



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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LETTER OPINION

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RE: *Paul S. Richter v. Geraldine K. Richter*
Case No. CL-2022-13830

Dear Counsel:

This case presents the unusual circumstance wherein Defendant, Geraldine K. Richter ("Defendant" or "GKR"), former wife of Plaintiff, seeks enforcement of the Court's prior order directing the sale of the former marital residence, more than 36 years after

entry of the governing Final Decree of Divorce (“Decree”),¹ so as to collect the \$100,000.00 contingent thereon, and prays for prejudgment interest and attorney fees and costs.² Plaintiff, Paul S. Richter (“Plaintiff” or “PSR”), former husband of Defendant, responds that while the Decree required him to sell the property, the timing of such sale was left to his determination and, because he has not yet made a decision to sell the property, he owes nothing to his former wife at present. Plaintiff further alternatively avers that if he owes Defendant anything, it is the \$100,000.00 he offered to pay in cash in 2002 less \$25,000.00³ he claims she owes him as a retirement equalization payment Defendant has allegedly refused to tender to him. Defendant initiated the proceedings by “Motion to Enforce,” which trial thereof was previously continued by this Court to permit the filing of cross-rules by the parties, inasmuch as the Court opined its powers to enforce court orders are significantly limited when not proceeding by Rule to Show Cause. Subsequently, GKR filed a Rule against PSR, to which PSR responded with an Answer and Affirmative Defenses, asserting therein his “counterclaim.” Trial was had on the expanded pleadings, the Court thereafter considering the litigants’ dueling post-trial briefs.

¹ With the merger of law and equity practice effective January 1, 2006, courts no longer refer to final orders of divorce as “decrees.” See Va. Sup. Ct. R. 3:1.

² Contrary to the contemporary practices of this Court, the file in this case was permanently sealed a long time ago, and thus, to the extent this Letter Opinion mentions information contained in such sealed file, any facts mentioned in this opinion are unsealed for purposes of effecting a publicly transparent ruling.

³ In his Answer and Affirmative Defenses PSR referenced the claimed amount to be “in excess of \$100,000.00.” At trial, PSR’s counsel averred orally the claimed amount to be \$25,000.00. In his post-trial brief, PSR references the claimed amount to be \$38,119.98. Irrespective, inasmuch as PSR is not entitled to his “counterclaim,” this discrepancy in the record is of fleeting import.

The parties present the Court with a number of issues of apparent first impression, namely: 1) whether the scope of a “Motion to Enforce” includes ordering the judicial sale of the property *and* the levying of prejudgment interest; 2) whether Plaintiff is in violation of the terms of the parties’ Decree in not selling the marital property heretofore; 3) whether the defense of laches excuses performance of the sale by Plaintiff; 4) whether Plaintiff may counterclaim for a set-off for Defendant’s alleged nonpayment of a retirement equalization amount; and 5) whether if Plaintiff is in contempt of court, the remedy afforded is coercive or compensatory.

First, the Motion to Enforce power of the Court in the context of this cause is limited by statute to the sale of the property via a special commissioner of sale and does not include awarding compensatory damages or prejudgment interest. Second, the Court finds Plaintiff is in violation of the Decree in not previously selling the marital home and paying Defendant her \$100,000.00. Plaintiff’s failure to take *any* action “promptly” to sell the property during the last 36 years is thus in clear contempt of a specific command by this Court. Third, Plaintiff’s defense of laches, otherwise doubtful in applicability to the Court’s Decree, does not apply despite the undue delay in enforcement by Defendant, because there has been only benefit and no prejudice to Plaintiff from such delay. Fourth, as to Plaintiff’s “counterclaim” for \$25,000.00, disputed by Defendant, the evidence is at best in equipoise. Even if Plaintiff were entitled to this claim, enforcement of the Decree in the within case must, generally, come by resort to the Court’s contempt power. Plaintiff was afforded an equal opportunity to proceed by Rule, thereby invoking the Court’s contempt power; he instead, in derogation of the Court’s guidance, asserted a *contractual* “counterclaim” for set-off in his Answer and Affirmative Defenses, which is not an

affirmative defense to disobedience of a court order. Fifth, the remedy to be afforded Defendant is civil compensatory contempt damages in allusion to part of the *Brandenburg*⁴ formula, to account for the increase in value of her \$100,000.00 portion from the marital residence due as of 1996 when Defendant last moved out of the home, coercive contempt no longer being viable as it would result in Defendant not being paid the full value of her equitable distribution award accounting for the appreciation in her unsold interest in the marital home, and would conversely result in significant adverse tax consequences to Plaintiff.

Accordingly, the Court shall enter a separate order holding Plaintiff in civil contempt, awarding Defendant civil contempt compensatory damages in the amount of \$243,729.00 for the failure of Plaintiff to sell the property as measured from 1996, and an equitable reduced portion of her attorney fees and costs in the amount of \$80,000.00, and denying Plaintiff's "counterclaim." Plaintiff shall have 120 days after entry of this Court's final order to pay the judgment, and thereafter, if the judgment remains unpaid, post-judgment interest will begin to run. Further, Defendant may then approach the Court for appointment of a special commissioner of sale to satisfy her judgment by sale of the Property, or otherwise seek collection on her judgment under other remedies available for collection of a debt.

BACKGROUND

On April 5, 1988, PSR and GKR entered into a Settlement Agreement ("Agreement"), which was incorporated into the parties' Decree on May 27, 1988. At the

⁴ *Brandenburg v. Brandenburg*, 617 S.W.2d 871 (Ky. Ct. App. 1981).

time of entry of the Decree, PSR was 42 years old and GKR 39 years in age. PSR is currently in good health while GKR is not. PSR is a practicing attorney represented in this cause by his law partner, while GKR is a retired physician. Both parties are intellectually sophisticated individuals who enjoyed considerable professional success in their careers. The parties had three children who are now adults.

