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SUPPORT v. ALIMONY IN VIRGINIA: IT'S TIME TO USE THE REVISED STATUTES

*Joel H. Holt**

The concept of alimony has been a traditional fixture in the law of divorce ever since the early common law. Since the church was the foundation for the institution of marriage, it was only logical that the separation of husband and wife was a matter for the ecclesiastical courts in early England. Ecclesiastical decrees, however, did not dissolve the marriage but only resulted in a "legal" separation, commonly known as a divorce a mensa et thoro.¹ In making such a decree, it was obviously necessary for the courts to make a discretionary award of support for the wife since at common law the husband exercised virtually absolute control over all of the wife's property, both real and personal, once the parties were married.²

With the development of the absolute divorce, commonly known as divorce a vinculo matrimonii, the original purpose for granting alimony disappeared since courts could now dispose of all marital property as deemed appropriate. The ecclesiastical courts' concept of alimony, however, seems to have been transferred to modern divorce law without much critical thought.³ Of course, to attribute the development of alimony law to a simple historical oversight would be an erroneous and misleading generalization. As long as the wife remained in her traditional role of taking care of domestic chores while depending upon the husband to provide the economic support, there was a definite need for alimony upon divorce to insure the wife's continued financial stability, unless the wife was adequately provided for by the disposition of the property.

Without going into the history of the development of the familial relationship since early England, it is sufficient for the purposes of this article to say that women today have increasingly broken out of the traditional role of the common law wife. Women's rights have

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1. See FOOTE, LEVY AND SANDER, *CASES AND MATERIALS ON FAMILY LAW*, 171-74 (1966) [hereinafter cited as FOOTE].

2. See generally 1 *AMERICAN LAW OF PROPERTY* §§ 5.50 to 5.56 (Casner ed. 1952).

3. See FOOTE, *supra* note 1, at 908.

slowly become widely recognized in this country so that many women are able to provide their own economic needs. With the recognition of rights, however, comes another change—the imposition of duties. It is the impact of this development that has finally begun to chip away at the once solid concept known as alimony.

In 1975, the Virginia General Assembly took note of this development and revised title 20 so as to abolish the terms “alimony” and “husband” from the code and replace them with the terms “support and maintenance” and “spouse”.⁴ Coupled with the fact that the Virginia Constitution, as redrafted in 1971, prohibited governmental discrimination based upon “religious conviction, race, color, sex or national origin . . .,”⁵ there is some question as to what impact the statutory changes should have upon the present case law. As of this time, there has been no significant change in the “alimony” cases addressed by the Virginia Supreme Court, other than a switch to the terms “support and maintenance”. This article will analyze the revised statutes, which were amended again in 1977, in light of the existing case law in an attempt to show that several fundamental changes will have to be made by the Virginia Supreme Court in the near future both as to alimony⁶ and child support.

I. THE ROLE OF FAULT

Prior to 1975, the Virginia Supreme Court consistently reviewed alimony as a substantive right of the wife.⁷ This fact is significant since it led to a distinction between (1) being entitled to alimony and (2) the actual amount of alimony received. In addressing this first issue, courts have traditionally considered the role of fault since courts felt the wife’s right to alimony depended upon the conduct

4. VA. CODE ANN. § 20-107 (Repl. Vol. 1975) (amended 1977). See notes 39-57 *infra*, and accompanying text.

5. VA. CONST. art. I, § 11 (emphasis added).

6. It should be noted here that the term “alimony” will appear throughout this article even though the Virginia statutes now use the terms “support and maintenance.” The use of the term “alimony” is necessary since all Virginia cases prior to 1975 use this term. Where there is a need to distinguish between the terms “alimony” and “support and maintenance” the author will point out the difference.

7. See, e.g., *White v. White*, 181 Va. 162, 168, 24 S.E.2d 448, 451 (1943) (alimony is a “substantive right, which may be decreed to any wife under a given state of facts.”); *Branch v. Branch*, 144 Va. 244, 251, 132 S.E. 303, 305 (1926) (alimony is a moral as well as legal obligation of the husband).

of the parties at the time of the divorce. As noted by the supreme court in *Eaton v. Davis*,⁸ alimony "stems from the common-law right of the wife to support by her husband, which right, unless the wife by her own misconduct forfeits it, continues to exist even after they cease to live together."⁹ The attitude that the wife is entitled to alimony as a matter of right *if* she is without fault in the marital break-up has been supported by recent case law,¹⁰ but the 1975 statutory changes cast serious doubt on this view. Nevertheless, the Supreme Court apparently still feels the wife has a right to alimony if she is without fault.¹¹

In revising the code section on support and maintenance, the General Assembly added several provisions including the statement: "Provided, however, that no permanent support and maintenance for the spouse shall be awarded by the court from a spouse if there exists in his or her favor a ground of divorce. . . ."¹²

Obviously the General Assembly has completely abolished the Supreme Court's concept of the wife's *right* to alimony,¹³ first by inserting the word "spouse" into the statute and then by changing the court's consideration of the fault of the parties. Instead of the wife having a right to alimony *unless* fault on her part was shown, now the role of fault is important only to see if a party should be

8. 176 Va. 330, 10 S.E.2d 893 (1940).

