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The Effect of Same-sex Cohabitation on Spousal Support

Stroud v. Stroud

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On February 27, 2007, the Court of Appeals of Virginia published its decision in *Stroud v. Stroud*, No. 3158-05-4, 2007 Va. App. LEXIS 69. The Court found that a former wife's right to spousal support may be terminated where, after her divorce, she cohabited with another woman in a relationship analogous to marriage. The Court's decision concerning the effect of the wife's same-sex relationship is of particular significance in light of the recent ratification of Section 15-A of Article I of the Virginia Constitution—the so-called marriage amendment (the amendment), which defines a marriage as a union between one man and one woman.

That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions. This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage. ¹

Prior to its ratification, the wording of the amendment was the subject of considerable debate as to its potential effect on the legal rights of unmarried persons. A 2006 Attorney General's opinion attempted to settle the debate, concluding that the effect of the amendment would not infringe upon the rights of unmarried individuals in areas such as contracts, wills, insurance, and the application of domestic violence laws.² Although the Court in *Stroud* did not directly address the effect of the amendment, by rendering its decision that the wife's same-sex relationship could be considered analogous to marriage, the Court took the first step toward validating the Attorney General's opinion that the amendment will not be interpreted to broadly affect the rights of unmarried individuals. Thus, the *Stroud* decision will likely play a role in future cases that serve to determine the contours and limits of the amendment.

Background and Procedural History

The parties in *Stroud* were divorced on April 7, 1999. The final divorce decree ratified, affirmed, and incorporated the parties' property settlement agreement (PSA). Under the terms of the agreement, the husband was obligated to pay spousal support in the amount of \$4,000 per month. The agreement also provided that the husband's support obligation would terminate upon "the remarriage of the Wife and/or *her cohabitation with any person to whom she is not related by blood or marriage in a situation analogous to marriage* for a period of thirty (30) or more continuous days. . . ." ³ After the parties' divorce, the wife began cohabiting with another woman.

The husband subsequently sought to terminate his support obligation under the terms of their agreement.

The evidence concerning the wife's relationship with her paramour was essentially undisputed. The wife admitted that her paramour stayed at the wife's house on average of five nights per week for a period of over one year, that she had her own key to the wife's home, and that she kept clothes and toiletries at the wife's house. The wife further admitted that she and her paramour shared the same bed, engaged in consensual sexual acts, and had exchanged rings. The wife's paramour acknowledged that she and the wife had been in an exclusive sexual relationship for at least three years and that they viewed themselves "as a couple."⁴

The wife's testimony also established that she and her paramour purposely took periodic breaks in their cohabitation in an attempt to avoid triggering the 30-day requirement of the agreement's termination provision.⁵ Despite the evidence of the wife's cohabitation with her paramour, they did not publicly hold themselves out as a couple, explaining that they were afraid of the potential negative effects on their respective employment. Furthermore, the paramour continued to own her own home despite the fact that she spent the overwhelming majority of her time at the wife's house and rented out her home, except for her bedroom and bathroom, to a third party.

Before reaching the question of whether the wife was cohabiting with another person in a situation analogous to marriage, the trial court first found it necessary to determine what the parties' agreement meant by the use of the word "person." The trial court found that this term was ambiguous and allowed the admission of parol evidence, specifically evidence concerning the parties' preliminary negotiation of the agreement, to determine the parties' intention. The husband testified that, under an early draft of the agreement, the wife's right to spousal support would only

terminate upon the wife's cohabitation with an unrelated male. The husband further testified that this reference was removed at his request and replaced with the term "person." The wife also testified that it was her understanding that the term "person" referred to anyone regardless of gender. Based on this evidence, the trial court found that, at the time the parties executed the agreement, they both understood that the term "person" was not limited to only persons of the opposite sex.

The trial court then turned to whether the husband satisfied his burden to prove by a preponderance of the evidence that the wife's relationship with her paramour rose to the level of cohabitation in a situation analogous to marriage as required by the parties' agreement.⁶ The trial court concluded that the evidence as to whether the wife's relationship did or did not rise to this level was in equipoise and, thus, held that the husband had failed to meet his burden. The trial court's decision was based primarily on its conclusion that the wife and her paramour maintained separate residences and that they did not present themselves to the public as a couple.

