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Overview of Virginia Supreme Court Cases on Domestic Relations: 1970-1980

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NOTE

OVERVIEW OF VIRGINIA SUPREME COURT DECISIONS ON DOMESTIC RELATIONS 1970-1980*

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I. INTRODUCTION

The Supreme Court of Virginia examined a variety of domestic relations problems and issues during the last decade. Most of the court's decisions involved divorce issues such as jurisdiction, alimony or support and maintenance, and child custody or support orders. However, the court also decided cases on annulment, the enforcement of support and maintenance decrees, legitimacy and paternity, adoption, name changes and intrafamily tort immunity.[1]

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1. The decisions by the Virginia Supreme Court regarding intrafamily tort immunity will not be discussed in the text of this note. It should be noted, however, that the court has not abolished the doctrine. *See* Wright v. Wright, 213 Va. 177, 191 S.E.2d 223 (1972) (parental immunity upheld in action by unemancipated child against father for alleged acts of simple negligence not related to his business or vocation and not involving a motor vehicle). *See also* Counts v. Counts, ___ Va. ___, 266 S.E.2d 895 (1980) (wife immune from liability in tort for personal injuries intentionally inflicted upon her husband at her direction during their marriage). The 1981 Virginia General Assembly significantly negated the holding in *Counts*, however, by abolishing the common-law defense of interspousal immunity in causes of action in tort arising on or after July 1, 1981. 19___ Va. Acts, ch. ___ (to be codified at VA. CODE ANN. § 8.01-220.1).

Rather than abrogate the doctrine of intrafamily tort immunity, the court has chosen to create several narrow exceptions. *See* Korman v. Carpenter, 216 Va. 86, 216 S.E.2d 195 (1975) (action for wrongful death may be maintained and predicated upon injuries to one spouse arising out of wrongful act by the other spouse, when such act terminates marriage by death, and when the deceased spouse is survived by no living child or grandchild); Surratt v. Thompson, 212 Va. 191, 183 S.E.2d 200 (1971) (interspousal immunity abolished in actions for personal injuries resulting from motor vehicle accidents); Smith v. Kauffman, 212 Va. 181, 183 S.E.2d 190 (1971) (parental immunity abrogated in automobile accident litigation).

The court has likewise declined to construe liberally these exceptions to immunity. *See* McMillan v. McMillan, 219 Va. 1127, 253 S.E.2d 662 (1979) (*Surratt* exception to interspousal immunity not applied in action by wife when automobile accident occurred in Tennessee and that state had not abrogated doctrine); Tyles v. Jackson, 216 Va. 797, 223 S.E.2d 873 (1976) (*Smith* exception to parental immunity did not have retrospective effect); Fountain v. Fountain, 214 Va. 347, 200 S.E.2d 513 (1973) (*Surratt* exception did not have retrospective effect). The court's policy of preserving family and marital harmony through the application of intrafamily tort immunity is contrary to the modern trend of abrogating the doctrine. A majority of states have completely or partially abandoned intraspousal and parental immunity. *See* Annot., 92 A.L.R.3d 901 (1979); Annot., 41 A.L.R.2d 904 (1972). *See also* Sanford, *Personal Torts Within the Family*, 9 VAND. L. REV. 823 (1956); Comment, *Intrafamily Immunity—The Doctrine and Its Present Status*, 20 BAYLOR L. REV. 27 (1967). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122 (4th ed. 1971).

It should also be noted, however, that the Virginia Supreme Court has permitted one spouse to testify against the other spouse in certain criminal proceedings. *See* Cumbee v. Commonwealth, 219 Va. 1132, 254 S.E.2d 112 (1979) (wife permitted to testify against her husband during prosecution of husband for incest against their minor daughter); Stewart v. Commonwealth, 219 Va. 887, 252 S.E.2d 329 (1979) (husband convicted of grand larceny of wife's personal property and wife permitted to testify against her husband because couple

The purpose of this note is to provide a reference guide for the Virginia practitioner regarding the supreme court's decisions during the past decade. Although the scope of this note necessitates limited analysis, relevant cases, statutes and supplementary materials have been cited for further reference purposes. For organizational purposes, the court's decisions have been discussed under the major headings of *ANNULMENT AND DIVORCE* and *THE FAMILY.*

II. ANNULMENT AND DIVORCE

A. Annulment

There were only two decisions by the Virginia Supreme Court between 1970 and 1980 which concerned annulment.[2] In *Sanderson v. Sanderson,*[3] the husband sought an annulment of his marriage on the ground of misrepresentation. Mr. Sanderson alleged that his wife falsely represented before their marriage that she had been previously married and divorced only once, when in fact she had been married and divorced five times. The supreme court affirmed the trial court's denial of the annulment and held that a misrepresentation as to prior marital status was not grounds for annulment.[4] This decision is in line with the weight of authority.[5]

In *McConkey v. McConkey,*[6] the Virginia Supreme Court determined that a divorced wife is not entitled to reinstatement of alimony payments from her first husband upon annulment of her voidable second marriage.[7] The court examined Code section 20-110[8] and distinguished between voidable marriages[9] and those void *ab initio.*[10] This distinction is impor-

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not validly married at time of trial); Osborne v. Commonwealth, 214 Va. 691, 204 S.E.2d 829 (1974) (actions of husband, charged with statutory rape of his stepdaughter, in beating wife, did not constitute "privileged communications" within meaning of statute).

2. For the various statutory grounds for annulment, see VA. CODE ANN. § 20-89.1 (Cum. Supp. 1980).

3. 212 Va. 537, 186 S.E.2d 84 (1972).

4. *Id.* at 537, 186 S.E.2d at 85.

5. Reynolds v. Reynolds, 85 Mass. (3 Allen) 605 (1862), is the leading early authority for the view that fraud must relate to the "essentials" of marriage (*e.g.*, ability to consummate the marriage and to have children) in order to constitute grounds for annulment. For a contemporary decision relying on *Reynolds, see* Masters v. Masters, 13 Wis. 2d 332, 108 N.W.2d 674 (1961). *See generally* cases collected in Annot., 15 A.L.R.3d 759 (1967).

6. 216 Va. 106, 215 S.E.2d 640 (1975).

7. The annulment was based on fraud by the wife's second husband. As a result, the marriage was voidable if the wife desired to have it annulled. *Id.* at 107, 215 S.E.2d at 641.

8. VA. CODE ANN. § 20-110 (Repl. Vol. 1975) provides: "If any former spouse to whom support and maintenance has been awarded shall thereafter marry, such support and maintenance shall cease as of the date of such marriage."

9. Voidable marriages enjoy legal validity until annulled because the aggrieved spouse

tant because the court expressly refrained from deciding whether Code section 20-110 "would apply to a person to whom alimony has been awarded who thereafter is involved in a *void* marriage."[11]

The supreme court's decision in *McConkey* follows the general trend of disallowing resumption of alimony payments from a former husband after annulment of a voidable second marriage.[12] Although this area remains unsettled,[13] strong public policy arguments support the trend. It would be unjust to compel a former husband to adjust his financial decisions to the risk that his ex-wife's remarriage would not be valid. "The husband has a right to assume the validity of the second marriage and to arrange his affairs accordingly. When his former wife voluntarily accepts the risk of a subsequent marriage, he should not be held accountable for her gullibility, mistake or misfortune."[14]

It is not unreasonable for an ex-spouse, either husband or wife,[15] to rely on Code section 20-110 and the validity of the ex-spouse's remarriage. The decisions to remarry and to seek annulment are both within the exclusive discretion of the other party. And, as the supreme court noted in *McConkey*, a "voidable marriage may not be annuled for years."[16] The court should likewise extend its holding in *McConkey* to remarriages that are void *ab initio* since Code section 20-107 authorizes maintenance and support in annulment proceedings.[17]

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may ratify a voidable marriage. *See* Alexander v. Kuykendall, 192 Va. 8, 63 S.E.2d 746 (1951); Toler v. Oakwood Smokeless Coal Corp., 173 Va. 425, 4 S.E.2d 364 (1939).

10. A void marriage confers no legal rights and is incapable of ratification regardless of the parties' desires. When it is determined that a marriage is void, it is as if no marriage had ever been performed. 12B M.J., *Marriage*, § 6 (Repl. Vol. 1978) (citing Chitwood v. Prudential Ins. Co. of America, 206 Va. 314, 143 S.E.2d 915 (1965) (bigamous marriage void *ab initio*)). Regarding void marriages in general, see VA. CODE ANN. § 20-45.1 (Repl. Vol. 1975). Regarding bigamous marriages void without decree, see VA. CODE ANN. § 20-43 (Repl. Vol. 1975).

11. 216 Va. at 107, 215 S.E.2d at 640 (emphasis added).

12. For a compilation of cases from various jurisdictions, see Annot., 45 A.L.R.3d 1033 (1972). *See generally* H. CLARK, LAW OF DOMESTIC RELATIONS § 3.6, at 139-43 (1968).

13. *Compare* Robbins v. Robbins, 343 Mass. 247, 178 N.E.2d 281 (1961) *and* Cecil v. Cecil, 11 Utah 2d 155, 346 P.2d 279 (1960) *with* Sefton v. Sefton, 45 Cal. 2d 872, 291 P.2d 439 (1955), Flaxman v. Flaxman, 57 N.J. 458, 273 A.2d 567 (1971), *and* Bridges v. Bridges, 217 So. 2d 281 (Miss. 1968).

14. 216 Va. at 108, 215 S.E.2d at 641.

15. In 1975, the Virginia General Assembly substituted "former spouse" for "person" and "support and maintenance" for "alimony" in VA. CODE ANN. § 20-110 (Repl. Vol. 1975) as well as other sections of Title 20 (domestic relations). 1975 Va. Acts, ch. 644.

16. 216 Va. at 108, 215 S.E.2d at 641.

17. VA. CODE ANN. § 20-107 (Cum. Supp. 1980). *See* Henderson v. Henderson, 187 Va. 121, 46 S.E.2d 10 (1948) (trial court had authority to make such further decree as it might

B. Divorce

1. Grounds for Divorce

During the past ten years, the supreme court has continued its strict construction of the traditional fault grounds contained in the Virginia divorce statutes.[18] In *Graham v. Graham,*[19] and *Johnson v. Johnson,*[20] the court held that a divorce cannot be granted merely because of incompatibility between spouses.[21] Although a husband and wife may have a "deplorable marital situation" and "the ends of society would be perhaps better served"[22] if the parties were divorced, a trial court is not warranted in granting a divorce upon insufficient evidence or upon uncorroborated evidence where corroboration is required.[23]

The supreme court has declined to re-evaluate its precedents on cruelty or to lessen the burden of corroboration in proving such charges.[24] Absent clear evidence of permanent and unexcused refusal of sexual relations by either party, a showing of mere cessation of intercourse is not sufficient to prove cruelty or constructive desertion.[25] Thus, in *Aichner v. Aichner,*[26]

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deem expedient in cases concerning the severance of the relations of the parties incident to marriage).

Virginia is one of a minority of 10 states which have statutes expressly authorizing permanent alimony upon annulment where such an award would be equitable. *See* H. CLARK, *Cases and Problems on Domestic Relations* 214 (3d ed. 1980). Absent specific statutory authority, it is generally held that permanent alimony may not be granted in annulment suits since any claim for alimony is eliminated by holding that the marriage was void *ab initio. See* Wigder v. Wigder, 14 N.J. Misc. 880, 188 A. 235 (1935). *See generally* Annot., 54 A.L.R.2d 1410 (1957).

18. For the grounds of divorce from bond of matrimony, see VA. CODE ANN. § 20-91 (Repl. Vol. 1975). *See also* VA. CODE ANN. § 20-95 (Repl. Vol. 1975).

19. 210 Va. 608, 172 S.E.2d 724 (1970).

20. 213 Va. 204, 191 S.E.2d 206 (1972).

21. The court in Johnson v. Johnson, 213 Va. at 211, 191 S.E.2d at 211 (quoting Graham v. Graham, 210 Va. at 617, 172 S.E.2d at 730 (1970)) observed that the present situation was an appropriate case for a non-fault divorce:

> This case gives support to the action of the General Assembly of Virginia in providing in Code § 20-91 that a divorce may be decreed on the application of either party if and when the husband and wife have lived separate and apart without any cohabitation and without interruption for two [currently one] years.

For discussion of decisions regarding "no-fault" divorce, see notes 42-62 *infra* and accompanying text.

22. 210 Va. at 617, 172 S.E.2d at 730 (quoting DeMott v. DeMott, 198 Va. 22, 28, 92 S.E.2d 342, 346 (1956)).

23. 213 Va. at 210-11, 191 S.E.2d at 211.

24. For discussion of the lack of corroboration as a defense to divorce, see notes 63-74 *infra* and accompanying text.

25. 213 Va. at 209, 191 S.E.2d at 209 (1972) (citing Carneal v. Carneal, 211 Va. 162, 176

the court held that a denial of sexual intercourse, when not permanent or inexcusable, failed to constitute cruelty or constructive desertion when other marital duties were satisfactorily performed.[27] And, in *Capps v. Capps*,[28] the court found that one instance of physical cruelty was insufficient to establish a ground for divorce.[29]

Likewise, the court's decisions between 1970 and 1980 broke little new ground in the areas of adultery and desertion. In *Painter v. Painter*,[30] the wife's petition for divorce on the ground of adultery was denied despite strong evidence which suggested that her husband was involved in an intimate relationship.[31] The supreme court upheld the trial court's denial because the evidence to establish a charge of adultery must be clear, positive and convincing. "Strongly suspicious circumstances are inadequate."[32]

The court held, in *Rowland v. Rowland*,[33] that demands to "get out" were inadequate to support an award of divorce on the grounds of constructive desertion.[34] In *Graham v. Graham*,[35] it was not improper to deny a husband's complaint of willful desertion where his wife's desertion was justified.[36]

Finally, the Virginia Supreme Court upheld the generally recognized

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S.E.2d 305 (1970)).

26. 215 Va. 624, 212 S.E.2d 278 (1975) (husband's complaint of cruelty based solely on wife's refusal to have sexual intercourse).

27. The parties separated and were reconciled prior to their final separation. Evidence indicated that they engaged in sexual relations on one occasion after they were reconciled. *Id.* at 625, 212 S.E.2d at 279.

28. 216 Va. 382, 219 S.E.2d 898 (1975).

29. The wife testified that her husband struck and choked her during an argument. There was no substantial evidence that the husband's act of physical cruelty was so severe and atrocious as to endanger the wife's life. *Id.* at 384-85, 219 S.E.2d at 899-901.

30. 215 Va. 418, 211 S.E.2d 37 (1975).

31. Mrs. Painter offered evidence of stains and lipstick on her husband's clothing, an intimate note addressed to her husband, and a private investigator's testimony of clandestine meetings between her husband and his alleged paramour. *Id.* at 419, 211 S.E.2d at 38. As a general rule, the testimony of private investigators is of little probative value. *See* Gray v. Gray, 181 Va. 262, 24 S.E.2d 444 (1943); Martin v. Martin, 166 Va. 109, 184 S.E.2d 220 (1936).

32. 215 Va. at 420, 211 S.E.2d at 38.

33. 215 Va. 344, 210 S.E.2d 149 (1974).

34. The husband's demand to his wife was unaccompanied by sufficiently corroborated evidence of other acts contributing to her departure. *Id.* at 345-46, 210 S.E.2d at 150.

35. 210 Va. 608, 172 S.E.2d 724 (1970).

36. Evidence indicated that the husband was indifferent to his wife, that he cursed, abused and physically assaulted her, and that he had violent outbursts of temper and destroyed furniture. *Id.* at 616, 210 S.E.2d at 730.

rule that the absenting of one spouse from the other after the commencement and during the pendency of a suit for divorce is not an act upon which a suit for desertion may be predicated.[37] The court held in *Painter v. Painter*,[38] that it is of the utmost importance to the proper disposition of a desertion claim that the date of the alleged desertion be established because "one spouse is not guilty of legal desertion in separating from the other after the institution of a suit for divorce or during its pendency."[39] In *Alls v. Alls*,[40] it was reversible error for the trial court to hold that the wife's departure from the family domicile, after commencement of her suit, constituted legal desertion.[41]

Virginia's divorce law has provided for divorce upon non-fault separation of the parties since 1960.[42] Code section 20-91(9)(a) provides that, upon application of either party, a court may decree a divorce for a husband and wife who have lived separate and apart without any cohabitation or interruption for one year.[43] This partial abandonment of the fault principle was motivated by a desire to avoid the harsh results of the re-

37. *See* Hudgins v. Hudgins, 181 Va. 81, 23 S.E.2d 774 (1943) (highly proper and commendable that spouses separate); *accord*, Plattner v. Plattner, 202 Va. 263, 117 S.E.2d 128 (1960); Smith v. Smith, 202 Va. 104, 116 S.E.2d 110 (1960). *See generally* Annot., 98 A.L.R.2d 1264 (1964).

38. 215 Va. 418, 211 S.E.2d 37 (1975).

39. *Id.* at 421, 211 S.E.2d at 39.

40. 216 Va. 13, 216 S.E.2d 16 (1975).

41. The record indicated that the wife deserted her husband the day after her suit was instituted and process was served on the husband. *Id.* at 14, 216 S.E.2d at 16-17.

42. 1960 Va. Acts, ch. 108 (codified at VA. CODE ANN. § 20-91(9) (Repl. Vol. 1975)). *See generally* Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966). Prior to 1960, a court could grant a divorce only after finding one of the parties at fault. The present statute specifies that grounds for divorce include adultery, sodomy or buggery committed outside the marriage, cruelty or wilful desertion. Another ground for divorce which is not, strictly speaking, a fault ground is conviction of a felony after the marriage and subsequent confinement for more than one year. VA. CODE ANN. § 20-91(1) to (8) (Repl. Vol. 1975).

43. VA. CODE ANN. § 20-91(9)(a) (Repl. Vol. 1975). Although divorces obtained under § 20-91(9)(a) are commonly referred to as "no-fault" divorces, § 20-91(9)(a) is a non-fault separation statute. Wadlington, *supra* note 42, at 68-69. Thus, the Virginia Supreme Court has held that the party applying for the divorce need not be the innocent spouse and that a husband who abandoned his wife could use § 20-91(9) to obtain a divorce. Canavos v. Canavos, 205 Va. 744, 747, 139 S.E.2d 825, 827 (1965). However, fault concepts are still prominent in Virginia in the area of alimony, and alimony (now maintenance support) cannot be awarded to a spouse at fault. Wadlington, *supra* note 42, at 79. *See* notes 169-175 *infra* and accompanying text for discussion of alimony and divorces based upon non-fault separation. (Divorces obtained under § 20-91(9) will hereinafter be referred to as non-fault divorces.)

crimination doctrine[44] and to remove from divorce proceedings the conflicts caused by the need to prove fault.[45]

The Virginia Supreme Court interpreted Code section 20-91(a) in several noteworthy decisions during the past decade. In *Graham v. Graham,*[46] and *Johnson v. Johnson,*[47] the court indirectly recommended that a divorce based upon non-fault separation would be appropriate in cases where neither party could sustain a divorce decree based on traditional fault grounds.[48] However, in *Robertson v. Robertson,*[49] the court held that a trial court was not required to grant a divorce under the two-year separation statute (now one year) to the exclusion of all other proven grounds.[50] "We find nothing in Code § 20-91(9), or in any other portion of the divorce law, which suggests legislative intent to give precedence to one proven ground of divorce over another."[51]

The court has upheld the public policy in favor of preserving marriages through its interpretation of subdivision (a) of Code section 20-91(9).[52] In *Moore v. Moore,*[53] the defendant-husband appealed the decree of the trial court which permitted the plaintiff-wife to dismiss voluntarily her divorce action for a "no fault" divorce.[54] He contended that his wife was prohib-

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44. Under the recrimination doctrine, no divorce could be granted if both parties were at fault. *See generally* Comment, *Recrimination and Comparatative Rectitude,* 20 WASH. & LEE L. REV. 354 (1963).

45. Wadlington, *supra* note 42, at 66-67. § 20-91(9)(c) provides, in part, that a non-fault divorce decree does not lessen a spouse's obligation to pay support and maintenance for his or her spouse. VA. CODE ANN. § 20-91(9)(c) (Repl. Vol. 1975). For discussion of non-fault divorces and alimony, see notes 169-175 *infra* and accompanying text.

46. 210 Va. 608, 617, 172 S.E.2d 724, 730 (1970).

47. 213 Va. 204, 211, 191 S.E.2d 206, 211 (1972).

48. For discussion of the traditional grounds of divorce alleged in *Graham* and *Johnson,* see notes 19-23 *supra* and accompanying text.

49. 215 Va. 425, 211 S.E.2d 41 (1975).

50. The husband filed a cross-bill for a non-fault divorce and contended on appeal that the trial court erred in awarding his wife a divorce on the grounds of desertion and adultery. He argued that the non-fault ground of divorce took precedence over the other divorce grounds because the statutory separation period had become complete subsequent to his desertion and acts of adultery. *Id.* at 426, 211 S.E.2d at 43.

