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MEMBER



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## ABANDONMENT AND ELECTIVE SHARE

A recent Supreme Court of Virginia opinion addressed the issue of abandonment within the context of an elective share claim against a decedent's estate. In *Purce v. Patterson* (Record No. 062368, January 11, 2008), the wife had filed for divorce in 2003, but no decree of divorce had been issued prior to her death in 2005. Her husband filed an elective share claim against her estate, and the trial court held that he had wilfully abandoned the wife, and, therefore, under Virginia Code § 64.1-16.3, he was not entitled to an elective share of her augmented estate.

The couple were married in 1988, and the wife had many health problems throughout the marriage. The husband did not visit the wife in the hospital during her illnesses and did not take care of her when she returned home. They had a tumultuous marriage, and they agreed that the wife would leave the marital residence, which she did in 2000. The wife brought into the marriage several rental properties that she owned, and that she managed. Her husband did not participate in managing the rental properties, and he did not provide any financial support to the wife after their separation. During her final illness, the wife lived with her daughter in New Jersey; the husband did not know she was in New Jersey, and he did not visit, call, or communicate with her.

The husband asserted that his post-separation conduct is not relevant to determining whether one spouse abandoned the other. The Supreme Court of Virginia disagreed, citing Virginia Code § 64.1-16.3(A), which addresses the period of abandonment relevant to an elective share claim:

If a husband or wife wilfully deserts or abandons his or her spouse and such desertion or abandonment continues until the death of the spouse, the party who deserted the deceased spouse shall be barred of all interest in the estate of the other by intestate succession, elective share, exempt property, family allowance, and homestead allowance.

The Court said that it was required to determine whether the wilful desertion or abandonment continued “until the death of the spouse,” and it concluded that the trial court did not err in considering facts occurring subsequent to the separation.

The husband’s remaining assignments of error challenge the sufficiency of evidence to support the trial court’s finding of abandonment. The Supreme Court of Virginia said that this was a mixed question of law and fact. The Court agreed with the parties that because the term “abandonment” is not defined in the statutes governing elective share claims, the principles of domestic relations law are helpful in determining the issue of abandonment under Virginia Code § 64.1-16.3. In domestic relations cases, the term “abandonment” is generally used synonymously with “desertion.” The Court has defined desertion as “a breach of matrimonial duty – an actual breaking off of the matrimonial cohabitation coupled with an intent to desert in the mind of the deserting party.” “Matrimonial duty” includes cooking, cleaning, support, and contributing to the well-being of the family. The Court stated that in this case it would use the word “abandonment” to mean “a termination of the normal indicia of a marital relationship combined with an intent to abandon the marital relationship.”

The Court discussed the differences in the analysis of the evidence in the context of a domestic relations claim and an elective share claim. The Court determined that the parties’ agreement to separate or seek a divorce does not defeat a finding of wilful abandonment, although it is relevant evidence of the termination of cohabitation. The Court analyzed the evidence in this case and determined that the mutual decision to cease cohabitation and the filing of the divorce petition were the result of an agreement of the parties, and not the product of wilful abandonment. The Court, however, also determined that the husband’s conduct after the separation and until the wife’s death did show a lack of support for the wife, and of the marital relationship. The Court found nothing in the record that indicated that the husband intended to reconcile with the wife, and at the time of the wife’s death, the husband “ceased to perform any marital duties.” The Court concluded that the evidence was sufficient to support the trial court’s holding that the husband abandoned the wife prior to and continuing until the time of her death, and the Court affirmed the judgment of the trial court that the husband was not eligible for an elective share of the wife’s augmented estate.

The attorneys at Oast & Hook can assist clients with their estate and trust administration needs.

### **Speakers**

If you are interested in having an elder law attorney from Oast & Hook speak at an event, then please call Jennifer Lantz at 757-399-7506.

### Ask Allie

O&H: How can a client provide for a pet if the client becomes disabled or dies?

Allie: To plan for a disability, the client can include a provision in the client's general durable power of attorney authorizing an agent to provide for the pet. The client can include a provision in the client's will to make a gift of the pet and to provide a monetary gift to provide funds for the pet's care. In Virginia, the client also has the option of creating a pet trust for the pet that appoints a trustee to manage funds for the pet's care and appoints a caretaker for the pet. The Virginia pet trust statute provides for enforcement of the pet trust's provisions. Hmmm, I'd better check with the Oast & Hook staff to see what provisions they've made for me ... after my nap.



Please feel free to e-mail your questions to Allie at: [allie@oasthook.com](mailto:allie@oasthook.com).

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