GKR seeks enforcement of a provision in the Decree that purportedly required the sale of the parties' former marital home and related relief, maintaining entitlement to \$100,000.00 plus 6% per annum prejudgment interest and attorney fees and costs.

Paragraph 9 of the Agreement addressed three contiguous parcels of land the parties collectively referred to as the "Catharpin Real Properties," purchased jointly by the parties as tenants by the entirety:

9. Catharpin Real Properties.

a. GKR shall deed all of her interests in the Catharpin Real Properties to PSR, subject to the existing deed of trust. PSR alone shall be responsible for all deed of trust note payments now or hereafter due.

b. *PSR agrees that he will sell the Catharpin property having the residence on it and that out of the proceeds of such sale, he will give GKR \$100,000.00 in cash. PSR shall have the sole discretion as to how, when and upon what terms and conditions such property is sold. In the event GKR procures a purchaser for such property so that no real estate brokerage commission is otherwise payable on the sale by PSR, PSR shall pay GKR an additional cash amount equal to 4% of the sales price upon closing on such sale.*

(Emphasis added).

Paragraphs 35 and 36 of the Agreement set forth responsibilities of PSR (paragraph 35) and the parties (paragraph 36) in carrying out their obligations thereunder:

35. *PSR agrees promptly after execution of the Settlement Agreement to prepare and submit to GKR an outline and time schedule for*

implementation of the Settlement Agreement. *PSR shall also promptly begin preparation of all other instruments, documents, joint motions, decrees, and orders which will be required for implementation of this Settlement Agreement for review by GKR and her counsel.*

36. Each of the parties agrees to execute (and instruct his or her counsel to execute) such further documents as may be reasonably requested to document, confirm, or more fully reflect or implement the transactions contemplated by this Settlement Agreement, so that all matters contemplated hereby may be promptly settled and concluded.

(Emphasis added).

The former marital house is located on one lot, and its corresponding garage occupies part of the same lot and protrudes into the adjoining lot (collectively “the Property”). PSR never sold the Property. GKR never quitclaimed her interest in the Property to PSR.

At trial, PSR testified he has not previously decided to sell the Property and has no present intention to do so during the next twelve months. He also maintained GKR never paid him \$25,000.00 she owed him under the Agreement as a retirement equalization payment. GKR testified PSR told her he “never intended to sell the Property,” and that she has not transferred her interest of record to him via quitclaim deed because PSR has shown no intent to sell as she maintains he was correspondingly required to do under the Agreement. GKR further averred she did not seek to enforce the Agreement earlier out of fear of PSR and being entangled in the type of costly litigation in which she now finds herself embroiled. Now in ill health, she stated her current motivation is to resolve the matter so as to benefit her children.

In 2021, GKR retained counsel and began pressing the issue of the status of the Property. Initially, GKR took the position the Agreement was void. In 2022, PSR offered

to pay GKR \$100,000.00⁵ in return for her quitclaiming her interest in the Catharpin Real Properties to him. GKR declined the offer because it did not account for the increase in the value of such funds since 1988 when adding interest, nor account for her attorney fees and costs expended.

Since then, the parties have been embroiled in vitriol and contentious litigation. In 2022, GKR sought to reopen the divorce file, and litigation ensued over whether the same should be unsealed, which in a rarity for this Court, it was not. A different judge declined to find there was sufficient cause to disturb the status quo that had existed since 1986. On February 3, 2023, GKR filed a Motion to Enforce the Agreement. PSR filed a subsequent quiet title action in the Prince William County Circuit Court seeking to extinguish GKR's title interest in the Catharpin Real Properties. The cause was stayed when that Court determined it might lack jurisdiction to dispose of the properties in light of the pending action to enforce the Decree in this Court and based on the bar to collateral litigation respecting division of marital property delineated in Virginia Code § 20-107.3(D).

The parties appeared before the undersigned judge on March 19, 2024, for trial of GKR's Motion to Enforce. The Court advised of the procedural concern that motions to enforce, while presenting the Court with the opportunity to opine on a question, are limited in scope of enforcement of resulting judicial pronouncements. Inasmuch as both parties claimed there were cross-violations of the Agreement in need of adjudication, the Court afforded each side the opportunity to file cross-rules to seek to enforce their claims. The matter was continued by agreement of the parties to April 30, 2024, so each could place

⁵ PSR asserts he also made the same offer in 2002.

their case in the proper posture for trial. GKR filed and served a Rule to Show Cause why PSR should not be held in contempt. PSR did not file his own Rule, but instead filed a pleading titled “Answer and Affirmative Defenses,” asserting his “counterclaim.”

