An additional remedy also available to the custodial parent of such child under such circumstances will be through the contempt powers of the court responsible for enforcing its support decree.³³

Your final inquiry concerns the extradition of a person, pursuant to § 20-84, whose subsequent failure to provide support after having left the Commonwealth creates necessitous circumstances. You ask whether, in order to extradite such person, an additional element of proof is required that the person's intention to leave the Commonwealth was to evade the support requirements of § 20-61.

Section 20-61 provides that

[a]ny spouse who without cause deserts or willfully neglects or refuses or fails to provide for the support and maintenance of his

or her spouse, and any parent who deserts or willfully neglects or refuses or fails to provide for the support and maintenance of his or her child[ren] ... being then and there in necessitous circumstances, shall be guilty of a misdemeanor.

Section 20-61 "creates the crime of desertion and non-support."³⁴ Section 20-61 clearly and unambiguously provides that a spouse or parent who "without just cause" deserts or fails to support his or her spouse or child(ren), "shall be guilty of a misdemeanor." The spouse or child must be destitute and in necessitous circumstances before the deserting spouse may be punished by a fine not exceeding \$500, or jail confinement not exceeding twelve months, or both.³⁵ When there is no ambiguity in a statute, the clear and unambiguous words must be accorded their plain meaning. There is no additional requirement that a person's intent to evade the support requirements of § 20-61 by leaving the Commonwealth be proven in order to facilitate the extradition procedure under § 20-84.

¹Sections 20-61 and 20-84 represent a portion of the statutory scheme governing desertion and nonsupport of a spouse or child(ren) in necessitous circumstances. Section 20-61 provides: "Any spouse who without cause deserts or willfully neglects or refuses or fails to provide for the support and maintenance of his or her spouse, and any parent who deserts or willfully neglects or refuses or fails to provide for the support and maintenance of his or her child under the age of eighteen years of age, or child of whatever age who is crippled or otherwise incapacitated from earning a living, the spouse, child or children being then and there in necessitous circumstances, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not exceeding \$500, or confinement in jail not exceeding twelve months, or both, or on work release employment as provided in § 53.1-131 for a period of not less than ninety days nor more than twelve months; or in lieu of the fine or confinement being imposed upon conviction by the court or by verdict of a jury he or she may be required by the court to suffer a forfeiture of an amount not exceeding the sum of \$1,000 and the fine or forfeiture may be directed by the court to be paid in whole or in part to the spouse, or to the guardian, curator, custodian or trustee of the minor child or children, or to some discreet person or responsible organization designated by the court to receive it. This section shall not apply to any parent of any child of whatever age, if the child qualifies for and is receiving aid under a federal or state program for aid to the permanently and totally disabled; or is an adult and meets the visual requirements for aid to the blind; and for this purpose any state agency shall use only the financial resources of the child of whatever age in determining eligibility."

Section 20-84 provides: "Whenever the judge or magistrate within whose jurisdiction such offense is alleged to have been committed shall, after an investigation of the facts and circumstances thereof, certify that in his opinion the charge is well founded and the case a proper one for extradition, or in any case if the cost of extradition is borne by the parties interested in the case, the person charged with having left the Commonwealth with the intention of evading the terms of his or her probation or of abandoning or deserting his or her spouse, or his or her child or children, or failing to support them, shall be apprehended and brought back to the county or city having jurisdiction of the case in accordance with the law providing for the apprehension and return to the Commonwealth of fugitives from justice, and upon conviction punished as hereinabove provided."

²Jones v. Robinson, 229 Va. 276, 283, 329 S.E.2d 794, 799 (1985) (citations omitted); see also Dept. Mental Hygiene v. Shepard, 212 Va. 843, 845, 188 S.E.2d 99, 101 (1972).

³Heflin v. Heflin, 177 Va. 385, 398, 14 S.E.2d 317, 321 (1941).

⁴See *Ambrogi v. Koontz*, 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982).

