216 Va. 378

CLERK
SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 741109

DAVID CAPPS SR.

Appellant

v.

PATRICIA DIANE SEWELL CAPPS

Appellee

APPENDIX

HOWARD I. LEGUM
Fine, Fine, Legum & Fine
720 Law Building
Norfolk, Virginia

Counsel for Appellant

TONITA M. WARREN
Suite 202
2901 West Avenue
Newport News, Va.

Counsel for Appellee

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O R D E R

THIS CAUSE came on May 10, 1974 to be heard upon the Plaintiff's Bill of Complaint for rescission of a Property Settlement attached to and made part of your Plaintiff's Bill of Complaint which had previously been filed in this Court and served on your Defendant, on your Defendant's Answer, the evidence heard ore tenus, and was argued by counsel, for the Plaintiff and Defendant.

UPON CONSIDERATION WHEREOF the Court finds that the Property Settlement entered into is unenforceable as contrary to public policy.

WHEREFORE, it is ORDERED that this Property Settlement be rescinded and nothing further to be done that this cause be removed from the docket and placed among the ended causes.

ENTER: 7/26/74

JUDGE

I Ask for This:

,p.q.

TONITA M. WARREN, ESQUIRE
Newport News Legal Aid Society
2901 West Avenue, Suite 202
Newport News, Virginia 23607

Seen and exception noted:

HOWARD I. LEGUM

A COPY. TESTE: GEORGE D. DeSHAZOR, Clerk

BY Linda Weatherly D. C.

BILL OF COMPLAINT

TO AN HONORABLE JUDGE OF THE AFORESAID COURT:

Your Plaintiff respectfully represents as follows:

1. That your Plaintiff was lawfully married to the Defendant on the 9th day of October, 1969, in the City of Roanoke Rapids, North Carolina.

2. That on December 5, 1973, the Defendant filed a Bill of Complaint for divorce in the Circuit Court for the City of Newport News, alleging the desertion of the Plaintiff which case is presently pending in your Court.

3. That on December 19, 1972, the Plaintiff and the Defendant entered into a post nuptial contract to define their respective rights in certain real property in the City of Newport News, a copy of which is attached as Plaintiff's Exhibit "A".

4. That the provisions of the contract requiring the Plaintiff to convey by deed to the Defendant her interests in said real property upon the institution by either party of "a suit for divorce, a suit for separate maintenance or any other legal proceedings affecting the marital relationship" are unenforceable due to a lack of present consideration in that the Defendant agreed only to make payments on the said real property which was a duty already binding upon him by nature of his relationship as husband of the Plaintiff, and in that these payments were future obligations in the said real property and thereby the Defendant gave no present consideration.

5. That the aforesaid provisions are as against public policy in that all of Plaintiff's rights in the property held jointly by the Plaintiff and Defendant as husband and wife would be forfeited by her in the exercise of other legal rights incident to the marriage therefore, and act to control her freedom of choice and action.

6. That the aforesaid provisions are unconscionable in that the Plaintiff was without benefit of legal council and had no knowledge of the Defendant's legal responsibility as her husband and further the parties stood on unequal footing as your Plaintiff had no independent resources and thereby signed the aforesaid agreement without any understanding of her individual and marital rights.

7. That the provisions of the contract rendereng such agreement enforceable upon the institution of divorce or separation proceedings by "either party" so as to facilitate a separation after marriage is inequitable and in violation of public policy upholding the sanctity of the marriage of the two parties and further amounts to a forfeiture of the Plaintiff's rights in the said real property without good and sufficient consideration therefore.

WHEREFORE, your Plaintiff, by reason of the aforesaid representation, prays that this Court rescind the aforesaid contract as unconsciounable, inequitable, contrary to public policy and unenforceable as between the parties to this suit.

Respectfully Submitted:

PATRICIA DIANE SEAWELL CAPPS
By Counsel

Tonita M Warren, p.q.