51. *Id.* In dictum, the court stated that a cause of action for divorce under Code § 20-91(9) was not subject to a plea of *res judicata* or recrimination with respect to any other ground. *Id.* at 426-27, 211 S.E.2d at 43.

52. VA. CODE ANN. § 20-91(9)(a) (Repl. Vol. 1975) provides, in part, that a divorce from the bond of matrimony may be decreed "[o]n the *application* of either party if and when the husband and wife have lived separate and apart without any cohabitation and without interruption for one year." (emphasis added).

53. 218 Va. 790, 240 S.E.2d 535 (1978).

54. A brief chronology of the facts is important. The wife sought a divorce from the bonds of matrimony but asked for no ancillary relief. The husband's answer admitted the wife's

ited from voluntarily dismissing her action because the suit had already been "submitted" to the chancellor for a ruling prior to the filing of her motion to dismiss.[55] His corollary argument was that *he* was entitled to have the *wife* awarded a divorce because *he* had made an "application" in the cause when it was "fully matured and submitted."[56]

Interpreting the terms "submission" in Virginia's non-suit statute[57] and "application" in subdivision (a) of Code section 20-91(9),[58] the supreme court rejected both arguments. It held that the wife had an absolute right to a voluntary dismissal in view of the fact that neither party had yielded issues to the trial court for consideration and decision.[59] The court also held that the request by the husband for a decree in favor of the wife did not amount to an "application" under code section 20-91(9)(a).[60] "For there to be an 'application' under this statute, *the party* applying must himself seek affirmative relief by way of divorce in his favor through an original divorce proceeding or through a cross-bill filed in a pending suit."[61] A close reading of *Moore* reveals that the decision was based on the supreme court's perception of the potential inequity and abuses engendered in the procedure suggested by the husband.[62]

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allegations and averred that, except for the merits of the divorce, there were no issues for the court to adjudicate. The cause was referred to a commissioner in chancery upon a decree of reference endorsed by both parties. After depositions at which the husband and his attorney did not appear, the commissioner reported that the ground for divorce had been proven. He recommended that the wife be granted the divorce based on the parties' two-year separation. The suit remained dormant for six months when the husband's attorney wrote the chancellor and asked that a final decree be entered. The attorney enclosed a draft of a decree, endorsed only by him, which provided for an absolute divorce to the wife on the ground alleged in her bill. Within a week thereafter, the wife filed a motion to "dismiss" the cause upon the ground "that she no longer wish[ed] to pursue the matter." The husband then filed a motion seeking a hearing on the wife's motion and also asked to be heard on his "application" for entry of a final divorce decree. The trial court, following oral argument, entered an order dismissing the wife's bill of complaint. *Id.* at 791-92, 240 S.E.2d at 535-36.

55. *Id.* at 793, 240 S.E.2d at 537.

56. *Id.* at 796, 240 S.E.2d at 538.

57. The husband relied on former VA. CODE ANN. § 8-220 (Repl. Vol. 1957) (current version at VA. CODE ANN. § 8.01-380(A) (Repl. Vol. 1977)).

58. The term "application" is used in a different context in the merger statute which allows the guilty party to move for merger. Under those circumstances, but unlike the facts in *Moore*, a determination on the merits of the grounds for divorce would have already been made. 218 Va. at 796, 240 S.E.2d at 539 n.6 (citing VA. CODE ANN. § 20-121 (Repl. Vol. 1975)).

59. 218 Va. at 796, 240 S.E.2d at 538.

60. *Id.* at 796, 240 S.E.2d at 538-39.

61. *Id.* at 796, 240 S.E.2d at 539.

62. While noting that the husband was seeking to force his wife to obtain a divorce against her wishes, the court frowned on the potential application of the husband's

2. Defenses to Divorce

Although there are numerous defenses to divorce,[63] the cases decided by the Virginia Supreme Court during the 1970's primarily concerned lack of corroboration. Code section 20-99 provides, in part, that no divorce may be granted on the uncorroborated testimony of either of the parties. The cause shall be heard independently of the admissions of either party in the pleadings or otherwise.[64] As previously discussed,[65] the supreme court applied this requirement strictly to deny divorce in *Graham, Johnson, Aichner, Capps, Painter,* and *Rowland.*

In *McIlwain v. McIlwain,*[66] the supreme court held that a self-serving statement was not admissible under the *res gestae* exception to the hearsay rule[67] since the statement was made at least two hours after the alleged act and was merely a narrative account given by the wife to her friend and confidante.[68] Likewise, "even if [the statement was] admissible, it [was] not sufficient to afford the corroboration required within the

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argument.

> Carried to its logical conclusion in a "contested" divorce case, approval of the procedure employed by this husband would permit the guilty party to force the innocent one to be awarded a merits adjudication of divorce contrary to the innocent party's desires when the guilty party himself had no grounds for a divorce in his favor. This would indeed be a novel development in the law, given the public policy in favor of preserving the marriage.

Id.

63. The classic defenses used in divorce litigation are collusion and condonation, connivance and recrimination. However, the divorce action may be defeated by failure of jurisdictional requirements (*e.g.*, residence, domicile or venue), lack of corroboration, separation by mutual consent, premature filing, application of the doctrine of *res judicata,* absence of requisite intent, insanity, limitation of action, or the lack of a valid marriage. For a discussion of the Virginia decisions in which these defenses have been litigated, see JOINT COMMITTEE ON CONTINUING EDUCATION OF THE VIRGINIA STATE BAR AND THE VIRGINIA BAR ASSOCIATION, *Virginia Lawyer's Handbook: Separation and Divorce* 46-56 (1980 ed.) [hereinafter cited as *Separation and Divorce*]. *See generally* CLARK, *supra* note 12, at §§ 12.8-12.12.

64. VA. CODE ANN. § 20-99 (Cum. Supp. 1980).

65. *See* notes 19-32 *supra* and accompanying text.

66. 215 Va. 633, 212 S.E.2d 284 (1975) (wife told neighbor that she had been struck by her husband two hours earlier).

67. Under the *res gestae* exception to the hearsay rule, spontaneous utterances at or immediately after an event are held to be admissible. *See* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§ 289-90 (2d ed. 1972). The time interval is important in determining the spontaneity of the utterance. *See generally* Portsmouth Transit Co. v. Brickhouse, 200 Va. 844, 847-48, 108 S.E.2d 385, 387-88 (1959) (statement made 20 minutes after event not admissible); Kuckenbecker v. Commonwealth, 199 Va. 619, 101 S.E.2d 523 (1958) (statement made 30 to 50 minutes later held inadmissible).

68. 215 Va. at 636, 212 S.E.2d at 286.

meaning of Code § 20-99."[69] *McIlwain* also involved the defense of condonation. The court held that, after condonation, an incident or certain conduct[70] could not be revived and relied upon as the basis for a divorce unless it was revived by similar conduct.[71]

The defense of lack of intent is especially applicable to divorce sought on the "no-fault" ground. In *Hooker v. Hooker*,[72] the court interpreted the words "separate and apart" in Code section 20-91(9)[73] to mean more than a mere physical separation of the husband and wife. The court held that the separation must be coupled with an intention by at least one of the parties to live separate and apart permanently. This intention must be shown to have existed at the beginning of the separation period.[74] The court's decision is in keeping with the general policy of preventing "extended separations required by other circumstances [to] ripen into 'instant divorce' without the salutory period of contemplation required by the statute during which the parties have an opportunity for reconciliation."[75]

3. Jurisdiction over Alimony, Child Support and Property

It is well established that jurisdiction in divorce suits is purely statutory.[76] In Virginia, such authority is found in Code section 20-107. This section provides, in part, that upon decreeing the dissolution of a mar-

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69. *Id.*

70. On one occasion, the husband excluded his wife and child from their home, locked her out, and refused to permit her to get medicine for the child. The parties reconciled and resumed their marital relations three weeks later. *Id.* at 634-35, 212 S.E.2d at 285.

71. *Id.* at 636-37, 212 S.E.2d at 286-87. The husband contended that his wife constructively deserted him by causing him to be excluded from the family home by an injunction. Because the injunction became effective after she had instituted her divorce, the court held she was not guilty of constructive desertion. *Id.* at 637, 212 S.E.2d at 287. *See* note 37 *supra* and accompanying text.

72. 215 Va. 415, 211 S.E.2d 34 (1975).

73. *See* notes 42-56 *supra* and accompanying text for discussion of no-fault divorce in Virginia.

74. The husband went to South Vietnam as a civilian employee of the United States Army in 1970 and lived separate and apart from his wife thereafter. In 1972, he wrote to an attorney in Richmond for the purpose of instituting divorce proceedings. Evidence indicated that he initially accepted overseas employment for monetary reasons. 215 Va. at 416, 211 S.E.2d at 36.

75. *Id.* at 417, 211 S.E.2d at 36. *See* Otis v. Bahan, 209 La. 1082, 26 So.2d 146 (1946); Sutherland v. Sutherland, 75 Nev. 304, 340 P.2d 581 (1959); Mallard v. Mallard, 234 N.C. 654, 68 S.E.2d 247 (1951); Beck v. Beck, 14 N.C.App. 163, 187 S.E.2d 355 (1972). *See also* CLARK, *supra* note 12, at § 12.6; 24 AM. JUR. 2d, *Divorce and Separation* § 148 at 305 (1966).

76. Watkins v. Watkins, ___ Va. ___, 265 S.E.2d 750, 752 (1980). *See generally* CLARK, *supra* note 12 at § 11.2.

riage and also upon decreeing a divorce,[77] whether from the bond of matrimony[78] or from bed and board,[79] the court "may make such further decree as it shall deem expedient concerning the maintenance and support of the parties, or either of them, and the care, custody of their minor children."[80] While interpreting these provisions as well as those in Code section 20.111,[81] the supreme court both reaffirmed and extended established Virginia precedent during the 1970's.

In *Richardson v. Moore*,[82] the court reiterated its holding in *Capell v. Capell*[83] that the trial court retains jurisdiction respecting alimony until the further order of the court. "[B]ecause it touches a public as well as a marital duty, jurisdiction cannot be ousted by any agreement of the parties *in pais* which the Court itself does not adopt and approve."[84]

In *Werner v. Commonwealth*,[85] the supreme court examined the interrelationship between the divorce jurisdiction of circuit courts[86] and juvenile and domestic courts with respect to support orders.[87] The court held

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77. In enacting this section, the legislature did not intend to make any distinction between decrees for the dissolution of a marriage and degrees annuling a marriage. Henderson v. Henderson, 187 Va. 121, 46 S.E.2d 10 (1948). *See* notes 2-17 *supra* and accompanying text for discussion of annulment.

78. *See* VA. CODE ANN. § 20-91 (Repl. Vol. 1975).

79. A divorce from bed and board may be decreed for cruelty, reasonable apprehension of bodily hurt, wilful desertion or abandonment. VA. CODE ANN. § 20-95 (Repl. Vol. 1975).

80. VA. CODE ANN. § 20-107 (Cum. Supp. 1980).

81. A decree of divorce from the bond of matrimony extinguishes contingent property rights, *e.g.*, dower and curtesy. VA. CODE ANN. § 20-111 (Repl. Vol. 1975). For discussion of the court's jurisdiction over personal property in divorce suits, see notes 123-33 *infra* and accompanying text.

82. 217 Va. 422, 229 S.E.2d 864 (1976).

83. 164 Va. 45, 178 S.E. 894 (1935).

84. 217 Va. at 423, 229 S.E.2d at 866. *See also* Casilear v. Casilear, 168 Va. 46, 190 S.E. 314 (1937).

85. 212 Va. 623, 186 S.E.2d 76 (1972). The husband petitioned for termination of alimony. He contended that his wife lost her right to enforce the support order of the juvenile and domestic relations court when she obtained a divorce decree from the circuit court without having provision therein for alimony. *Id.* at 624, 186 S.E.2d at 77.

86. VA. CODE ANN. § 20-96 (Cum. Supp. 1980) provides that:

> A. The circuit court, on the chancery side thereof, shall have jurisdiction of suits for annulling or affirming marriages and for divorces.
>
> B. The suit, in either case, shall be brought in the county or corporation in which the parties last cohabitated, or at the option of the plaintiff, in the county or corporation in which the defendant resides, if a resident of this State, and in cases in which an order of publication may be issued against the defendant under § 8.01-316, venue may also be in the county or city in which the plaintiff resides.

87. VA. CODE ANN. § 20-61 (Cum. Supp. 1980) empowers juvenile and domestic relations courts to impose criminal penalties upon a spouse who fails to support his or her spouse. VA.

that a support order of a juvenile and domestic relations court continues in full force and effect notwithstanding the entry by a court of record of a divorce decree that was silent as to support.[88] Under Code section 20-79(a)[89] the jurisdiction of the juvenile and domestic relations court ceases only if a specific provision for allowance or denial of support is included in the final divorce decree of the court of record. The court also noted that juvenile and domestic relations district courts are particularly well equipped to supervise the collection of support payments from recalcitrant husbands, as evidenced by Code section 20-79(c).[90]

In three noteworthy cases,[91] the Virginia Supreme Court focused on

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CODE ANN. § 20-67 (Repl. Vol. 1975) vests juvenile and domestic relations courts with exclusive or original jurisdiction in nonsupport cases arising under chapter 5, Desertion and Nonsupport, of title 20, Domestic Relations.

88. 212 Va. at 625, 186 S.E.2d at 78.

89. VA. CODE ANN. § 20-79(a) (Cum. Supp. 1980) provides:

> In any case where an order has been entered under the provisions of this chapter, directing either party to pay any sum or sums of money for the support of his or her spouse, or concerning the care, custody or maintenance of any child, or children, the jurisdiction of the court which entered such order shall cease and its orders become inoperative upon the entry of a decree by the court or the judge thereof in vacation in a suit for divorce instituted in any circuit court in this State having jurisdiction thereof, in which decree provision is made for support and maintenance for the spouse or concerning the care, custody or maintenance of a child or children, or concerning any matter provided in a decree in the divorce proceedings in accordance with the provisions of § 20-103.

90. 212 Va. at 626, 186 S.E.2d at 78. VA. CODE ANN. § 20-79(c) (Cum. Supp. 1980) provides:

> [T]hat in any suit for divorce or suit for maintenance and support the court may after a hearing, pendente lite, or in decree of divorce a mensa et thoro, decree of divorce a vinculo matrimonii, final decree for maintenance and support, or subsequent decree in such suit, transfer to the juvenile and domestic relations district court the enforcement of its orders pertaining to support and maintenance for the spouse, maintenance, support, care and custody of the child or children. After the entry of a decree of divorce a vinculo matrimonii the court may transfer to the juvenile and domestic relations district court any other matters pertaining to support and maintenance for the spouse, maintenance, support, care and custody of the child or children on motion by either party, and may so transfer such matters before the entry of such decree on motion joined in by both parties. An appeal of an order by such juvenile and domestic relations district court which is to enforce or modify the decree in the divorce suit shall be as provided in § 16.1-214.

See also Poole v. Poole, 210 Va. 442, 171 S.E.2d 685 (1970) (juvenile and domestic courts have exclusive statutory jurisdiction on question of custody).

91. Newport v. Newport, 219 Va. 48, 245 S.E.2d 134 (1978); Osborne v. Osborne, 215 Va. 205, 207 S.E.2d 875 (1974) (Virginia Supreme Court will recognize the validity of another court's adjudication of marital status); Romeo v. Romeo, 218 Va. 290, 237 S.E.2d 143 (1977) (Virginia Supreme Court refused to relitigate the question of the validity of a marriage because it had already been decided by a court of competent jurisdiction).

foreign decrees of absolute divorce and the concept of divisible divorce adopted by the United States Supreme Court in *Estin v. Estin*,[92] *Kreiger v. Kreiger*,[93] *Armstrong v. Armstrong*,[94] and *Vanderbilt v. Vanderbilt*.[95] The divisible divorce concept is applicable when the foreign divorce has been obtained in an *ex parte* proceeding,[96] and it separates the issues of divorce and property rights upon dissolution of the marital status.[97] The principle allows a court to dissolve the marital status in an uncontested proceeding but preserves the right of a spouse not subject to that court's jurisdiction to seek support payments.[98]

Osborne v. Osborne[99] involved a foreign decree of absolute divorce that provided for compensation to the wife and children in a manner and degree different from an award under Virginia law.[100] The Virginia Supreme

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92. 334 U.S. 541 (1948).

93. 334 U.S. 555 (1948).

94. 350 U.S. 568 (1956).

95. 354 U.S. 416 (1957).

96. Osborne v. Osborne, 215 Va. 205, 210, 207 S.E.2d 875, 881. The United States Supreme Court has recognized that states can grant divorces unilaterally. "[E]ach state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent." Williams v. North Carolina, 317 U.S. 287, 298-99 (1942). For a general discussion of foreign decrees, see CLARK, *supra* note 12, at § 11.2; A. PHELPS, DOMESTIC RELATIONS IN VIRGINIA, §§ 16-1 to 16-5 (3d ed. 1977).

97. The Virginia Supreme Court recognized the divisible divorce concept in Isaacs v. Isaacs, 115 Va. 562, 79 S.E. 1072 (1913) to uphold a wife's right to alimony awarded before the entry of a final divorce decree in a foreign jurisdiction. The court recognized the foreign decree as a final dissolution of the marriage but declined to give it effect as to termination of the lien for past and future installments of alimony payable under the Virginia decree. *Id.* at 569, 79 S.E. at 1074. *See also* Isaacs v. Isaacs, 117 Va. 730, 86 S.E. 105 (1915). For discussion of division of personal and marital property upon divorce, see notes 123-31 *infra* and accompanying text. For discussion of enforcement of foreign divorce and support decrees, see notes 290-300 *infra* and accompanying text.

98. *See, e.g.*, Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957), where the wife filed for support payments in New York after the husband had secured an ex parte divorce. The Supreme Court stated: "Since the wife was not subject to its jurisdiction, the Nevada divorce court had no power to extinguish any right which she had under the law of New York to financial support from her husband." *Id.* at 418. *See generally* 24 AM. JUR. 2d, *Divorce and Separation*, § 953; Annot., 49 A.L.R.3d 1266 (1973); Annot., 28 A.L.R.2d 1303 at § 3 (1953).

99. 215 Va. 205, 207 S.E.2d 875 (1974).

100. The parties were married in Virginia and subsequently moved to Texas. After their separation, the wife and children returned to Virginia. The husband filed for divorce in Texas and was able to obtain *in personam* jurisdiction over his wife in Texas. The wife then sued for a divorce in Virginia; she was also able to acquire *in personam* jurisdiction over her husband. The Virginia court denied his plea in abatement (which asserted that all matters in controversy should be adjudicated in the Texas court) and awarded temporary child custody and alimony to the wife. The wife discharged her counsel in Texas and did not appear

Court held that a Texas decree awarding the husband a divorce and dividing property between the husband and wife was entitled to full faith and credit under the United States Constitution[101] and federal[102] and Virginia statutes[103] not only as to the wife's marital status, but also as to her rights to property and support.[104] Thus, the Texas decree terminated the Virginia trial court's award of alimony *pendente lite* to the wife,[105] and it precluded the Virginia trial court from awarding the wife permanent alimony.[106]

Although the supreme court discussed *Isaacs v. Isaacs*,[107] and the United States Supreme Court cases on divisible divorce,[108] it distinguished those cases from the facts in *Osborne*. The court noted that the Texas final decree of divorce was entered before, rather than after, permanent alimony was decreed by the trial court in Virginia.[109] The decree was conclusive and unmodifiable because Texas had personal jurisdiction over Mrs. Osborne and she was given an opportunity to protect her marital rights. Since the Texas courts would not permit relitigation of the is-

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in person or by counsel at the trial. The Texas court granted the husband an absolute divorce accompanied by a child support award to the wife smaller than the *pendente lite* Virginia award. Since Texas is a community property state, the parties' community property was divided in lieu of awarding alimony to the wife for her maintenance and support. The husband filed a second plea in abatement in the Virginia court as he sought the settlement of all matters in controversy with the Texas decree. The Virginia trial court only recognized the decree as to the dissolution of the parties' marital status and it continued to exercise jurisdiction over affairs of child custody and alimony. After the final decree awarded the wife separate monthly stipends for permanent alimony and child support, the husband effectuated an appeal to the Virginia Supreme Court. *Id.* at 206-07, 207 S.E.2d at 878-79.

101. U.S. CONST. art. IV, § 1 provides in pertinent part: "Full Faith and Credit shall be given in each state to the . . . judicial proceedings of every other State. . . ."

102. 28 U.S.C. § 1738 (1976) provides in pertinent part: "[J]udicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of [the] State . . . from which they are taken."

103. VA. CODE ANN. § 8.01-389(B) (Cum. Supp. 1980) provides: "Every court of this Commonwealth shall give such records of courts not of this Commonwealth the full faith and credit given to them in the courts of the jurisdiction from whence they come."

104. Despite the significant distinctions in the assets that could be used, the available flexibility and the duration of the award, the court concluded that the Texas scheme of economic adjustment upon the dissolution of marriage sought to protect the same right as the award of alimony in Virginia. 215 Va. at 210, 207 S.E.2d at 880.

