

**VIRGINIA:**

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

**CHERI SMITH,  
Plaintiff,**

**v.**

**WESLEY C. SMITH,  
Defendant**

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**Chancery No. 53360**

**#62 – MOTION TO STRIKE COUNT III OF  
AMENDED BILL OF COMPLAINT**

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**COMES NOW** the Defendant, Wesley C. Smith, and makes a motion to strike Count III, Separation Of The Parties Exceeding One Year, of Amended Bill Of Complaint filed by the Plaintiff. In support of his MOTION the Defendant states as follows:

1. The Plaintiff dated Amended Bill Of Complaint, Feb 23<sup>rd</sup> 2004, and the file index shows it was filed on March 20<sup>th</sup> 2004.

2. The Parties lived together at the marital home until June 2003, thus when the Amended Bill Of Complaint was signed and filed the couple had not lived separate and apart for the statutory period.

3. Thus the court the court lacked jurisdiction, via that claim, to hear the suit at the time it was filed. Thus the Plaintiff can't be granted a divorce on grounds of one year separation (at least not in Chancery 53360).

"The act relied upon for divorce must be alleged and proved to have occurred prior to the bringing of the suit . . . ." Beckner v. Beckner, 204 Va. 580, 583, 132 S.E.2d 715, 717-18 (1963). see also Johnson v. Johnson, 213 Va. 204, 210, 191 S.E.2d 206, 210 (1972).

We hold that the court erred by entering the final divorce decree because the grounds for divorce alleged in the bill of complaint did not exist when the bill was filed and, thus, the court lacked jurisdiction to entertain the suit at the time it was filed. JONES v JONES, MAY 30, 2000, Record No. 2580-99-3

Code 20-91(A)(9)(a) provides that a "no-fault" divorce may be granted only after an application has been filed properly alleging that the parties have lived separate and apart for the requisite time. See Moore v. Moore, 218 Va. 790, 796, 240 S.E.2d 535, 538 (1978) The ground for divorce alleged is a statutory element and jurisdictional prerequisite to filing the suit for divorce under Code 20-91(A)(9)(a). The grounds must be properly alleged and proven.

4. In order to have jurisdiction the court must find that either party had a clam according to ground

under Code 20-91 at the time the Plaintiff filed the suit (June 2003).

**WHEREFORE** the Defendant moves that this court strike Count III, Separation Of The Parties Exceeding One Year from the Amended Bill Of Complaint not consider it at trial. Further as the Plaintiff's motion to amend asked only to include the one year separations ground, striking this from effectively removes an approved modification, thus the Defendant asks that for simplicity that the Amended Bill Of Complaint be struck entirely.

**Respectfully Submitted,  
Wesley C. Smith**

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Wesley C. Smith, Defendant  
5347 Landrum Rd APT 1, Dublin, VA 24084-5603  
liamsdad@liamsdad.org - no phone

**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 U.S. mail, this 17 day of May 2006.

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Wesley C. Smith