

OP. NO. 05-055

DOMESTIC RELATIONS: DIVORCE, AFFIRMATION AND ANNULMENT.

COURTS OF RECORD: CIRCUIT COURT.

Delaying divorce petition brought by incarcerated complainant until his release is inadvisable; where transportation of incarcerated complainant is inappropriate, authorized alternatives are available.

The Honorable Mark S. Davis
Judge, Third Judicial Circuit
Circuit Court of the City of Portsmouth

August 1, 2005

Issue Presented

You inquire concerning the proper procedure to follow when divorce petitions are filed by incarcerated complainants who are unable to appear before the court for the necessary evidentiary proceedings. Specifically, you ask whether it is appropriate to place the case on hold until the complainant is able to present himself personally upon release.

Response

It is my opinion that delaying a divorce petition brought by an incarcerated complainant until his release is inadvisable. Even where transportation of the incarcerated complainant is inappropriate, authorized alternatives are available.

Background

You relate that the court generally advises incarcerated complainants to proceed once they are able to present themselves to the court upon their release. You state that while the incarcerated complainant awaits release, the case remains pending as an inactive case file. You note that the court feels there are financial and security problems associated with entering transportation orders or conducting telephonic hearings. Therefore, you state that it is not clear whether placing the case on hold is an appropriate alternative to dismissal.

Applicable Law and Discussion

A divorce petition is a civil matter properly brought in the circuit court.¹ The Supreme Court of Virginia states that "[c]onvicts are not civilly dead in Virginia."² Even when a court determines that a prisoner should not personally appear in a civil case, the Commonwealth may not preclude a prisoner from asserting a civil claim.³ Where a prisoner's claim falls within the jurisdictional limits of the circuit court, he may bring the claim there; the court has discretion to enter a transportation order or obtain testimony by alternate means.⁴ The problems associated with transportation are insufficient grounds to dismiss a divorce

petition brought by an incarcerated complainant otherwise entitled to assert his civil claim and present his evidence.⁵

In a divorce action brought by an incarcerated complainant, the appointment by the court of a committee is proper. Section 53.1-221(A) provides that "[w]hen a person is convicted of a felony and sentenced to confinement in a state correctional facility, his estate, both real and personal, may, on motion of any party interested, be committed by the circuit court." Additionally, § 53.1-221(B) provides that:

If a person so convicted and sentenced, whether a resident or a nonresident of Virginia, has no property or estate in the Commonwealth, a committee may be appointed for him, on motion of any party interested, by the circuit court of the county or city wherein the offense for which he was convicted was committed.

A divorce case falls under § 53.1-221; and, therefore, the appointment of a committee is appropriate.⁶ The committee is authorized to "sue and be sued in respect to all claims of every nature in favor of or against such prisoner."⁷

At this point, the court may collect the necessary evidence by one of three means: (1) an *ore tenus* hearing; (2) a deposition testimony; or (3) refer the case to a commissioner in chancery.⁸ An *ore tenus* hearing may be held with an appearance by the complainant pursuant to a transportation order.⁹ Whenever any party in a civil action requires an inmate as a witness, a circuit court in Virginia may

in its discretion and upon consideration of the importance of the personal appearance of the witness and the nature of the offense for which he is imprisoned, issue an order to the Director of the Department of Corrections to deliver such witness to the sheriff of the jurisdiction of the court issuing the order.^[10]

Although § 8.01-410 specifically addresses inmates as witnesses, the Virginia Supreme Court has ruled that it also applies to inmates who initiate civil proceedings.¹¹ In a divorce proceeding, the importance of the personal appearance of one of the parties is significant. Should, however, the court in its discretion believe transportation is not a viable option, it may consider alternative means of evidence collection.¹² For example, the court may: (a) hold a telephonic or video hearing with the complainant;¹³ (b) allow testimony by deposition;¹⁴ or (c) send a commissioner in chancery to the correctional facility.¹⁵