Tonita M. Warren, Esquire
Newport News Legal Aid Society
2901 West Avenue, Suite 202
Newport News, Virginia 23607

CERTIFICATE

I hereby certify that a true copy of the foregoing Bill of Complaint was mailed, postage fully prepaid, to Louis Ellenson, Esquire, First & Merchants National Bank Building, 2600 Washington Avenue, Suite 410, Newport News, Virginia, 23607, counsel of record for the Defendant, this 17th day of December, 1973.

Tonita M. Warren
Tonita M. Warren, Esquire

EXHIBIT "A" OF BILL OF COMPLAINT

THIS AGREEMENT made this 19 day of December, 1972, by and between DAVID CAPPS, SR. hereinafter known as Husband, and PATRICIA DIANE SEAWELL CAPPS, hereinafter known as Wife,

WITNESSETH:

WHEREAS the parties were lawfu-ly married on October 9, 1969, in Roanoke Rapids, North Carolina; and

WHEREAS on child has been born of this marriage, namely, DAVID CAPPS, JR., born 1971, and one child has been adopted, namely, Serena Leigh Seawell Capps, born to the Wife on June 23, 1969, and adopted on November 9, 1970; and

WHEREAS the Husband proposes to purchase certain real property in the City of Newport News, Virginia, briefly described as Lot 22, Section 3, Green Oaks, and more commonly known as 1189 Tyler Avenue, Newport News, Virginia, and a condition of his obtaining a mortgage loan on the said property is the joint execution by the Wife with the Husband of a promissory note and deed of trust on the said property; and

WHEREAS the Husband has agreed that the title to the said property shall be taken in the joint names of husband and wife; and

WHEREAS the parties desire to define their respective rights in the said real property;

NOW, THEREFORE, THESE PRESENTS WITNESSETH: That for and in consideration of the agreement by the Husband to pay the purchase price of the said property in excess of the said mortgage loan, the parties do hereby agree as follows:

That in the event either party hereafter institutes a suit for divorce, a suit for separate maintenance, or any other legal proceedings affecting the marital relationship, the Wife will execute and deliver a good and sufficient deed, with covenants of general warranty of the said real property to the Husband.

The Husband agrees that, simultaneously with the execution and delivery of the deed as aforesaid, he will execute and deliver such documents as may be necessary to assume and promise to pay any indebtedness or liens on the said real property, and to save the Wife harmless from any claims therefore.

This Agreement shall not be construed as an agreement to separate, since the parties are now living together with no prospect of separation, but the parties agree that this agreement shall be incorporated into any decree of divorce or separate maintenance hereinafter granted to either party, and that nothing inconsistent with the provisions herein shall be incorporated into any such decree.

WITNESS the following signatures and seals:

/s/David Capps, Sr.

/s/Patricia Diane Seawell Capps

STATE OF VIRGINIA

City of Newport News, to-wit:

I, Rutherford C. Lake, Jr. , a Notary Public in and for the City and State aforesaid, whose commission expires on the 12 day of July, 1974, do hereby certify that DAVID CAPPS, SR. whose name is signed to the foregoing wrting bearing date on the 19 day of December, 1972, has acknowledged the same before me in my city and State aforesaid.

Given under my hand this 19 day of December, 1972.

/s/ Rutherford C. Lake, Jr.
Notary Public

STATE OF VIRGINIA

City of Newport News, to-wit:

I, Rutherford C. Lake, Jr. , a Notary Public in and for the City and State aforesaid, whose commission expires on the 12 day of July, 1974, do hereby certify that PATRICIA DIANE SEAWELL CAPPS whose name is signed to the foregoing writing bearing date on the 19 day of December, 1972, has acknowledged the same beforeme in my City and State aforesaid.

Given under my hand this 19 day of December, 1972.

/s/ Rutherford C. Lake, Jr.
Notary Public

ANSWER

Comes now the Defendant, David Capps, Sr., by counsel, for his Answer to the Bill of Complaint filed against him, and says as follows:

1. That he admits the allegations of fact contained in paragraphs numbered 1, 2, and 3 of said complaint.

2. That he categorically denies the allegations contained in paragraphs numbered 4, 5, 6, and 7 of said Bill of Complaint and demands strict and convincing proof thereof; and further, the Defendant states that the contract concerned herein is a legal and binding instrument, entered into for consideration.

