

**Legal Malpractice – A Call for a Discovery Rule in Virginia. *Van Dam V. Gay*, 699 S.E. 2d 480 (Va.S.Ct. 2010).**

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## **Introduction**

The Virginia General Assembly has consistently rejected a discovery rule. A discovery rule causes a right of action to accrue and the statute of limitation period to run from the date the damage is discovered. Without a discovery rule, and pursuant to the Virginia Code, a right of action accrues when a breach of contract occurs. *See* Virginia Code § 8.01-230. In *Gay*, the absence of a discovery rule resulted in the plaintiff having her legal malpractice action against her former divorce attorney dismissed.

In Virginia, actions for legal malpractice sound in contract. That means a plaintiff must bring their right of action within two (2) years of an oral breach; and within three (3) years of a written breach. The problem is, however, that many plaintiff’s are unaware that a breach occurred. In *Gay*, the plaintiff brought her action twenty-three (23) years late, since she was unaware that the damage occurred when the court entered her divorce decree. Therefore, Virginia Code § 8.01-230 should be amended to include a discovery rule. As it is written today, the law protects the attorney at the peril of his client.

## **I. Background**

The *Gay* case involves the assignment of retirement benefits in divorce. The assignment of retirement benefits in divorce is notoriously mishandled by many family law attorneys. Timing is perhaps one of the biggest issues for malpractice. Timing refers to *when* a court order, such as a Qualified Domestic Relations Order (“QDRO”) for ERISA plans, should be entered with the court; and *when* the order should be served upon a plan administrator. To properly secure a client’s benefits, the court order should be entered concurrently with the divorce decree. A certified copy of the order should then be served immediately upon the plan administrator.

Under federal plans like the two (2) plans in *Gay*, the rule is this: a former spouse loses his or her retirement benefits at divorce, in connection with the marriage, by operation of law. The operation of law rule also applies to ERISA-based plans. Importantly, it is the court order, or QDRO if it is an ERISA plan, that secures a former spouse’s benefits. Most family law attorneys ignore this timing rule and its potential impact on their client. Like *Gay*, failure to recognize the timing rules can result in a denial of benefits.

## II. Statement of the Case

Holding: The plaintiff's legal injury arose when the court entered her divorce decree in 1986. The circuit court properly dismissed the plaintiff's case (sustaining plea in bar) for failing to comply with the statute of limitations under Virginia Code § 8.01-230. The Virginia Supreme Court affirmed the lower court's decision.

Facts and Procedural History: The plaintiff, Josephine Van Dam, and her former husband, Nicholas Van Dam, were parties to a divorce suit in 1986. The plaintiff retained the defendant Gordon B. Gay, an attorney at law, to represent her in the suit. The parties, through their attorneys, negotiated a settlement agreement; and the circuit court entered a final decree of divorce on November 3, 1986. During the marriage, the husband accrued benefits under the Civil Service Retirement System ("CSRS") and Military Retired Pay. The divorce decree assigned the plaintiff her marital share of the retirement benefits, including survivor benefits. The plaintiff and her attorney failed to timely serve the respective plan administrators with the decree or clarifying order. The former husband died on June 22, 2006. The plaintiff applied for benefits to both federal agencies. The plan administrators denied the plaintiff's claims. The plaintiff then brought suit against her divorce attorney for malpractice.

## III. Analysis

The Court's holding in *Gay* is correct. It is the role of the General Assembly, not the courts, to change the rule of law.

### A. Statutory Construction of Virginia Code § 8.01-230

In *Gay*, the Virginia Supreme Court properly construed the Virginia Code. The court's holding is correct, irrespective of which statutory interpretation theory that you apply: Textualism, Intentionalism or Purposivism. All three theories point to the same conclusion. That is, Virginia Code § 8.01-230 deems the statute of limitation period under a breach of contract to begin *when the breach occurs*, not when the breach is discovered. Below is the text of the statute.

*Va. Code Ann. § 8.01-230 (2011)*

§ 8.01-230. Accrual of right of action

In every action for which a limitation period is prescribed, the *right of action* shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person or damage to property, when the *breach of contract occurs* in actions ex contractu and *not when the resulting damage is discovered*, except where the relief sought is solely equitable or where otherwise provided under § 8.01-233, subsection C of § 8.01-245, §§ 8.01-249, 8.01-250 or other statute (*emphasis added*).