Although apparently unnecessary in light of its conclusion that the husband failed to establish that the wife was cohabiting in a relationship analogous to marriage, the trial court also addressed the issue of whether, as a matter of Virginia law, individuals of the same sex could cohabit in such a situation. The trial court concluded that they could not, stating that "in Virginia, where marriage between persons of the same sex is barred—'cohabit' has to mean between people of the opposite sex. . . as a matter of law, in Virginia, people of the same sex cannot cohabit, and that's how the PSA was written."⁷ The trial court based its assessment of Virginia law on a 1994 Attorney General's opinion that limited the definition of cohabit to individuals of the opposite sex.⁸

Court of Appeals' Decision and Discussion

Both the husband and the wife appealed the decision of the trial court. The husband alleged that the trial court erred in holding that he failed to establish by a preponderance of the evidence that the wife was cohabiting with her paramour in a relationship analogous to marriage. The husband alleged that the trial court further erred in holding that persons of the same sex cannot cohabit in such a relationship as a matter of law. For her part, the wife appealed the trial court's decision to admit parol evidence to aid in the interpretation and construction of the parties' agreement.

The Court affirmed in part and reversed in part the trial court's decision. The Court held that the trial court correctly permitted parol evidence concerning the negotiation of the parties' agreement. The Court, however, found that the trial court erred in holding that the husband did not establish that the wife was cohabiting with her paramour in a situation analogous to marriage. The Court also rejected the trial court's conclusion that persons of the same sex cannot cohabit in a relationship analogous to marriage as a matter of law.

A. Admission of Parol Evidence

The parol evidence rule provides that evidence external to unambiguous agreements cannot be used when interpreting or construing its terms; only if the terms of the agreement are ambiguous can parol evidence be used.⁹ In *Stroud*, the Court explained that an agreement is ambiguous if it is capable of being understood in multiple ways "so long as both meanings are 'objectively reasonable.'" ¹⁰ In affirming the trial court's use of parol evidence, the Court found that the use of the word "person" was ambiguous, as it could mean individuals of different sexes or individuals of both sexes. "We hold the word 'person' can be understood in either way by an objectively reasonable standard and,

accordingly, that word is ambiguous as it is used in the PSA." ¹¹

The Court's conclusion that the term "person" is ambiguous is seemingly contrary to the general rule of contract construction that "[w]ords that the parties used are normally given their usual, ordinary, and popular meaning."¹² The word "person" has been defined as "an individual human being."¹³ This broad definition denotes that the usual meaning of the word "person" refers to individuals of both genders and does not hint at the ambiguity found by the Court.

At first blush, the Court's decision concerning parol evidence appears to be relatively innocuous as the Court ultimately reached the conclusion that the word "person" used in the parties' agreement referred to any individual regardless of gender, a conclusion supported by the common meaning of the word without consideration of parol evidence. However, the Court's decision may have a much broader impact on cases involving the construction and interpretation of contracts than is immediately apparent from the Court's opinion. The question of whether a contract is ambiguous is a question of law.¹⁴ Thus, the Court in *Stroud* effectively held that the word "person" is inherently ambiguous as a matter of law when used in a contract, opening the door for the admission of parol evidence in other cases.

B. Evidence of Cohabitation

Considering the undisputed nature of the facts in the case, the least contentious portion of the Court's opinion in *Stroud* is its holding that the husband had in fact met his burden to prove by a preponderance of the evidence that the wife's relationship with her paramour was a situation analogous to marriage. In reaching this decision, the Court utilized the four nonexclusive factors enumerated by the Court in a prior decision that are "demonstrative of the 'mutual responsibilities of the marital relationship.'" ¹⁵ These factors are (1) common residence, (2) intimate or romantic

involvement, (3) the provision of financial support, and (4) duration and continuity of the relationship and other indicia of permanency.¹⁶ Upon a review of the undisputed evidence, especially the wife's and her paramour's admissions concerning the nature of their relationship, the Court had no trouble concluding that a consideration of these factors established the existence of a relationship analogous to marriage between the wife and her paramour.