ANALYSIS

I. The Limited Scope of the Motion to Enforce

GKR seeks the sale of the Property, judgment interest, and attorney fees and costs via her Motion to Enforce. “Motions to Enforce” are disfavored in this Circuit because they are largely illusory in enforcement in most contexts, as they generally afford only the opportunity for the Court to declare the rights of the parties without a mechanism to enforce the Court’s prior orders. The authority of the Court in this context, absent invocation of civil contempt, is significantly limited by statute:

K. The court shall have the continuing authority and jurisdiction to make any additional orders necessary to effectuate and enforce any order entered pursuant to this section, including the authority to:

1. Order a date certain for transfer or division of any jointly owned property under subsection C or payment of any monetary award under subsection D;
2. Punish as contempt of court any willful failure of a party to comply with the provisions of any order made by the court under this section;
3. Appoint a special commissioner to transfer any property under subsection C where a party refuses to comply with the order of the court to transfer such property; and
4. Modify any order entered in a case filed on or after July 1, 1982, intended to affect or divide any pension, profit-sharing or deferred compensation plan or retirement benefits pursuant to the United States Internal Revenue Code or other applicable federal laws, only for the purpose of establishing or maintaining the order as a qualified domestic relations order or to revise or conform its terms so as to effectuate the expressed intent of the order

Va. Code § 20-107.3(K)(1)-(4). GKR argues the Court has broad powers under the aforesaid statute to bestow the relief she requests independent of the Court's contempt power. However,

the rule of *eiusdem generis* suggests that "when a particular class of persons or things is enumerated in a statute and general words follow, the general words are to be restricted in their meaning to a sense analogous to the less general, particular words." *Norton v. Board of Supervisors of Fairfax Cnty.*, 299 Va. 749, 759 (2021) (quoting *Martin v. Commonwealth*, 224 Va. 298, 301-02 (1982)). In this way, "[t]he effect of general words *when they follow* particular words [is] thus restricted." *Rockingham Co-op. Farm Bureau v. City of Harrisonburg*, 171 Va. 339, 344 (1938) (emphasis added).

Tomlin v. Commonwealth, 302 Va. 356, 367-68 (2023). If the enforcement powers of the Court were as broad as GKR suggests, the enumerated authority would be superfluous. Instead, the statute suggests in the context of this case enforcement of the sale of the Property must come under either contempt (paragraph 2) or by appointment of a special commissioner of sale (paragraph 3). Attorney fees, this being a divorce action, are available by independent statute in enforcement in a family proceeding. Va. Code § 20-99. "An award of attorney's fees in a divorce suit is discretionary with the court upon consideration of the circumstances and equities of the entire case." *Dwoskin v. Dwoskin*, No. CL-2019-3494, 2021 Va. Cir. LEXIS 40, at *3 (Fairfax Mar. 5, 2021) (citing *Gamer v. Gamer*, 16 Va. App. 335, 346 (1993)).

In the instant case, however, post-judgment interest is not available to GKR. "[T]he court, may provide for *interest on any principal sum awarded*, or any part thereof, and fix the period at which the interest shall commence." Va. Code § 8.01-382 (emphasis added). Here, PSR was ordered to sell the marital residence and pay GKR \$100,000.00 *from the proceeds of sale*. The Decree commands the sale of the Property which would then yield

proceeds, *if any*, to be paid to GKR. The order is not a direct award of a principal sum, but instead a contingent award which does not qualify under the language for interest in Virginia Code § 8.01-382 until the contingency is first satisfied. Thus, the full remedy sought by GKR may not be accomplished by her Motion to Enforce.

II. PSR is in Civil Contempt of Court in Failing to Sell the Property

The Court has “continuing authority and jurisdiction” to “effectuate and enforce” equitable distribution determinations in orders of divorce (formerly referred to as decrees) using its contempt power. Va. Code § 8.01-107.3(K). PSR argues the language of the parties’ Agreement affords him the discretion to sell the Property at a time of his own choosing, and further, that there is no specific command in the Decree compelling the sale.

Under well-established Virginia jurisprudence, contempt only lies “for disobedience of what is decreed, not for what may be decreed.” *Petrosinelli*, 273 Va. at 706-07, 643 S.E.2d at 154 (citation omitted). “[B]efore a person may be held in contempt for violating a court order, *the order must be in definite terms as to the duties thereby imposed* upon him and the command must be expressed rather than implied.” *Id.* at 707, 643 S.E.2d at 154 (quoting *Winn v. Winn*, 218 Va. 8, 10, 235 S.E.2d 307, 309 (1977)). “[F]or a proceeding in contempt to lie,” there “must be an express command or prohibition’ which has been violated.” *Id.* (quoting *French v. Pobst*, 203 Va. 704, 710, 127 S.E.2d 137, 141 (1962)). These principles arise from the recognition that the “judicial contempt power is a potent weapon.” *Id.* at 706, 643 S.E.2d at 154 (quoting *International Longshoremen’s Ass’n v. Philadelphia Marine Trade Ass’n*, 389 U.S. 64, 76 (1967)). See also *Shebelskie v. Brown*, 287 Va. 18, 30, 752 S.E.2d 877, 884 (2014) (same).

DRHI, Inc. v. Hanback, 288 Va. 249, 255 (2014) (emphasis added).

In the case at bar, the duties imposed on PSR are in sufficiently definite terms. “He” is commanded to sell and provide the \$100,000.00 from the proceeds to “her;” “PSR agrees that he will sell the Catharpin property,” i.e., the language contemplates the sale

of the Property is to take place during the parties' lifetimes. Moreover, PSR was to "promptly" prepare a "time schedule" to detail the steps to effectuate such a sale. Instead, he willfully ignored this requirement altogether, claiming he complied with such requirement by providing a placeholder document containing the mere notation "to be determined." It is self-evident that stating a schedule is "to be determined" is not the provision thereof.

In addition, according to GKR, PSR told her "he never intended to sell the Property." PSR counters he has never formed the intent not to sell the Property. The history of PSR's inaction supports the credibility of GKR's testimony on this point. However, PSR's focus on his *purported* lack of intent to violate the Decree is misplaced.

"Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. . . . Since the purpose is remedial, *it matters not with what intent the defendant did the prohibited act.* The decree [is] not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents."

Leisge v. Leisge, 224 Va. 303, 309 (1982) (quoting *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949) (holding "the absence of a specific intent to violate the court order does not relieve" the violator "of the consequences") (emphasis added).