WHEREFORE, your Defendant prays that the Plaintiff's Bill of Complaint be dismissed, and the relief prayed for therein denied.

DAVID CAPPS, SR.

By:_____
Counsel

ELLENSON, FOX AND WITTAN, INC., p. d.
Attorneys at Law
410 First and Merchants National Bank Building
Post Office Box 410
Newport News, Virginia 23607

By:_____

I certify that on.....
I mailed a true copy of the foregoing pleadings to each counsel of record for the plaintiff.
_____p. d.

NOTICE OF MOTION

Please take notice that on 10 May, 1974, at 2:00 p.m., or as soon thereafter as I may be heard at the Courthouse of the above Court, I will move the Court to require you to execute a deed in accordance with our contract filed as Exhibit "A" with the Bill of Complaint herein. A copy of the deed is attached herewith and the undersigned will move the Court to require specific performance of the said agreement and an order directing you to comply on your part by executing the deed attached herein.

DAVID CAPPS, SR.

By: _____
Of Counsel

HARRY E. ATKINSON, p.d.
555 Denbigh Boulevard
Newport News, Virginia 23602

I certify that a copy of this pleading was mailed to all counsel of record on the day of ; 19 .

_____

THIS ASSUMPTION DEED, made this 3rd day of May, 1974,

by and between DAVID CAPPS, SR. and PATRICIA S. CAPPS, husband and wife, party of the first part; and DAVID CAPPS, SR.

party of the second part:

WITNESSETH: That for and in consideration of the sum of TEN DOLLARS ($10.00), cash in hand paid, and the further consideration of the assumption by the party of the second part, as evidenced by said party joining in the execution hereof, of the payment of the balance due under that certain deed of trust from David Capps, Sr. and Patricia S. Capps, husband and wife, to James E. Millar, et al, trustee, dated December 19, 1972, and recorded in the Clerk's Office of the Circuit Court for the City of Newport News, Virginia, in Deed Book 812, page 528, securing the original principal sum of $19,950.00, to Weaver Bros., Inc., a Delaware corporation

the party of the first part doth hereby grant and convey, with General Warranty of Title, unto the said party of the second part, his heirs, successors and assigns, in fee simple forever,

the following described property, to-wit:

All that certain lot, piece or parcel of land situate, lying and being in the City of Newport News (formerly City of Warwick), Virginia, known and designated as Lot Numbered TWENTY-TWO (22) as shown on that certain plat entitled "Plat of Green Oaks, Third Section, Newport District, City of Warwick, Virginia," property of Thomas J. Hundley and B. C. Greene, made by Robert F. Pyle, Certified Land Surveyor, dated August 14, 1952, and recorded in the Clerk's Office of the Circuit Court for the City of Newport News, Virginia, in Plat Book 3, page 35, to which reference is here made.

Subject to easements and restrictions of record affecting said property.

Together with all and singular the buildings and improvements thereon, tenements, hereditaments, easements and appurtenances thereunto belonging, or in anywise appertaining.

LAW OFFICES
555 Denbigh Blvd.
NEWPORT NEWS, VA.

TO HAVE AND TO HOLD the said land unto DAVID CAPPS, SR., his heirs, successors and assigns, in fee simple forever.

Save as aforesaid, the said party of the first part covenants that he has the right to convey the said land to the grantee; that he has done no act to encumber the said land; that the grantee shall have quiet possession of the land, free from all encumbrances and that the said party of the first part will execute such further assurances of the said land as may be requisite.

Whenever used herein, the singular shall include the plural, the plural the singular, and the use of any gender shall include all other genders.

Witness the following signatures and seals

DAVID CAPPS, SR.	(Seal)	DAVID CAPPS, SR.	(Seal)
PATRICIA S. CAPPS	(Seal)		(Seal)

STATE OF VIRGINIA
City of Newport News, , to-wit:

I, , a Notary Public in and for the City and State aforesaid, whose commission expires on the day of , 19 , hereby certify that DAVID CAPPS, SR. whose name is signed to the foregoing writing bearing date on the 3rd day of May , 19 74, has acknowledged the same before me in my City and State aforesaid.