9. *Id.* at 338, 10 S.E.2d at 897.

10. *See, e.g., Rowand v. Rowand*, 215 Va. 344, 346, 210 S.E.2d 149, 150 (1974) (wife forfeits her right to support only if her misconduct was the cause of the divorce); *Monahan v. Monahan*, 212 Va. 406, 407, 184 S.E.2d 812, 813 (1971); *Guy v. Guy*, 210 Va. 536, 539, 172 S.E.2d 735, 737-38 (1970).

11. *Thomas v. Thomas*, 217 Va. 502, 504, 229 S.E.2d 887, 889 (1976). While the court stated that a wife has a right to support unless she is at fault, it does not appear that counsel for the husband objected to this view. Thus, it could be assumed that the court has not addressed the question of whether the wife no longer has an absolute right to alimony since apparently no party has raised that argument on appeal.

12. VA. CODE ANN. § 20-107 (Repl. Vol. 1975) (amended 1977). The change was not affected by the 1977 amendments.

13. There can be no question that the General Assembly has the constitutional power to change the law regarding the award of alimony since divorces a vinculo "are wholly creatures of statute law." *Eaton v. Davis*, 176 Va. 330, 338, 10 S.E.2d 893, 897 (1940). Since divorces a mensa et thoro were adopted by the legislature from the common law, an argument could be made that the new statutory provisions are unconstitutional as applied to such divorces. This argument is not very strong since the legislature has the inherent power to codify and change the common law. Surely such a distinction would lead to an absurd and unnecessary state of confusion.

prevented from obtaining alimony. However, even if the wife is not at fault in the marital break-up, she is no longer entitled to alimony per se. The fact that she was not at fault only allows her to proceed further and try to show that she is entitled to alimony upon a consideration of other factors.¹⁴ While the Virginia Supreme Court has not yet recognized this change,¹⁵ it must clearly do so in the near future if the revised statutes are to be given their intended effect.

The changing role of fault is quite significant from the husband's point of view. First, alimony can no longer be viewed as a punitive measure against a husband who is the cause of the divorce.¹⁶ Regardless of the husband's fault, the wife has no *right* to alimony unless she can show she meets the criteria for need under statute section 20-107. This same analysis applies to a no-fault divorce. Second, since there is no right of the wife to support per se, failure of the wife to show she is entitled to support at the time of the divorce decree may *completely* relieve the husband of any further possible obligations, absent special circumstances.

This second concept is somewhat complex, but it should lead to a substantial change in the existing case law. Perhaps this concept could be better understood by applying the revised statute to a recent case decided just prior to the 1975 changes.

In *Gagliano v. Gagliano*,¹⁷ the trial court found that the wife was completely able to support herself and therefore was not entitled to an award of alimony. The Supreme Court affirmed the court's finding that the wife was not in need of any alimony at that time. The court, however, went on to note that since the trial court had found no fault on the part of Mrs. Gagliano, she had not forfeited her right

14. The General Assembly left the award of support and maintenance up to the discretion of the trial court but listed several factors the court must consider in reaching its decision. See note 28 *infra*, for a list of these factors.

15. See, e.g., *Thomas v. Thomas*, 217 Va. 502, 504, 229 S.E.2d 887, 889 (1976).

16. See, e.g., *Capell v. Capell*, 164 Va. 45, 178 S.E. 894 (1935), where the court stated:

A decree for alimony is something more than an order for the payment of money. A husband who has wronged his wife must continue to contribute to her support. A decree for alimony "is an order compelling a husband to support his wife, and this is a public as well as a marital duty—a moral as well as a legal obligation."

Id. at 49, 178 S.E. at 895 (citation omitted). Clearly this view of alimony is out-dated by the 1975 statutory changes.

17. 215 Va. 447, 211 S.E.2d 62 (1975). This case was decided a few months before the revised title 20 became effective.

to alimony. Therefore, the trial court was instructed to include an express reservation in the divorce decree for future alimony if the wife could show a need for it due to changed circumstances.¹⁸ By leaving open the possibility for future alimony should the wife be unable to support herself, the court reaffirmed its view that a wife who is not at fault has a *right* to alimony although at any given time the amount she is actually entitled to receive may be zero if she is currently able to support herself. Under the revised section on maintenance and support,¹⁹ the court's analysis in *Gagliano* would be erroneous since the wife no longer has the right to alimony simply because she is not at fault. The role of fault has been changed.