In reaching its conclusion, the Court rejected the two primary bases relied on by the trial court to support its decision that the husband failed to meet his burden. The Court held that the wife and her paramour maintained a common residence, despite the fact that the paramour technically continued to own her own home. The Court found that the paramour spent almost all of her time at the wife's house while her house had been rented out to another and held that this evidence was sufficient to establish that the wife and her paramour shared a common residence. The Court also found that the trial court erred in placing any significant emphasis on the fact that the parties did not publicly hold themselves out as a couple. The Court noted that such a display was not a necessary condition before a relationship analogous to marriage could be found to exist. The Court further noted that the wife and her paramour explained their reasons for keeping their relationship private, namely potential adverse employment consequences. Thus, the Court found "the trial court's reliance on this factor in its decision unpersuasive."¹⁷

C. Same-sex Cohabitation and Virginia Law

Regardless of the scope and effect of the Court's other holdings in the case, it is almost certain that the Court's decision in *Stroud* will primarily be known for its holding that same-sex couples may be considered to be cohabiting in a relationship analogous to marriage under Virginia law. In reaching

this decision, the Court held that the trial court's reliance upon the 1994 Attorney General's opinion was misplaced.¹⁸ In addition to noting that the opinion was not binding, the Court also concluded that it was inapplicable since that opinion only concerned the statutory definition of cohabitation, while the case before it involved the enforcement of a contract. "That being said, in this case we are concerned with a contract between a man and a woman, husband and wife, not a statute defining or to be interpreted as defining 'cohabitation,' which is the subject of the Opinion on which the trial court relied."¹⁹

Having determined that the only question before it was the proper interpretation and construction of the parties' agreement, the Court proceeded to address the precise language of the agreement. The Court stated that the phrase "analogous to marriage" only meant that the wife's relationship with her paramour must have been "similar in some way" to a marriage.²⁰ More importantly, the Court found that the parties' agreement was only concerned with whether or not the wife was cohabiting with another person in a relationship that was factually analogous to marriage and that the legal status of the wife's relationship was immaterial.

Our analysis of the phrase "analogous to marriage" in the PSA is based upon the *factual* relationship of wife and [paramour], and explicitly does not purport to grant, or comment upon, any *legal* status of that relationship. Succinctly stated, that relationship, as established by the facts, is similar "but not identical in form and substance" to a marriage.²¹

The Court also held that the Virginia public policy concerns evidenced by statutes prohibiting same-sex marriages or other similar arrangements were also irrelevant for purposes of determining whether the wife and her paramour were cohabiting in a situation analogous to marriage under the terms of the parties' agreement. The Court

concluded that its holding would not confer any legal status to the relationship of the wife and her paramour and, thus, such policy implications were not offended.

For a congruent reason, wife's reliance on brief on the provisions of *Code* § 20-45.2 and *Code* § 20-45.3 is misplaced. The former prohibits same-sex marriages in Virginia. The latter prohibits same-sex civil unions, partnership contracts, or other arrangements purporting to grant the privileges and obligations of marriage. As stated above, our holding in this case explicitly does not grant any legal status to the relationship between wife and [paramour].

Accordingly, neither the trial court nor this Court is required to review the relationship between wife and [paramour] with respect to matters of public policy as set forth in those statutes. Indeed, wife specifically testified that she and [paramour] had never entered into a "contract" with respect to their relationship, nor participated in any "ceremony" concerning the same. In short, *Code* §§ 20-45.2 and 20-45.3 are irrelevant to the issue here raised. Thus, we do not address their application. ²²

Conclusion

The Court's decision in *Stroud* is notable for being the first published appellate decision in Virginia issued after the ratification of the amendment to address how same-sex relationships will be treated. However, the Court's decision may be equally notable for what is missing from the opinion.

The Court limited its decision to the terms of the parties' agreement and expressly declined to address whether a same-sex couple could be found, as a matter of Virginia law, to be cohabiting under any statute in the Virginia Code. Thus, the Court's decision left undecided the question of whether the public policy of Virginia, as expressed in its statutes, precludes a court from holding that a same-sex couple is cohabiting in a case where only a statute is at issue. The 1994 and 2006 opinions of the respective Attorneys General have clearly reached divergent conclusions as to this issue. ²³

As the Court's decision in *Stroud* did little to resolve this conflict, there is still the possibility that the statutory and contractual definitions of cohabitation will be given different meanings by the courts. In the context of spousal support, such a conclusion would result in differing treatment for parties depending on whether or not a contract was involved. For example, subsection A of § 20-109 of the Code of Virginia is the statutory equivalent of the termination provision contained in the parties' agreement in *Stroud*. The relevant portion of the statute provides that if "the spouse receiving support has been habitually cohabiting with another person in a relationship analogous to a marriage for one year or more commencing on or after July 1, 1997, the court shall terminate spousal support and maintenance. . ." ²⁴ If such a dual standard is ever established, then obligor spouses would be better served by entering into agreements setting forth the requirements for terminating spousal support than relying on the provisions of subsection A of § 20-109.

