Dividing the House Divided

BY CHERYL WATSON SMITH

In the summer of 2001, the Court of Appeals decided two unpublished cases addressing the issue of post-separation, pre-divorce mortgage payments, *Raiello* v. *Raiello*, No. 2444-00-4 (Ct. of App., July 17, 2001) written by Judge Agee, and *Banks* v. *Banks*, No. 0414-00-4 (Ct. of App., July 31, 2001) written by Judge Clements. The issue raised by both cases is whether mortgage payments made post-separation and pre-divorce are a mandatory hybrid property classification issue or a discretionary division factor issue involving credits. This article explores the current state of the law regarding such mortgage payments in light of these two recent cases. The short answer is that the case law conflicts with itself and with the statute and there is no uniformity among the Court of Appeals judges.[1]

For a full treatment of the developing case law regarding pre-separation mortgage payments, post-separation mortgage payments made after the divorce and payments made between separation and divorce, you must start with Brett R. Turner's[2] article in the April 1998 edition of *Virginia Lawyer*,[3] "Reimbursement for the Post-Separation Mortgage Payments Under Virginia Equitable Distribution Law." It is fair to say that the case law on each of these issues is confusing and conflicting and Mr. Turner's suggestions to each mortgage payment situation provide logical approaches to analyzing and presenting these issues to the court.

Two conflicting lines of thought appear in the case law. Under the first line of thought, the equity increase due to separate funds is classified as the payor's separate property, in which case the court *must* award credit to the payor. Under the second line of thought, the equity increase due to separate funds is a contribution factor the court *may* consider in making its division of the marital property.

The majority of the appellate decisions affirm the trial courts' awards denying credit for post-separation, pre-divorce payments. The only reported decision on this issue is *Von Raab* v. *Von Raab*.[4] Prior to Von Raab, several unreported Court of Appeals cases affirmed the trial courts' discretionary approaches.[5] In 1990, the Code was amended to address the division of hybrid property. Then, in the 1992 unreported decision of *Bergdahl* v. *Bergdahl*,[6] the Court reversed the trial court's decision because the trial court only gave Mr. Bergdahl credit for the equity increase of his post-separation, pre-divorce payments from his separate funds and failed to give him credit for his payments post-divorce. The Court remanded the issue of credit to the husband for increasing equity in the marital residence due to his mortgage payments from separate funds.[7] *Bergdahl* came along after several discretionary cases and applied classification principles to the issue.

Von Raab returned to the discretionary approach and it is the reported decision on this issue. Mr. Von Raab made post-separation mortgage payments on the marital residence and on various properties. He argued that the payments created his separate equity in the properties. The trial court concluded that the properties were marital and the Court of Appeals affirmed the trial court's discretionary approach stating that "[a]lthough the separate contribution of one party to the acquisition, care and maintenance of marital property is a factor that the trial court must consider when making its award of equitable distribution. § 20-107.3 does not mandate that the trial court award a corresponding dollar-for-dollar credit for such contributions.[8] This language comes from division factor (2) in subsection (E) of § 20-107.3. In dicta the Court mentioned that Mr. Von Raab's evidence failed to establish that his "source of funds" for making the post-separation mortgage payments on the Prince Street property was actually his separate property."[9]

Since Mr. Turner's April 1998 article and before *Raiello*[10] and *Banks*,[11] this issue continued to develop in unreported cases. *See, Wells* v. *Wells*,[12] (where trial court gave husband credit by giving him larger share of other assets, trial court did not err in refusing to grant monetary reimbursement for post-separation mortgage payments); *Hall v. Hall*,[13] (proper to deny credit to husband, who took various improper actions to delay the case); *Cline v. Cline*,[14] (proper to grant wife credit equal to the amount by which mortgage was reduced); *Alberger v. Alberger*,[15] (proper to deny credit: the opinion does not note any failure of proof, and suggests strongly that the whole issue is discretionary with the trial court); *Stacey v. Stacey*,[16] (proper to deny credit: husband had not proven amount by which the mortgage payments increased the equity in the home); and *Overbey v. Overbey*,[17] (proper to deny credit for post-separation payments on marital debts: no indication that the debts at issue included a mortgage, but the court relied on *Von Raab*, which did involve a mortgage).