While the code does allow a trial court to increase or decrease a previous award of support as the circumstances require,²⁰ the Virginia Supreme Court has interpreted this section to mean that a trial court can alter a previous award of support only if such an award was actually made or a power to make a later award was expressly reserved by the trial court in the divorce decree.²¹ Under the new law, however, a trial court cannot make such a reservation simply because the wife was not at fault in the separation; instead, the court must base such a reservation of power on the other factors found in section 20-107. Thus, the reasoning in *Gagliano* is not sufficient to remand a case under the new law. The trial court's decision not to include such a reservation of power in the decree must stand on appeal unless the lower court erred in not finding a *need* for such a reservation under one of the criteria in section 20-107. In short, before such a reservation of power to award possible future support can be made, there must be more of a finding than simply lack of fault by the wife.²² Otherwise, the husband must be

18. *Id.* at 452-53, 211 S.E.2d at 66.

19. VA. CODE ANN. § 20-107 (Cum. Supp. 1977).

20. VA. CODE ANN. § 20-109 (Cum. Supp. 1977).

21. *Perry v. Perry*, 202 Va. 849, 120 S.E.2d 385 (1961) (failure to award support at the time of the marital dissolution bars a later initial award since this would be more than a modification unless the power was expressly reserved); *Losyk v. Losyk*, 212 Va. 220, 222, 183 S.E.2d 135, 137 (1971) (the language "with leave to either party to have the same reinstated for good cause shown" found in the divorce decree was *not* a sufficient "express reservation" to allow a court to invoke § 20-109 in order to make a subsequent award of alimony).

22. The basic reason for a court to include a reservation of power to award possible future support to a spouse is to give the court continuing jurisdiction over the parties while granting the relief of a final divorce as soon as possible. However, since the woman no longer has the

completely discharged of all his marital duties once the divorce is final.

While the changing role of fault has not yet become apparent in the cases decided since the statutory changes,²³ it undoubtedly will have its impact in the future. This change puts a greater burden on the wife in a divorce suit since she must now show more than lack of fault on her part in order to be entitled to support from her husband. This fact will become even more obvious as the role of women in our society progresses to the point where the vast majority of women have careers and support themselves financially. As we approach that point, the role of fault will diminish even further.²⁴

II. THE AMOUNT OF SUPPORT TO BE GIVEN

Once the court has determined that a spouse is not at fault in the marital break-up, the court can look further to see whether there should be an award of any support.²⁵ Under the new statutes, either spouse is eligible to receive such an award, although at the present

right to alimony merely because she is not at fault, courts cannot make such a retention of jurisdiction over the parties unless the wife shows a need for the court to do so, which was not the situation in *Gagliano*. In short, courts cannot grant such a reservation of power over the parties as a matter of routine, as was indicated in *Gagliano*.

The attempt to relieve the husband of all marital obligation as soon as possible is clearly in line with other supreme court holdings. For example, the court has strictly construed section 20-109 to mean that a court cannot later make an award of support if no such provision were made at the time of the final decree. See note 21 *supra*, and the cases cited therein. Obviously the court wants to protect the husband from the possible exposure at any time to financial disruption due to events beyond his control after he has made financial commitments in reliance upon the fact that he was released from all his marital duties. *Accord*, *McConkey v. McConkey*, 216 Va. 106, 215 S.E.2d 640 (1975) (when former wife who is receiving alimony enters into a voidable marriage, the husband is relieved of all duties even if the later marriage is subsequently annulled).

23. As late as November, 1976, the supreme court still considered the wife to have a right to support if she was not at fault in the marital break-up. *Thomas v. Thomas*, 217 Va. 502, 229 S.E.2d 887 (1976).

24. The UNIFORM MARRIAGE AND DIVORCE ACT § 308(b) has completely abolished any consideration of marital misconduct in determining the amount of support to be given. For a discussion of the role of fault in several other states, most of which have different statutory provisions than Virginia, see 87 HARV. L. REV. 1579 (1974).

25. Of course the parties can make a private agreement among themselves as to the amount and then have the court make this agreement part of the final decree. It appears that once the court has incorporated this agreement into the final decree, it has no power to later amend the agreement without the consent of both parties since this would be a violation of the constitutional right of the parties to enter into a contract that creates vested property rights. *Shoosmith v. Scott*, 217 Va. 290, 227 S.E.2d 729 (1976).

time it will normally be the wife who seeks such an award. This article, therefore, will discuss the problem of determining the amount of support to be given as if it is the wife who is seeking relief, although it should be remembered that the parties could be reversed today.

A. *The 1975 Changes*

Generally speaking, courts in Virginia have looked to two factors in order to determine the amount of support to be awarded once it has determined that the wife is entitled to some assistance. First, courts have established the standard of living to which the wife has become accustomed during the marriage.²⁶ Second, courts have balanced the husband's ability to pay with the wife's need for support.²⁷ The 1975 changes in the code listed six factors which the court must consider in determining the amount of support to be given.²⁸ In addition to codifying the existing case law, the legislature added several considerations which indicate that the General Assembly intended to place more of an obligation on the wife to support herself whenever possible.

Even though the trend towards equal rights for women may never lead to an actual situation where the husband gets an award of support from his wife, it will almost certainly lead to significant reductions in the size of support awards given to the wife in many

26. See *Butler v. Butler*, 217 Va. 195, 197, 227 S.E.2d 688, 690 (1976); *Robertson v. Robertson* 215 Va. 425, 427, 211 S.E.2d 41, 44 (1975).