Given under my hand this day of May , 19 74.

Notary Public

STATE OF VIRGINIA
City of Newport News , to-wit:

I, , a Notary Public in and for the City and State aforesaid, whose commission expires on the day of , 19 , hereby certify that PATRICIA S. CAPPS whose name is signed to the foregoing writing bearing date on the 3rd day of May , 19 74, has acknowledged the same before me in my City and State aforesaid.

Given under my hand this day of May , 19 74.

Notary Public

LAW OFFICES
5 DENBIGH BLVD.
NEWPORT NEWS, VA.

NOTICE OF APPEAL

Defendant, David Capps, Sr., appeals from the final order entered in the above-styled case on July 26, 1974, in the Chancery suit in which Patricia Diane Seawell Capps was Complainant and David Capps, Sr., was Defendant.

ASSIGNMENTS OF ERROR

1. The Court erred in entering the final order of July 26, 1974.

2. The Court erred in finding that the agreement dated December 19, 1972, by the parties was unenforceable as contrary to public policy.

3. The Court erred in holding that the agreement of December 19, 1972, by the parties be rescinded.

4. The Court erred in refusing to hold that the written agreement of December 19, 1972, by the parties was a legally binding instrument.

5. The Court erred in refusing to grant the motion of defendant, David Capps, Sr., to require the complainant, Patricia Diane Seawell Capps, to execute a deed in accordance with the written agreement of December 19, 1972.

6. The Court erred in refusing to grant the motion of defendant, David Capps, Sr., to require the complainant to perform specifically said agreement and to execute the deed dated May 3, 1974, which was attached to a notice of motion returnable May 10, 1974, at 2:00 P.M.

7. The Court erred in sustaining the motion of counsel for the complainant to strike the evidence offered by the defendant, when the complainant did not offer any evidence in support of her bill of complaint, and the Court treated the answer of the defendant and the motion for specific performances as a cross-bill.

8. The Court erred in granting the prayer of the bill of complaint.

CERTIFICATE

The transcript of the proceedings before the Court on May 10, 1974, was previously filed by the Court Reporter in the Clerk's Office of this Court and is part of the record.

DAVID CAPPS, SR.

s/sBy Howard I. Legum

HOWARD I LEGUM p.d.
Fine, Fine, Legum & Fine
720 Law Building
Norfolk, Virginia 23510

I certify that a copy was mailed this 6th day of August, 1974, to Ms. Tonita M. Warren, p.g.

s/sHoward I. Legum

FILED
8/7/74

1 have to work that out. I don't recall that --
2 not being in the order, of course.
3 All right, let's proceed.
4 MR. ATKINSON: Now we move on
5 to the matter that is filed in the matter of
6 Patricia Capps v. David Capps, having to do
7 with the specific performance of a contract.
8 The parties undertook in 1973
9 to purchase a house in the City of Newport
10 News, and because of problems that had
11 existed between the parties previous to the
12 purchase of the residence, a pre-purchase
13 agreement was entered into by the parties.
14 The agreement was drawn by Mr. Lake, and was
15 executed by the parties concerned.
16 We are here today saying to you
17 that we want to order an enforcement of the
18 agreement, and it is filed with the papers
19 in this matter a proposed deed, and a copy
20 of it has been served on the Plaintiff in
21 this matter, and we want you to hear the
22 evidence, and then order a specific performance
23 of the contract.
24 COURT: I may be in the
25 wrong file because I don't have it.