The *Raiello* decision created a short-lived stir of excitement because it articulated a clear rule of law consistent with the statute. But *Raiello* was not designated for publication and *Banks* came down two weeks later.

> In *Raiello*, the court said that "[t]he mortgage payments shown to have been paid by husband from his post-separation earnings should have received recognition as separate property (the equity increase in the home) and credited in the trial court's calculation. *See generally Von Raab v. Von Raab*, 26 Va. App. 239, 494 S.E.2d 156 (1996) [sic]. It is clear that the trial court was unsure of this point and instead determined that if its classification was wrong then any payments nonetheless should not be in the husband's favor and should be considered rent to the wife."[18]

The trial court's equitable distribution award was reversed and the case remanded for the court to consider the credit due to Mr. Raiello for the equity increase in the home that was attributable to his post-separation mortgage payments made with

his separate funds.

The *Raiello* approach is consistent with the statute. *Virginia Code* § 20-107.3 (A)(3)(d) provides that

> "[w]hen marital property and separate property are commingled, by contributing one category of property to another, resulting in the loss of identity of the contributed property, the classification of the contributed property shall be transmuted to the category of property receiving the contribution. *However, to the extent the contributed property is retraceable by a preponderance of the evidence and was not a gift, such contributed property shall retain its original classification."*[19] (Emphasis added.)

Commingling occurs each time one party's post-separation contribution of separate funds increases the value of marital property.[20] Since post-separation earning are separate property,[21] then the resulting equity increase should be classified as separate property and credited to the payor. Because, "[e]xcept as provided in subsection G [of § 20-107.3], the *court shall have no authority to order the division or transfer of separate property."*[22] (Emphasis added.) The statute and the holding in *Raiello* is that the division of the separate equity created by post-separation mortgage payments with separate funds, should be mandatory, not discretionary. The court shall determine 1) if there was an increase in value after separation; 2) the amount of the increase; 3) the source of funds for the increase; and, 4) the respective values of the separate interest and the marital interest. Once the court determines the classification of the asset, then the court should address the equities of the case and make any necessary adjustments in its division of the marital interest in the property. If the equity reduction is treated as a classification issue, a clear rule of law emerges and clear rules of law promote settlement.

Two weeks after *Raiello*, *Banks* v. *Banks*[23] found "no abuse of discretion in the trial court's decision not to award husband credit for his post-separation mortgage payments."[24] Mr. Banks failed to present evidence that he made the post-separation mortgage payments with his separate funds and failed to establish the amount of the equity increase, so under either approach the result is the same. But *Banks* falls in line with the cases holding that this is a discretionary division stage issue instead of a mandatory classification issue.

Why all the fuss? Because, the intent of the 1990 amendments to § 20-107.3 was to bring more certainty and uniformity to the division of hybrid property. But *Von Raab* is the only published opinion on the issue and it affirmed the trial court's discretionary approach. The remaining cases are unreported and follow divergent paths of thought. As a result, the line of cases from the Court of Appeals is inconsistent and undoubtedly the trial court rulings are just as inconsistent. Some litigants receive credit for their separate contribution to a marital asset and others do not. This leads to more litigation, since practitioners cannot rely on a clear rule of law consistent with the statute to settle this issue. Often the marital residence is the largest asset and the mortgage is the largest debt. Therefore any clear rules of law that address this issue will give the family law practitioner more settlement tools. As more and more potential litigants take advantage of mediation, the mediation process too will benefit from a clear rule of law on this issue.◆