105. *See* VA. CODE ANN. § 20-103 (Repl. Vol. 1975). For a discussion of decisions regarding temporary or *pendente lite* support and maintenance, see notes 203-04 *infra* and accompanying text.

106. 215 Va. at 211, 207 S.E.2d at 882.

107. 115 Va. 562, 79 S.E. 1072 (1913) *rev'd* on other grounds, 117 Va. 730, 86 S.E. 105 (1915).

108. *See* notes 91-97 *supra* and accompanying text.

109. 215 Va. at 211, 207 S.E.2d at 881.

sue of support due to the principle of *res judicata,* Virginia courts were bound by the Texas decision and the wife could not be permitted to relitigate in Virginia a right already determined by the Texas court.[110]

The court took a different posture regarding the increase in the amount of the child support beyond that ordered by the Texas court.[111] It declined to give full faith and credit to a child support order entered in another state as the result of uncontested proceedings.[112] "[H]aving jurisdiction of the parties and of their minor children, [a Virginia court] may make a child support award without being bound by any previous award that may have been made in another state."[113] The supreme court further held that, since Virginia courts can make independent determinations of proper payments for child support, no proof of change of circumstances was required before the trial court could make a child support award which differed from the Texas child support decree.[114]

Newport v. Newport[115] decided the question left open by the Virginia Supreme Court in *Osborne*: whether the prior grant of an *ex parte* divorce from another state extinguished a spouse's right to seek alimony.[116] After her husband was awarded an *ex parte* divorce in Nevada, Mrs. Newport filed a bill of complaint against her husband in the Circuit Court of Fairfax County, Virginia for separate support and maintenance. The trial court accorded full faith and credit to the divorce decree insofar as it terminated the marital status of the parties, but held that the Nevada

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110. *Id.* at 212, 207 S.E.2d 880-81.

111. The husband contended that the Virginia court had no power, in the absence of a changed circumstance, to increase the amount of child support beyond that ordered in the Texas decree. *Id.* at 212, 207 S.E.2d at 882.

112. The court noted that the Virginia court had jurisdiction over the parties to enter decrees awarding custody of the children and child support to the mother, and that such decrees were entered before the Texas divorce decree was entered. The record also indicated that the Texas court gave no consideration or effect to the Virginia decrees during the uncontested proceedings. Likewise, the children resided with their mother in Virginia throughout the litigation and the Virginia court never surrendered jurisdiction over them. *Id.* at 212-13, 207 S.E.2d at 882.

113. *Id.* at 213, 207 S.E.2d at 882. The court also noted that it was not required to give full faith and credit to a child custody decree of another state. *See* VA. CODE ANN. § 20-107 (Cum. Supp. 1980). For a discussion of child support orders, see notes 268-89 *infra* and accompanying text.

114. 215 Va. at 213, 207 S.E.2d at 882. For a discussion of the constitutional questions raised by *Osborne* concerning the effect of full faith and credit in regard to modifiable decrees, see *Domestic Relations, 1974-1975 Virginia Survey,* 61 VA. L. REV. 1732, 1738-39 (1975) [hereinafter cited as *1974-1975 Virginia Survey*].

115. 219 Va. 48, 245 S.E.2d 134 (1978).

116. The *Newport* court indicated that this question had been left undecided in *Osborne.* *Id.* at 54, 245 S.E.2d at 139.

court was without power to adjudicate the question of alimony between the parties and that the decree dissolving the marriage did not terminate the wife's right to support.[117]

Relying on the line of cases concerning divisible divorce which had been adopted by the United States Supreme Court,[118] the Virginia Supreme Court rejected the husband's contention that the Virginia courts lacked authority in a later proceeding to order payment of permanent alimony under Virginia law.[119] The court adopted the concept of divisible divorce and held that the right of a wife to support "survives an absolute divorce obtained by her husband in an *ex parte* proceeding in another state."[120]

In many respects, the decision of the Virginia Supreme Court that alimony could not be extinguished without personal jurisdiction over both parties was founded on equitable[121] and public policy considerations.[122] The court properly applied the divisible divorce concept to protect the state's interest in regulating and supervising marital relationships as well as to ensure that the spouse may secure a proper judicial determination

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117. *Id.* at 49, 245 S.E.2d at 135. *Compare with* Jones v. Richardson, 320 F. Supp. 929 (W.D. Va. 1970) (foreign divorce decree which superseded Virginia support order did not render support order ineffective because only Virginia divorce decrees nullify Virginia support orders, pursuant to §§ 20-74, -79).

118. The court in *Newport* cited extensively from Vanderbilt v. Vanderbilt, 354 U.S. 416, 418-19 (1957), Armstrong v. Armstrong, 350 U.S. 568, 577 (1956) and Estin v. Estin, 334 U.S. 541, 546-47, 549 (1948). The facts in *Vanderbilt* more nearly paralleled the facts in *Newport*. 219 Va. at 51, 245 S.E.2d at 137.

119. The husband claimed that the Virginia trial court was required to accord full faith and credit to the Nevada divorce decree and was precluded from awarding the wife permanent alimony. 219 Va. at 49, 245 S.E.2d at 135.

120. *Id.* at 54, 245 S.E.2d at 139. The *Newport* court, in dictum stressed the duty of a husband to support his wife, and the wife's inherent right to receive such support. *Id.* at 55-56, 245 S.E.2d at 139. In light of the holding of Orr v. Orr, 440 U.S. 268 (1979) (Alabama divorce statute which allowed alimony awards to wives but not to husbands held unconstitutional), it is reasonable to assume that future opinions of the Virginia Supreme Court will not rely on such now unconstitutional albeit historically recognized rationales. "Given the sexually neutral language of Virginia's revised spouse and child support statutes, *Newport* requires equal protection of the husband's rights in *ex parte* proceedings." *Separation and Divorce, supra* note 63, at 110-14.

121. Inequities result when a spouse, after establishing domicile in another state, can unilaterally terminate the marital status as well as the right of the other spouse to receive support and maintenance. Such an inequitable result occurred in Stambaugh v. Stambaugh, 458 Pa. 147, 329 A.2d 483 (1974), where the Supreme Court of Pennsylvania held that an *ex parte* divorce decree procured by the husband in a foreign jurisdiction precluded a wife's subsequent suit for alimony because Pennsylvania law made no provision for an ex-wife to receive permanent alimony from her husband.

122. 219 Va. at 55, 245 S.E.2d at 139 (quoting Estin v. Estin, 334 U.S. 541, 546-47 (1948)).

on the question of support and maintenance payments.

Virginia remains a member of a shrinking minority of states which do not permit equitable division of personalty upon divorce.[123] The supreme court has interpreted the language of Code section 20-107 to deny trial courts jurisdiction in divorce suits to enter decrees affecting property rights save those created by marriage in and to the real estate of the parties.[124]

In *Guy v. Guy*,[125] the court held that the trial court lacked potential jurisdiction in a divorce proceeding to decide the issue of ownership of furniture and furnishings of a home.[126] Interpreting a legislative amendment to Code section 20-107,[127] the court found that the "General Assem-

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123. As of mid-1978, there were only seven common law property states (as opposed to community property states such as Texas and California) where courts had no general or equitable power to distribute property; title alone controlled, subject to constructive trusts and tracing of equitable title. These states were Florida, Mississippi, New York, Pennsylvania, Tennessee (jointly held property may be equitably distributed), Virginia, and West Virginia. Freed & Foster, *Divorce in the Fifty States: An Overview as of 1978*, 13 FAM. L.Q. 105, 116-17 (1979). Although Freed and Foster list South Carolina as one of 37 common law property states where courts have equitable jurisdiction to distribute property, a recent newspaper article included South Carolina in the remaining four states where courts have no general or equitable power to distribute property. Mississippi, Virginia and West Virginia are the other members of this declining minority. Jackson, *Women's Property Rights*, Richmond Times-Dispatch, Sept. 28, 1980, § A, at 1, col. 2. *See generally* 24 AM. JUR. 2d at §§ 925-29.

124. Watkins v. Watkins, ___ Va. ___, 265 S.E.2d 750 (1980) (court lacked jurisdiction to determine and settle daughter's right to securities held by her father); Jackson v. Jackson, 211 Va. 718, 180 S.E.2d 500 (1971) (trial court had no power to award use of jointly held property of the parties to the wife as a part of alimony and child support award); Guy v. Guy, 210 Va. 536, 172 S.E.2d 735 (1970) (trial court lacked potential jurisdiction to decide issue of ownership of furniture and furnishings of family home). *Contra*, Bryan v. Bryan, 242 Ga. 121, 249 S.E.2d 605 (1978) (evidence authorized award of jointly held personal property to husband in divorce action); Hargrett v. Hargrett, 242 Ga. 725, 251 S.E.2d 235 (1978) (jointly owned property may be partitioned in divorce action by the court as in an equitable proceeding); Morris v. Morris, 268 S.C. 104, 232 S.E.2d 326 (1977) (wife entitled to one-half interest in furniture and fixtures in marital residence); Newsome v. Newsome, 43 N.C. App. 580, 259 S.E.2d 577 (1979) (wife entitled to right to possession of all the parties' household effects and appliances); Holloway v. Holloway, 233 Ga. 631, 212 S.E.2d 809 (1975) (evidence permitted jury to find in divorce action that monies in safe deposit box belonged to both husband and wife and verdict dividing monies on deposit equally was not an illegal award of alimony to the husband).

125. 210 Va. 536, 172 S.E.2d 735 (1970).

126. The trial court decreed that all the furniture and furnishings of the marital home, worth approximately $50,000.00, were the sole property of the wife. *Id.* at 540, 172 S.E.2d at 738.

127. The 1962 General Assembly amended § 20-107 by adding these words: "The word 'estate' as used in this section shall be construed to mean only those rights of the parties

bly did not intend to confer on courts jurisdiction in a divorce suit to enter a decree affecting property rights save those created by the marriage in the real estate of the parties. Such jurisdiction having been withheld . . . it cannot be conferred by consent or waiver."[128]

The Virginia Supreme Court has modified the holding in *Guy* by allowing lump sum awards for the purpose of furnishing and equipping a wife's new residence.[129] Also, in 1977, the General Assembly deleted the term "estate" from code section 20-107 and gave trial courts discretionary authority to award lump sum payments "based upon consideration of the property interests of the parties except those acquired by gift or inheritance during the marriage."[130]

Despite these changes, however, the recent case of *Watkins v. Watkins*,[131] illustrates that Virginia trial courts still have no authority in divorce actions to divide personal property acquired outside the marriage. In *Watkins*, the chancellor entered a final divorce decree, and, as part of the maintenance and support provisions for the wife, enjoined the husband from disposing of his shares of stock in two family owned corporations.[132] While voiding the part of the final decree dealing with the husband's stock, the Virginia Supreme Court held that the chancellor was without jurisdiction to enjoin the husband from disposing of his stock and that the effect of the chancellor's directive was to impound improperly the husband's personal property.[133]

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created by the marriage in and to the real property of each other," (*e.g.*, dower and curtesy). This amendment was in reaction to the court's holding in Smith v. Smith, 200 Va. 77, 104 S.E.2d 17 (1958) (trial court has jurisdiction to adjudicate the ownership of real and personal properties jointly and equally owned).

128. 210 Va. at 541, 172 S.E.2d at 738-39. One commentator surmised that the legislature prefers a rule such as *Guy* in order to protect the interests of third parties who are not before the court in the divorce proceeding. Holt, *Support v. Alimony in Virginia: It's Time to Use the Revised Statutes*, 12 U. RICH. L. REV. 139, 150-51 (1977).

129. Turner v. Turner, 213 Va. 42, 43-44, 189 S.E.2d 361, 363 (1972) (court may award a lump sum payment in addition to regular payments so that deserving spouse can furnish a residence upon divorce). 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). *See* notes 198-201 *infra* and accompanying text for discussion of lump sum payments.

130. 1977 Va. Acts, ch. 475 (codified at VA. CODE ANN. § 20-107 (Cum. Supp. 1980)). *See also* Holt, *supra* note 128, at 151-52.

131. ___ Va. ___, 265 S.E.2d 750 (1980).

132. *Id.* at ___, 265 S.E.2d at 752.

133. *Id.* at ___, 265 S.E.2d at 752-53. *See also* Cooper v. Spencer, 218 Va. 541, 238 S.E.2d 805 (1977), where the Virginia Supreme Court considered the question whether a partnership existed between a man and woman who had lived together as husband and wife and whether the woman was entitled to a statement and settlement of accounts. The court held

4. Separation Agreements and Property Settlements

This topic was the source of numerous decisions by the Virginia Supreme Court during the past decade.[134] Virginia law permits a divorcing couple to execute a separation agreement regulating the post-divorce disposition of property or other matters. Code section 20-109.1 provides that such an agreement may be incorporated into the final divorce decree.[135] It is the established rule in Virginia that separation agreements[136] introduced into divorce proceedings that are confirmed, approved, and ratified will be considered contracts and not alimony.[137] Commentators have noted that this rule "places a heavy burden on the drafters either to anticipate the many eventualities which may arise and specifically deal with them, or to provide for reopening or renegotiating all or some contractual

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that the woman had the burden of proving the existence of an implied business partnership agreement since there was no express partnership agreement. The fact that she jointly owned farm property and may have shared gross returns of commercial egg business and farming operations was held to be insufficient to establish an implied business partnership.

134. Cooley v. Cooley, ___ Va. ___, 263 S.E.2d 49 (1980) (postnuptial separation agreement and subsequent contract); Lindsay v. Lindsay, 218 Va. 599, 238 S.E.2d 817 (1977) (separation agreement modified by consent decree); Shoosmith v. Scott, 217 Va. 290, 227 S.E.2d 729 (1976), *aff'd on rehearing*, 217 Va. 789, 232 S.E.2d 787 (1977) (separation and property settlement agreement); Harris v. Harris, 217 Va. 680, 232 S.E.2d 739 (1977) (contract ratified and confirmed by decree *a vinculo matrimonii*); Thomas v. Thomas, 217 Va. 502, 229 S.E.2d 887 (1976) (postnuptial contract); Thomas v. Thomas, 216 Va. 741, 222 S.E.2d 557 (1976) (stipulation agreement); Morris v. Morris, 216 Va. 457, 219 S.E.2d 864 (1975) (settlement agreement executed during pendency of divorce); Capps v. Capps, 216 Va. 378, 219 S.E.2d 901 (1975) (separation agreement concerning divorce); Wickham v. Wickham, 215 Va. 694, 213 S.E.2d 750 (1975) (separation agreement); McLoughlin v. McLoughlin, 211 Va. 365, 177 S.E.2d 781 (1970) (property settlement agreement).

135. VA. CODE ANN. § 20-109.1 (Cum. Supp. 1980). *See also* VA. CODE ANN. § 20-109 (Cum. Supp. 1980).

136. Inter-spousal agreements formed before marriage are "antenuptial", those formed during marital harmony are "postnuptial", and those formed in immediate contemplation or during separation are separation agreements. 1 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 3, at 3-6 (1978).

137. Thomas v. Thomas, 216 Va. 741, 222 S.E.2d 557 (1976) (when a stipulation agreement is filed and no objection is raised, trial court's jurisdiction over awarding alimony, suit money or counsel fees is restricted to terms of stipulation agreement); McLoughlin v. McLoughlin, 211 Va. 365, 368, 177 S.E.2d 781, 783 (1970) (payments made pursuant to a property settlement agreement that was incorporated into a divorce decree cannot be judicially eliminated or modified as can alimony payments); *accord*, Harris v. Harris, 217 Va. 680, 232 S.E.2d 739 (1977).

In 1977, the General Assembly amended the statute that allowed a party to object to a property settlement when the agreement was introduced in the divorce court. The amendment forbids objection to the agreement in court. 1972 Va. Acts, ch. 222 (codified at VA. CODE ANN. § 20-109 (Cum. Supp. 1980)).

provisions at certain times or on the occurrence of certain events."[138]

Shoosmith v. Scott[139] "emphasize[d] the inviolability of separation agreements and should serve as notice to practitioners to draft them carefully and completely."[140] In *Shoosmith*, the court held that retroactive application of amendments to code sections 20-109 and 20-109(1) was unconstitutional as applied to a prior property settlement.[141] Since the divorce decree approved a contract between the parties but did not incorporate the contract or order the husband to perform its obligations, it was not an award of alimony. "Rather, the decree was an approval of a private bilateral contract based upon mutual consideration for payments in lieu of alimony. Like other private contracts, such contracts may not be impaired by legislative enactment."[142]

It is well settled in Virginia that a consent decree which contains provisions of a previous property settlement agreement supersedes the agreement and is binding upon the parties. "A consent decree is a contract or agreement between the parties to the suit, entered of record in the cause with the consent of the court, and [it] is binding unless secured by fraud or mistake."[143] In *Lindsay v. Lindsay*,[144] the court held that the introduc-

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138. *See Domestic Relations, 1976-1977 Virginia Survey*, 63 VA. L. REV. 1418, 1420 n.17 (1977) (quoting Wadlington, *Separation and Settlement Agreements in Virginia: Drafting for Future Modification*, 3 VA. BAR J. 4, 8 n.15 (Winter 1977)) [hereinafter cited as *1976-1977 Virginia Survey*].

139. 217 Va. 789, 232 S.E.2d 787 (1977), *aff'g* 217 Va. 290, 227 S.E.2d 729 (1976). The case was heard twice because the court erroneously referred to the agreement as alimony at one point. In the second *Shoosmith* opinion, the court affirmed the rationale of its prior holding and noted that the agreement was a contract rather than alimony. 217 Va. at 793, 232 S.E.2d at 789.

140. *1976-1977 Virginia Survey, supra* note 138, at 1420.

141. The husband and wife executed a property settlement after their divorce in 1959. The chancellor "approved" the settlement but it was not made an express part of his decree. The General Assembly passed amendments to the code which provided that alimony was to cease if the person receiving the payment remarried or died. Even though the amendments were passed after his wife's remarriage and the agreement did not state that payments would cease if she remarried, Shoosmith contended that the amended provisions ended his obligation to continue payment to his remarried former wife. 217 Va. at 791-93, 232 S.E.2d at 788-89. *See* 1977 Va. Acts, ch. 222 (codified at VA. CODE ANN. § 20-109 (Cum. Supp. 1980)).

142. 217 Va. at 793, 232 S.E.2d at 789. *See* U.S. CONST. art. I, § 10, cl.1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."); VA. CONST. art. I, § 11 ("[T]he General Assembly shall not pass any law impairing the obligation of contracts . . . ."); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (impairment will be upheld if necessary to achieve state's purpose and reasonable under the circumstances); El Paso v. Simmons, 379 U.S. 497 (1965) (impairment upheld because it did not involve the "primary consideration" of the contract).

143. Durrett v. Durrett, 204 Va. 59, 63, 129 S.E.2d 50, 52-53 (1963). *See also* Barnes v.

tion of an original property settlement agreement "for evidentiary purposes only" did not constitute a repudiation of a consent decree or evidence an intent to be bound by the terms of the original agreement. Therefore, the trial court had the authority to modify the support and property settlement by consent decree and to incorporate the modified agreement into a final decree of divorce.[145]

The Supreme Court of Virginia held in *Morris v. Morris*,[146] that the purpose of code section 20-109.1 is to facilitate enforcement of the terms of settlement agreements by the contempt power of the court. Refusing to narrowly construe the language of code section 20-109.1,[147] the supreme court concluded that any provision of a separation agreement that "reasonably relate[s] to the maintenance and care of the children" can become part of a divorce decree.[148] The *Morris* decision thus enhances the ability of courts to enforce the provisions of separation agreements incorporated in divorce decrees. It also signifies that the supreme court will encourage voluntary, court-approved agreements which effectuate the

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American Fertilizer Co., 144 Va. 692, 720, 130 S.E. 902, 911 (1925).

144. 218 Va. 599, 603, 238 S.E.2d 817, 819 (1977). The parties submitted a consent decree to the trial court, and the wife introduced a previous separation agreement for evidentiary purposes only. Relying on the consent decree, the court modified certain provisions of the separation agreement in incorporating the provisions into the final decree. The husband contended that the original agreement should have been binding on the wife because she reinstated the agreement by introducing it at trial. He also argued that the trial court lacked authority to modify the agreement, pursuant to VA. CODE ANN. § 20-109 (Repl. Vol. 1975) (current version at VA. CODE ANN. § 20-109 (Cum. Supp. 1980)). 218 Va. at 600-03, 238 S.E.2d at 817-19.

145. 218 Va. at 603-04, 238 S.E.2d at 819-20. This decision emphasizes the importance of drafting separation agreements carefully and the need to be explicit in stating what parts of the agreement are to be incorporated into the final decree and what areas are to be left to the court's discretion. *See Domestic Relations, 1977-1978 Virginia Survey*, 64 VA. L. REV. 1439, 1441 (1978) [hereinafter cited as *1977-1978 Virginia Survey*].

146. 216 Va. 457, 459, 219 S.E.2d 864, 866-67 (1975).

147. VA. CODE ANN. § 20-109.1 (Cum. Supp. 1980) provides in relevant part: "Any court may affirm, ratify and incorporate by reference in its decree . . . any valid agreement between the parties, or provisions thereof, concerning the conditions of the maintenance of the parties, or either of them and the care, custody and maintenance of their minor children. . . ."