1 MR. ATKINSON: Well, maybe
2 I put the wrong number on there and got it
3 crossed again, Judge.
4 COURT: The deed is
5 in the wrong file.
6 MR. ATKINSON: It is probably
7 in the wrong file because I put the wrong
8 number on it.
9 COURT: Everything is
10 filed in the wrong file. -- You have the
11 wrong number on it.
12 MR. ATKINSON: Yes, sir, this
13 should be 478 - -
14 COURT: That is no
15 problem, we can separate that at a later
16 time.
17 MR. ATKINSON: Yes, sir.
18 COURT: Your position
19 is that you want a specific performance of
20 the contract?
21 MR. ATKINSON: Yes, sir. I
22 have Mr. Lake.
23 COURT: Mrs. Warren,
24 what do you say about him proceeding for
25 specific performance of a contract by way of

1 a motion? I didn't know you could do that.
2 MRS. WARREN: I think it is
3 rather unusual, I admit.
4 COURT: You have a bill
5 to . . .
6 MRS. WARREN: To rescind the
7 contract.
8 COURT: To rescind the
9 contract. I don't think you can seek
10 specific performance merely by notice, I think
11 you have to do it by way of answer and cross
12 bill at the very least.
13 MR. ATKINSON: An answer has
14 been filed by other counsel.
15 COURT: Yes, sir, but
16 there is no cross bill seeking specific
17 performance. - - Unless it is mixed up
18 in this divorce file. - - What does the
19 answer say?
20 MR. ATKINSON: The answer says,
21 this was filed by previous counsel in the
22 matter, that he denied the fact that it
23 was not a valid instrument; said that it
24 was a valid instrument; and is a legal and
25 binding instrument entered into for a

1 consideration. The parties are then at
2 issue, having a . . .
3 COURT: They are at
4 issue as to the validity of the contract,
5 but specific performance -- I don't believe
6 they are at issue. I don't know that we
7 gain much by delaying the matter. We are
8 all here.
9 MR. ATKINSON: The matter
10 came on as a bill of complaint, and that
11 is the way it was docketed in this Court,
12 and I am taking up . . .
13 COURT: The matter
14 came on as a bill of complaint seeking to
15 rescind the contract; and answer has been
16 filed in which the invalidity of the contract,
17 alleged invalidity of the contract has been
18 denied; but nowhere has there been a
19 prayer for specific performance, or any
20 notice served on them -- or bill instituted
21 for that, and I am not sure you can do it
22 by notice.
23 Inasmuch as we are here, every-
24 body is ready, I assume, to be heard, in
25 absence of serious objection, I will hear you.

1 MRS. WARREN: I don't have any
2 serious objection. I would have to go ahead
3 and proceed on this basis.
4 COURT: If it becomes
5 necessary, we can file an amended bill
6 of some sort, a cross bill, if it should
7 become necessary, and we can nunc pro tunc
8 as far as that is concerned. We are all
9 here, and we might as well proceed.
10 All right, we will proceed.
11
12 MR. RUTHERFORD C. LAKE, JR., called
13 as a witness on behalf of the Defendant,
14 being first duly sworn, testified as
15 follows:
16
17 DIRECT EXAMINATION
18
19 BY MR. ATKINSON:
20 Q State your name and occupation, sir.
21 A Rutherford C. Lake, Jr., Attorney,
22 Newport News.
23 Q And do you know or are you acquainted
24 with David Capps, Sr., and Patricia Diane Seawell Capps,
25 the parties to this matter?

1 A I am.

2 Q And in what capacity did you become

3 acquainted with them, Mr. Lake?

4 A My files reveal I first became

5 acquainted with the parties, the first with David Capps,

6 in October, '69, My notes show that he had recently been

7 married to Patricia Diane Seawell Capps, and the purpose

8 of the proceeding at that time was for the adoption of the

9 child of Patricia Diane Seawell.

10 Subsequently, I represented the

11 parties, we carried through the adoption, the order was

12 entered in November, 1970.

13 There was subsequent marital

14 disturbances back and forth through the years, and in 1971,

15 July 15, 1971, Mrs. Capps filed a bill of complaint for

16 divorce, which was subsequently dismissed -- voluntarily

17 dismissed agreed on July 20, 1971.