27. See, e.g., *Brooks v. Brooks*, 201 Va. 731, 734, 113 S.E.2d 872, 874 (1960).

28. VA. CODE ANN. § 20-107 (Repl. Vol. 1975) (amended 1977). These factors are:

- (1) The earning capacity, obligations and needs, and financial resources of the parties;
- (2) The education and training of the parties and the ability and the opportunity of the parties to secure such education and training;
- (3) The standard of living established during the marriage;
- (4) The duration of the marriage;
- (5) The age, physical and mental condition of the parties; and
- (6) Such other factors as are necessary to consider the equities between the parties.

In interpreting the phrase "earning capacity" in subsection (1), the Virginia Supreme Court has construed this term to mean the amount one can potentially earn rather than one's actual earnings at the time of divorce. *Butler v. Butler*, 217 Va. 195, 227 S.E.2d 688 (1976) (ability to pay computed by husband's capacity to earn despite his desire to stay in a low paying position—his decision should not be permitted to penalize his wife). See also *Hawkins v. Hawkins*, 187 Va. 595, 47 S.E.2d 436 (1948).

cases. For example, even where a husband clearly is without justification in leaving his wife, a court will probably weigh the wife's earning capacity, despite the fact she may not have ever worked during the marriage, before determining what amount, if any, the husband should pay.

The idea of forcing the woman to work if she is able and has the opportunity to obtain employment is not new to Virginia case law. In 1922 the Virginia Supreme Court refused to increase a request for alimony by a woman recently divorced from a young lawyer, stating that:

It must also be borne in mind that the appellee is a young woman, only twenty-eight years of age, and that under modern conditions there is open to her practically every avenue for making money that is open to her husband, that by the decree of the court she is released from her former household duties, that her time is her own, and that she has no right to remain idle at the expense of her former husband, and that it is her duty to minimize his loss, albeit it was through his fault that she was compelled to ask that the contract of marriage be rescinded.²⁹

While this case is clearly the exception rather than the rule at the present time, courts are obviously moving in this direction. Another case which is even more in line with the approach courts will probably take in the future is *Baytop v. Baytop*.³⁰ Even though the divorce was not the wife's fault and despite the fact her husband appeared to be financially able to give her some support, the court refused to give the wife alimony since she had always earned enough money on her own³¹ to amply support herself.³²

29. *Barnard v. Barnard*, 132 Va. 155, 164, 111 S.E. 227, 230 (1922). The court quoted *Barnard* with approval in *Babcock v. Babcock*, 172 Va. 219, 225, 1 S.E.2d 328, 330 (1939), where it denied alimony to a woman married to a relatively older gentleman. The court found that the wife was more capable of earning a living than her former husband so that she should not be able to look to him for support. See also *Brauer v. Brauer*, 215 Va. 62, 66-67, 205 S.E.2d 665, 668 (1974) (court said in dicta that a wife with the ability to work must do so).

30. 199 Va. 388, 100 S.E.2d 14 (1957).

31. *Id.* at 395, 100 S.E.2d at 19. One factor that the court may have considered significant was that the wife had lived apart from her husband for most of the marriage, having a job in a different town. Obviously the wife had not relied too heavily on her husband for support.

32. See also *Gagliano v. Gagliano*, 215 Va. 447, 451-52, 211 S.E.2d 62, 65 (1975) (there can be no award of alimony where the wife can presently support herself).

There should also be another change in how alimony is determined as the courts shift their scrutiny from whether the husband should pay (because it is his duty to support his wife) to whether the wife can support herself. At the present time, the general rule appears to be that the wife's own personal estate does not have any bearing on the husband's obligation to pay alimony. In 1946, the Supreme Court of Virginia in *Ring v. Ring*³³ rejected the contention that the wife's own affluence should be a factor in determining alimony, stating:

While it is true, as shown by the record, that appellee is possessed of a sizeable estate, there is no rule of law that requires her to expend her estate to ameliorate the condition of appellant, brought about by his faithlessness to his marriage vows.³⁴

It is uncertain whether this rule is applicable only when the husband's actions are the cause of the divorce (so that the rule is penal in nature) or whether the rule applies any time the wife is entitled to support. Regardless of the scope of the rule, it clearly cannot still be valid today.

In amending the statute section regarding the award of maintenance and support, the legislature expressly included "the financial resources of the parties"³⁵ as a factor to be considered. This enactment obviously is intended to overrule the *Ring* holding. It should be noted that there is some case law to this effect, although it is quite old. In *Myers v. Myers*,³⁶ which has never been expressly overruled, the wife was granted a divorce on the grounds of cruelty by her husband, yet her request for alimony was denied since she was found to have an ample estate of her own.³⁷ Even if *Myers* was overruled by *Ring*, there can be no question that *Ring* is no longer

33. 185 Va. 269, 38 S.E.2d 471 (1946).