148. 216 Va. at 459, 219 S.E.2d at 867. The trial court declined to "enforce, interpret or rule upon" provisions of the separation agreement that were not expressly related to "child custody, visitation and support, or alimony." The excluded provisions required the husband to convey or transfer to his wife his interest in the family residence, furniture, furnishings, and automobile and to maintain life insurance for the children. Other provisions concerned tax deductions and independent legal advice. *Id.* at 459-60, 219 S.E.2d 866-67. Agreements containing similar provisions were incorporated into divorce decrees without question in Carter v. Carter, 215 Va. 475, 477, 211 S.E.2d 253, 255-56 (1975) and Paul v. Paul, 214 Va. 651, 653, 203 S.E.2d 123, 125 (1974).

prompt resolution of disputes concerning the maintenance and care of minor children and the property rights of divorcing spouses.[149]

Traditionally, courts have held that antenuptial agreements which contemplated separation and divorce were invalid as against public policy.[150] This almost universal "public policy" rule holds:

> Any antenuptial contract which provides for, facilitates, or tends to induce, a separation or divorce of the parties after marriage, is contrary to public policy, and is therefore void. It has often been held that an antenuptial agreement limiting the liability of the husband to the wife [or vice versa] for alimony, or fixing the property rights of the parties, in the event of a separation or divorce, is void.[151]

As with most jurisdictions, Virginia has followed this general rule.[152]

The Supreme Court of Virginia, however, has recently taken a more progressive view of antenuptial and postnuptial contracts relating to the adjustment of property rights between spouses. In *Capps v. Capps*,[153] the court upheld the validity of a postnuptial agreement relating to the disposition of real property.[154]

Although the supreme court restated its general opposition to antenuptial or postnuptial agreements which tended to encourage or facilitate separation or divorce,[155] it also noted that "property settlements, when entered into by competent parties upon valid consideration for lawful

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149. 216 Va. 457, 459, 219 S.E.2d 864, 867 (1975). The court is in line with the modern judicial trend of facilitating the settlement of marital dissolutions through agreements made upon or after separation. *See* 1 A. LINDEY, *supra* note 136, § 3, at 3-23 to 3-24 (citing, *inter alia*, Ryan v. Griffin, 199 Va. 891, 103 S.E.2d 240 (1958)); 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS § 90, at 90-27 (1979). For an extensive analysis of antenuptial agreements, see Swisher, *Divorce Planning in Antenuptial Agreements: Toward a New Objectivity*, 13 U. RICH. L. REV. 175 (1979).

150. Swisher, *supra* note 149, at 177.

151. Crouch v. Crouch, 53 Tenn. App. 594, 385 S.W.2d 288, 293 (1964) (quoting 17 AM. JUR., *Divorce and Separation* § 16 (1957)).

152. Arrington v. Arrington, 196 Va. 86, 82 S.E.2d 548 (1954); Cumming v. Cumming, 127 Va. 16, 102 S.E. 575 (1920). For similar decisions of other states, see Swisher, *supra* note 149, at 177-78, n.7. *See also* Annot., 57 A.L.R.2d 942 (1958); Annot., 70 A.L.R. 826 (1931).

153. 216 Va. 378, 219 S.E.2d 901 (1975).

154. The parties had executed a written agreement prior to their separation. It called for the wife to assume joint liability on a promissory note in exchange for joint title in the marital home. The agreement further provided that if either party should file a suit for divorce or separate maintenance, the wife would surrender her interest in the property and the husband would idemnify his wife's liability on the note. And, as the court noted, the agreement stated that the parties were living together as husband and wife with no prospect of a separation. *Id.* at 379, 219 S.E.2d at 902-03.

155. *Id.* at 380, 219 S.E.2d at 903.

purposes, are favored in the law and [such will be enforced] unless their illegality is clear and certain."[156] Thus, the court held that the agreement did not violate public policy because it tended to promote a continuation of the marriage, rather than encouraging or facilitating a divorce or separation.[157]

The *Capps* decision was affirmed by the Virginia Supreme Court in a recent 1980 case. In *Cooley v. Cooley*,[158] the court considered the question whether a postnuptial agreement *and* a subsequent contract modifying the agreement were void and unenforceable as facilitating divorce.[159] Emphasizing that the parties had experienced marital difficulties for nearly three years before its execution, the supreme court found that the agreement was merely an attempt by an estranged couple to adjust mutual rights and obligations prior to their actual separation, which took place immediately.[160]

As to the contract modifying the agreement, evidence indicated that the ground for the divorce preexisted the contract and had already become irrevocably fixed.[161] Consequently, the court held that the postnuptial agreement and subsequent contract were not void and unenforceable since "the general purpose of the contract, like the agreement, was to adjust the [parties'] property rights; facilitation of the divorce was not its specific object."[162] Although these cases may be open to analytical criticism,[163] the substantive import of *Capps* and *Cooley* nonetheless merit commendation because the Virginia Supreme Court has decided to follow the progressive trend of jurisdictions that allow married couples to plan for divorce.[164]

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156. *Id.*

157. 216 Va. at 380, 219 S.E.2d at 903. The parties in this suit were the same as those in Capps v. Capps, 216 Va. 382, 219 S.E.2d 898 (1975). For a discussion of another aspect of this case, see note 29 *supra* and accompanying text.

158. ___ Va. ___, 263 S.E.2d 49 (1980).

159. *Id.* at ___, 263 S.E.2d at 50.

160. The husband and wife recognized that a separation was unavoidable. The preamble of the agreement even recited the "unhappy" conditions and the necessity to separate for "the health and happiness" of both parties. *Id.* at ___, 263 S.E.2d at 52.

161. The wife had no defense to the husband's one-year separation charge and she had promised not to contest the issue of spousal support at the divorce proceeding in consideration for modification of the original agreement. *Id.* at ___, 263 S.E.2d at 52.

162. *Id.* at ___, 263 S.E.2d at 52.

163. *See Domestic Relations, 1975-1976 Virginia Survey*, 62 VA. L. REV. 1431, 1436-37 (1976) [hereinafter cited as *1975-1976 Virginia Survey*].

164. *See* Swisher, *supra* note 149, at 183-95.

5. Alimony or Support and Maintenance of Spouse

The term "alimony" is derived from the Latin *alimonia*, "sustenance."[165] As traditionally applied by the Virginia Supreme Court, it meant the sustenance or support of the wife by the divorced husband. "It 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, continued to exist even after they cease to live together."[166] Prior to 1975, the Virginia Supreme Court consistently held that alimony was a substantive right of the wife.[167] However, several decisions based on recent amendments by the General Assembly indicate that the court has altered this traditional view and that alimony is no longer an absolute right of a wife upon divorce.[168]

The Virginia Supreme Court has reaffirmed its rule that a wife cannot obtain alimony (now called support and maintenance[169]) when her husband is granted a divorce on the basis of the wife's misconduct.[170] As of 1978, Virginia was one of ten jurisdictions (including Puerto Rico) which still considers marital misconduct an automatic bar to alimony.[171] It

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165. Eaton v. Davis, 176 Va. 330, 338, 10 S.E.2d 893, 897 (1940), *quoted in* Newport v. Newport, 219 Va. 48, 55, 245 S.E.2d 134, 139 (1978). For an excellent comparison of alimony and support, see Holt, *supra* note 128, at 139-56.

166. Eaton v. Davis, 176 Va. 330, 338, 10 S.E.2d 893, 897. *See generally* Clark, *supra* note 12, at 14.1-14.12. For discussion of forfeiture of alimony due to fault, see notes 170-76 *infra* and accompanying text.

167. Holt, *supra* note 128, at 140. *See, e.g.*, White v. White, 181 Va. 162, 168, 24 S.E.2d 448, 451 (1943) (alimony is a "substantive right"); 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).

168. Brooker v. Brooker, 218 Va. 12, 235 S.E.2d 309 (1977) (neither party in divorce has an automatic obligation to support the other); *accord*, Bristow v. Bristow, ___ Va. ___, 267 S.E.2d 89 (1980).

169. The General Assembly revised title 20 (domestic relations) in 1975 so as to abolish the terms "alimony" and "husband" from the Code and to replace them with the terms "support and maintenance" and "spouse." 1975 Va. Acts ch. 644 (codified at scattered sections of VA. CODE ANN. § 20 (Repl. Vol. 1975 and Cum. Supp. 1980)). Therefore, neither party has an automatic right to support and maintenance. *See, e.g.*, Bristow v. Bristow, ___ Va. ___, 267 S.E.2d 89 (1980). For a discussion of these legislative amendments, see Holt, *supra* note 128, at 140-56; *1974-1975 Virginia Survey*, *supra* note 114, at 1742-51.

170. Carneal v. Carneal, 211 Va. 162, 176 S.E.2d 305 (1970) (wife deserted family home without justification and was not entitled to alimony). *See also* Mason v. Mason, 209 Va. 528, 165 S.E.2d 392 (1969); McClung v. McClung, 206 Va. 782, 146 S.E.2d 195 (1966); Stolfi v. Stolfi, 203 Va. 696, 126 S.E.2d 923 (1962); Robinette v. Robinette, 153 Va. 342, 149 S.E. 493 (1929); Duff v. Duff, 145 Va. 526, 134 S.E. 555 (1926); House v. House, 102 Va. 235, 46 S.E. 299 (1904); Harris v. Harris, 72 Va. (31 Gratt) 13 (1878).

171. Freed & Foster, *supra* note 122, at 115. There is a modern trend to minimize the importance of the role of fault in awarding alimony. Sixteen jurisdictions, including the Virgin Islands, expressly or impliedly exclude marital fault from consideration; 12 states regard

should be noted that this rule was codified and extended to *either* spouse as the result of amendments to code section 20-107.[172]

The court consistently held throughout the 1970's that when a divorce is granted under code section 20-91(9),[173] the husband is not relieved of the obligation to support his wife *unless* it can be shown that the separation was caused by the wife's fault or misconduct.[174] The fault or misconduct which would deprive a wife of alimony when a "no fault" decree is awarded the husband *must* be such as to constitute grounds for divorce under the fault provisions of code section 20-91.[175] Therefore, in *Lancaster v. Lancaster*,[176] the court held that it was reversible error for a chancellor to deny a wife support and maintenance in the absence of finding fault or misconduct on her part.

In *Brooker v. Brooker*,[177] the court additionally held that it was reversible error for the trial court to deny support and maintenance to a spouse without making any findings regarding the various factors which code section 20-107 requires a court to consider in determining such support and maintenance.[178] Even though these standards were not effective until

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marital fault as a discretionary factor; 15 states have statutes which make no mention of marital fault; seven jurisdictions, including the District of Columbia, consider economic misconduct a factor. *Id.* at 115-16. *The Uniform Marriage and Divorce Act* § 308(b) has completely abolished any consideration of fault or marital misconduct in determining the amount of support to be given. For a discussion of the role of fault in other states, see 87 HARV. L. REV. 1579 (1974).

172. VA. CODE ANN. § 20-107 (Cum. Supp. 1980) provides "that no permanent support and maintenance or lump sum payment for the spouse shall be awarded from a spouse if there exists in his or her favor a ground of divorce under any provision of §§ 20-91(1) through (8) or 20-95."

173. VA. CODE ANN. § 20-91(9) (Repl. Vol. 1975) provides, in pertinent part, that either spouse may obtain a divorce after living separate and apart for one year. For a discussion of non-fault divorces, see notes 42-52 *supra* and accompanying text.

174. Guy v. Guy, 210 Va. 536, 172 S.E.2d 735 (1970) (emphasis added) (citing Mason v. Mason, 209 Va. 528, 165 S.E.2d 392 (1969)). *See also* Bristow v. Bristow, ___ Va. ___, 267 S.E.2d 89 (1980); Monahan v. Monahan, 212 Va. 406, 184 S.E.2d 812 (1971).

175. Young v. Young, 212 Va. 761, 762, 188 S.E.2d 200, 201 (1972) (emphasis added). *See also* Brooker v. Brooker, 218 Va. 12, 235 S.E.2d 309 (1977); Rowland v. Rowland, 215 Va. 344, 210 S.E.2d 149 (1974); Graham v. Graham, 210 Va. 608, 172 S.E.2d 724 (1970).

176. 212 Va. 127, 183 S.E.2d 158 (1971).

177. 218 Va. 12, 235 S.E.2d 309 (1977). The court inferred, in dictum, that neither party to a divorce had an automatic obligation to support the other. "The 1975 amendment to Code § 20-91, Acts 1975, c. 644, places husband and wife on an equal footing in that either spouse now may be awarded support and maintenance from the other." *Id.* at 13 n.2, 235 S.E.2d at 310 n.2.

178. *Id.* at 13, 235 S.E.2d at 310. VA. CODE ANN. § 20-107 (Cum. Supp. 1980) provides that:

> The court shall, in determining such support and maintenance for the spouse or chil-

1975, they are basically the same tests traditionally applied in determining alimony and child support.[179] Thus, where the wife establishes her need for support and the husband's ability to provide it, and she is not shown to be guilty of misconduct entitling the husband to divorce, the chancellor has no choice but to award the wife support and maintenance.[180]

In resolving the question of "how much support and maintenance" is required, the applicable rule requires a husband, within the limits of his financial ability, to maintain his former wife in the manner in which she was accustomed during the marriage.[181] Virginia courts are empowered to assess spousal support awards, not to penalize or reward either spouse, but rather to do equity between the parties' interests and to protect society's interests in the incidents of the marital relationship.[182] It is necessary to balance the several needs and capacities of the husband and wife, and the balance must be struck and awards made "upon the basis of the circumstances disclosed by the evidence at the time of the award."[183]

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dren, consider the following:
(1) The earning capacity, obligation and needs, and financial resources of the parties;
(2) The education and training of the parties and the ability and 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;
(5a) The contributions, monetary and non-monetary, of each party to the well-being of the family;
(5b) The property interests of the parties, both real and personal;
(6) Such other factors as are necessary to consider the equities between the parties.

179. *See, e.g.*, Ingram v. Ingram, 217 Va. 27, 225 S.E.2d 362 (1976). *See also* Holt, *supra* note 128, at 144-52.

180. Thomas v. Thomas, 217 Va. 502, 229 S.E.2d 887 (1976). The trial court awarded the wife a divorce but only awarded periodic payments of $200.00 per month for her support and maintenance for two years. The parties were married 30 years and the wife's only employment outside of raising four children and housekeeping was as a substitute teacher. The wife was not qualified for any employment other than substitute teaching and her yearly earnings did not exceed $1,546.00; her needs were $757.57 per month. On the other hand, Mr. Thomas earned $28,000.00 per year and had a take-home salary of $1,546.56 per month; his needs were $1,573.08. Since the record was devoid of any evidence that Mrs. Thomas' need or Mr. Thomas' ability to provide for her need would substantially change within the immediate or reasonably foreseeable future, the Virginia Supreme Court also held that the trial court's action in limiting its award to two years was reversible error as it was not supported by the record. *Id.* at 503-05, 229 S.E.2d at 888-90.

181. Butler v. Butler, 217 Va. 195, 227 S.E.2d 688 (1976); Robertson v. Robertson, 215 Va. 425, 211 S.E.2d 41 (1975); Turner v. Turner, 213 Va. 42, 189 S.E.2d 361 (1972).

182. Jacobs v. Jacobs, 219 Va. 993, 254 S.E.2d 56 (1979).

183. *Id.* at 995, 254 S.E.2d at 58 (quoting Thomas v. Thomas, 217 Va. 502, 505, 229 S.E.2d 887, 889-90 (1976)).

In "striking the balance," the Virginia Supreme Court held in *Brauer v. Brauer*,[184] that it was improper in a divorce suit to construe the will of a divorced husband's mother who left her son a life estate in realty assessed at over $200,000.00. However, the court held that it was proper, in determining the husband's ability to pay alimony, to consider his ability to derive income from his life estate.[185] The *Brauer* holding was affirmed in *Robertson v. Robertson*,[186] where the court held it was improper to consider the possibility of a greater return on the husband's investments since there was no indication that the husband had designed the investment plan to frustrate his wife's efforts to secure alimony.[187]

While considering both actual earnings and the capacity to earn, the Virginia Supreme Court will not permit a husband to choose to remain in a lower salaried, career-oriented, staff position which sacrifices immediate income for future expectations to penalize his wife and children.[188] However, the court has also held that there can be no award of alimony where the wife can presently support herself, and that a wife with the ability to work must do so.[189]

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184. 215 Va. 62, 205 S.E.2d 665 (1974).

185. *Id.* at 65, 205 S.E.2d at 667. The husband's mother died testate in 1958 seized of real property assessed in 1974 at $207,600.00. The mother devised all of her property to her son "for life and at his death the residue of said property, if any, to be divided equally between [her] . . . brother and sisters, as might be living." *Id.* She also appointed an executor and authorized him to use such portions of the estate as might be necessary, in addition to the income, for the maintenance and support of her son. After awarding the wife judgment against her husband for arrearages in alimony of $23,353.00 the trial court denied the husband's motion for a reduction of alimony. The trial court also noted the value of the husband's life estate and ordered the husband's alimony be increased to $500.00 per month. The husband appealed the judgment against him and claimed the amount fixed by the trial court was excessive. On appeal, the Virginia Supreme Court held that the wife's judgment for alimony arrearages was a lien on her husband's real property including his life estate. However, the alimony award was reversed and remanded; the trial court was instructed to consider not only the needs of both parties, but also the ability of the husband to pay, taking into consideration the existence of the judgment lien on his life estate. *Id.* at 64-68, 205 S.E.2d at 667-69.

186. 215 Va. 425, 211 S.E.2d 41 (1975).

187. *Id.* at 428, 211 S.E.2d at 44 (likewise, it was not proper to consider what the husband might ultimately receive as a potential recipient of a share of a trust fund).

188. Butler v. Butler, 217 Va. 195, 227 S.E.2d 688 (1976). *See also* Hawkins v. Hawkins, 187 Va. 595, 47 S.E.2d 436 (1948).

189. Brauer v. Brauer, 215 Va. 62, 66-67, 205 S.E.2d 665, 668 (1978) (in dictum, citing Babcock v. Babcock, 172 Va. 219, 1 S.E.2d 328 (1939); Gagliano v. Gagliano, 215 Va. 447, 451-52, 211 S.E.2d 62, 65 (1975) (denial of alimony not plainly wrong in view of the wife's present income and ability to earn as well as award of attorney's fees and child support); Barnard v. Barnard, 132 Va. 155, 111 S.E. 227 (1927). *See also* Baytop v. Baytop, 199 Va. 388, 395, 100 S.E.2d 14, 19 (1957) (court refused to award wife alimony since she had always

Practitioners should take note of the recent case of *Bristow v. Bristow*[190] where the Virginia Supreme Court made it clear that it is reversible error for a trial court to rely upon only one factor of code section 20-107 in awarding spousal support. The chancellor in *Bristow*, after finding that neither party was entitled to a divorce based on marital fault, entered a "no-fault" divorce decree and denied the wife support and maintenance. His decision to deny support was based solely on code section 20-107(4).[191]

Upon appeal, the court first noted that the husband had not proven a ground of divorce against his wife and thus was not relieved of any obligation he might otherwise have to support his wife.[192] Next, the court stated that neither party has an automatic obligation to support the other.[193] Rejecting the husband's constitutional arguments against sexual discrimination, the court held that the chancellor was mandated by the language of code section 20-107 to consider the specific factors contained therein. It was, therefore, reversible error for the chancellor to fail to consider all the factors and to rely upon the fourth factor alone.[194]

Although this holding on first blush may appear to signal a reactionary return to the concept of alimony as a substantive right, such an assessment would be incorrect in two respects. First, the Virginia Supreme Court was concerned with the equity of permanently denying support and maintenance when it stated:

> We do not think the error [of the chancellor in only considering one factor] was harmless. The holding based upon it not only denied the wife the present right to support but also foreclosed forever the right she would otherwise enjoy under Code § 20-109 to petition for support some time in the

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earned enough money on her own to amply support herself).

190. ___ Va. ___, 267 S.E.2d 89 (1980).

191. *Id.* at ___, 267 S.E.2d 89, 90. VA. CODE ANN. § 20-107(4) (Cum. Supp. 1980) provides that the court shall consider the duration of the marriage. The chancellor held that the husband was not liable to support "this lady because they were just married such a very short period of time [11 months]." In referring to the other factors in § 20-107, he stated, "I really don't get to those grounds." *Id.* at ___, 267 S.E.2d at 90. *See* note 76 *supra* and accompanying text for discussion of § 20-107.

192. *Id.* at ___, 267 S.E.2d at 90 (quoting § 20-91(9)). *See* notes 170-76 *supra* and accompanying text for discussion of non-fault divorce and alimony.

193. *Id.* at ___, 267 S.E.2d at 90 (quoting Brooker v. Brooker, 218 Va. 12, 13 n.2, 235 S.E.2d 309, 310 n.2 (1977).