18 Later in 1972, David came to see me

19 about buying a house. I believe it was a house that they

20 had been renting. Contract was signed, supposedly,

21 according to the dates here, on October 18, 1972; and

22 projected date of closing was November 30, 1972. There

23 were the usual flare-ups from time to time about the contract

24 and about repairs, etc., and David had expressed to me his

25 great concern about his marital situation, and the possibility

1 of Mrs. Capps leaving him or again filing a bill for divorce;
2 and was concerned as to what would happen to the property
3 if he bought it and subsequently his wife started action
4 for a divorce. His concern, I recall distinctly, was . . .
5 MRS. WARREN: I am going to
6 continue to object to this type of testimony.
7 David Capps is not here to verify this
8 and I can't cross-examine him.
9 COURT: Well, was Mrs.
10 Capps present at this meeting?
11 A I don't believe so, your Honor.
12 COURT: I don't think
13 it is admissible.
14 Q All right, did there come a time
15 in this course that you prepared an agreement for the two
16 of them to execute?
17 A Yes, I did.
18 Q And do you have the original copy
19 of that agreement in your file?
20 A I have an original - - my recollection
21 is that I prepared at least two or three duplicate, or
22 triplicate originals. We generally do.
23 MR. ATKINSON: I ask that this
24 be marked as - - I am Defendant in this - -
25 as Defendant's Exhibit 1, and received in
evidence.

1 (Agreement was accepted in
2 evidence marked Defendant's
3 Exhibit 1.)
4 BY MR. ATKINSON:
5 Q That agreement you have just handed
6 me, and now has been marked Defendant's Exhibit 1 in this
7 matter, Mr. Lake, was it executed by the parties?
8 A Yes, it was.
9 Q And was it executed in your presence?
10 A Yes, it was.
11 Q Who took the notary?
12 A I did. - - I think it was executed on
13 two different occasions, but I do recall having given a copy
14 of the agreement to David with instructions to take it home
15 and discuss it with his wife; and my advice - - well,
16 perhaps I can't testify to this.
17 Q Did they come to your office to
18 execute this?
19 A I do remember - - yes, David executed
20 it there, certainly, and I think perhaps Patricia executed
21 it at a different time, but it was at my office, I do
22 remember her coming to my office.
23 Q Did you have any discussion with
24 her regarding the instrument, that you can recall?
25 A I believe I had a very brief discussion,

1 if any, and I asked if she understood it, I do recall that,
2 and if she knew what the import of this agreement was. I
3 can't recall - - I don't think there was any extended
4 discussion.
5 Q Do you recall how she answered your
6 inquiries as to whether she understand it?
7 A She said she did.
8 Q All right. And subsequent to the
9 execution of this agreement, did you close the loan on the
10 sale of -- the purchase of the property?
11 A Yes, the file reveals it was closed
12 on December 19 - - wait a minute - - there were several
13 false starts about it, for reasons to do with the real
14 estate, the agent, and that sort of thing - - recorded,
15 December 19, 1972.
16 MR. ATKINSON: All right, sir,
17 I don't have any other questions.
18
19 CROSS EXAMINATION
20 BY MRS. WARREN:
21 Q Mr. Lake, you testified that you had
22 a copy of Mrs. Capps' bill of complaint in your file?
23 A Yes.
24 Q Why is that?
25 A Well, her husband had brought it to

1 me back in 1971 when the action was instituted.
2 Q Did he ask you to represent him in
3 that action?
4 A Yes, and I recall discussing what
5 action we should take with him, and decided to do nothing,
6 I believe they worked it out somehow between themselves. I
7 never filed an answer or took any action. I did discuss
8 it with his wife's counsel.
9 Q Now, you testified in 1972 a
10 contract was signed, and closing took place November 30th,
11 is that correct?
12 A Yes.
13 Q What happened at that closing? Was
14 everything taken care of?
15 A No, the closing was deferred until
16 December 19th, and I assume from the file the various
17 repairs and what-not to the house were taken care of, but
18 if you don't wish me to testify about the things you
19 objected to, I can't go into the other reasons.
20 Q So closing was put off until the
21 end of December, December 19th?
22 A That is correct.
23 Q At the time the contract, the agreement
24 was signed, were Mr. and Mrs. Capps living together?
25 A Yes, I believe so.