34. *Id.* at 273-74, 38 S.E.2d at 473. This view was reaffirmed in *Klotz v. Klotz*, 203 Va. 677, 680, 127 S.E.2d 104, 106 (1962), where the court noted that a wife should not be required to dispose of her own property to support herself when it was her husband's actions that led to the divorce.

35. VA. CODE ANN. § 20-107 (Repl. Vol. 1975) (amended 1977). See note 28 *supra*.

36. 83 Va. 806, 6 S.E. 630 (1887).

37. *Id.* at 815, 6 S.E. at 635. The court also refused to award child support since the wife had her own separate estate. See also *Hulcher v. Hulcher*, 177 Va. 12, 18, 12 S.E.2d 767, 769 (1941) (husband allowed a reduction in alimony payments where former spouse inherited an estate even though husband's conduct was the original cause of the divorce).

good law in light of the 1975 amendments to section 20-107. Thus, now a wife's separate estate can be considered in determining the award of support.³⁸

While a husband can now theoretically receive support from his former wife, the greatest impact of the amended statute will be the heavier burden on the wife to show a need for support. The change will also lead to a significant reduction in the amount of support the wife will receive. The day when a wife who was unjustifiably deserted by her husband could expect a sizeable recovery as a matter of course is but a fleeting memory.

B. *The 1977 Changes*

The General Assembly amended section 20-107 in 1977³⁹ after considering four separate proposals.⁴⁰ The changes which were finally adopted by the legislature are quite significant and could signal the beginning of several new concepts in the law of domestic relations in Virginia. Of course, the judicial interpretation given to the amendments to section 20-107 will be crucial in determining how much the law will evolve.

The first change made was the addition of two more factors to be considered in determining the amount of support to be given.⁴¹ The first factor which was added basically requires the court to legally recognize the contribution of the homemaker⁴² in determining the

38. The 1977 amendments also lead to this conclusion. See note 44 *infra*, and accompanying text.

39. 1977 Va. Acts ch. 475. The new amendments became effective July 1, 1977.

40. All four proposed changes dealt primarily with two things: (1) the division of property held by husband and wife at the time of divorce, including the family home; and (2) the consideration of the nonmonetary contributions of the parties in determining the amount of support. H. B. 1738, 1739, 1741 & 1742, General Assembly, 1977 Sess. The legislature finally passed an amended version of H. B. 1742. For a list of the other factors and a discussion thereof, see note 28 *supra*, and accompanying text.

41. The two factors are (1) the monetary and nonmonetary contributions of each party to the well-being of the family and (2) the property interests of the parties. VA. CODE ANN. § 20-107(5)(a) and (b) (Cum. Supp. 1977).

42. VA. CODE ANN. § 20-107 (Cum. Supp. 1977). The amendment states that the court must consider: "(5a) The contributions, monetary and nonmonetary, of each party to the well-being of the family."

While the statute specifically mentions both the monetary and nonmonetary contributions of the parties, the significant addition is the inclusion of the nonmonetary contributions. This factor requires a court for the first time to consider the role of a housewife in awarding

amount of support to be awarded. While the language of the statute is neutral on its face, the practical effect of this amendment is that the wife, who is traditionally the homemaker,⁴³ will be able to use her status as a housewife to justify a request for support.

It is uncertain how courts will interpret this directive from the legislature, but an argument could be made that a wife who has never worked cannot now be forced to work, even though she is able to do so, if she has contributed significantly to the "well-being" of the family. This analysis is obviously an extreme view, but courts are certain to have difficulty in weighing this factor. It is unlikely that a wife who has never worked, but is able to do so, will be allowed to use this section to automatically get support. The legislature did include the term "monetary" to balance out any overemphasis on the nonmonetary contributions. Thus, some sort of compromise between the two factors will have to be reached which will probably require some direction from the Virginia Supreme Court. While this new factor obviously will help the wife in most cases, it is certainly not designed to defeat the over-all intent of section 20-107 that a wife who is able to provide for herself adequately must do so.

The second factor added by the 1977 amendments⁴⁴ merely makes the requirement that a court consider the financial resources of *both* parties more explicit.⁴⁵ The addition to section 20-107 expressly states that a court must consider both the real and personal interests of each party. By the inclusion of this factor there can be no question that the legislature has abolished the rule in *Ring v. Ring*⁴⁶ so that the wife's separate estate must be considered in determining the amount of support to be awarded.

support. Many courts have always considered this factor, but the statute now expressly requires all courts to do so, thus giving the homemaker more leverage in asserting his or her role. The inclusion of the word "monetary" is designed primarily to offset the significance of the word "nonmonetary", so that courts would not overreact to the new change in considering the nonmonetary contributions, especially in determining custody of the child.

43. Of course, if the husband is the homemaker, he can also assert this fact under the amended statute.

44. VA. CODE ANN. § 20-107 (Cum. Supp. 1977). The amendment provides that the court must consider:

(5b) The property interests of the parties, both real and personal.

45. See notes 33-37 *supra*, and accompanying text.

46. 185 Va. 269, 38 S.E.2d 471 (1946).