194. The husband contended that the chancellor had the discretion, under § 20-107, to consider only the duration of the marriage. ___ Va. at ___, 267 S.E.2d at 90. The court did not address the husband's argument regarding constitutional guarantees against sex discrimination.

future "as the circumstances may make proper."[195]

Second, and perhaps most important, the holding emphasizes that trial courts cannot pick and choose among the various factors set out in code section 20-107. Trial courts are required to make an objective, non-biased decision, taking into account the various personal factors of *both* spouses, whether *either* party *may* receive support and the amount thereof.

Although Virginia trial courts are prevented from equitably dividing personalty upon divorce by the holding in *Guy*,[196] the Virginia Supreme Court, in *Turner v. Turner*,[197] affirmed a lump sum award of $6,000.00 to the wife for the express purpose of furnishing and equipping her new residence. The court made no effort to distinguish *Guy* and noted that alimony ordinarily takes the form of either a lump sum payment or the more usual periodic payments.[198] However, the court held that where special equities exist or where there is an impelling reason for its necessity or desirability, trial courts may award a lump sum *in addition to* the periodic payments of alimony and support. The lump sum award of $6,000.00 was affirmed by the court because it found that the evidence fully established impelling necessity.[199] The court reaffirmed and extended the *Turner* decision in *Robertson v. Robertson*,[200] where it affirmed the trial court's decree that the husband must provide the wife with "suitable" replacements for any furniture or furnishings he might remove from the family apartment where the wife continued to reside.[201]

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195. ___ Va. at ___, 267 S.E.2d at 90 (quoting Losyk v. Losyk, 212 Va. 220, 223, 183 S.E.2d 135, 137 (1971)).

196. *See* notes 122-132 *supra* and accompanying text for discussion of the *Guy* decision.

197. 213 Va. 42, 189 S.E.2d 361 (1972).

198. *Id.* at 44, 189 S.E.2d at 363.

199. 213 Va. at 44, 189 S.E.2d at 363. In *Turner*, the court stressed that the wife had been deprived of occupancy of the marital residence and its furnishings by the husband who changed the locks and took possession of the house and its contents while the wife was temporarily absent. The wife owned no furnishings or equipment and had no means of acquiring them. On the other hand, the husband's annual income prior to their separation was in excess of $50,000.00, with a net worth in excess of one million dollars. *Id.* at 43, 189 S.E.2d at 363.

200. 215 Va. 425, 211 S.E.2d 41 (1975).

201. The court denied that the provision was violative of the rule enunciated in *Guy*, and held that it was consonant with *Turner*. *Id.* at 430, 211 S.E.2d at 45. The General Assembly codified the lump sum concept of *Turner* and *Robertson* in 1977. VA. CODE ANN. § 20-107 (Cum. Supp. 1980) provides that the court may, in its discretion, award a lump sum payment "in addition to or in lieu of periodic payments for maintenance and support of a spouse." For a critical analysis of the *Turner* and *Robertson* exception to the *Guy* rule, see *Separation and Divorce, supra* note 63, at 115-17. *See also Domestic Relations, 1972-1973 Virginia Survey*, 59 VA. L. REV. 1520, 1521 (1973).

With respect to awarding spousal and child support, code section 107 vests discretion in the chancellor, and such awards will not be reduced or set aside on appeal absent proof from the record that the amounts are, as a matter of law, "obviously excessive" or unsupported by the evidence.[202] Likewise, section 20-103 provides that the trial court may make orders, in its discretion, for the support and maintenance of a petitioning spouse in a suit for divorce (alimony *pendente lite*).[203] Where the wife has no separate estate and is the defendant in a divorce action, it is proper for the trial court to allow a reasonable sum to be paid by her husband for attorney's fees and suit money. However, the court should not entirely ignore the financial condition of the husband in allowing the wife a reasonable sum for attorney's fees and suit money.[204]

As in spousal and child support, the awarding of attorney's fees upon a final divorce decree is a matter within the discretion of the chancellor.[205] However, in *Robertson v. Robertson*,[206] the record did not justify or explain an award of $10,000.00 in counsel fees to the wife. The Virginia

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202. Ingram v. Ingram, 217 Va. 27, 29, 225 S.E.2d 362, 364 (1976) (amounts awarded for alimony and child support, $800.00 and $400.00 per month respectively, were not obviously excessive and were not unsupported by evidence that the husband had a net worth of $1,029,313.70 and an annual income estimated at $100,000.00). *See also* Turner v. Turner, 213 Va. 42, 43, 189 S.E.2d 361, 363 (1972) (award of $800 per month alimony and $400 per month child support found to be fair and reasonable). *Accord*, Thomas v. Thomas, 217 Va. 502, 229 S.E.2d 887 (1976); Gagliano v. Gagliano, 215 Va. 447, 211 S.E.2d 62 (1975); Treger v. Treger, 212 Va. 538, 186 S.E.2d 82 (1972).

203. VA. CODE ANN. § 20-103 (1975 Repl. Vol. & Cum. Supp. 1980). *See also*, VA. CODE ANN. §§ 20-71 and 71.1 (Repl. Vol. 1975) (temporary orders for support and attorney's fees for such). *See* Moon v. Moon, 210 Va. 575, 577, 172 S.E.2d 778, 779 (1970) where the wife was awarded $125.00 per month separate maintenance after her husband's desertion. The wife was granted a divorce from the husband on the ground of desertion, but the court vacated the separate maintenance decree and awarded her alimony of $25.00 per month. On appeal, the Virginia Supreme Court found the nominal award of alimony unrealistic and unsupported by the evidence that the wife was employed and had an income independent of the husband's contributions. The court reversed and remanded the alimony award and held that she should not be penalized for her industry in working at two jobs, nor for her frugality in establishing a savings account as a shield against emergencies. Section 20-107 and the *Bristow* holding would now require the trial court, *at a minimum* to consider the wife's earnings and earning capacity. *See* notes 190-95 *supra* and accompanying text.

204. Rowlee v. Rowlee, 211 Va. 689, 179 S.E.2d 461 (1971). *See also* Wilkerson v. Wilkerson, 214 Va. 395, 200 S.E.2d 581 (1973); Eddens v. Eddens, 188 Va. 511, 50 S.E.2d 397 (1948) (obligor may be punished by trial court for contempt if he refuses to comply with an order for alimony *pendente lite*, the payment of attorney's fees and/or suit money); McFarland v. McFarland, 179 Va. 418, 19 S.E.2d 77 (1942).

205. Ingram v. Ingram, 217 Va. 27, 225 S.E.2d 362 (1976); Jones v. Jones, 216 Va. 161, 162, 217 S.E.2d 800, 801 (1975); Wilkerson v. Wilkerson, 214 Va. 395, 398, 200 S.E.2d 581, 584 (1973).

206. 215 Va. 425, 211 S.E.2d 41 (1975).

Supreme Court refused to sustain the award and instructed the trial court to re-examine the amount of counsel fees based upon a proper showing of what was reasonable.[207]

In *Lawrence v. Lawrence*,[208] the court also held that the time at which permanent alimony shall commence is within the sound discretion of the court. Therefore, it is proper for the chancellor to ante-date a final alimony (support and maintenance) award to the time of the commencement of the divorce suit.[209] If there are no restrictions on support and maintenance payments, the recipient is free to use the funds as he or she sees fit. In *Jenkins v. Jenkins*,[210] the court held that the wife was not required to use her alimony payments to pay the mortgage installments or real estate taxes since no part of the alimony was designated for any particular purpose.[211]

"Code section 20-109 grants the courts of Virginia continuing jurisdiction to modify awards where changed circumstances are demonstrated."[212] It is the obligation of the divorced husband to pay the specified amounts according to the terms of the alimony award and he cannot vary the terms to suit his convenience. If conditions change, the husband's remedy, if any, is obtained by applying to the court for relief available pursuant to code section 20-109.[213]

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207. *Id.* at 429-30, 211 S.E.2d at 43. *Cf.* Thomas v. Thomas, 217 Va. 502, 229 S.E.2d 887 (1976) (failure to award counsel fees is an abuse of discretion when trial court finds wife needs and is entitled to support and maintenance and the husband has the financial ability to meet needs). *See generally* CLARK, *supra* note 12, at § 14.2, at 428-31. In most states, attorney fees may be awarded to a spouse even though she was the losing party in the divorce action. Annot., 32 A.L.R.3d 1227 (1970).

208. 212 Va. 44, 181 S.E.2d 640 (1971).

209. *Id.* at 47, 181 S.E.2d at 642. This issue had previously been undecided in Virginia. The court adopted the rule that had been followed in other jurisdictions and noted that Cralle v. Cralle, 84 Va. 198, 6 S.E. 12 (1887) was not dispositive of the issue. 212 Va. at 46, 181 S.E.2d at 642. *See* Switzer v. Elmer, 175 La. 724, 144 So. 432 (1932); Winkel v. Winkel, 178 Md. 489, 15 A.2d 914, 917 (1940). *See also* 2 NELSON, *Divorce and Annulment*, § 14.62, at 91 (2d rev. ed. 1961).

210. 211 Va. 797, 180 S.E.2d 516 (1971).

211. *Id.* at 799, 180 S.E.2d at 518. The *Jenkins* court also held that, upon sale of property of which parties were tenants in common, the husband should be required to reimburse his wife for one-half of the sum paid by her on the mortgage and that she should be charged only with one-half rather than all of the real estate taxes. 211 Va. at 800, 180 S.E.2d at 518.

212. Jacobs v. Jacobs, 219 Va. 993, 995, 254 S.E.2d 56, 58 (1979) (quoting Thomas v. Thomas, 217 Va. 502, 505, 229 S.E.2d 887, 889-90 (1976)). VA. CODE ANN. § 20-109 (Repl. Vol. 1975 & Cum. Supp. 1980) provides that "upon petition of either party the court may increase, decrease or cause to cease, any support and maintenance for the spouse . . . as the circumstances may make proper."

213. Richardson v. Moore, 217 Va. 422, 424, 229 S.E.2d 864, 866 (1976) (quoting Newton

The Virginia Supreme Court has interpeted this provision 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.[214] However, in *Gagliano v. Gagliano*[215] the court instructed the trial court to incorporate into the final decree a reservation of power to reinstate the cause and award the wife alimony upon a proper showing of a change of circumstances.[216]

Although trial courts are vested with jurisdiction to modify awards, trial courts do not have authority to enter a divorce decree that includes an escalator clause for spousal support. In *Jacobs v. Jacobs*,[217] the Virginia Supreme Court interpreted the statutory scheme for support to dictate that support awards must be determined in light of contemporary circumstances and then, if necessary, redetermined in light of new circumstances. Since the escalator clause was premised upon the occurrence of uncertain future circumstances, the court held that the award ignored the design and defeated the purpose of the statutory scheme.[218]

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v. Newton, 202 Va. 515, 519, 118 S.E.2d 656, 659 (1961)). *See also* Cofer v. Cofer, 205 Va. 834, 140 S.E.2d 663 (1965). In *Richardson*, the Virginia Supreme Court also held that a former wife's passive acquiescence did not excuse her husband's noncompliance, who without seeking a court order reduced payments from $75.00 to $60.00 per month. Though the husband's administrator contended that the wife was barred from recovering the support arrearages by laches, the court stated that "even a court of equity, in an effort to do equity, cannot disregard the provisions of a lawful decree." 217 Va. at 423-24, 229 S.E.2d at 865-66 (quoting Fearon v. Fearon, 207 Va. 927, 931, 154 S.E.2d 165, 168 (1967)). *But see* Gagliano v. Gagliano, 215 Va. 447, 450-51, 211 S.E.2d 62, 64-65 (1975) where the Supreme Court of Virginia estopped the wife from denying that payments made by her husband were not proper credit against payment fixed in the divorce decree. The court emphasized that the wife received the payments and disbursed the funds at her exclusive discretion and that when the basic purposes of a support decree are not frustrated, a court may permit technical deviation from a divorce decree to avoid inequity.

214. Holt, *supra* note 128, at 143; *see* Losyk v. Losyk, 212 Va. 220, 222, 183 S.E.2d 135, 137 (1971), where the language "with leave to either party to have the same reinstated for good cause shown" was an insufficient "express reservation" to allow the trial court to make a subsequent award of alimony under § 20-109. *See also* Liverman v. Liverman, 463 F. Supp. 906 (E.D. Va. 1978) (certain joint debts created by husband and wife pursuant to a valid agreement for the payment of alimony were not dischargeable in bankruptcy).

215. 215 Va. 447, 211 S.E.2d 62 (1975).

216. This result appears to be equitable because the trial court had declined to award the wife support and maintenance based on her present ability to support herself. *Id.* at 448, 211 S.E.2d at 63. Also, the trial court found as a fact that the wife was without fault. *Id.* at 452, 211 S.E.2d at 66.

217. 219 Va. 993, 254 S.E.2d 56 (1979). The escalator clause required the husband to pay his wife 25% of all income received by him in any calendar year in excess of $32,000.00.

218. *Id.* at 995-96, 254 S.E.2d at 58 (citing Robertson v. Robertson, 215 Va. 425, 428, 211 S.E.2d 41, 44 (1975)) (improper to consider what husband might ultimately receive as potential recipient of a share of a trust fund). *See* VA. CODE ANN. §§ 20-107, 109 (Cum. Supp.

Finally, Virginia courts may apportion unitary awards made pursuant to settlement agreements in divorce proceedings where the evidence indicates a change of circumstances never contemplated by the parties when they entered into their settlement agreement. In *Carter v. Carter*,[219] the Supreme Court of Virginia adopted this rule for the first time and held that the unitary award was for both alimony and child support.[220] Therefore, the trial court was authorized, under code section 20-108, to alter the child support portion of the unitary award when custody of the children was transferred from the wife to the husband.[221] *Wickam v. Wickam*,[222] however, limited the *Carter* holding to cases involving substantially similar factual situations. While distinguishing *Carter*, the court held that it did not intend *Carter* to authorize the apportionment of unitary awards made pursuant to approved settlement agreements without a finding of necessity for apportioning the award.[223]

6. Child Custody

Perhaps the most significant changes in Virginia domestic relations law during the decade between 1970 and 1980 occurred in the area of child custody. Practitioners should take note that the Virginia General Assembly adopted with slight change the Uniform Child Custody Jurisdiction

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1980).

219. 215 Va. 475, 211 S.E.2d 253 (1975). Divorced husband petitioned for permanent custody of children and for termination of monthly payments which he was required to make pursuant to separation agreement. The wife appealed the reduction of the husband's monthly payments from $600.00 to $150.00 after he was awarded custody.

220. *Id.* at 480-81, 211 S.E.2d at 258. The *Carter* holding is in keeping with the majority of decisions. *See, e.g.*, Green v. Green, 168 Colo. 303, 451 P.2d 283 (1969); Beasley v. Beasley, 154 So. 2d 874 (Fla. Dist. Ct. App. 1963); Bebermeyer v. Bebermeyer, 241 Md. 72, 215 A.2d 463 (1965). *Contra*, Hale v. Hale, 6 Cal. App. 2d 661, 45 P.2d 246 (1935); Blalock v. Blalock, 214 Ga. 586, 105 S.E.2d 721 (1958); Estes v. Estes, 192 Ga. 100, 14 S.E.2d 680 (1941). For compilation of cases, *see* Annot., 78 A.L.R.2d 1110 (1961).

221. The court's holding prevented a windfall to the wife after the transfer of child custody. She contended that the holding in *McLoughlin*, interpreting § 20-109, prevented the chancellor from entering any order to reduce payments intended to be entirely for her support pursuant to the parties' prior settlement agreement. The husband argued, on the other hand, that the lump sum was entirely for child support and that the trial court had authority to alter or amend such an order. 215 Va. at 480, 211 S.E.2d at 258. *See* notes 135-36 *supra* and accompanying text for discussion of *McLoughlin*. *See* notes 275-78 *infra* and accompanying text for discussion of § 20-108.

222. 215 Va. 694, 213 S.E.2d 750 (1975).

223. *Id.* at 696, 213 S.E.2d at 751-52. The court noted that *Carter* had addressed an entirely different problem. In *Wickam*, the wife petitioned for an increase in child support (rather than the decrease requested by the husband in *Carter*) but she failed to show her necessity (*i.e.*, that circumstances had so changed as to warrant an increase in child support). *Id.* at 696, 213 S.E.2d at 752.

Act effective January 1, 1980.[224] The purpose of the Act is to discourage continued controversies over child custody and thereby stabilize the home environment for the contested child, to deter child abductions and like practices, and to promote interstate assistance in adjudicating custody matters.[225] As of 1979, thirty-seven states had adopted the Act, and it is anticipated that the cooperative efforts of these states will help put an end to forum shopping and continuing litigation in child custody disputes.[226]

In deciding the difficult question of custody with respect to minor children whose parents are divorced or separated, code section 31-15 dictates that the welfare of the child is the primary, paramount and controlling consideration. All other matters are secondary.[227] Code section 31-15 also negates the judicial device of a legal presumption in favor of either parent.[228] Notwithstanding this statutory mandate, the Virginia Supreme Court adopted the "tender years" doctrine[229] in the landmark decision of *Mullen v. Mullen*.[230] This case resulted in a maternal preference rule, and, as traditionally applied in Virginia, "courts religiously relied upon the tender years rationale in awarding custody to the mother."[231]

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224. 1979 Va. Acts, ch. 229 (codified at VA. CODE ANN. §§ 20-125 to -146 (Cum. Supp. 1980)).

225. UNIFORM CHILD CUSTODY JURISDICTION ACT, 9 Uniform Laws Ann. § 1. For an excellent analysis of the Act and its effect on Virginia law, *see* Comment, *The Uniform Child Custody Jurisdiction Act in Virginia*, 14 U. RICH. L. REV. 435 (1980).

226. Comment, *The Uniform Child Custody Jurisdiction Act in Virginia, supra* note 225, at 435-36.

227. Hall v. Hall, 210 Va. 668, 671, 173 S.E.2d 865, 868 (1970). *See also* Harper v. Harper, 217 Va. 477, 229 S.E.2d 875 (1976); Burnside v. Burnside, 216 Va. 691, 222 S.E.2d 529 (1976). VA. CODE ANN. § 31-15 (Repl. Vol. 1979) provides that "the court or judge of any court of competent jurisdiction, in awarding the custody of the child to either parent or to some other person, shall give primary consideration to the welfare of the child."

228. VA. CODE ANN. § 31-15 (Repl. Vol. 1979) provides, in pertinent part, that "as between the parents there shall be no presumption of law in favor of either."

229. The doctrine is a corollary of the overall maternal preference rule in resolving custody disputes between natural parents. Numerous courts have held that a mother's love is so important to a child that the child should be given to the mother in preference to the father, even though the latter may have been without fault and may have been awarded the divorce. Annot., 70 A.L.R.3d 262, 267-68 (1976). *See* Monahan v. Monahan, 212 Va. 406, 184 S.E.2d 812 (1971); Moore v. Moore, 212 Va. 153, 183 S.E.2d 172 (1971); Rowlee v. Rowlee, 211 Va. 689, 179 S.E.2d 461 (1971); Campbell v. Campbell, 203 Va. 61, 122 S.E.2d 658 (1961); Brooks v. Brooks, 200 Va. 530, 106 S.E.2d 611 (1959); Mullen v. Mullen, 188 Va. 259, 49 S.E.2d 349 (1948); Markley v. Markley, 145 Va. 596, 134 S.E. 536 (1926). For a detailed analysis of the evolution of the doctrine in Virginia as well as nationwide trends, *see* Comment, *The "Tender Years" Doctrine in Virginia*, 12 U. RICH. L. REV. 593 (1978).

230. 188 Va. 259, 49 S.E.2d 349 (1948).

231. Comment, *The "Tender Years" Doctrine in Virginia, supra* note 229, at 595.

The Virginia Supreme Court reaffirmed the traditional application of the doctrine in *Moore v. Moore*,[232] a custody dispute involving two daughters, ages eleven and seven. Although the husband was awarded the divorce and was found to be a fit parent, the court held that the chancellor should have awarded custody of the two children to the wife because there was no evidence that she had neglected the children or that she was unfit to have their custody.[233] The court cited the "tender years" doctrine in support of this holding, and stated that it was "settled practice" in Virginia to award custody of children of tender years, especially girls, to the mother if, "other things being equal," she was a fit and proper parent.[234] As noted by one commentator, the inference from *Moore* was that the "mother would have to be adjudged 'unfit' by clear and convincing evidence to preclude the application of the maternal preference."[235]

Several recent decisions by the Virginia Supreme Court indicate that the court has followed the trend of a number of other jurisdictions by relegating the doctrine to a tie-breaker role to be used where all factors are equal between the parents.[236] The traditional view enunciated in *Moore* was qualified in *White v. White*,[237] when the court affirmed a custody award to the father of a child of "tender years," six year old son, without finding that the mother was unfit.[238] Although the facts of the

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232. 212 Va. 153, 183 S.E.2d 172 (1971).

233. *Id.* at 155-56, 183 S.E.2d at 174-75. The wife deserted the husband because she intended to marry an excommunicated minister with whom she had worked. She took custody of her two girls, 11 and 7 years old, and resided at her mother's home. Although the court found her relationship "improper," it did not conclude that she was not a good mother or that the children would be subjected to immoral influence if she should marry. *Id.* at 155-56, 183 S.E.2d at 173-74.