A trial court "has the authority to hold [an] offending party in contempt for acting in bad faith *or for willful disobedience* of its order." *Carswell v. Matterson*, 224 Va. 329, 332, 295 S.E.2d 899, 901 (1982). In a show cause hearing, the moving party need only prove that the offending party failed to comply with an order of the trial court. *Frazier v. Commonwealth*, 3 Va. App. 84, 87, 348 S.E.2d 405, 407 (1986). The offending party then has the burden of proving justification for his or her failure to comply. *Id.*

Alexander v. Alexander, 12 Va. App. 691, 696 (1991) (emphasis added).

PSR testified he never made the decision to go forward with the sale of the property and does not intend to sell it for at least the next twelve months, this, with the awareness GKR is in ill health. It is irrelevant that he claims to not have formed the intent to disobey the Decree. PSR has never taken action to comply with the sale of the Property, or even to provide a time schedule for its sale, let alone “promptly.” His decades of inaction impart both bad faith and willfulness. Moreover, civil contumacy⁶ does not require proof of specific intent on the part of the violator of a court order. *Leisge*, 224 Va. at 309. It is transparently obvious PSR disobeyed the command to sell the Property by impermissibly equating his timing discretion to sell, with the right *never* to do so.

III. The Defense of Laches Does Not Excuse PSR’s Failure to Comply With the Court’s Order to Sell the Marital Residence, Inasmuch as He Cannot Show He Was Prejudiced by the Delay in Coercive Enforcement by GKR

PSR asserts the affirmative defense of laches to GKR’s current action against him. Laches is an equitable defense requiring a showing of unreasonable delay and *prejudice* to the adverse party. Laches encompasses “the neglect or failure to assert a known right or claim for an unexplained period of time under circumstances prejudicial to the adverse party.” *Princess Anne Hills v. Susan Constant Real Est.*, 243 Va. 53, 58 (1992).

The applicability of this defense to defeat a court order in this case is questionable. “Laches is an equitable defense, but ‘even a court of equity, in an effort to do equity, cannot disregard the provisions of a lawful decree. . . .’” *Richardson v. Moore*, 217 Va. 422, 423-24 (1976) (quoting *Fearon v. Fearon*, 207 Va. 927, 931 (1967)). “In the absence

⁶ The term is defined as a “stubborn resistance to authority,” more “*specifically*: willful contempt of court.” *Contumacy*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/contumacy> (last visited July 31, 2024).

of statute, payments exacted by the original decree of divorce become vested as they accrue and the court is without authority to make any change as to past due installments.”

Id. at 424 (quoting *Cofer v. Cofer*, 205 Va. 834, 838 (1965)).

“[It] is the obligation of [the obligated party] to pay the specified amounts according to the terms of the decree and . . . he should not be permitted to vary these terms to suit his convenience. [If conditions change] . . . his remedy is to apply to the court for . . . relief.”

Id. at 424 (quoting *Newton v. Newton*, 202 Va. 515, 519 (1961)). “The rule applies to awards of spousal support or to unitary awards for spousal and independent child support.” *Taylor v. Taylor*, 14 Va. App. 642, 646 (1992); see *Arthur v. Commonwealth ex rel. Smith*, No. 1762-98-3, 1999 Va. App. LEXIS 62, at *4-5 (Ct. App. Feb. 2, 1999) (barring the defense of laches in a child support case).

Laches is thus not typically applied to bar the enforcement of terms found in orders of divorce, which are often considered vested rights. In the context of divorce and the sale of marital property, Virginia courts have upheld orders for the sale of marital homes even when there have been delays or disputes between the parties. For example, in the case of *Robertson v. Loy*, No. 0232-21-4, 2022 Va. App. LEXIS 21, at *8 (Ct. App. Jan. 25, 2022), the court upheld the order for the sale of the marital home despite the parties' failure to reach a mutual agreement on its disposition. Similarly, in *Nassabeh v. Montazami*, 101 Va. Cir. 151, 152 (Fairfax 2019), this Court enforced the sale of a marital home through a special commissioner of sale when one party failed to comply with the refinancing requirement. Therefore, while laches can be a defense to some equitable claims, it is likely inapplicable to defeating a court-ordered sale of a marital home in a divorce proceeding. Virginia courts prioritize the enforcement of their orders to ensure the

equitable distribution of marital assets. Equitable distribution judgments are also not subject to collateral attack in separate proceedings, indicating their vested nature. Va. Code § 20-107.3(D) (“Any marital property, which has been considered or ordered transferred in granting the monetary award under this section, shall not thereafter be the subject of a suit between the same parties to transfer title or possession of such property.”).

Alternatively, even if the defense of laches were applicable to this cause, PSR has failed to prove prejudice from any delay in enforcement. The defense of laches requires two essential elements: a lack of diligence by the party against whom the defense is asserted, and prejudice to the party asserting the defense. See *Whitehall Farm, L.L.C. v. Whitehall Farms, L.L.C.*, 109 Va. Cir. 190, 196-97 (Fairfax 2021). This principle is consistently upheld in Virginia case law. For instance, in *Stewart v. Lady*, 251 Va. 106, 114 (1996), the Court emphasized the burden of proving both laches and prejudice rests with the party asserting the defense, and a finding of laches will not be sustained if prejudice is not proved.