A similar situation arises when a spouse who is not incarcerated initiates divorce proceedings against an incarcerated spouse. The spouse is not required to suspend action until the release of the incarcerated spouse. The action proceeds despite the fact that concerns regarding transporting a prisoner or obtaining testimony by alternative means are the same if the inmate contests the action. In those instances, the circuit court would avail itself of one of the options listed above. The procedure should not be different if the incarcerated spouse is the complainant.¹⁶

Finally, placing a divorce case initiated by an incarcerated complainant on hold places the action on tenuous footing. Inactive cases which are pending for more

than three years with no order or proceeding, except continuances, may be removed from the court's docket and discontinued with no notice to either party.¹⁷ In addition, allowing the case to linger in the courts is contrary to the idea that "[c]ourts are provided for the purpose of putting an end, and a speedy end, to controversies, and not as a forum for endless litigation."¹⁸

Conclusion

Accordingly, it is my opinion that delaying a divorce petition brought by an incarcerated complainant until his release is inadvisable. Even where transportation of the incarcerated complainant is inappropriate, authorized alternatives are available.

¹ See Va. Code Ann. § 20-96 (LexisNexis Repl. Vol. 2004).

² *Dunn v. Terry*, 216 Va. 234, 239, 217 S.E.2d 849, 854 (1975).

³ See *Commonwealth v. Brown*, 259 Va. 697, 706-07, 529 S.E.2d 96, 101 (2000).

⁴ *Id.* at 707, 529 S.E.2d at 101-02.

⁵ See *Saleem v. Saleem*, No. 2845-00-4, 2001 Va. App. LEXIS 646, at *4-5 (Va. Ct. App. Nov. 20, 2001).

⁶ Note that in a divorce proceeding instituted against a prisoner, the court must appoint a committee prior to a determination of property under § 20-107.3. See Va. Code Ann. § 53.1-223 (LexisNexis Repl. Vol. 2005).

⁷ Section 53.1-222 (LexisNexis Repl. Vol. 2005).

⁸ See *Burts v. Burts*, 227 Va. 618, 620, 316 S.E.2d 745, 746 (1984).

⁹ See *Brown*, 259 Va. at 707, 529 S.E.2d at 101-02.

¹⁰ Va. Code Ann. § 8.01-410 (LexisNexis Supp. 2005).

¹¹ See *Brown*, 259 Va. at 704, 529 S.E.2d at 100 (noting that "§ 8.01-410 is the only statute that addresses the issuance of prisoner transportation orders in civil cases *initiated by prisoners*" (emphasis added)).

¹² *Id.* at 707, 529 S.E.2d at 102.

¹³ See Va. Code Ann. § 17.1-513.2 (LexisNexis Repl. Vol. 2003) (granting discretion to court in any civil proceeding in which party is incarcerated to conduct hearing using telephonic communication system or electronic audio and video communication system to provide for appearance of any party).

¹⁴ See § 8.01-410 (providing that any party to civil action in any circuit court in Commonwealth may take deposition of inmate, which may be admissible in evidence).

¹⁵ See § 8.01-607 (LexisNexis Supp. 2005) (authorizing circuit court to appoint commissioners in chancery to dispatch business of court); § 8.01-609 (LexisNexis Repl. Vol. 2000) (directing commissioner in chancery to examine and report any matters referred to him by court); § 8.01-614 (LexisNexis Repl. Vol. 2000) (authorizing commissioner in chancery to adjourn proceeding to anywhere in Commonwealth and to continue proceeding and take depositions and other evidence with same force and effect as if done in same place where he was appointed).

¹⁶ In fact, the Virginia Supreme Court has stated that "the modern view [is] that prisoners, after judgments of conviction and while incarcerated, have a right to bring civil actions." *Brown*, 259 Va. at 703, 529 S.E.2d at 99.

¹⁷ See § 8.01-335(B) (LexisNexis Repl. Vol. 2000).

¹⁸ *Holmes v. Holmes*, 7 Va. App. 472, 481-82, 375 S.E.2d 387, 393 (1988) (quoting *Gills v. Gills*, 126 Va. 526, 546, 101 S.E. 900, 906 (1920)).

[Back to August 2005 Opinion Index](#)