234. *Id.* at 155, 183 S.E.2d at 174. *See also* Rowlee v. Rowlee, 211 Va. 689, 179 S.E.2d 461 (1971) (cited the "tender years" doctrine but rejected its applicability upon finding that the mother was unfit); Monahan v. Monahan, 212 Va. 406, 184 S.E.2d 812 (1971) (held it was error to find mother was not a proper person to have custody of her three daughters where there was no evidence which would cast doubt upon her fitness).

235. Comment, *The "Tender Years" Doctrine in Virginia*, *supra* note 229, at 597.

236. Freed & Foster, *supra* note 123, at 123-24. As of 1978, twenty-seven jurisdictions, including the District of Columbia, had rejected the doctrine by statute or court decision; 12 states had subordinated the doctrine to the best interests of the child; and 10 states, Virginia included, were applying the doctrine when all factors were equal between parents. *Id.* at 124-25. *See* McCreery v. McCreery, 218 Va. 352, 237 S.E.2d 167 (1977); Brown v. Brown, 218 Va. 196, 237 S.E.2d 89 (1977); Clark v. Clark, 217 Va. 924, 234 S.E.2d 266 (1977); Harper v. Harper, 217 Va. 477, 229 S.E.2d 875 (1976); Burnside v. Burnside, 216 Va. 691, 222 S.E.2d 529 (1976); White v. White, 215 Va. 765, 213 S.E.2d 766 (1975); Hall v. Hall, 210 Va. 668, 173 S.E.2d 865 (1970).

237. 215 Va. 765, 213 S.E.2d 766 (1975).

238. For a thorough discussion of *White*, see *1974-1975 Virginia Survey*, *supra* note 114, at 1739-40. *See also* Comment, *The "Tender Years" Doctrine in Virginia*, *supra* note 229,

case "seemed to demand" application of the traditional "tender years" doctrine,[239] the Supreme Court of Virginia broke new ground by emphasizing the qualifying phrase "if other things are equal."[240] After a rigorous examination of the facts, the court held that the mother's home was less suitable than the father's home and, therefore, it affirmed the custody award to the father.[241]

It should be noted that the Virginia Supreme Court did not reject the traditional application of the "tender years" doctrine in *White*; rather, the court found that the maternal presumption was inoperative because "other things" were unequal between the mother and the father. "Still, it clearly rejected a talismanic legal rule in favor of a more careful calculus which could achieve the most beneficial disposition of the child's interests."[242] This new approach was reaffirmed in *Burnside v. Burnside*,[243] when the court utilized the *White* rationale to award custody of a seven year old boy to his father.[244] Significantly, the court also stated in dictum that the "tender years" doctrine "is a flexible one and it is not to be applied without regard to the surrounding circumstances."[245]

The court's modification of the traditional application of the "tender years" doctrine was completed in *Harper v. Harper*[246] where it directly

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at 597.

239. *1974-1975 Virginia Survey, supra* note 114, at 1739. Both parents were found to be fit and properly equipped to care for the child. Both homes were also determined to be physically suitable. 215 Va. at 767-68, 213 S.E.2d at 768.

240. 215 Va. at 767, 213 S.E.2d at 768. Prior to *White*, the phrase "if other things are equal" had been a superfluous part of the doctrine. Comment, *The "Tender Years" Doctrine in Virginia, supra* note 229, at 597.

241. 215 Va. at 767-68, 213 S.E.2d at 768-69. Rather than merely comparing physical accommodations or material advantages to determine parental suitability, the court considered as determinative the "warmth and stability of the home environment and the kind of home life which the child [could] be expected to experience." *Id.* at 768, 213 S.E.2d at 768. The court found the father's home more suitable because of the "companionship of children in the neighborhood where the child [had] resided for nearly three years and the affectionate interest of [the father's] mother and sister-in-law and of the [mother's] parents and relatives." *Id.* at 768, 213 S.E.2d 768-69. In dissent, Justice Carrico stated that the court should adhere to the "tender years" presumption. He termed the majority's finding that the mother's home was unsuitable "a slender reed." *Id.* at 768-69, 213 S.E.2d at 769.

242. *1974-1975 Virginia Survey, supra* note 114, at 1740.

243. 216 Va. 691, 222 S.E.2d 529 (1976).

244. The court noted that the facts in *White* were "strikingly similar to the facts in the instant case, and the reasoning of the court there could well be applied here." *Id.* at 692, 222 S.E.2d at 530. Justice Carrico again dissented as in *White*. *Id.* at 694, 222 S.E.2d 530-31.

245. *Id.* at 692, 222 S.E.2d at 530 (quoting Portewig v. Ryder, 208 Va. 791, 794, 160 S.E.2d 789, 792 (1968)).

246. 217 Va. 477, 229 S.E.2d 875 (1976).

confronted the maternal preference of *Moore* and the statutory language of code section 31-15.[247] The court noted that the *Moore* rule was not a rule of law and that code section 31-15 "expressly states that there shall be no presumption of law in favor of either parent."[248] The court then reduced the significance of the doctrine from a legal presumption to a rebuttable inference by holding that, "[a]t most the principle for which *Moore* stands is no more than a permissible and rebuttable inference, that when the mother is fit, and other things are equal, she, as the natural custodian, should have custody of a child of tender years."[249]

Nevertheless, the *Burnside* ruling did not abolish the "tender years" presumption. The court affirmed the presumption's continued existence in *McCreery v. McCreery*,[250] but limited the scope of the doctrine. The court held that the custodial care received by the child was paramount to the custody rights of a parent and that the "tender years" presumption only concerned the custodial care received by the child. Likewise, the inference controls only when evidence shows that the mother is fit and all "other things" affecting the child's welfare are equal.[251] Therefore, even though the trial court misinterpreted *Burnside*, when it held that *Burn-*

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247. Comment, *The "Tender Years" Doctrine in Virginia*, *supra* note 229, at 598.

248. Harper v. Harper, 217 Va. 477, 479, 229 S.E.2d 875, 877 (custody award of six year old boy to his mother affirmed by the supreme court on the basis of the "tender years" doctrine after determining that both parents were fit and proper to have custody).

249. *Id.*; *accord*, Clark v. Clark, 217 Va. 924, 234 S.E.2d 266 (1977) (custody awarded to father since mother's home, evaluated on basis of warmth and stability, rather than material advantages, was not as suitable as the father's). *See also* Comment, *The "Tender Years" Doctrine in Virginia*, *supra* note 229, at 598; *1976-1977 Virginia Survey*, *supra* note 138, at 1421-22.

250. 218 Va. 352, 354-55, 237 S.E.2d 167, 168 (1977). The chancellor awarded custody of two minor children to father and held that "tender years" presumption was abolished by *Burnside*. The chancellor also found that the best interests of the children would be better served by awarding them to the custodial care of the their father.

251. *Id.* at 355, 237 S.E.2d at 168. The court also explicitly defined the qualifying phrase "other things."

> These "other things" are things which affect the quality of the custodial care received by the child. Quality is determined not only in terms of the training, talents, and resources of the custodian but also in terms of the motivation of the custodian to make proper provision for the physical needs of the child, its psychological and emotional health, its intellectual and cultural growth, and its moral development. Although fully qualified in other respects, a person may be too ill-suited by temperament or too preoccupied with personal pursuits to administer proper care to a child. Comparing the quality of care offered by two parents, the courts are guided by histories of past performance and prospects for future performance. If the comparison results in equipoise, the inference that the right of the child is best served by awarding the child the custodial care of the mother controls.

Id. at 355, 237 S.E.2d at 168-69.

side abolished the tender years presumption, the Virginia Supreme Court affirmed the award of custody to the father because the trial court had considered the proper criteria concerning the respective custodial qualities of the parents and had determined that the "other things" were not equal.[252] Commentators have noted that there will be little opportunity to apply the "tender years" presumption if courts continue to analyze realistically the custodial qualities or "other things" of each parent because it is improbable that parental qualities will balance.[253]

The supreme court's examination of each parent's custodial qualities in *Brown v. Brown*[254] indicates that the moral climate in which children are to be raised is an important consideration in determining custody, and that the mother's adultery reflects on her moral values.[255] The court noted that "[a]n illicit relationship to which minor children are exposed cannot be condoned. Such a relationship must necessarily be given the most careful consideration in a custody proceeding."[256] The Virginia Supreme Court has also examined each parent's financial ability to provide a suitable and stable home for children in determining custody. In *Alls v. Alls*,[257] the trial court found no evidence of unfitness of either parent but awarded custody of a minor child to the husband. The court dismissed

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252. *Id.* at 359, 237 S.E.2d at 171. The chancellor found that the "environment for raising the children" was more favorable with the father. He considered the father's more spacious living quarters and its close proximity to a school, the family's church and the children's babysitter, as balanced against the mother's preoccupation with the glamor of her work and her relationship with her supervisor. The court rejected the mother's constitutional argument that the decree denied her equal protection of the laws by treating her differently from the father on the basis of her employment since the evidence supported the chancellor's conclusions. *Id.* at 355-59, 237 S.E.2d at 169-71.

253. Comment, *The "Tender Years" Doctrine in Virginia, supra* note 229, at 600-01; Annot., 70 A.L.R.3d 262, 269 (1976); *1977-1978 Virginia Survey, supra* note 145, at 1443-44.

254. 218 Va. 196, 237 S.E.2d 89 (1977) (mother appealed custody award of her two sons to the father and lower court's determination that she was unfit for custody because of an adulterous relationship).

255. *Id.* at 199, 237 S.E.2d at 91.

256. *Id.* at 199-200, 237 S.E.2d at 91-92. *See also* Wadlington, *Sexual Relations After Separation or Divorce: The New Morality and the Old and New Divorce Laws*, 63 VA. L. REV. 249 (1977).

257. 216 Va. 13, 216 S.E.2d 16 (1975). The wife left her husband the day after she instituted a divorce suit for cruelty and constructive desertion. She took her son to the home of relatives and later moved into an apartment. She left the child at the home of her relatives due to her limited earnings. The husband provided no funds for her support and the support of the child between their separation and the date of the hearing (about five weeks later). Although the chancellor found no evidence of unfitness of either parent, the child was awarded to the father. The chancellor emphasized that the wife had failed to "establish a home with the child and to demonstrate that she could provide a stable situation for the child." *Id.* at 14-15, 216 S.E.2d at 17.

the trial court's emphasis of the wife's failure to provide a stable situation for the child and remanded the custody award to the father because there was no evidence that the wife would not be able to provide a suitable and stable home if she received support and maintenance from the husband.[258] The holding in *Alls* indicates that the court will not allow a spouse to be penalized in a custody proceeding for the failure of the other spouse to provide support and maintenance.

In a line of cases involving custody disputes between natural parents and non-parents, the court balanced the best interests of the children with the rights of the natural parents.[259] In *Dyer v. Howell,*[260] the natural father of a child who had been formally divested of custody[261] sought to change custody of his daughter from the child's maternal aunt and uncle to himself. The court declined to resolve an apparent conflict between the rules set out in *Judd v. Van Horn*[262] and *Forbes v. Haney.*[263] In *Dyer,* since the father had been formally divested of custody and the child had been awarded to the maternal aunt and uncle, the burden was on the father to show that circumstances had so changed that it would be in the

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258. The court determined that the husband was not entitled to a divorce on the ground of the wife's desertion. *Id.* at 15, 216 S.E.2d at 17. For a discussion of the court's holding on this issue, *see* notes 40-41 *supra* and accompanying text. As a result of its holding, the court remanded the case for a determination of the wife's support and maintenance under § 20-107. "In view of the wife's entitlement to separate maintenance, and the effect it might have upon her ability to provide a suitable home for the child," it was likewise necessary for the trial court to reconsider the custody award to the father. 216 Va. at 15, 216 S.E.2d at 17. *See also* Carpenter v. Carpenter, 220 Va. 299, 257 S.E.2d 845 (1979). The mother of two children appealed a decree which denied her consent to remove the residence of her two minor children from Virginia and permanently restrained and enjoined such change of residence without prior court approval. The chancellor weighed various factors and determined that the best interests of the children would not be served by such a move. Since the chancellor's ruling was not clearly erroneous and was supported by the evidence, the court found no abuse of discretion and affirmed the decree. *Id.* at 303, 257 S.E.2d at 847-48.

259. For discussion of parental rights in adoption proceedings, *see* notes 330-65 *infra* and accompanying text.

260. 212 Va. 453, 184 S.E.2d 789 (1971).

261. *Id.* at 454-55, 184 S.E.2d 790-91. The father killed his wife and was found not guilty by reason of insanity. He subsequently was adjudged mentally competent after which he remarried and became the father of a second child. His daughter was placed in temporary custody after her mother's death and was later placed with the maternal aunt and uncle, the Howells. She resided with the Howells thereafter.

262. 195 Va. 988, 81 S.E.2d 432 (1954) (natural parent is entitled to custody unless it is proved that he is unfit, the law presuming that the best interests of the child will be served by placing the child in the parent's custody).

263. 204 Va. 712, 133 S.E.2d 533 (1963) (welfare of the child is the paramount concern; where such welfare would best be served by denying custody to the parent, the technical rights of the latter may be disregarded).

child's best interests to transfer custody to him.[264]

The holding in *Dyer* was not dispositive in *Wilkerson v. Wilkerson*[265] where the court held that the rights of parents cannot be lightly severed but are to be respected if at all consonant with the best interest of the child.[266] Therefore, in the absence of a showing of unfitness of the parent by the parties opposing the parent's right to custody, special facts and circumstances must be shown constituting an extraordinary reason for taking a child away from its parents.[267]

7. Child Support Orders

As in the area of child custody, there has been substantial change in the area of child support and maintenance as the result of legislative changes and judicial interpretations. Traditionally, it was the father's legal and moral duty to support his dependent infant children;[268] his duty was based upon his right to their custody and control.[269] This traditional rule regarding the father's duty of support was overruled in the recent case of *Featherstone v. Brooks*.[270] The supreme court held that both parents of a child owe that child a duty of support during minority. This decision is especially noteworthy since the father had custody of the three

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264. 212 Va. at 456-57, 184 S.E.2d at 792-93. The trial court determined that the father did not prove that transferring custody to him would be in his daughter's best interests. On the contrary, his visits with the child made her anxious and tense, his remarriage had not been tested, the Howell's marriage was settled, and their home was the only home the child knew. The Virginia Supreme Court affirmed this decision because it was not clearly erroneous and was supported by the evidence. *Id. Accord,* McEntire v. Redfearn, 217 Va. 313, 227 S.E.2d 741 (1976) (in custody dispute between natural parent and maternal grandmother, burden upon father to prove that circumstances had changed since earlier juvenile court determination that custody should be assumed by the court to the exclusion of the father); Watson v. Shepard, 217 Va. 538, 229 S.E.2d 897 (1976) (denial of mother's petition to regain custody was based on her voluntary relinquishment of custody, and burden was on mother to show that circumstances had so changed that it would be in child's best interests to transfer custody).

265. 214 Va. 395, 200 S.E.2d 581 (1973) (husband awarded divorce; temporary custody order entered with his approval awarding custody of child to wife's step-aunt during pendency of divorce action).

266. *Id.* at 396-97, 200 S.E.2d at 583 (citing Malpass v. Morgan, 213 Va. 393, 400, 192 S.E.2d 794, 799 (1972)).

267. 214 Va. at 398, 200 S.E.2d at 583. The court noted that the correct rule of law was that laid down in *Judd,* and the wife's burden, therefore, was to show her husband's unfitness by clear and convincing evidence. *See also* Higgins v. Higgins, 205 Va. 324, 329-30, 136 S.E.2d 793, 797 (1964).

268. Boaze v. Commonwealth, 165 Va. 786, 183 S.E. 263 (1936).

269. Butler v. Commonwealth, 132 Va. 609, 110 S.E. 868 (1922).

270. 220 Va. 443, 258 S.E.2d 513 (1979).

children and had been providing for their support.[271] In another recent decision, *Cutshaw v. Cutshaw*,[272] the court held that parents have the legal obligation to support their children only during their children's minority although parents can contract to support the children after their minority.[273] Thus, it was reversible error for a trial court to determine that a father's obligation continued after the child's eighteenth birthday because the court's jurisdiction to provide for the child's support and maintenance terminated when the child attained its majority.[274]

Code section 20-108[275] expressly gives a court continuing jurisdiction to change or modify its decree as to the care, custody and maintenance of minor children if a material change in condition and circumstances has occurred.[276] A contract between husband and wife cannot prevent the court from exercising this power and the court can apportion a lump sum into alimony and child support for this purpose.[277] Parents can justify

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271. The father petitioned for a modification of the support decree. Finding that the father's salary had not increased as much as support costs, the trial court ordered the wife to pay $100.00 per month in support and maintenance. In affirming the order, the Virginia Supreme Court held that the evidence established a material change in condition and circumstances. The court also noted that in allocating the burden of support between parents, § 20-107(1) required the courts to consider, along with other factors, the earning capacity, obligations and needs, and financial resources of the parties. *Id.* at 447-48, 258 S.E.2d at 515-16. Justice Carrico dissented because he felt the father had failed to show a material change in conditions and circumstances. *Id.* at 448, 258 S.E.2d at 516. *See also* Annot., 98 A.L.R.3d 1146 (1980).

272. 220 Va. 638, 261 S.E.2d 52 (1979).

273. The former wife was awarded judgment against her former husband for the amount of child support arrearages and the husband was ordered to keep weekly payments current even after the child's eighteenth birthday. The father conceded that his contractual obligation to pay child support continued although the child had reached age of majority, but argued that the trial court lacked jurisdiction to enforce the support obligation, as modified by the court, after the child's eighteenth birthday. *Id.* at 640-41, 261 S.E.2d at 53-54.

274. *Id.* at 641, 261 S.E.2d at 54.

275. VA. CODE ANN. § 20-108 (Repl. Vol. 1975) provides:

> The court may, from time to time after decreeing as provided in [§ 20-107], on petition of either of the parents, or on its own motion or upon petition of any probation officer or superintendent of public welfare, which petition shall set forth the reasons for the relief sought, revise and alter such decree concerning the care, custody, and maintenance of children and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children may require.

276. 220 Va. 638, 261 S.E.2d 52 (1979); Featherstone v. Brooks, 220 Va. 443, 258 S.E.2d 513 (1979); Hammers v. Hammers, 216 Va. 30, 216 S.E.2d 20 (1975); Carter v. Carter, 215 Va. 475, 211 S.E.2d 253 (1975). *See generally* Annot., 61 A.L.R.3d 657 (1975). *See also* Cofer v. Cofer, 205 Va. 834, 140 S.E.2d 663 (1965); De Mott v. De Mott, 198 Va. 22, 92 S.E.2d 342 (1956); Morris v. Henry, 193 Va. 631, 70 S.E.2d 417 (1952); Kern v. Lindsey, 182 Va. 775, 30 S.E.2d 707 (1944).

277. Featherstone v. Brooks, 220 Va. 443, 258 S.E.2d 513 (1979); Morris v. Morris, 216 Va.

reduction of child support on grounds of financial hardship only by demonstrating that their inability to pay was not caused by voluntary choice or negligence.[278]

Effective July 1, 1972, the General Assembly reduced the age of majority from 21 to 18 years.[279] This amendment triggered a line of cases concerning the effect of this change upon child support orders.[280] The thread of decision running through these cases has two strands. The court decides whether the parties' contractual intent is applicable, and if so, then construes the provisions of the contract to determine that intent. Otherwise, if the court finds the child support provisions are not supplanted by later court orders, contractual intent is controlling.[281] In *Eaton v. Eaton*,[282] the child support provisions of the contract were supplanted by a subsequent court decree or order, and the court held that the parties' contractual intent was inapplicable.[283] Moreover, when the contract is incorporated into the divorce decree, as in *Meredith v. Meredith*,[284] a subsequent order revising the amount of the monthly support does not nec-

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457, 219 S.E.2d 864 (1975); Hammers v. Hammers, 216 Va. 30, 216 S.E.2d 20 (1975); Carter v. Carter, 215 Va. 475, 211 S.E.2d 253 (1975). *See also* Gloth v. Gloth, 154 Va. 511, 153 S.E. 879 (1930). For a discussion of apportionment of unitary awards made pursuant to settlement agreements, see notes 218-23 *supra* and accompanying text.

278. Featherstone v. Brooks, 220 Va. 443, 258 S.E.2d 253 (1979); Morris v. Morris, 216 Va. 457, 219 S.E.2d 864 (1975); Hammers v. Hammers, 216 Va. 30, 216 S.E.2d 20 (1975).

279. 1972 Va. Acts, chs. 824, 825 (codified at VA. CODE ANN. § 1-13.42 (Repl. Vol. 1979)).

280. Gazale v. Gazale, 219 Va. 775, 250 S.E.2d 365 (1979); Mack v. Mack, 217 Va. 534, 229 S.E.2d 895 (1976); Meredith v. Meredith, 216 Va. 636, 222 S.E.2d 511 (1976); Eaton v. Eaton, 215 Va. 824, 213 S.E.2d 789 (1975); Paul v. Paul, 214 Va. 651, 203 S.E.2d 123 (1974).