The last change made by the 1977 General Assembly is probably the most significant in light of the impact it may have on the law of domestic relations in Virginia. Before discussing the actual amendments made by the legislature, however, it will be necessary to go into certain prior developments in the Virginia law.

In 1958, the Virginia Supreme Court held in *Smith v. Smith*⁴⁷ that a court in a divorce proceeding had jurisdiction to make a division of property owned jointly by the husband and wife.⁴⁸ Thus, in addition to awarding alimony, a court could divide up the furniture, the house and any other property among the parties as the court deemed appropriate. The legislature then amended section 20-107 in 1962 in order to narrowly define the term "estate" to mean only the rights created by marriage in the real property of the other spouse,⁴⁹ such as the rights of dower and curtesy. The supreme court strictly construed this new definition in 1970 when it said in *Guy v. Guy*⁵⁰ that courts no longer had jurisdiction to decide the issue of ownership of jointly owned property such as furniture and furnishings. While the court has modified this holding slightly in later cases,⁵¹ the basic rule has prevailed that a court has no power to divide up jointly owned property.⁵²

Perhaps the primary reason for the legislature to desire such a rule is that often third parties who are not before the court in the divorce proceeding have an interest in the property in question. For exam-

47. 200 Va. 77, 104 S.E.2d 17 (1958).

48. *Id.* at 84-85, 104 S.E.2d at 23-24. The supreme court reached this decision by broadly construing the term "estate" in section 20-107 to include more than just the marital rights of the parties. The court felt that the term "estate", which it had power to divide, covered all property owned jointly by the husband and wife, as well as other marital property rights.

49. The supreme court had noted in *Smith v. Smith*, 200 Va. 77, 104 S.E.2d 17 (1958), that the legislature could re-define the term "estate" if it desired an interpretation different than that given by the court. *Id.* at 86, 104 S.E.2d at 24.

50. 210 Va. 536, 541, 172 S.E.2d 735, 738-39 (1970).

51. For example, a court may award a lump sum payment in addition to regular payments so that a deserving spouse can furnish a residence upon divorce. *Turner v. Turner*, 213 Va. 42, 43-44, 189 S.E.2d 361, 363 (1972). Furthermore, a court can order the deserting spouse to replace any furniture removed from the apartment by him with a "suitable" substitute. *Robertson v. Robertson*, 215 Va. 425, 430, 211 S.E.2d 41, 45-46 (1975).

52. *See, e.g., Jackson v. Jackson*, 211 Va. 718, 180 S.E.2d 500 (1971), where the court held that a house owned by husband and wife as tenants by the entirety was not a right created by the marriage and hence a court in a divorce proceeding did not have jurisdiction to award the house to the wife as part of an award of alimony.

ple, the bank may have a security interest in the family car or house; yet, the bank is not before the court in the divorce proceeding and thus would have no say in how its security interest is handled by the court. On the other hand, the rule established by the legislature has led to a certain amount of disruption in the settlement of a divorce, since the parties must not only litigate the divorce itself but they may also have to litigate the question of property rights in a separate suit if they cannot reach an agreement among themselves.

The General Assembly in its 1977 amendments to section 20-107 has attempted to alleviate some of the problems caused by the division of the property interests of the parties. First, the legislature completely abolished the term "estate" from the section so that it only deals with the award of maintenance and support and not the division of the estate.⁵³ Second, the legislature added the following provision:

In addition to or in lieu of periodic payments for maintenance and support of a spouse, the court may, in its discretion, award a lump sum payment, based upon consideration of the property interests of the parties except those acquired by gift or inheritance during the marriage.⁵⁴

While the Virginia Supreme Court has already stated that a court could award a lump sum payment in addition to regular support payments in order for a spouse to furnish a residence upon divorce,⁵⁵ the statute goes well beyond that holding.

It should be noted that a court can only order a lump sum payment of money. It still cannot divide the property itself up among the parties; therefore, interested third parties are still protected. A court in its discretion can, however, order one lump sum payment to be made by considering the value of the property interests of the parties excluding property acquired by gift or inheritance. The amendment becomes quite significant when one considers the effect it will have. For example, assume that the husband earns \$18,000 a year and the wife earns \$10,000. Furthermore, assume the two live

53. VA. CODE ANN. § 20-107 (Cum. Supp. 1977).

54. *Id.*

55. *Turner v. Turner*, 213 Va. 42, 43-44, 189 S.E.2d 361, 363 (1972).

in a house owned by the husband which is worth \$30,000. If the court feels that the wife should have the house upon divorce of the parties and this award will be sufficient to satisfy her needs, then the court could order the husband to pay the wife \$30,000. The indirect result would probably be that the husband would deed the house to the wife in satisfaction of his obligation to her. Although this example is oversimplified, the basic result is certainly possible under the amended statute.

It is hard to say at this time how the courts will react to this part of the amended statute. Third party creditors may still be protected, but courts can now do indirectly what *Guy v. Guy*⁵⁶ prohibits them from doing directly: divide the property acquired during marriage.⁵⁷ Obviously this change could have a profound impact on the future case law.