In this example, such a result would necessarily undermine the fundamental purpose of a provision requiring the termination of support upon the supported spouse's cohabitation in a relationship analogous to marriage, regardless of whether such a provision is statutory or contractual. The purpose of spousal support is to provide for the supported spouse's needs after divorce. The purpose of the rule allowing for termination of such support is for the protection of the obligor spouse—so as not to require support of a spouse that no longer needs it due to financial contributions by a cohabitant, or to prevent a spouse from using support to help sustain his or her cohabitant. In light of this purpose, there is no logical reason to treat heterosexual and homosexual cohabitation differently. However, the Court in *Stroud* has deferred the resolution of this question for another day.

The other conspicuous omission from the Court's decision in *Stroud* is the lack of any discussion of Section 15-A of Article 1 of the

Virginia Constitution. This omission is likely explained by the timing of the appeal in *Stroud*. All the briefs in the case were filed by May 26, 2006.²⁵ However, by the time of oral argument, held on November 16, 2006,²⁶ and well before the issuance of the decision, the Court was certainly aware of the ratification of the constitutional amendment by Virginia voters on November 7, 2006.²⁷ Although the Court's failure to discuss the amendment in *Stroud* is understandable, it leaves the Court's holding open to attack on the ground that it does not actually settle the question of whether same-sex couples can be considered to be cohabiting in a relationship analogous to marriage under the current state of Virginia law. Thus, it could be argued that the *Stroud* decision is necessarily limited to the time period upon which it focused—before the ratification of the constitutional amendment.

However, despite the Court's failure to discuss the amendment and despite the unanswered questions that remain after *Stroud*, the Court's decision is much more likely to be viewed as the first attempt to limn the contours and effects of same-sex relationships in Virginia in the post-amendment context. The Court's decision gives support, albeit indirectly, to the conclusion expressed in the Attorney General's 2006 opinion that the amendment banning same-sex marriage does no more than that and will not affect the rights of unmarried individuals. This support is especially manifest in the Court's clear distinction between the factual relationship existing between a same-sex couple and the legal status of such a relationship.²⁸ However, any inclination to view the *Stroud* decision as a harbinger of the future, bearing out the 2006 Attorney General's opinion that the amendment merely serves to limit same-sex marriage, must be somewhat tempered until the unanswered questions left after *Stroud* are resolved.

Notes

¹ Section 15-A, Article 1, VA Constitution (ratified on November 7, 2006 and effective as of January 1, 2007).

² 2006 Va. AG LEXIS 34. Opinions of the Attorney General, while entitled to due consideration, are not binding on a court. *Beck v. Shelton*, 267 Va. 482, 492, 593 S.E.2d 195 (2004).

³ *Stroud v. Stroud*, No. 3158-05-4, 2007 Va. App. LEXIS 69 at *2 (2007).

⁴ *Id.* at *10.

⁵ Similar deliberate breaks in cohabitation have previously been held not to preclude the termination of spousal support. See *Penrod v. Penrod*, 29 Va. App. 96, 101, 510 S.E.2d 244 (1999) (support termination provisions of parties' separation agreement, which would be triggered by wife's cohabitation with a person of the opposite sex for a period in excess of 60 days, were satisfied despite wife's attempts to avoid these provisions by periodically breaking off cohabitation).

⁶ Because his claim was based on the terms of the parties' agreement, the husband only had to satisfy the burden of establishing the wife's cohabitation by a preponderance of the evidence. See *O'Hara v. O'Hara*, 45 Va. App. 788, 796, 613 S.E.2d 859 (2005) (holding that the clear and convincing burden of proof to establish cohabitation under subsection A of § 20-109 of the Code of Va., which provides that an award of spousal support may be terminated based on the supported spouse's cohabitation, does not apply to the enforcement of a contract between the parties).

⁷ *Stroud*, *supra* n.3 at *22.