281. Gazale v. Gazale, 219 Va. 775, 778, 250 S.E.2d 365, 367 (1979) (court must enforce child support payments under terms of settlement agreement if the support provisions are not supplanted by subsequent court orders).

282. 215 Va. 824, 827, 213 S.E.2d 789, 791-92 (1975). Contract provisions regarding child support entered prior to the statutory change in the age of majority were supplanted by a later court order in a divorce suit entered after the change of majority. The Virginia Supreme Court held that the court order controlled and the support provisions were not owing for children over eighteen despite the contract's provisions for payments until age twenty-one. Also, the court held that the divorce court's jurisdiction over a child terminates *ipso facto* when the child reaches majority. The same event terminates, by operation of law, the prospective effects of a judicial support decree. *Id.* at 827, 213 S.E.2d at 792.

283. *Id.* at 827, 213 S.E.2d at 791.

284. 216 Va. 636, 637, 222 S.E.2d 511 (1976). The divorce decree incorporated a contract requiring the father to support his child "until such child shall reach his majority." The Virginia Supreme Court construed the intent of the language and held that the parties intended the term of support duty to be no longer than the period imposed by Virginia law, and the father was therefore relieved of his obligation when the child reached the new age of majority fixed by the statute. *Accord,* Mack v. Mack, 217 Va. 534, 229 S.E.2d 895 (1976).

essarily "supplant" the contract provisions regarding child support.[285]

In *Gazale v. Gazale*,[286] the supreme court articulated the thread of decision and concluded that the consent decree served only to amend, rather than supplant, the child support provisions of the parties' contract.[287] Therefore, the parties' intent was the controlling factor. The court construed the contract and determined that the parties intended that the husband's monthly support obligation should continue as long as the daughter was in the mother's custody and had not reached twenty-one.[288] The Virginia Supreme Court's reasoning appears to be in step with the decisions of other jurisdictions.[289]

8. Enforcement of Maintenance and Support Decrees

The Virginia Supreme Court decided several cases in this area during the 1970's. In the previously discussed case of *Werner v. Commonwealth*,[290] the court recognized that juvenile and domestic relations courts are particularly well equipped to supervise the collection of support payments from recalcitrant husbands, as evidenced by code section 20-79(c) which authorizes courts of record to refer such matters to juvenile and domestic relations courts. In *Winn v. Winn*,[291] the court followed the general rule that before 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 express rather than implied.[292] Since the parties' settlement agreement did not state expressly

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285. 216 Va. at 638, 222 S.E.2d at 512.

286. 219 Va. 775, 250 S.E.2d 365 (1979).

287. *Id.* at 778, 250 S.E.2d at 367.

288. As a result, the consent decree did not deprive the trial court of jurisdiction to order the former husband to provide support beyond his daughter's age of majority. *Id.* at 799-80, 250 S.E.2d at 367-68. *See also* Cutshaw v. Cutshaw, 220 Va. 638, 641, 261 S.E. 52, 54 (1979) (parents can contract to support minor child beyond child's age of majority).

289. *See* Collins v. Collins, 418 S.W.2d 739 (Ky. 1961), Barbier v. Barbier, 45 Mich. App. 402, 206 N.W.2d 464 (1973); Shoaf v. Shoaf, 282 N.C. 287, 192 S.E.2d 299 (1972); Hastings v. Hastings, 328 A.2d 782 (N.H. 1974); Mason v. Mason, 84 N.M. 720, 507 P.2d 781 (1973); Parker v. Parker, 497 S.W.2d 572 (Tenn. 1973); Whitt v. Whitt, 490 S.W.2d 159 (Tenn. 1973).

290. 212 Va. 623, 186 S.E.2d 76 (1972). *See* notes 84-87 *supra* and accompanying text. *See also* Gowen v. Wilkerson, 364 F. Supp. 1043 (W.D. Va. 1973) (federal habeas corpus proceeding by husband held in contempt of state court for his failure to comply with a support order).

291. 218 Va. 8, 235 S.E.2d 307 (1977).

292. *Id.* at 10, 235 S.E.2d at 309 (quoting Wood v. Goodson, 253 Ark. 196, 203, 485 S.W.2d 213, 217 (1972)). *See* Taliaferro v. Horde's Adm'r, 22 Va. (1 Rand.) 242, 247 (1822) ("the process for contempt lies for disobedience of what *is* decreed, not for what *may be* decreed"). *See generally* Comment, *Lack of Due Process in Virginia Contempt Proceedings*

that it was the husband's duty to procure hospitalization insurance guaranteeing his divorced wife substantially the same benefits she had enjoyed prior to the divorce, the husband did not violate a clearly defined duty and his actions did not constitute contempt when he failed to obtain a policy which would have covered his wife after their divorce became final.[293]

The Virginia Supreme Court interpreted sections of the Virginia enactment of the Revised Uniform Reciprocal Enforcement of Support Act (RURESA)[294] in two recent cases concerning foreign divorce decrees. In *Alig v. Alig*,[295] a divorced wife sought enforcement of the alimony provisions of a Maryland divorce decree and the payment of arrearages. The trial court denied her petition for arrearages on the grounds of equitable estoppel but ordered the husband to resume monthly alimony payments.[296] The supreme court noted that, although Virginia courts are not compelled under the full faith and credit clause to recognize and enforce a Maryland divorce decree for alimony which was subject to modification, such a decree could, upon the principle of comity, be recognized and treated with the same force and effect as if it were entered in Virginia.[297]

Of greater significance, however, was the court's holding that RURESA

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for Failure to Comply with Order for Support and Alimony, 4 U. RICH. L. REV. 128 (1969). *See also* French v. Pobst, 203 Va. 704, 710, 127 S.E.2d 137, 141 (1962).

293. 218 Va. at 10-11, 235 S.E.2d at 308-09. The settlement agreement required the husband to maintain a certain group hospitalization policy covering his wife or a similar policy containing substantially the same benefits for two years. The husband maintained his group hospitalization policy, but the insurer refused to pay his wife's claim when it discovered her divorce had become final. The Virginia Supreme Court rejected the wife's argument that maintenance of the husband's policy did not satisfy his contractual obligation because it did not carry out the intent of the parties, that after the divorce she would be protected by insurance to the same degree as when she was married. *Id.*

294. 1952 Va. Acts, ch. 516 (codified at VA. CODE ANN. §§ 20-88.12 to -.31 (Repl. Vol. 1975 & Cum. Supp. 1980). The purposes of RURESA "are to improve and extend by reciprocal legislation the enforcement of duties of support and to make" applicable laws uniform. VA. CODE ANN. § 20-88.12 (Repl. Vol. 1975).

295. 220 Va. 80, 255 S.E.2d 494 (1979).

296. The wife travelled to Virginia and telephoned her husband that she "had had enough of him, his children and his money." The husband ceased making alimony payments afterwards. The children previously had been taken from the wife by juvenile authorities. She returned to Maryland by cab, paying $1,000.00 for her fare. Later that day she was taken into custody by police and placed in a psychiatric hospital, where she remained for several months. *Id.* at 82-83, 255 S.E.2d at 496.

297. *Id.* at 84, 255 S.E. 2d at 497 (quoting McKeel v. McKeel, 185 Va. 108, 113, 37 S.E.2d 746, 749 (1946)). *See* Worthley v. Worthley, 44 Cal. 2d 465, 283 P.2d 19 (1955); Light v. Light, 12 Ill. 2d 502, 147 N.E.2d 34 (1957); Mosher v. Mosher, 25 Wash. 2d 778, 172 P.2d 259 (1946); Annot., 132 A.L.R. 1272 (1941). *See also* notes 89-121 *supra* and accompanying text.

required a state court to recognize and enforce a foreign alimony decree even though the full faith and credit clause did not so require.[298] The *Alig* decision was dispositive of the issue in *Scott v. Sylvester*,[299] where the trial court ruled that it had no jurisdiction to enter judgment for arrearages except for the time the husband was in Virginia. Reiterating *Alig*'s liberal construction of RURESA and citing cases from other jurisdictions, the supreme court held that the trial court committed reversible error by defeating the intent and purpose of RURESA.[300] *Alig* and *Sylvester* indicate that the Virginia Supreme Court will fully utilize the provisions of RURESA in order to provide support and maintenance for spouses and dependent children.

III. The Family

A. *Illegitimate Children*

1. Child Support Orders

The Supreme Court of Virginia, in *Brown v. Commonwealth Ex Rel. Custis*,[301] added to Virginia's tradition of both legislative and judicial protection of the rights of children, notwithstanding the marital problems of the parents.[302] "The dispositive issue in [*Brown* was] whether the paternity of a child not born of a lawful marriage [could] be determined in any manner other than in accordance with the provisions of code section 20-

298. 220 Va. at 84, 255 S.E.2d at 497 (quoting §§ 20-88.13(14), -88.30:6(a)). The court held that the trial court was required by due process to consider any questions of modification raised by either party which could have been presented to the Maryland courts. Likewise, "Alig was under a clear duty to comply with the terms of the alimony decree until modified by a further court order, and he could not escape this duty merely by relying upon the erratic statements and actions of an emotionally unstable person." *Id.* at 85, 255 S.E.2d at 497 (citing Griffin v. Griffin, 327 U.S. 220, 233-34 (1946).

299. 220 Va. 182, 257 S.E.2d 774, 775-76 (1979).

300. *Id.* at 185, 257 S.E.2d at 776-77. *See* Woodson v. Commonwealth Util., Inc., 209 Va. 72, 74, 161 S.E.2d 669, 670 (1968). *See also* Engelson v. Mallea, 180 N.W.2d 127, 131 (Iowa 1970); Childers v. Childers, 9 N.C. App. 220, 224-25, 198 S.E.2d 485, 488 (1973); Barrow v. Barrow, 220 Tenn. 491, 495, 419 S.W.2d 164, 165-66 (1967); Raney v. Raney, 536 S.W.2d 617, 619 (Tex. Ct. App. 1976); Yetter v. Commeau, 84 Wash. 2d 155, 524 P.2d 901 (1974).

301. 218 Va. 40, 235 S.E.2d 325 (1977).

302. *1976-1977 Virginia Survey, supra* note 138, at 1418-19. *See* McClaugherty v. McClaugherty, 180 Va. 51, 21 S.E.2d 761 (1942); *accord*, State v. Bragg, 152 W.Va. 372, 163 S.E.2d 685 (1968). *See generally* Helmholz, *Support Orders, Church Courts, and the Rule of Filius Nullius: A Reassessment of the Common Law*, 63 Va. L. Rev. 431 (1977); Johnson, *Inheritance Rights of Children in Virginia*, 12 U. Rich. L. Rev. 275, 281-84 (1978); *see also* Heflin v. Heflin, 177 Va. 385, 14 S.E.2d 317 (1941); Goodman v. Goodman, 150 Va. 42, 45, 142 S.E.2d 412, 413 (1928); Stones v. Keeling, 9 Va. (5 Call) 143, 146 (1804).

61.1, which concerns the support of the children of unwed parents."[303]

Mrs. Custis and Brown were married in 1972 while the former was still married to her first husband. Brown left their marital home after five weeks of cohabitation to serve in the armed forces. He returned in 1973 and lived with Mrs. Custis until July of 1974. Mrs. Custis testified that she had sexual relations solely with Brown during this period. Brown denied paternity when the child was born, and Mrs. Custis thereupon petitioned for child support. The lower court awarded her support after finding that the infant was the issue of a void marriage (*i.e.*, bigamous marriage) between Brown and Mrs. Custis, and that the child was deemed to be legitimate, pursuant to former code section 64.1-7.[304]

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303. 218 Va. at 41, 235 S.E.2d at 326. VA. CODE ANN. § 20-61.1 (1975 Repl. Vol. & Cum. Supp. 1980) provides that:

> Whenever in proceedings hereafter under this chapter concerning a child whose parents are not married, a man admits before any court having jurisdiction to try and dispose of the same, that he is the father of the child or the court finds that the man has voluntarily admitted paternity in writing, under oath, or if it be shown by other evidence beyond reasonable doubt that he is the father of the child and that he should be responsible for the support of the child, the court may then enter and enforce judgment for the support, maintenance and education of such child as if the child were born in lawful wedlock.
>
> Such other evidence that the man is the father of the child shall be limited to evidence of the following:
>
> (1) That he cohabited openly with the mother during all of the ten months immediately prior to the time the child was born; or
>
> (2) That he gave consent to a physician or other person, not including the mother, charged with the responsibility of securing information for the preparation of a birth record that his name be used as the father of the child upon the birth records of the child; or
>
> (3) That he allowed by a general course of conduct the common use of his surname by the child; or
>
> (4) That he claimed the child as his child on any statement, tax return or other document filed and signed by him with any local, State or federal government or any agency thereof.
>
> The findings of a court hereunder shall not be used against the man in any manner except for specific purposes of this chapter and for the purposes of descent and distribution pursuant to Title 64.1.
>
> Notwithstanding the provisions of § 19.2-271 or any other law, the judge or other court officer before whom a man has admitted paternity of any child, whose support is the subject of any proceeding brought under the provisions of this chapter, may testify, in any court having jurisdiction to conduct proceedings under this chapter, as to any admission of paternity made by such man in his court and as to any other facts directly affecting the relevancy or probative value of such admission.

304. 218 Va. at 41, 235 S.E.2d at 326. Former § 64.1-7 provided that the issue of marriages deemed null in law were nevertheless legitimate. *See* VA. CODE ANN. § 20-31.1 (Cum. Supp. 1980) (originally codified at VA. CODE ANN. § 64.1-7 (Repl. Vol. 1973)).

Brown contended on appeal that former code section 64.1-7 should not affect the question of paternity because it was enacted for the benefit of children of bigamous marriages and was not intended to affect the rights of parents.[305] According to Brown, code section 20-61.1 was the applicable statute to determine paternity of the infant because he and Mrs. Custis were unmarried as a result of their bigamous marriage which was void *ab initio*. Brown argued that his paternity had not been proven by Mrs. Custis in the manner provided by statute because he had not voluntarily admitted his paternity. He also contended that his paternity of the infant had not been established by other evidence admissible under code section 20-61.1(1)-(4).[306]

The supreme court rejected Brown's contention that Code section 20-61.1 was applicable or that it was the only means by which paternity could be established. The court interpreted this section and its strict proof requirements of paternity to apply expressly to proceedings dealing with desertion and nonsupport, and it noted that the legislature was "referring to and providing for the support of the offspring of a meretricious union between a man and a woman."[307] The court then emphasized that it was not dealing with the offspring of a meretricious relationship but with the child of an actual, albeit void, marriage which was solemnized in a formal manner.[308] Noting that it had on numerous occasions held that a child should not be deprived of his rights because of statutes affecting the marital status of his parent, the court held that the child in *Brown* was not excluded from the benefits of former code section 64.1-7 because that section was enacted for the purpose of protecting such children. Brown was therefore prevented from invoking code section 20-61.1, which concerned unwed parents, because the evidence showed conclusively that a marriage was performed and that he did enter into the marriage relationship.[309]

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305. 218 Va. at 42, 235 S.E.2d at 326-27.

306. *Id.* at 43, 235 S.E.2d at 328. In essence, the court noted, Brown's position was that "in the absence of an express admission of paternity it [paternity] must be proved: that since his marriage . . . was void *ab initio*, they were not married, and that his paternity of the child could be established *only* by the type of evidence outlined in § 20-61.1." *Id.* at 42, 235 S.E.2d at 327 (emphasis added).

307. *Id.* at 43, 235 S.E.2d at 328. The court noted that the reason that Code § 20-61.1 required strict and limited proof of paternity was "presumably to protect a man from a specious claim of fatherhood made by a woman who has not entered into a marital relationship with the man." *Id.*

308. *Id.* at 44, 235 S.E.2d at 328.

309. *Id.* *See* Goodman v. Goodman, 150 Va. 42, 45, 142 S.E. 412, 413 (1928) (remedial purpose of the statutory ancestors of §§ 64.1-6, .1-7, 20-42 was to remove the stain and disabilities of bastardy from innocent and unoffending children); Stones v. Keeling, 9 Va. (5

The court likewise rejected the far-reaching effect of Brown's position that, absent an admission of paternity by the father in the manner provided by code section 20-61.1, there must be evidence that he cohabited openly with Mrs. Custis during the entire ten months immediately prior to the child's birth.[310] Stating that it would have to ignore the humanitarian principles upon which former code section 64.1-7 were based if it denied a court of equity the right to accord the child in *Brown* the benefit of that section, the supreme court concluded that when the legislature enacted code section 20-61.1 and related sections, "it did not intend to impair the jurisdiction of a court of equity to determine in a proper proceeding for the support of an infant, whether such child is 'the issue' of 'a null marriage.' "[311]

The court then cited an early Virginia case regarding children born of a bigamous marriage and applied the "access" rule developed in that case.[312] Since there was uncontroverted evidence that Brown had sole "access" to Mrs. Custis during the time the child was conceived, the trial court was not clearly erroneous in finding that Brown was the father of the child born to Mrs. Custis. Accordingly, the supreme court held that the child was the legitimate issue of a void marriage and entitled to be supported by her father.[313]

2. Workmen's Compensation Death Benefits

A rationale similar to *Brown* was applied in the recent case of *Allstate Messenger Serv. v. James*,[314] in which the illegitimate child of an employee who had suffered an industrial accident claimed death benefits. The court held that the evidentiary standards for paternity in code section 20-60.1 were not the only means of establishing paternity; indeed, code section 20-61.1 was not applicable to claims by illegitimate children for workman's compensation benefits. The court then applied code section 65.1-66 and held that the testimony of three witnesses was sufficient to establish that the claimant was an "acknowledged illegitimate child"

Call.) 143, 146 (1804) (strong case to show the sense of the legislature that the turpitude or guilt of a bigamous marriage should not fall upon the heads of innocent offspring).

310. 218 Va. at 44-45, 235 S.E.2d at 328-29.

311. *Id.* at 45, 235 S.E.2d at 329. The court also noted that it had on numerous occasions held that sections addressing desertion and nonsupport did not usurp the inherent jurisdiction of equity to deal with the questions of support and maintenance. *Id.* at 46, 235 S.E.2d at 329; *accord,* McClaugherty v. McClaugherty, 180 Va. 51, 65-66, 21 S.E.2d 761 (1942); State v. Bragg, 152 W. Va. 372, 163 S.E.2d 685 (1968).

312. Stones v. Keeling, 9 Va. (5 Call.) 143, 148-49 (1804).

313. 218 Va. at 48, 235 S.E.2d at 331.

314. ___ Va. ___, 266 S.E.2d 86 (1980).

and entitled to workmen's compensation benefits.[315] *Brown* and *Allstate Messenger Service* indicate that the Virginia Supreme Court will not allow statutes designed to prevent fraud in one situation to permit a father in another situation to escape his support obligation or to deny authorized death benefits to an illegitimate child.

As shown in *Brown*,[316] as well as in *T. . . v. T. . .*,[317] the common law rule excluding testimony by either spouse as to nonaccess has been abrogated by statute.[318] *T. . . v. T. . .* presented the novel question of whether a former husband, who knew when he married his wife that she was pregnant by another person, had a continuing obligation to support the child after their divorce.[319] The court found that the necessary elements of equitable estoppel were present, and held that the express oral contract between the parties regarding child support estopped the husband from pleading the statute of frauds.[320]

3. Wrongful Death Benefits

The Virginia Supreme Court has also protected the interests of illegiti-

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315. *Id.* at ___, 266 S.E.2d at 87. VA. CODE ANN. § 65.1-66 (Repl. Vol. 1980) provides, in pertinent part, that an acknowledged illegitimate child shall be conclusively presumed to be a dependent wholly dependent for support upon the deceased employee.

316. 218 Va. at 43, 48, 235 S.E.2d at 327, 330.

317. 216 Va. 867, 869, 224 S.E.2d 148, 150 (1976); *accord*, Cassady v. Martin, ___ Va. ___, 266 S.E.2d 104, 106 (1980).

318. VA. CODE ANN. §§ 20-82 and 88.29 (Repl. Vol. 1975) provide that in prosecutions under chapter 5 (desertion and nonsupport) both husband and wife shall be competent witnesses to testify against each other in all relevant matters, including the facts of their marriage.

319. 216 Va. at 868, 224 S.E.2d at 149. The trial court granted the wife a divorce *a vinculo matrimonii* on the ground of the husband's desertion but relieved the husband of any duty to support the child.