Plaintiff’s defense of laches fails despite the undue delay in enforcement because there has been no prejudice to him. Although he indicated documents have been destroyed by the parties that might have aided his defense, he did not testify that one of those destroyed documents was the required schedule imparting the timing for the sale. By his own words, Plaintiff confirmed he never complied with the court order requiring him to detail *when* the sale was to take place. Contrary to being prejudiced, Plaintiff has benefitted greatly by not selling the Property, which same has appreciated in excess of 243% since 1996 alone, the use of which he has had unhindered since such time. From

the outset, it was PSR who sought delay in this matter of which he cannot now, in benefit thereof, complain.

IV. PSR's Collateral "Counterclaim" is Unenforceable Because Despite Guidance to Do So, He Has Failed to Invoke the Court's Contempt Power, and neither Contractual Recoupment nor Set-Off Are Applicable

PSR pled a "counterclaim" for set-off for an amount "well in excess of \$100,000.00." The "counterclaim" is disputed by GKR. The evidence on this point appears at best to be in equipoise. Before the Court can even reach such conclusion, the question whether PSR can viably assert such a "counterclaim" as a matter of procedure must be settled. At trial, PSR alternatively asserted recoupment or set-off may be applicable.

Recoupment, . . . is the right of the defendant to cut down or diminish the claim of the plaintiff in consequence of his failure to comply with some provision of the *contract* sought to be enforced, or because he has violated some duty imposed upon him by law in the making or performance of that contract. The delinquency or deficiency which will justify the reduction of the plaintiff's claim must arise out of the same transaction, and not out of a different transaction.

Nat'l Bank & Tr. Co. v. Castle, 196 Va. 686, 695 (1955) (citation and quotation marks omitted) (emphasis added). "[A] plea of recoupment under Code § 8.01-422 is not subject to a statute of limitations defense." *Cummings v. Fulghum*, 261 Va. 73, 80 (2001). Of note, however, PSR did not specifically assert recoupment in his filed Answer and Affirmative Defenses. It is firmly established that no court can base its judgment or decree upon facts not alleged or upon a right which has not been pled and claimed. "Pleadings are as essential as proof, and no relief should be granted that does not substantially accord with the case as made in the pleading." *Ted Lansing Supply Co. v. Royal Aluminum & Constr. Corp.*, 221 Va. 1139, 1141 (1981) (citations omitted).

Addressing PSR's pled "counterclaim" of set-off, it

is a counter demand of a liquidated sum growing out of a transaction extrinsic to the plaintiff's demand, for which an action on *contract* might be maintained by the defendant against the plaintiff and which is now exhibited by the defendant against the plaintiff for the purpose of counterbalancing in whole or in part the plaintiff's demand, and, where it exceeds the plaintiff's demand, of recovering a judgment in his own favor for the excess.

Nat'l Bank & Tr. Co., 196 Va. at 695 (citation and quotation marks omitted) (emphasis added). Set-off, unlike recoupment, is subject to the statute of limitations, meaning if the legal demand is barred by the statute, it is equally barred in equity. *Belcher v. Kirkwood*, 238 Va. 430, 433 (1989) ("It is a well-established principle uniformly acted upon by courts of equity, that in respect to the statute of limitations equity follows the law; and if a *legal demand* be asserted in equity which at law is barred by statute, it is equally barred in equity." (citations omitted)). This case is long past any applicable statute of limitations permitting the assertion of set-off as an independently brought claim, and, because set-off involves damages, the same holds true whether the claim is asserted at law or in equity.⁷ Va. Code § 8.01-251.

Both recoupment and set-off are contractual defenses. Additionally, styled as "counterclaims," they would generally be applicable in response to a suit initiated by a complaint rather than a contempt Rule. See Va. Sup. Ct. R. 3:9. Although the parties' marital Settlement Agreement is a contract, the parties here are not suing for enforcement at law in light of the applicable statute of limitations bar, but instead are before the Court in contemplation of enforcement of their Decree. Contempt proceedings are generally focused on whether the respondent has willfully disobeyed a court order, and defenses

⁷ Where, however, the remedy sought is *entirely* equitable rather than for money damages, the statute of limitations does not bar a recognized equitable claim. See *Willems v. Batcheller*, 109 Va. Cir. 319, 330 (Fairfax 2022).

typically revolve around the inability to comply without fault or excusable mistake. The concepts of recoupment or set-off, which involve offsetting mutual contractual debts between parties, are not applicable in the context of contempt proceedings, which are designed to address compliance with court orders rather than adjudicating remaining contractual financial disputes between parties.

If PSR wanted to enforce his rights under the Decree, that could not come via counterclaim to a contempt action or even a motion to enforce, which as noted previously, is of limited scope in implementation. In order to do so, PSR needed to invoke the Court's contempt power against GSR by requesting a Rule, which would then afford the Court the authority to order her to comply with any claimed violation, if proved. PSR's set-off "counterclaim" cannot stand as a separate contractual action now asserted in response to a contempt action. A contempt action does not serve as a vehicle to enable counterclaims on matters collateral to those asserted via Rule to Show Cause. Plaintiff was afforded an equal opportunity to proceed by Rule. Instead, he merely asserted the contractual "counterclaim" for set-off in his Answer and Affirmative Defenses, which is not a defense to disobedience of a court order. Rather, PSR's "counterclaim" against GKR is an averment she disobeyed a separate requirement of the Decree that can only be brought by Rule at this juncture. In order for PSR's "counterclaim," styled as a set-off, to be enforceable against GKR via contempt, inasmuch as the period for the statute of limitations on a separate contract action has long passed, the Court would have to be empowered to resort to its contempt power via a Rule issued *against* GKR. PSR "should have opportunity to present whatever grievance he may have to a court of competent jurisdiction; but having enjoyed that opportunity and having failed to avail himself of it, he

must accept the consequences.” *Miller v. Smith*, 109 Va. 651, 655 (1909). Because of his failure, despite invitation to do so, to invoke the contempt power of the Court, Plaintiff, who is represented by his law partner and who is a sophisticated attorney himself, has forfeited his opportunity to enforce his “counterclaim,” even if the Court had found it viable.

