

**VIRGINIA:**

**IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY**

**CHERI SMITH,**  
**Plaintiff,**

**v.**

**WESLEY C. SMITH,**  
**Defendant**

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**Chancery No. 53360**

**#55 – MOTION TO DECLARE THE DATE OF SEPARATION**

A pdf copy of this motion is available at: [http://www.liamsdad.org/court\\_case/](http://www.liamsdad.org/court_case/)

**COMES NOW** the Defendant, Wesley C. Smith, and moves this to declare the date the parties separated is 12/31/2003. In support of his MOTION the Defendant states as follows:

1. The Plaintiff has repeatedly used the date of separation as the basis for her amounts stated in her EQUITABLE DISTRIBUTION WORKSHEET and PLAINTIFF'S PROPOSED DISTRIBUTION OF MARITAL PROPERTY.

2. The amounts claimed by the Plaintiff do not match any reasonable, or even consistent, date of separation.

3. The Plaintiff has in the past claimed various separation dates between Sep 2002 and Sept 2004.

4. In 2002 the Plaintiff advised the Defendant in order to be considered legally separate that one of them would need to move out of the home or they would need to follow very specific rules to keep things separate while living together in the house.

5. The Plaintiff continued to live in the house with the Defendant until June 2003 and did not comply with the rules she herself had stated were necessary to be considered legally separate, thus by her actions she demonstrated that she did not wish to separate at that time.

6. Besides sleeping in separate bedrooms of the residence, and not engaging in sexual relations, the Parties continued to cohabit as husband and wife, i.e. maintaining the same lifestyle they had in the following ways:

- 1) payment of the family bills, including but not limited to the payment of credit cards, utilities and other expenses in the names of both parties;
- 2) sharing of health insurance benefits;
- 3) filing joint tax return;

- 4) sharing a joint safe deposit box;
- 5) regular cooperation in many areas of the family responsibilities, including, but not limited to, washing dishes, doing laundry, lawn mowing and other home maintenance.

7. "Living separate and apart" as set forth in Virginia Code means more than mere physical separation. *Hooker v. Hooker*, 215 Va. 415, 211 S.E.2d 34 (1975). *Jacobi v. Jacobi*, 56 Va. Cir. 164 (2001). Separation must be coupled with an intention on the part of at least one of the parties to live separate and apart permanently, and that this intention must be shown to have been present at the beginning of the uninterrupted separation period without any cohabitation. *Id.*

8. In general, matrimonial cohabitation" ... imports the continuing condition of living together and carrying out the mutual responsibilities of the marital relationship." *Schweider v. Schweider*, 243 Va. 245, 248; 415 S.E.2d 135 (1992). In Virginia, the two essential elements of cohabitation include (1) sharing of familial or financial responsibilities and (2) consortium. *Rickman v. Commonwealth*, 33 Va. App. 550, 557; 535 S.E.2d 187 (2000). Possible factors establishing shared familial or financial responsibilities might include provisions for shelter, food, clothing, utilities, and/or commingled assets. *Id.* Factors that might establish consortium include mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations. *Id.*

9. In *Ott v. Ott*, the Court of Appeals held that a Husband and Wife did not live separate and apart in the same home where the husband moved out of the marital home and began living above the garage of the marital residence. 2001 Va. App. Lexis 10. The court found no intention to permanently separate existed, despite the husband's testimony to the contrary, as the parties continued to perform basic marital duties and responsibilities as husband and wife. *Id.*

10. In comparison, the court in *Carter v. Carter* held that the parties did not corroborate a divorce ground based on living separate and apart. 37 Va. Cir. 326. The court found that while the parties no longer slept in the same bedroom, they continued to raise their children together, they continued to share household chores, the wife continued to keep track of the household bills and expenses, and the husband continued to write checks for those bills and expenses when she requested. *Id.* at 328.

11. In 2003 the Plaintiff made statements that she would consider remaining married if the Defendant gave her complete control of his life.

12. There is no legal basis for a separation before the Plaintiff moved out on or about June 1, 2003, although a good case could be made for a later date at least up to Dec 31, 2003. Indeed by her admissions in her EQUITABLE DISTRIBUTION WORKSHEET and PLAINTIFF'S PROPOSED DISTRIBUTION OF MARITAL PROPERTY the parties continued to share expenses until 12/31/2003.

13. A ruling setting the date of separation is needed in order to correctly specify any needed pre/post separation financial amounts.

**WHEREFORE** the Defendant requests the Court rule a specific date on which the parties separated and that it is 12/31/2003 or in the alternative no earlier than June 1, 2003 (when the Plaintiff moved out), and such further relief as the nature of the case or the goals of equity require.

**Respectfully Submitted,  
Wesley C. Smith**

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Wesley C. Smith, Defendant  
5347 Landrum Rd APT 1, Dublin, VA 24084-5603  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing motion was served to Loretta Vardy and Ronald Fahy (GAL) via e-mail and/or fax and/or website, this 12th day of April 2006.

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Wesley C. Smith