Although there has been a general shift towards lowering the amount of support awarded to the wife and raising the burden of proving that one should receive such an award, the 1977 amendments definitely favor the spouse who has primarily been a homemaker. A spouse who is able to provide her own needs will still not be able to receive support, but courts now must be cognizant of the fact that a person has made nonmonetary contributions to the household in making an award of support. Furthermore, now that courts may order lump sum payments in lieu of regular payments, there may be a significant change in the tactics of the parties in settling divorce cases. The 1977 amendments will undoubtedly play a significant role in the future in determining the amount of support to be awarded.

III. CHILD SUPPORT

While it may be unreasonable to expect a husband to be awarded support from his former wife, the recent statutory changes could realistically lead to an increase in the obligations of the wife to

56. 210 Va. 536, 541, 172 S.E.2d 735, 738-39 (1970).

57. The UNIFORM MARRIAGE AND DIVORCE ACT § 308 encourages the division of the marital property as the primary method for providing for the anticipated financial requirements of the parties rather than support payments. The act authorizes the award of support payments only when the division of the marital property is not sufficient to provide for the respective parties.

contribute to child support, especially where custody is given to the father.⁵⁸ Many jurisdictions have adopted this view where the mother is financially capable of making such a contribution.⁵⁹ Since many divorced women do work, it would not be at all unusual to find the wife able to contribute significantly to child support.

Although it is a misdemeanor in Virginia for either parent to fail to provide support for a minor child,⁶⁰ the older Virginia case law only discusses the father's duty to continue to provide child support upon divorce.⁶¹ Indeed, prior to the 1975 revision of section 20-107, the code did not expressly empower a court to require a wife to pay child support upon divorce, although this power could have been inferred.⁶² However, the amended section 20-107 does provide for such duty to be imposed upon the wife by substituting the word "spouse" in place of the word "husband".

Naturally, the cause of the divorce has nothing to do with the requirement of child support since the court is concerned here solely with the best interest of the child.⁶³ Courts should now become more conscious of the wife's ability to provide child support. Undoubtedly a court would be quicker in making the wife pay child support than it would be in forcing the wife to support her former spouse.⁶⁴

58. In Virginia there is no presumption in favor of either parent regarding custody of the children upon divorce. Instead, the best interests of the individual child is to be the sole consideration in awarding custody. VA. CODE ANN. § 31-15 (Repl. Vol. 1973). However, the supreme court has often stated that "all things being equal" the mother is the natural guardian of children of tender years. *See, e.g., White v. White*, 215 Va. 765, 767, 213 S.E.2d 766, 768 (1975). Nevertheless, courts today are far more likely to consider giving custody to the father. *See, e.g., Burnside v. Burnside*, 216 Va. 691, 222 S.E.2d 529 (1976); *Portewig v. Ryder*, 208 Va. 791, 160 S.E.2d 789 (1968). Furthermore, in our society today it would not be unusual for a career-oriented woman to not desire complete custody of the children. Thus, it is entirely conceivable that the wife will be ordered to contribute to child support in many circumstances.

59. For a discussion of several different cases which have held the wife must contribute to child support where she is able to do so, see 77 W. VA. L. REV. 808 (1975).

60. VA. CODE ANN. § 20-61 (Cum. Supp. 1977).

61. *See, e.g., Gramelspacher v. Gramelspacher*, 204 Va. 839, 134 S.E.2d 285 (1964); *Oliver v. Oliver*, 202 Va. 268, 117 S.E.2d 59 (1960); *Bundy v. Bundy*, 197 Va. 795, 91 S.E.2d 412 (1956); *Mihalcoe v. Holub*, 130 Va. 425, 107 S.E. 704 (1921).

62. *See VA. CODE ANN. § 20-61* (Cum. Supp. 1977).

63. *See, e.g., Stolfi v. Stolfi*, 203 Va. 696, 126 S.E.2d 923 (1962) (the husband's duty to provide child support is not diminished simply because the wife was at fault in the marital break-up).

64. The spouse paying both child support and "alimony" must be careful to pay the other

IV. CONCLUSION

It is apparent that the 1975 and 1977 amendments to section 20-107 of the Virginia Code should have a tremendous impact on the future developments in the award of support upon divorce. Since the wife no longer has a right to support merely because she is not at fault in the marital break-up, she will have to demonstrate both a clear need for support and an inability on her part to provide that support. If she has her own ample separate estate, she will not be allowed to receive assistance. Furthermore, if she is perfectly able to support herself and there is no evidence that she will be unable to continue to support herself in the future, the husband must be relieved of all marital obligations. Courts can no longer routinely reserve the power to make a possible future award unless the wife demonstrates a need for the court to do so.