V. Civil Compensatory Contempt is the Only Appropriate Equitable Remedy in this Cause, Inasmuch as Coercive Compliance Would not Serve to Compensate GKR Fully for PSR’s Failure to Obey the Decree, and Would in Application Impose an Inequitable Punitive Tax Burden on PSR

The question of the remedy to be afforded GKR involves distinguishing when the Court is to exercise its civil contempt power coercively and when to do so in a compensatory fashion, in application of what is equitable. Civil compensatory contempt, though a recognized remedy available to the Court, is much less often applied than the coercive variety, and not well-known in most legal quarters.

Civil contempt sanctions are either *compensatory* or *coercive*. Compensatory, civil contempt sanctions *compensate* a plaintiff for losses sustained because a defendant disobeyed a court's order. Coercive, civil contempt sanctions are imposed to compel a recalcitrant defendant to comply with a court's order. See, e.g., *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947); *Gompers*, 221 U.S. at 448; *United States v. Darwin Const. Co., Inc.*, 873 F.2d 750, 753-54 (4th Cir. 1989).

Bagwell v. Int'l Union, United Mine Workers, 244 Va. 463, 475 (1992) (emphasis added).

Whether contempt is coercive or compensatory, it is axiomatic that the paradigm goal is to give the parties the benefit of the order to which they are subject. The two remedies are not coextensive alternatives afforded the predilection of litigants, but rather the Court must generally first resort to coercive contempt unless the same is no longer viable. This is because the Court's contempt power is there to enforce its orders, not to provide an alternative avenue for paying damages in disobedience thereof. Civil

compensatory contempt, though much less known, is a powerful tool available to the courts where coercion no longer leads to the equitable result contemplated by the order now violated. In other words, compensatory contempt is available where coercion has failed or is no longer workable to enforce the rights afforded an aggrieved party in the relevant court order.

With respect to equitable distribution in divorce actions, the *Code of Virginia* provides as follows: "The court shall have the *continuing authority* and jurisdiction to make any additional orders necessary to effectuate and enforce any order entered pursuant to this section, including the authority to . . . [p]unish as contempt of court any willful failure of a party to comply with the provisions of any order made by the court under this section." *Va. Code Ann.* § 20-107.3(K) (2005) (emphasis added). When the Court incorporates an agreement into a final divorce decree, it therefore can use its contempt power to enforce the terms of that agreement. *Id.* § 20-109.1; *Owney v. Owney*, 8 Va. App. 255, 259, 379 S.E.2d 745, 748, 5 Va. Law Rep. 2566 (1989). For an alleged contemnor to be held in contempt for violation of an order in a divorce decree, it must be shown that he or she acted in bad faith or willfully disobeyed the court order. *Alexander v. Alexander*, 12 Va. App. 691, 696, 406 S.E.2d 666, 669, 8 Va. Law Rep. 34 (1991). In a show cause hearing, the moving party need only prove that the offending party failed to comply with an order of the trial court; the offending party then has the burden of proving justification for his or her failure to comply. *Id.*

Hartley v. Hartley, 91 Va. Cir. 277, 280-81 (Norfolk 2015). "The movant's burden of proving the related compensatory damages, on the other hand, is by a preponderance of the evidence." *Id.* at 281.

An apt illustration of when civil compensatory contempt damages are appropriate occurred in *Nassabeh v. Montazami*, where the Court's Special Commissioner of Sale caused the Court to pay proceeds from a court-ordered sale of a home to the debtor instead of his creditor. Special commissioners of sale are personally immune from suit for carrying out their duties, and thus the Commissioner in *Nassabeh* could not be sued by

the aggrieved creditors for failing to honor their liens. However, the Commissioner was held in civil contempt by this Court for disobedience of the appointing order and ordered to compensate the creditor in question personally. In *Nassabeh*, the Commissioner could no longer be coerced into complying with the Court's appointing order inasmuch as the disbursement of funds had occurred long before the Court was made aware of the issue, and the Court was dispossessed of jurisdiction to take any other action to claw back from the debtor the funds he was wrongfully paid in the original case. The Court, however, maintained jurisdiction to enforce its orders via contempt, authority it likewise retains in the instant case. 101 Va. Cir. 151.

A corollary question is whether the compensatory award should include prejudgment interest. The Court "may provide for interest on any principal sum awarded, or any part thereof, and fix the period at which the interest shall commence." Va. Code § 8.01-382. "Generally, prejudgment interest is not allowed on unliquidated damages in dispute between the parties." *Advanced Marine Enters. v. PRC, Inc.*, 256 Va. 106, 126 (1998) (citing *Skretvedt v. Kouri*, 248 Va. 26, 36 (1994); *Beale v. King*, 204 Va. 443, 447 (1963)). The Decree did not specify GKR would receive \$100,000.00 from PSR, but rather that she would receive the sum from the *proceeds* of the sale of the marital home. The judgment was thus to sell the property and distribute contingent proceeds, and not for the identified amount directly to be paid by PSR. It was thus not an amount reduced to judgment, enforceable via normal collection proceedings. The award of prejudgment interest also requires a specific date from which the delay in payment is measured. See *Ragsdale v. Ragsdale*, 30 Va. App. 283, 293 (1999).