The Virginia Supreme Court began its analysis with the text of the statute. The words used are unambiguous. Next, the Court looked to the intent and purpose of the statute. In doing so, the Court properly examined the legislative intent. The Court noted that the legislators rejected proposals to add a discovery rule. See H.B. 486, Va. Gen. Assem. (Reg. Sess. 1994) and H.B. 569, Va. Gen. Assem. (Reg. Sess. 1994). Therefore, the Court concluded that the plaintiff's suit is time barred under the Virginia Code since her damage occurred when the circuit court entered the decree of divorce in 1986. According to the Court, and implying that an injustice had occurred, only the Virginia General Assembly can set the rule of law, not the courts.

#### B. Federal Retirement Plans Impose Stringent Timing Requirements for Former Spouse's Seeking Divorce Related Benefits

In *Gay*, the former husband had accrued benefits under the Civil Service Retirement System ("CSRS") and Military Retired Pay during the marriage. CSRS benefits are governed by 5 U.S.C. § 8301, *et seq.* The assignment of Military Retired Pay is governed by the Uniformed Services Former Spouse's Protection Act ("USFSPA"), codified as 10 U.S.C. 1408, *et seq.* ("USFSPA").

Under both CSRS and Military Retired Pay, a former spouse loses her retirement benefits, in connection with the marriage, by operation of law. *See* 5 U.S.C. § 8339(j)(5) and 10 U.S.C. § 1448 (b)(3)(A) respectively; *see also Matter of Haviland*, 1996 U.S. Comp. Gen. LEXIS 313 (1996) (holding that survivor benefit coverage for a former spouse terminates upon marriage). Moreover, under the USFSPA, an election for survivor benefits (referred to as SBP) by a former spouse must be made within one (1) year of the divorce. *Id.* In *Gay*, the plaintiff and her attorney failed to comply with federal law. As a result, each plan properly denied the plaintiff's claim.

#### C. Distinguishing Between a Right of Action and a Cause of Action

The Court also made a distinction between a right of action and a cause of action. The terms are not synonymous. Virginia Code § 8.01-230 uses the term right of action. Importantly, a right of action cannot arise until a cause of action exists. In *Gay*, the plaintiff contended that her right of action did not accrue until she suffered damage arising from the attorney's malpractice, which was the death of her former husband. The plaintiff relied on the testamentary case of *Rutter*. *See Rutter v. Woltz, Blechman, Woltz, & Kelly*, P.C., 568 S.E.2d 693 (Va.S.Ct. 2002). In *Rutter*, the executor of a decedent's estate sued a law firm for malpractice. The firm prepared testamentary documents that resulted in tax liability to the decedent's estate.

In *Rutter*, the issue was whether the cause of action arose during the decedent's lifetime and survived her death. Under the Virginia Code, only actions that survive a party's death are those actions that "existed" prior to the party's death. In other words, the issue was whether the decedent could have maintained the malpractice suit against her attorney during her lifetime. The *Rutter* Court answered the question in the negative. The *Rutter* Court reasoned that no cause of action existed until the decedent sustained some injury or damage.

In *Gay*, the Supreme Court distinguished the facts of *Rutter*. According to the Court, the difference lies in the mutability or ability to change a testamentary disposition. That is, in a testamentary disposition, the testator may change his disposition as he pleases. A will or trust does not take effect until the death of the testator; a beneficiary only has a bare expectancy. Conversely in *Gay*, the plaintiff suffered a legal injury arising out of the attorney's alleged malpractice when the circuit court entered the divorce decree.

## **Conclusion**

The Supreme Court's interpretation of Virginia Code § 8.01-230 is correct. Under Virginia law, the statute of limitations period begins to run when the damage occurs, not when discovered. Importantly in *Gay*, the plaintiff's damage occurred when the circuit court entered the divorce decree. Therefore, the court properly dismissed the plaintiff's case for failing to comply with the statute of limitations.

Without a discovery rule in Virginia, too many plaintiffs are denied a remedy. Importantly, many plaintiff's are unaware of when the damage actually occurs. As stated by the Court in *Gay*, it is the role of the General Assembly, not the courts, to change the rule of law. Therefore, Virginia Code § 8.01-230 should be amended to include a discovery rule so that all plaintiffs will have their day in court.