⁸ 1994 Va. AG LEXIS 21. In this opinion, then-Attorney General, the Honorable James S. Gilmore, III, concluded that a person who cohabited with a person of the same sex could not be prosecuted for assault and battery of a family or household member under § 18.2-57.2. "In my opinion, therefore, the use of 'cohabitants' indicates a legislative intent that the definitions of 'family or household member' in §§ 16.1-228 and 18.2-57.2 encompass unrelated persons in the same household only if they are of opposite sexes and are

living as husband and wife." *Id.* at *4-5. It should be noted that in his 2006 opinion, the current Attorney General, the Honorable Robert F. McDonnell, stated that the 1994 opinion had been superseded and he instead concluded that the definition of cohabit under these sections would include same-sex couples. The 2006 opinion cites an unpublished Virginia Court of Appeals decision, *Cowell v. Comm.*, No. 3198-03-1, 2005 Va. App. LEXIS 42 (Va. Ct. App. 2005), to support the claim that the 1994 opinion has been superseded. *Cowell* relies on an earlier reported Court of Appeals' decision, *Rickman v. Comm.*, 33 Va. App. 550, 535 S.E.2d 187 (2000), in which the Court held that the definition of cohabit in the context of domestic relations and spousal support, namely a relationship that approximates the responsibilities of an actual marital relationship, does not necessarily apply to § 18.2-57.2, instead adopting a totality-of-the circumstances test to determine when cohabitation exists. It is important to note that both *Cowell* and *Rickman* deal solely with whether an opposite sex couple was cohabiting under § 18.2-57.2 and do not purport to address the issue of the treatment of same-sex couples.

⁹ *Stroud*, *supra* n.3 at *4.

¹⁰ *Id.* at *3 (quoting *Vilseck v. Vilseck*, 45 Va. App. 581, 589, 612 S.E.2d 746 (2005)).

¹¹ *Id.* at *4.

¹² *D.C. McClain, Inc. v. Arlington County*, 249 Va. 131, 135 452 S.E.2d 659 (1995).

¹³ Webster's Third New International Dictionary at 1686 (2002). See also Black's Law Dictionary at 1178 (8th ed. 2004) (person is defined as "[a] human being.").

¹⁴ *Stroud*, *supra* n.3 at *4.

¹⁵ *Id.* at *14 (quoting *Schweider v. Schweider*, 243 Va. 245, 248, 415 S.E.2d 135 (1992)).

¹⁶ *Id.* (citing *Pellegrin v. Pellegrin*, 31 Va. App. 753, 763-66, 525 S.E.2d 611 (2000)).

¹⁷ *Id.* at *20.

¹⁸ *Supra* n.8. The Court did not cite the 2006 Attorney General's opinion which held that the 1994 opinion had been

superseded as a basis for its decision that the 1994 opinion did not apply, however the 2006 opinion was issued after oral arguments were held in *Stroud*. See *infra* n.27.

¹⁹ *Stroud*, *supra* n.3 at *23.

²⁰ *Id.* at * 24.

²¹ *Id.*

²² *Id.* at *24-25.

²³ *Supra* n.8.

²⁴ Subsection A of § 20-109 Code of Va. It should be noted that the 2006 Attorney General's opinion does not address Subsection A of § 20-109.

²⁵ According to the Court of Appeals of Virginia Case Information System, <http://208.210.219.132/stars/select.jsp> (last visited March 7, 2007), the Appellant's brief was filed on April 21, 2006, the Appellee's brief was filed on May 12, 2006, and the Appellant's reply brief was filed on May 26, 2006.

²⁶ The Court of Appeals Dockets, http://www.courts.state.va.us/coa/dockets/Merit_Dockets-Alexandria/11-15-06_WEB_Alexandria_Merit_Docket.pdf (last visited March 7, 2007).

²⁷ *Supra* n.1.

²⁸ *Stroud*, *supra* n.3 at 24-25. This conclusion mirrors the conclusion expressed in the 2006 Attorney General's opinion that "the right to contract, pursuant to well-established and long-standing principles of contract law, is not a right that finds its origin in the 'design, qualities, significance, or effects of marriage,' nor the 'rights, benefits, obligations, qualities, or effects of marriage.'" 2006 Va. AG LEXIS 34, *16 (footnotes omitted).

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