1 Q Is that what the agreement states?
2 Doesn't the agreement state that in the last paragraph?
3 A That is correct.
4 Q But at that time, Mr. Capps, you
5 told the Court before I objected, told you he was having
6 marital difficulties, is that not also correct?
7 A He had told me things were better,
8 but he was afraid the same thing might happen again. This
9 is the gist of what he told me.
10 Q On that basis, you undertook to
11 represent both Mr. and Mrs. Capps in signing this agreement?
12 A No, Mrs, Warren, I wouldn't say I
13 represented them both. I prepared this for Mr. Capps, gave
14 him a copy - - well, do you want me to go into that?
15 Q Then you prepared that for Mr. Capps?
16 A That is correct.
17 Q Was Mrs. Capps represented?
18 A I do not know. I know that I
19 urged . . . can I say it?
20 Q Well, you already testified the only
21 thing you can remember was you went over the agreement with
22 her and asked if she understood it?
23 A Right. Do you want me to say what
24 I told him too?
25 Q No. I want to know what you told her,

1 and I think you testified to that.

2 MR. ATKINSON: Told who? I

3 didn't understand?

4 MRS. WARREN: I wanted to know

5 what he told Mrs. Capps. I have no further

6 questions.

7 COURT: All right, sir,

8 thank you.

9 (Mr. Lake was then

10 excused from the witness stand.)

11

12 MR. ATKINSON: We rest.

13

14 MRS. WARREN: Your Honor, I

15 make a motion to strike at this point. I

16 do not think he proved this agreement - -

17 first of all that it was signed by Mrs.

18 Capps to begin with; there has been no

19 meeting of the minds that has been shown;

20 and the agreement speaks for itself when

21 you look at it, there is no consideration

22 in it.

23 MR. ATKINSON: I agree that

24 the agreement speaks for itself. It is

25 signed by David Capps, Sr., and Patricia

1 Diane Seawell Capps, and signed in the
2 presence of Mr. Lake. He has so testified.
3 The consideration is set forth
4 in the agreement, and the agreement is to be
5 read within its four corners. It is a valid,
6 binding contract, and we have proven a
7 contract, and we are certainly entitled
8 to go forward and have it enforced at this
9 time. - - Short of absence of duress,
10 or fraud, or something of - - and those are
11 affirmative defenses.
12 MRS. WARREN: I would respond,
13 I think the consideration he is representing
14 is the fact that the husband pay the
15 purchase price of the property to provide
16 his family with a home, which is a duty
17 which he can't contract away; and on that
18 basis, this contract does not stand, you
19 can't contract away your duty. Mrs. Capps
20 was given no money, she was given nothing
21 for her signature on this page.
22 COURT: Is that all you
23 have to say?
24 MRS. WARREN: On my motion,
25 yes, sir.

1 MR. ATKINSON: Other than
2 forbearance. It is certainly a valid
3 consideration. They were living in a
4 rental house, and he is going to buy the
5 house and improve their life-style, and
6 this is what he agrees to do, he is going
7 to pay out all this money, he is going
8 to do certain things. - - Certainly,
9 there is consideration, and it is a valid,
10 binding, agreement, contract.
11 If there is fraud in it,
12 duress, or some such thing, then, of course,
13 it is a different proposition.
14 MRS. WARREN: One other point
15 I neglected to make is the fact that the
16 contract was prepared by the husband's
17 previous attorney, the attorney that was
18 going to represent him in a divorce action,
19 this was not Mrs. Capps' attorney; and
20 he undertook to represent two parties
21 in a contract that shows no present
22 consideration.
23 I don't think Mrs. Capps was
24 informed of her rights, he did not explain
25 the situation, she was asked only if she