In the instant case, the Court could attempt to coerce the sale of the property or alternatively order the sale of the property via special commissioner of sale, thereby triggering the resulting contingent payment of the \$100,000.00 to GKR. This scenario poses the possibility of two inequitable results. GKR would be paid in inflated dollars, while PSR could be subjected to a considerable tax burden inasmuch as the property has greatly appreciated.

Thus, the only equitable remedy of enforcement of the civil contempt finding under the unusual circumstances of this case is thus for this Court to impose a compensatory damages award equal to what GKR's interest in the \$100,000.00 value would be as measured from 1996 forward⁸ under a *Brandenburg*-type calculation, to account for the damages caused by Plaintiff's willful disobedience of this Court's Decree. The *Brandenburg* formula is a method available in Virginia courts to determine the division of property in divorce cases, particularly when dealing with hybrid property including both marital and separate contributions. This formula more typically calculates the respective shares based on the contributions towards the property's acquisition or improvement. "The *Brandenburg* formula was approved by the Court of Appeals of Virginia in *Hart v. Hart*, 27 Va. App. 46, 65, 497 S.E.2d 496, 505 (1998), holding that the '*Brandenburg* formula is an acceptable method of tracing and determining the value of the marital and separate property components of hybrid property under Code § 20-107.3(A) (3).'" *Potter v. Potter*, No. 190174, 2005 Va. Cir. LEXIS 115, at *4 (Fairfax Aug. 4, 2005). In the instant matter, the Court resorts to an admittedly novel allusion to

⁸ GKR moved back into the property from 1994-96 when the parties attempted a reconciliation, thereby forfeiting the right to claim civil compensatory damages for any earlier period.

Brandenburg, in this atypical case, to account for the appreciation GKR would be entitled to from her \$100,000.00 share of the marital residence, which sale PSR intentionally thwarted.

A derivative question in the applicable *Brandenburg* calculation is whether the appreciation of one or two lots in the parties' names should be considered. One lot contains the marital home, while the adjoining lot is largely vacant land except for the parties' car garage partially encroaching into such lot. The Decree calls for the sale of the parties' marital "residence." In Virginia, a "residence" includes the curtilage, which can encompass a garage for cars. The concept of curtilage is well-established in criminal jurisprudence and can include the area immediately surrounding and associated with the home.

The curtilage is a well-established common law concept describing the area immediately surrounding one's house, as defined by "its relationship to the residence and its use by its occupants." *Foley v. Commonwealth*, 63 Va. App. 186, 195, 755 S.E.2d 473, 478 (2014). The term "curtilage," as it is used in the legal context, "is historically understood to refer to an extension of the home that is so intertwined with the home that the law must provide it the same protection as the home itself."

Stickle v. Commonwealth, 68 Va. App. 321, 334 (2017).

Residential garages may be considered to be within the curtilage. For instance, in *Commonwealth v. Carper*, 11 Va. Cir. 181, 184 (Frederick 1988), the court determined a detached garage, even if somewhat separated from the main house, was part of the curtilage due to its intimate usage relationship with the dwelling. The United States Supreme Court has guided curtilage includes "an area adjacent to the home and 'to which the activity of home life extends.'" *Collins v. Virginia*, 584 U.S. 586, 594 (2018) (internal

citation omitted); see Va. Code § 64.2-308.16 (including “curtilage” in the scope of “family residence”).

Hence, the “residence” in the case at bar comprises two parcels of land, containing on one lot the marital home and partially, the associated car garage, which encroaches into the adjoining lot. Per tax assessments by local county authorities introduced as evidence at trial, the assessed value of the residence was \$523,900.00 in 1996, and \$1,276,900.00 in 2023. In 1994-1996, GKR last occupied the Property, interrupting her right to enforce sale of the residence. Thereafter, PSR has benefitted from the unrestricted use and appreciation of the Property, including the portion attributable to the \$100,000.00 of locked-in value belonging to GKR. It would be inequitable and a windfall to PSR to allow him to benefit from his recalcitrance in not complying with the Decree by paying GKR for 1996 dollars in 2024 dollars. This would not account for the diminution of the value thereof since 1996.

The Court has already analyzed why prejudgment interest is not available in this case, because the payment of the funds as ordered in 1988 was contingent rather than liquidated. Another inequitable result of effecting coercive contempt at this late date to sell the residence would be on the other side of this litigation coin, thereby unnecessarily subjecting PSR to capital gains taxes on the sale of the Property he wishes to keep as his home. Thus, alluding to a portion of the *Brandenburg* formula, the \$100,000.00 PSR should have paid GKR in 1996 upon her departure from the home, should be compensated at \$243,729.00 (equaling 243.79% appreciation in the residence since 1996 multiplied by \$100,000.00) to now make her whole. In addition, PSR shall pay GKR \$80,000.00 in reduced attorney fees and costs as a matter of the Court’s power to do

what is equitable. Va. Code § 20-99 (“6. Costs may be awarded to either party as equity and justice may require.”).⁹ Considering the evaluative framework suggested in *Dwoskin*, No. CL-2019-3494, 2021 Va. Cir. LEXIS 40, the Court finds the trial record supports such an award as reasonable. PSR does not dispute his significant financial ability to pay, and in fact even boasted of it to this Court.

The total amount awarded shall be reduced to judgment. Plaintiff shall have 120 days after entry of this Court’s final order to pay the contempt judgment to Defendant, and if he chooses not to do so, Defendant may enforce this judgment by approaching this Court for sale of the Property via special commissioner of sale. Post-judgment interest will begin to run after the 120-day deadline, that is, commencing on day 121 following the final order of this Court. Upon receipt of the full payment due hereunder, Defendant *shall* forthwith quitclaim her interest in the property to Plaintiff, and file with the Court a satisfaction of the judgment.