NOTES

1. Chief Judge Fitzpatrick voted for the mandatory approach in *Raiello*, but affirmed the trial court's discretionary approach in *Von Raab*, *Longmeyer* in which she wrote the opinion, *Lindsey* and *Wells*. Judge Benton wrote the opinion setting out the mandatory approach in Bergdahl and wrote the opinion affirming the trial court's discretionary approach in *Lindsey*. Judge Willis affirmed the trial court's discretionary approach in *Banks* and has not sat on a panel taking the mandatory approach. Judge Elder affirmed the trial court's discretionary approach in *Stacey, Cline* and *Lindsey* and has not sat on a panel taking the mandatory approach. Judge Bray affirmed the trial court's discretionary approach in *Banks* and *Alberger* and has not sat on a panel taking the mandatory approach. Judge Annunziata voted for the mandatory approach in *Raiello*, but affirmed the trial court's discretionary approach in *Overbey* and *Alberger*. Judge Bumgardner affirmed the trial court's discretionary approach in *Overbey, Cline, Stacey* and *Hall*, and has not sat on a panel taking the mandatory approach. Judge Frank affirmed the trial court's discretionary approach in *Overbey*, in which he wrote the opinion, and in *Alberger* and has not sat on a panel taking the mandatory approach. Judge Humphreys has not sat on a panel addressing this issue. Judge Clements wrote the opinion in *Banks* affirming the trial court's discretionary approach and has not sat on a panel taking the mandatory approach. Judge Agee wrote the opinion setting out the mandatory approach in *Raiello* and has not sat on a panel taking the discretionary approach. Senior Judges Overton, Coleman and Hodges have not sat on panels addressing this issue. See endnotes 4-6 and 10-18 for case cites.

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Cheryl Watson Smith recently opened her own law firm, Cheryl Watson Smith, P.C. She was previously a partner in the law firm of Mundy, Rogers & Frith, L.L.P. Ms. Smith practices primarily in the area of family law, including complex property matters. In addition, she is a mediator certified by the Supreme Court of Virginia and mediates cases by private and court referral. Ms. Smith is a graduate of the University of Virginia and the T.C. Williams School of Law of the University of Richmond. where she was a member of the *University of Richmond Law Review* and co-chaired the Client Counseling and Negotiation Board. She is a member of the VBA and its Domestic Relations Section Council, in addition to numerous other professional associations.

2. Mr. Turner is a senior attorney for family law with the National Legal Research Group in Charlottesville. He is author of *Equitable Distribution of Property* (2d ed. 1994) and editor of *Divorce Litigation*, a monthly journal covering the entire field of family law. He received his law degree from the University of North Carolina at Chapel Hill.

3. The *Virginia Lawyer* is the official publication of the Virginia State Bar.

4. 26 Va. App. 239, 494 S.E. 2d 156 (1997). See also the unpublished decision released the same day addressing the same issue, *Von Raab* v. *Von Raab*, No. 0669-97-4 (Ct. of App., Dec. 23, 1997).

5. *See, Longmeyer* v. *Longmeyer*, No. 1543-94-4 (Va. Ct. App., April 11, 1995); *Lindsey* v. *Lindsey*, No. 2249-92-4 (Va. Ct. App., March 29, 1994).

6. No. 1173-91-4 (Va. Ct.. App., Nov. 3,1992).

7. *Von Raab* v. *Von Raab*, 26 Va. App. at ___, 494 S.E. 2d at ___ (1997).

8. *Id.* at 26 Va. App. at ___, 494 S.E. 2d at ___, citing *Ellington* v. *Ellington*, 8 Va. App. 48, 56, 378 S.E. 2d 626, 630 (1989).

9. *Id.* at 26 Va. App. at ___, 494 S.E.2d at ___.

10. No. 2444-00-4 (Va. Ct. App., July 17, 2001).

11. No. 0414-00-4 (Va.Ct.App., July 31, 2001).

12. No. 2601-96-4 (Va.Ct.App., Nov. 18, 1997).

13. No. 1255-98-3 (Va.Ct.App., Nov. 24, 1998).

14. No. 0504-99-03 (Va.Ct.App., Nov. 24, 1998).

15. No. 2527-98-4 (Va.Ct.App., June 15, 1999).

16. No. 0634-99-1 (Va.Ct.App., Sept.7, 1999).

17. No. 1395-00-3 (Va.Ct.App., April 3, 2001).

18. No. 2444-00-4 (Va.Ct.App., July 17, 2001) at 12.

19. Section 20-107.3(A)(3)(d).

20. *Von Raab* v. *Von Raab*, No. 0669-97-4 (Ct. of App., Dec.23, 1997).

21. *Deitz* v. *Deitz*, 17 Va. App. 203, 436 S.E. 2d 463 (1993).

22. §20-107.3(C).

23. No. 0414-00-4 (Va. Court. App. July 31, 2001).

24. *Id.* at 10-11.