1 understood it, and no investigation was
2 made to see if she really understood this
3 document at all.
4 COURT: Now, first of
5 all, if there were no consideration in the
6 contract, I believe under the law of the
7 Commonwealth, that gap was filled in by
8 the use of the seal, that when one signs
9 an instrument under seal, he waives
10 consideration for the instrument. So
11 I don't really have to rule on the
12 consideration.
13 Whether or not she was
14 represented by counsel is also immaterial
15 in absence of showing of any duress,
16 threats, promises, etc., on the part
17 of either the husband or his counsel,
18 or anyone else.
19 Whether she was advised of
20 her rights is also immaterial, assuming
21 she was of sufficient age that if she
22 signed something, she is supposed to know
23 what is in it.
24 So none of those defenses,
25 I think, would be applicable in this case.

1 Now, we look to the agreement
2 itself.
3 Now, I think the agreement is
4 invalid and unenforceable; and I arrive at
5 that decision not by virtue of her lack of
6 understanding, if any, or that her husband's
7 attorney drew the instrument, or that she
8 was put under any coercion, or no
9 consideration -- I don't consider any of
10 that at all.
11 I think that it is invalid
12 because the agreement is contrary to public
13 policy.
14 Now, the agreement sets out
15 that the husband is going to buy a home, or
16 a piece of property - - proposed to purchase
17 certain real property in the city of Newport
18 News, which I understand from the evidence
19 was later to be used as a home for the family;
20 and then, in order for him to be able to
21 finance the property, the contract goes on
22 to say, he was going to take - - he agreed
23 to take title to the property in the joint
24 names of the husband and wife.
25 Now, when the property went into

her name, she is now title owner in interest in that property as a matter of record. Now, you say, well, in spite of notice to the public and third parties, these people can still contract between themselves as to property interest, and I agree with that, and they can contract between themselves, I assume, that under certain conditions, one party could be divested of his right, title and interest in the real estate; but when we look to the conditions which would divest this woman of her right, title and interest in the property, what do we find?

We find that the parties agree, as follows: "That in the event either party hereinafter institutes a suit for divorce, a suit for separate maintenance, or any other legal proceeding affecting the marital relationship. . ." - - which, I assume could be - - could certainly be construed to mean a criminal warrant for assault and bettery - - or maiming - - neglect of a child - - or anything - - ". . . or any other legal proceeding affecting the marital relationship, the

1 wife will execute a good and sufficient
2 deed."
3 Now, here this lady, in
4 order -- under the terms of this contract,
5 in order to protect herself from physical
6 abuse -- or would have to endure physical
7 abuse, she would have to endure any kind
8 of hardship and privation at the hands of
9 her husband, and she forfeits her right
10 to protection of the court of chancery in
11 a divorce proceeding, in order to protect
12 a financial interest that her husband has
13 given her. I don't know what the property
14 is worth, but a half interest in the house
15 could probably be worth a considerable
16 amount of money; and if the husband were
17 to die, of course, during the coverture,
18 she would receive it all -- I assume it
19 was with survivorship, or tenants by the
20 entireties, I assume that, I don't have
21 the deed.
22 But she would have to - - she
23 has no way to protect herself save by giving
24 up her financial interest in the property.
25 It is not only - - this would

1 amount to almost involuntary servitude on the
2 part of this woman, who would be bound, in
3 the interest of herself, and her children, if
4 any, for economic purposes to stay with
5 this husband.
6 And then, not only that, but
7 there is an absolute lack of mutuality
8 because the husband, at any time under
9 the terms of this contract, could divest
10 his wife of her interest in the property
11 by the institution of any kind of an
12 action which would affect the marital
13 life. He could do it at a whim. He
14 could institute a suit for divorce with
15 absolutely no grounds, or any semblance
16 of grounds, and divest this woman of her
17 property.
18 Now, I think a contract
19 like that is contrary to public policy,
20 and lack of mutuality, and this Court
21 declares it invalid and unenforceable
22 between the parties.
23 MR. ATKINSON: Please
24 note our exception to the ruling of
25 the Court.

COURT: Yes, sir, we will note your objection and exception.

All right, if there is nothing further, court will stand adjourned.

(At this time, court adjourned.)

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