⁵See *id.* at 386-87, 297 S.E.2d at 662-63.

⁶See *Broadnax v. Com.*, 24 Va. App. 808, 485 S.E.2d 666 (1997); *Diggs v. Commonwealth*, 6 Va. App. 300, 302, 369 S.E.2d 199, 200 (1988).

⁷*Waldrop v. Commonwealth*, 255 Va. 210, 214, 495 S.E.2d 822, 825 (1998); see also *Yarborough v. Commonwealth*, 247 Va. 215, 218, 441 S.E.2d 342, 344 (1994).

⁸*Vollin v. Arlington Co. Electoral Bd.*, 216 Va. 674, 679, 222 S.E.2d 793, 797 (1976).

⁹See *Commonwealth v. Orange-Madison Coop.*, 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980); *Op. Va. Att'y Gen.*: 1995 at 289, 290; 1991 at 296, 298; 1990 at 233, 234.

¹⁰*Black's Law Dictionary* 1402 (6th ed. 1990).

¹¹*Webster's Encyclopedic Unabridged Dictionary of the English Language* 1376 (1989).

¹²*Black's Law Dictionary*, *supra* note 10, at 480.

¹³See *generally* *Heflin v. Heflin*, 177 Va. at 398-99, 14 S.E.2d at 321-22.

¹⁴*Watkins v. Watkins*, 220 Va. 1051, 265 S.E.2d 750 (1980); *Bray v. Landergren*, 161 Va. 699, 172 S.E. 252 (1934).

¹⁵Section 2.1-118 requires that any request by a Commonwealth's attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions."

¹⁶*Black's Law Dictionary*, *supra* note 10, at 446.

¹⁷Section 20-107.2 is a portion of the statutes governing divorce in Virginia. See tit. 20, ch. 6, §§ 20-89.1 to 20-124, entitled "Divorce, Affirmation and Annulment."

¹⁸See *Morris v. Henry*, 193 Va. 631, 639, 70 S.E.2d 417, 422 (1952).

¹⁹See *Campbell v. Campbell*, 203 Va. 61, 64, 122 S.E.2d 658, 661 (1961).

²⁰Sections 20-112, 20-113; see also *Rippe v. Rippe*, 3 Va. App. 506, 351 S.E.2d 181 (1986).

²¹Section 20-124.2; see also *Boaze v. Commonwealth*, 165 Va. 786, 183 S.E. 263 (1936).

²²Section 20-108; see also *Orlandi v. Orlandi*, 23 Va. App. 21, 26, 473 S.E.2d 716, 718 (1996).

²³Section 20-124.2.

²⁴Section 20-135.

²⁵Section 20-124.2.

²⁶Alexander v. Alexander, 12 Va. App. 691, 696, 406 S.E.2d 666, 669 (1991) (quoting Carswell v. Masterson, 224 Va. 329, 332, 295 S.E.2d 899, 901 (1982)).

²⁷Small v. Commonwealth, 12 Va. App. 314, 317, 398 S.E.2d 98, 100 (1990).

²⁸Carter v. Commonwealth, 2 Va. App. 392, 395, 345 S.E.2d 5, 7 (1986) (quoting In re Chadwick, 109 Mich. 588, 596, 67 N.W. 1071, 1074 (1896)).

²⁹Boaze v. Commonwealth, 165 Va. at 788-89, 183 S.E. at 264; 1980-1981 Op. Va. Att'y Gen. 240, 241.

³⁰Dept. Mental Hygiene v. Shepard, 212 Va. at 845, 188 S.E.2d at 101; 1980-1981 Op. Va. Att'y Gen., *supra*, at 241.

³¹McClagherty v. McClagherty, 180 Va. 51, 67, 21 S.E.2d 761, 768 (1942).

³²*Id.*

³³See § 20-124.2.

³⁴Heflin v. Heflin, 177 Va. at 397, 14 S.E.2d at 321.

³⁵Section 20-61.