CONCLUSION

The Court has considered the unusual circumstance wherein Defendant GKR, former wife of Plaintiff, seeks enforcement of the sale of the former marital residence in excess of 36 years after entry of the governing Decree, so as to collect the \$100,000.00 contingent thereon, and prayer for prejudgment interest and attorney fees and costs. Plaintiff PSR, former husband of Defendant, responds that, while the order required him

⁹ Independent of this statutory authority limited to family law cases, the Supreme Court of Virginia has noted, at least in the context of equitable actions, that award of attorney fees may be proper where otherwise, the prevailing litigant’s “victory would have been hollow.” *Prospect Dev. Co. v. Bershader*, 258 Va. 75, 93 (1999).

to sell the Property, the timing of such sale was left up to him and, because he has not yet made a decision to sell the property, he owes nothing to his former wife at present. Plaintiff further alternatively avers that even if he owes Defendant anything, it is the \$100,000.00 he offered to pay in cash in 2002 minus \$25,000.00 he claims she owes him as a retirement equalization payment Defendant has allegedly refused to tender to him. Defendant initiated the proceedings by "Motion to Enforce," which trial thereof was previously continued by this Court to permit the filing of cross-rules by the parties inasmuch as the Court opined its powers to enforce court orders are significantly limited when not proceeding by Rule to Show Cause. Subsequently, GKR filed a Rule against PSR, to which PSR responded with an Answer and Affirmative Defenses, asserting therein his "counterclaim." Trial was had on the expanded pleadings, the Court thereafter considering the litigants' dueling post-trial briefs.

The parties presented the Court with a number of issues of apparent first impression, namely: 1) whether the scope of a "Motion to Enforce" includes ordering the judicial sale of the property *and* the levying of prejudgment interest; 2) whether Plaintiff is in violation of the terms of the parties' Decree in not selling the marital property heretofore; 3) whether the defense of laches excuses performance of the sale by Plaintiff; 4) whether Plaintiff may counterclaim for a set-off for Defendant's alleged nonpayment of a retirement equalization amount; and 5) whether if Plaintiff is in contempt of court, the remedy afforded is coercive or compensatory.

First, the Motion to Enforce power of the Court thereunder is limited by statute to the sale of the property via a special commissioner of sale and does not include the awarding of compensatory damages or prejudgment interest. Second, the Court finds

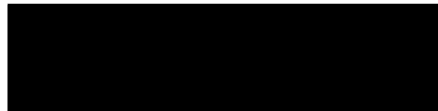
Plaintiff is in violation of the Decree in not previously selling the marital home and paying Defendant her \$100,000.00. Plaintiff's failure to take *any* action "promptly" to sell the Property during the last 36 years is thus in clear contempt of a specific command by this Court. Third, Plaintiff's defense of laches, otherwise doubtful in applicability to the Court's order, does not apply despite the undue delay in enforcement by Defendant because there has been only benefit and no prejudice to Plaintiff from such delay. Fourth, as to Plaintiff's "counterclaim" for \$25,000.00, disputed by Defendant, the evidence is at best in equipoise. Even if Plaintiff were entitled to this claim, enforcement of the Decree in the within case must, generally, come by resort to the Court's contempt power. Plaintiff was afforded an equal opportunity to proceed by Rule; he instead, in derogation of the Court's guidance, asserted a *contractual* "counterclaim" for set-off in his Answer and Affirmative Defenses, which is not an affirmative defense to disobedience of a court order. Fifth, the remedy to be afforded Defendant is civil compensatory contempt damages in allusion to part of the *Brandenburg* formula, to account for the increase in value of the \$100,000.00 portion from the marital residence due Defendant as of 1996 when she last moved out of the home, coercive contempt no longer being viable as it would result in Defendant not being paid the full value of her equitable distribution award and would conversely result in significant adverse tax consequences to Plaintiff.

Consequently, the Court shall enter a separate order holding Plaintiff in civil contempt, awarding Defendant civil contempt compensatory damages in the amount of \$243,729.00 for the failure of Plaintiff to sell the property as measured from 1996, and an equitable reduced portion of her attorney fees and costs in the amount of \$80,000.00, and denying Plaintiff's counterclaim. Plaintiff shall have 120 days after entry of this Court's

final order to pay the judgment, and thereafter, if the judgment remains unpaid, post-judgment interest will begin to run, and Defendant may then approach the Court for appointment of a special commissioner of sale to satisfy her judgment by sale of the Property,¹⁰ or otherwise seek collection on her judgment under normal remedies available in collection of a debt.

THIS CAUSE CONTINUES pending entry of the final order incorporating this Letter Opinion by reference, which shall further delineate that upon his full compliance with such order, Plaintiff's civil contempt shall be deemed purged.

Sincerely,

A solid black rectangular redaction box covering the signature of David Bernhard.

David Bernhard
Judge, Fairfax Circuit Court

¹⁰ The parties dispute whether the word "residence" in their Decree includes only the lot upon which the former marital home sits or also the adjoining lot to which part of the garage protrudes, both lots being titled in the name of the parties. Because the parties occupied both lots as their marital residence as analyzed heretofore, this Court could sell both lots in satisfaction of the judgment but could also direct the special commissioner of sale to sell only one of the parcels sufficient to satisfy the judgment of Defendant. However, selling of only one lot could prove problematic unless the garage which sits on both lots is partially demolished. The decision of whether to sell one or both lots is left to the court enforcing Defendant's judgment should a sale become necessary. However, PSR indicated to the Court he is of significant means and can satisfy any judgment the Court could possibly impose, so, the sale of either lot may prove unnecessary.