Obviously the wife will have a greater burden than in the past in showing that she should be given support from her former spouse. On the other hand, courts must consider the nonmonetary contributions of the homemaker, a factor which will generally benefit women. This amendment is certainly consistent with the general principles of equity and hopefully will assist the truly deserving spouse in receiving support. Likewise, the amendment allowing the court to order a lump sum payment should also benefit women since traditionally the husband accumulates the family wealth in his own name. Certainly that change in the law is the most significant one in terms of its potential impact on future support settlements.

The effect all of this will have on the decisions of the Virginia Supreme Court is hard to speculate. To date, the court has not implemented any significant changes. The supreme court has, however, shown a stronger tendency to defer to the trial court's discretion unless there is clearly an error in the trial court's award.⁶⁵ It will

spouse rather than the child directly unless the portion attributable to child support is specifically designated as such. Otherwise the payment to the child will *not* discharge the obligation to the former spouse. *Fearon v. Fearon*, 207 Va. 927, 931-32, 154 S.E.2d 165, 168 (1967). However, checks made payable to the child but received and disbursed by the designated spouse are deemed to be sufficient payment on the support obligation. *See Gagliano v. Gagliano*, 215 Va. 447, 211 S.E.2d 62 (1975).

65. *See, e.g., Thomas v. Thomas*, 217 Va. 502, 504, 229 S.E.2d 887, 889 (1976), where the court refused to alter the size of the award since there was no evidence in the record which would justify a change. Of course, the supreme court has always deferred to the trial court's

be interesting to see how the court will address the holdings in *Ring v. Ring*,⁶⁶ regarding the wife's separate estate, and *Gagliano v. Gagliano*,⁶⁷ regarding when a court should reserve its jurisdiction over the parties.

Hopefully the supreme court will recognize the changes which the legislature intended to make since the revised statutes are more in line with the woman's role in society today. The West Virginia Supreme Court was faced with similar questions in 1974 and apparently departed little from the traditional view of alimony.⁶⁸ The West Virginia legislature had amended the state code⁶⁹ in a way very similar to revised title 20 of the Virginia Code. When faced with adopting the new statutory changes, however, in place of the traditional standards regarding alimony, in the case of *Corbin v. Corbin*,⁷⁰ the West Virginia court apparently opted for a compromise between the two approaches. The court first acknowledged the amended statutory view that either spouse was entitled to support but then reverted to the traditional view that support was a *right* of the wife to be determined by the husband's ability to pay in relation to the station in life to which the wife had become accustomed during marriage.⁷¹ As a result of the *Corbin* holding, the purpose of the new statutory changes was substantially diluted.⁷²

The statutory changes made by the Virginia General Assembly are not an attempt to deprive a deserving wife of support. Instead, the changes are actually a necessary step towards dealing with the marital relationship as it exists in light of women's emerging role in our society today. Indeed, the amended support statute even pro-

discretion whenever possible, but the cases seem to indicate that the court is being more deferential in the more recent decisions. The same is true regarding custody of the child. *See, e.g., Burnside v. Burnside*, 216 Va. 691, 222 S.E.2d 529 (1976); *Portewig v. Ryder*, 208 Va. 791, 160 S.E.2d 789 (1968).

66. 185 Va. 269, 38 S.E.2d 471 (1946). *See note 33 supra*, and accompanying text.

67. 215 Va. 447, 211 S.E.2d 62 (1975). *See note 17 supra*, and accompanying text.

68. *Corbin v. Corbin*, 206 S.E.2d 898 (W.Va. 1974). *See generally* 77 W. VA. L. REV. 808 (1975).

69. 1969 W. Va. Acts ch. 49, § 48-2-1 to -31. For a discussion of these changes, see 72 W. VA. L. REV. 104 (1970).

70. 206 S.E.2d 898 (W. Va. 1974).

71. *Id.* at 903-04.

72. *Accord*, 77 W. VA. L. REV. 808 (1975). "As evidenced by . . . *Corbin* . . . , the court has not exclusively bound itself to the letter or the spirit of these revised domestic relations statutes and will continue to apply traditional standards." *Id.* at 814-15.

vides for situations which the old law did not really contemplate by directing the court to consider other equities which exist between the parties.⁷³ For example, if a wife works while putting her husband through college and the two are divorced shortly after the husband's graduation, the wife might not be able to recover any support and maintenance from the husband since she always provided the family income. She cannot show a need or a standard of living to which she became accustomed while depending on the husband. Under the new statute, a court could force the husband to support his former spouse while she obtained a college degree as this would certainly be a proper exercise of a court's equitable powers. Once the wife earned her degree, the award of support would cease. Clearly such a situation was not contemplated by the common law approach to alimony.

In summary, it is obvious that the legislature intended to change the traditional concept of alimony in order to conform to the changing attitudes regarding the role of the sexes today. These statutory changes are certainly sensible and should be implemented more fully by the courts. Hopefully the future case law will adopt the view that no longer can the divorced wife merely sit at home and wait for the check to come. While few husbands will ever get an award of support themselves, unless absolutely destitute, the wife will have a harder time getting a decree of support, and when she does, the amount will be smaller.

73. VA. CODE ANN. § 20-107(6) (Cum. Supp. 1977).