320. *Id.* at 873, 224 S.E.2d at 152. The woman became pregnant while unmarried and planned to move to another state in order to put her baby up for adoption. She obtained employment in New York. The man, with full knowledge of her pregnancy, promised he would care for the child as his own if she would forego her plans and marry him. She thereupon married him in 1968, and the child was born in 1969. The father's name was placed on the child's birth certificate with his approval, and he listed the child as a dependent for purposes of receiving additional pay and allowances from the U.S. Navy. The father permitted the child to use his name for more than four years; he held himself out to the public as her father; and he listed the child as a dependent on the couple's tax returns. *Id.* at 868, 224 S.E.2d at 149. *See* L_ v. L_, 497 S.W.2d 840 (Mo. 1973) (former husband liable for child support under express oral contract). *Contra*, Fuller v. Fuller, 247 A.2d 767 (D.C. App. 1968) (promise not to reject wife's child by another was no more than inducement to marry and only a commitment to support child during marriage). *See generally* Clevenger v. Clevenger, 189 Cal. App. 2d 658, 11 Cal. Rptr. 707 (1961); Spellens v. Spellens, 49 Cal. 2d 210, 317 P.2d 613 (1957); Taylor v. Taylor, 279 So. 2d 364 (Fla. Dist. Ct. App. 1973).

mate children in wrongful death actions. *Carroll v. Snead*[321] involved an action by an illegitimate child against the administrator of her father's estate to share in the recovery for the wrongful death of her father. For the first time, the Virginia Supreme Court liberally construed the word "children" as used in the Virginia wrongful death statute to include the illegitimate child of a father whose death gave rise to a wrongful death action.[322] The decedent's acknowledged illegitimate child was accordingly entitled to the amount recovered by the decedent's administrator, rather than the decedent's parents, or brothers and sisters, because she was the decedent's only beneficiary of the first class.[323]

The supreme court extended its scope of protection to the family of illegitimate children in *Edwards v. Syrkes*,[324] where the administrator of the estate of an eight year old decedent appealed the inadequacy of a wrongful death award.[325] Agreeing with the administrator's contention, the court held that it was error to admit prejudicial evidence regarding the illegitimacy of the decedent and his half-sister and the half-sister's premarital pregnancy. Such evidence did not tend to show any lack of affection by the mother and half-sister toward the decedent, or that his

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321. 211 Va. 640, 179 S.E.2d 620 (1971). The trial court held that the child, being illegitimate, was not entitled under former § 8-636 to share in the recovery of the wrongful death of her father. *Id.* at 641, 179 S.E.2d at 621. *See* VA. CODE ANN. § 8-636 (Cum. Supp. 1966) (currently codified at VA. CODE ANN. §§ 8.01-52, -53 (Repl. Vol. 1977 and Cum. Supp. 1980)). The trial court also distinguished Levy v. Louisiana, 391 U.S. 68 (1968), which held that a Louisiana statute excluding illegitimate children from participation in a recovery for the wrongful death of their mother denied the children equal protection. 211 Va. at 641, 179 S.E.2d at 621.

322. 211 Va. at 644, 179 S.E.2d at 623. The Virginia Supreme Court requested that opposing counsel file supplemental briefs directed to the question whether the term "children" as used in former § 8-636 included illegitimate children irrespective of any constitutional consideration. The court did not consider whether *Levy* was applicable. 211 Va. at 641, 644 n.3, 179 S.E.2d at 621, 623 n.3. *See also Domestic Relations, 1970-1971 Virginia Survey*, 57 VA. L. REV. 1487, 1491-92 (1971).

323. 211 Va. at 641, 179 S.E.2d at 621. The court's decision was controlled by Withrow v. Edwards, 181 Va. 344, 25 S.E.2d 343, *reversed in part and remanded*, 181 Va. 592, 25 S.E.2d 899, *cert. denied*, 320 U.S. 761 (1943) (child illegitimate in South Carolina but legitimate in Virginia entitled to share in a recovery for the wrongful death of her father).

324. 211 Va. 600, 179 S.E.2d 902 (1971).

325. Herman Williams was eight years of age when he was struck and killed by an automobile driven by the defendant. The administrator of decedent's estate instituted an action against the defendant to recover for wrongful death. The jury returned a verdict and judgment for $1,000.00 in favor of the administrator, which was divided equally between the decedent's mother and half-sister. The administrator contended that the award of damages was grossly inadequate as the result of the error of the trial court in admitting highly prejudicial evidence which revealed the illegitimacy of the decedent and his half-sister and the pre-marital pregnancy of his half-sister. *Id.* at 600-01, 179 S.E.2d at 902-03.

death brought them no sorrow, suffering or mental anguish. Since the prejudicial effect of the evidence on the jury exceeded its probative value, the judgment was set aside and the case remanded for a new trial on the question of damages alone.[326]

Although the Virginia Supreme Court is diligent in protecting the interests of illegitimate children and their families,[327] the court still requires that a claimant of wrongful death benefits establish paternity. In *Cassady v. Martin*,[328] the supreme court held that the trial court erred in ruling as a matter of law that the claimant of wrongful death benefits was the decedent's putative child. Since the claimant had the burden of proving that the decedent was his parent, paternity was a question for the jury to decide.[329]

B. Termination of Parental Rights and Adoption

1. Introduction

The consent of the natural parents is usually required in adoption proceedings, and most adoption statutes require proof that the child has been abandoned or neglected, or that certain other defined conditions exist (*e.g.*, abuse) before the parent's rights may be involuntarily terminated.[330] The United States Supreme Court has likewise recognized that a

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326. *Id.* at 601, 179 S.E.2d at 903.

327. The federal district courts in Virginia have likewise protected the interests of illegitimate children. *See, e.g.*, Kasey v. Richardson, 331 F. Supp. 580 (W.D. Va. 1971) (daughter of marriage deemed null at law, *i.e.*, common law marriage, legitimate within meaning of former § 64.1-7 and for social security purposes). For a discussion of *Kasey*, see *Domestic Relations, 1971-1972 Virginia Survey*, 58 VA. L. REV. 1257, 1259-60 (1972) [hereinafter cited as *1971-1972 Virginia Survey*].

328. ___ Va. ___, 266 S.E.2d 104 (1980).

329. *Id.* at ___, 266 S.E.2d at 106. The administratrix of a decedent's estate brought a wrongful death action on behalf of the decedent's putative child. The defendant appealed after the trial court ruled as a matter of law that the claimant was the decedent's putative child. *Id.* at ___, 266 S.E.2d at 105. The court also held that the mother of the child by the decedent could testify regarding the non-access by her legal husband. *Id.* at ___, 266 S.E.2d at 106-07.

330. CLARK, *supra* note 12, at §§ 18.3-.5. Simpson, *The Unfit Parent: Conditions Under Which a Child May be Adopted Without Consent of His Parents*, 39 U. DET. L. REV. 347 (1962). It is important to note that the legal process of adoption (by which a child acquires parents other than his natural parents and parents acquire a child other than a natural child) involves two separate steps: (1) the termination of parental rights and obligations which formerly existed; (2) the formation of a legal bond between the child and the adoptive parents. CLARK, *supra* note 12, at § 18.1. *See generally* VA. CODE ANN. §§ 63.1-222 to -238 (Repl. Vol. 1980). For an extensive discussion of the Virginia statute on termination of parental rights, see Comment, *Termination of Parental Rights—An Analysis of Virginia's Statute*, 15 U. RICH. L. REV. 213 (1980).

natural parent's relationship with his or her child is "cognizable and substantial" and thus protected by the due process clause of the fourteenth amendment.[331]

Virginia is one of the few states which permit children to be adopted when it is found that parental consent has been withheld contrary to the best interests of the child.[332] Code section 16.1-283(c) also authorizes the termination of residual parental rights when a court finds that a child has been neglected or abused or placed in foster care as a result of an entrustment agreement or other voluntary relinquishment.[333] In a line of decisions during the 1970's, the Virginia Supreme Court examined and balanced the "cognizable and substantial" rights of natural parents against the best interests of the child as well as the adoptive parents and the state.[334]

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331. Stanley v. Illinois, 405 U.S. 645 (1972), where the United States Supreme Court held that, under the equal protection clause, a state could not presume that unwed fathers were unfit as parents, *id.* at 658, and that, as a matter of due process, the father was entitled to a hearing in an adoption proceeding concerning his fitness as a parent, *id.* at 649-58. *Cf.* Quilloin v. Wolcott, 434 U.S. 246 (1978) (state's "best interest of child" standard adequately protected rights of unwed natural father). *See also* People *ex rel.* S.S.T., 39 Colo. App. 110, 553 P.2d 82 (1976); Adoption of Ekstrom, 24 A.D.2d 276, 265 N.Y.S.2d 727 (1965), *appeal dismissed,* 17 N.Y.2d 655, 216 N.E.2d 604, 269 N.Y.S.2d 444, *aff'd on rehearing,* 51 Misc. 2d 731, 273 N.Y.S.2d 833 (Sup. Ct. 1966); 2 C.J.S. *Adoption of Persons* § 93 (1972). For a discussion of the rights of natural parents, see Simpson, *supra* note 330; Comment, *Termination of Parental Rights in Adoption Cases: Focusing on the Child,* 14 J. FAM. L. 547 (1975-76); Note, *In the Child's Best Interests: Rights of the Natural Parent in Child Placement Proceedings,* 51 N.Y.U. L. REV. 446 (1976).

332. CLARK, *supra* note 12, § 18.5 at 629 n.1.; Gordon, *Terminal Placements of Children and Permanent Termination of Parental Rights: The New York Permanent Neglect Statute,* 46 ST. JOHN'S L. REV. 215, 220-21 n.41 (1971) (Virginia is listed as one of the four jurisdictions which dispense with consent when withholding consent is contrary to the child's best interest. The other three jurisdictions are Arizona, the District of Columbia and Maryland). *See* VA. CODE ANN. § 63.1-225(c) (Repl. Vol. 1980) which provides, in pertinent part that, "if after hearing evidence, the court finds that the valid consent of any person or agency whose consent is . . . required is withheld contrary to the best interests of the child or is unobtainable, the court may grant the petition without such consent."

333. VA. CODE ANN. § 16.1-283(c) (Repl. Vol. 1980).

334. Weaver v. Roanoke Dept. of Human Resources, ___ Va. ___, 265 S.E.2d 692 (1980) (distinction between order terminating parental custodial rights and order terminating residual parental rights); Ward v. Faw, 219 Va. 1120, 253 S.E.2d 658 (1979) (parental rights cannot be terminated without a finding of parental unfitness); Shank v. Dept. of Social Services, 217 Va. 506, 230 S.E.2d 454 (1976) (court order terminating parental rights severs all parental rights); Harry v. Fisher, 216 Va. 530, 221 S.E.2d 118 (1976) (best interest of child should be promoted where valid consent is given but subsequently revoked); Berrien v. Green Co. Dept. of Public Welfare, 216 Va. 241, 217 S.E.2d 854 (1975) (parental rights may not be terminated without a finding of parental unfitness); Rocka v. Roanoke Co. Dept. of Welfare, 215 Va. 515, 211 S.E.2d 76 (1975) (parental rights may not be terminated without a

2. Dual Approach Followed in Custody and Adoption Proceedings

A dual approach has evolved throughout the court's decisions regarding custody and adoption. This approach was first articulated in *Malpass v. Morgan,*[335] where the court expressed its new standard in the following terms:

> Where, as here, there is no question of the fitness of the non-consenting parent and he has not by conduct or previous legal action lost his rights to the child, it must be shown that continuance of the relationship between the two would be detrimental to the child's welfare.[336]

While articulating the established rule that in custody and adoption cases the welfare of the child is of paramount concern and takes precedence over the rights of parents, the court also added the following condition:

> There is, however a condition to the rule in custody cases where the context is between parent and non-parent, and we believe the condition should apply equally in adoption cases. The condition is that the rights of parents may not be lightly severed but are to be respected if at all consonant with the best interests of the child.[337]

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finding of parental unfitness); Commonwealth v. Hayes, 215 Va. 49, 205 S.E.2d 644 (1974) (putative father's parental rights not consonant with illegitimate daughter's best interest); Szemler v. Clements, 214 Va. 639, 202 S.E.2d 880 (1974) (best interest of child should be promoted where valid consent is given but subsequently revoked); Malpass v. Morgan, 213 Va. 393, 192 S.E.2d 794 (1972) (parental rights cannot be severed without finding of parental unfitness); Dyer v. Howell, 212 Va. 453, 184 S.E.2d 789 (1971) (prior court order divested parent of custodial rights and burden was on parent to prove that circumstances had so changed that it would be in children's best interests to restore custody to parent).

335. 213 Va. 393, 192 S.E.2d 794 (1972), where Malpass refused to consent to adoption of his child by his former wife's new husband. Without finding Malpass unfit or guilty of any conduct which would have required forfeiture of his parental rights, trial court held that his consent to adoption was being withheld contrary to the best interests of the child. The supreme court reversed the court ordered adoption and held that the rights of parents cannot be lightly severed but are to be respected if consonant with the best interests of the child. *Id.* at 395-99, 192 S.E.2d at 796-99. For an excellent analysis of this case, see Comment, *Malpass v. Morgan: Determining When a Parent's Consent to Adoption is Being Withheld Contrary to the Best Interests of the Child,* 60 VA. L. REV. 718 (1974) [hereinafter cited as *Parent's Consent to Adoption*].

336. 213 Va. at 399, 192 S.E.2d at 799.

337. *Id.* (citations omitted). *Malpass* was a retrenchment from the court's prior holding in Dyer v. Howell, 212 Va. 453, 184 S.E.2d 789 (1971), where an adoption was upheld over the objections of a natural parent. The court in *Dyer* implied that it would give little weight to any inherent parental interest in the child and would only require a showing that the adoption was in the child's best interest. For a discussion of *Dyer,* see *1971-1972 Virginia Survey, supra* note 327, at 1263-64; *Parent's Consent to Adoption, supra* note 335, at 718-20. *See also* notes 260-264 *supra* and accompanying text for discussion of custody issue in *Dyer.*

In view of this dual approach, the court has repeatedly held that unless the nonparent in an adoption (or custody proceeding) demonstrates that a continuation of the parent-child relationship would be detrimental to the child, the language in code section 63.1-225(c) forbids an adoption (and necessarily, the termination of parental rights of a nonconsenting parent through an adoption proceeding) where there is no finding that the nonconsenting parent is unfit and the parent has not been deprived of his rights to the child by conduct or previous legal action.[338]

This rule is also applied in situations where a local department of public welfare or social services is attempting to terminate the rights of natural parents. In *Berrien v. Green County Department of Public Welfare*,[339] the juvenile court awarded custody of Berrien's child and adoption rights to the county Department of Public Welfare. However, there was no clear and convincing evidence that the natural mother was unfit at the time of the hearing. The burden of proving her own fitness had been placed on the mother.[340]

The supreme court reversed the custody award and stated that the parent prevails in custody and adoption cases between a parent and a nonparent "unless the non-parent bears the burden of proving, by clear and convincing evidence, both that the parent is unfit and that the best interest of the child will be promoted by granting custody to the non-parent."[341] Finding that the child had been the "pawn of contending forces" for more than half her life, the court, rather than remanding the case for another evidentiary hearing, ordered that custody of the child be restored to her natural mother.[342] In so doing, the Virginia Supreme Court recognized the unique status of parenthood and subordinated the role of expert opinion in determining the welfare of children. The holding also "evidences judicial impatience with those who would disturb too readily the parent-child relationship."[343]

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338. Weaver v. Roanoke Dept. of Human Resources, ___ Va. ___, 265 S.E.2d 692, 694-95 n.1 (1980) (citing Ward v. Faw, 219 Va. 1120, 1124, 253 S.E.2d 658, 661 (1979); Malpass v. Morgan, 213 Va. 393, 399, 192 S.E.2d 794, 799 (1972)).

339. 216 Va. 241, 217 S.E.2d 854 (1975).

340. *Id.* at 243-44, 217 S.E.2d at 855-56.

341. *Id.* at 244, 217 S.E.2d at 856 (quoting Rocka v. Roanoke Co. Dep't of Welfare, 215 Va. 515, 518, 211 S.E.2d 76, 78 (1975) (county board of public welfare granted permanent custody of two children, but finding that such custody would be to the benefit and welfare of the children was not the equivalent of the requisite finding that the mother was an unfit parent).

342. 216 Va. at 244, 217 S.E.2d 857 (1975).

343. *1975-1976 Virginia Survey, supra* note 163, at 1433.

3. Parental Intervention in Adoption Proceedings

Where valid parental consent has been given but is subsequently revoked, as in *Harry v. Fisher*[344] and *Szemler v. Clements*,[345] the court has upheld the granting of adoptions which promote the child's best interests. As the court noted in *Weaver v. Roanoke Department of Human Resources*,[346] once a final order divesting a parent of custodial rights has been entered, the burden is on the natural parent seeking custody to show that circumstances have so changed that it would be in the best interests of the child to restore custody to the parent.[347]

In *Shank v. Department of Social Services*,[348] the supreme court held that a natural parent has no right to intervene in adoption proceedings subsequent to a decree permanently separating the child from his parent.[349] The lower court's decision in *Shank* that the natural mother lost

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344. 216 Va. 530, 531-32, 221 S.E.2d 118, 119 (1976). In a custody dispute between child's natural and adoptive parents, the natural mother attempted to revoke her consent. Adoptive parents proved by preponderance of evidence that adoption was in child's best interests and court denied natural mother's attempt to regain custody.

345. 214 Va. 639, 644-45, 202 S.E.2d 880, 884 (1974). When the execution of a valid consent for adoption, within the meaning of § 63.1-225, is proved, the natural parents will be denied custody of the child in a contest with adoptive parents provided the adoptive parents establish by a preponderance of the evidence that the child's best interests will be served if it remains in their custody. For discussion of *Szemler* and *Fisher*, see *Domestic Relations, 1973-1974 Virginia Survey*, 60 VA. L. REV. 1529 (1974); *1975-1976 Virginia Survey, supra* note 163, at 1431-32.

346. ___ Va. ___, 265 S.E.2d 692 (1980).

347. *Id. Cf.* Commonwealth v. Hayes, 215 Va. 49, 52-54, 205 S.E.2d 644, 646-48 (1974) where an illegitimate female child was placed for adoption with her mother's consent but the putative father claimed custody. The Virginia Supreme Court reversed the custody award to the father, and held that a putative father was not entitled to custody without a finding of parental fitness. The court further held that Hayes was an unfit parent to be given custody. Stanley v. Illinois, 405 U.S. 645 (1972) (father entitled to a hearing concerning his fitness as a matter of due process in adoption proceeding) was held to be inapplicable in *Hayes* because, in *Stanley*, the mother had died and the putative father had established a familial and custodial relationship with his children. The putative father in *Hayes* had never seen his child or supported her. Thus the due process hearing requirement in *Stanley* was inapposite. The court in *Hayes* also held that, regardless of how *Stanley* is to be applied, it certainly did not stand for the proposition that a putative father who was in fact unfit was nonetheless entitled to child custody. 215 Va. at 53, 205 S.E.2d at 647. *See generally* Note, *Adoption: The Constitutional Rights of Unwed Fathers*, 40 LA. L. REV. 923 (1980).

348. 217 Va. 506, 230 S.E.2d 454 (1976).

349. *Id.* at 510-11, 230 S.E.2d at 456-57. After reports of child abuse, the plaintiff's two infants were removed by the state in 1971 and placed in protective custody. The trial court *permanently separated* the infants from their mother, and the children were placed in the foster care of their paternal uncle and his wife in 1973. When the foster parents sought adoption of the children in 1975, the natural mother filed a petition for custody upon the

all right to custody as a result of the prior proceeding was affirmed. The severance of her custody rights made the mother "a legal stranger" to the children.[350] The mother would be allowed to intervene in the adoption proceeding only if she had a claim of right to adopt or could show unfitness of the adopting couple. Since she failed to pursue either course, the court denied her intervention.[351] One commentator has observed that the *Shank* decision, by ending parental rights after the state assumes custody, but before the adoption proceedings, balances the interests of the child, the natural parents, and the prospective adoptive parents and reaches a solution which demonstrates compassion for all the parties.[352]

4. Termination of Residual Parental Rights

The recent case of *Weaver v. Roanoke Department of Human Services*[353] is especially noteworthy because the court distinguished the parental burden of showing changed circumstances to justify a change in custody[354] from the burden of demonstrating that residual parental rights[355] should not be terminated.[356] Pursuant to code section 16.1-

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ground of a material change in circumstances and also sought to enjoin the adoption proceedings. *Id.* at 507-08, 230 S.E.2d at 455-56. *See* VA. CODE ANN. § 16.1-283 (Cum. Supp. 1980) (replacing VA. CODE ANN. § 16.1-178 (Repl. Vol. 1975)).

350. 217 Va. at 509, 230 S.E.2d at 457.

351. *Id.* at 510-11, 230 S.E.2d at 457.

352. *1976-1977 Virginia Survey, supra* note 138, at 1424. *See also* Carson v. Elrod, 411 F. Supp. 645 (E.D. Va. 1976) (mother was not entitled to notice or opportunity to be heard prior to her child's adoption where she had been permanently divested of custody of her child by lawful court order). For other federal court decisions regarding adoption in Virginia, see Wooldridge v. Commonwealth, 453 F. Supp. 1333 (E.D. Va. 1978) (foster parent alleged violation of her rights under the due process, equal protection and freedom of religion clauses of the first and fourteenth amendments as a result of the removal of her foster child by welfare department); Moore v. Richardson, 345 F. Supp. 75 (W.D. Va. 1972) (unadopted child living with wage earner and wife was not entitled to collect children's benefits under the Social Security Act because adoption petition was filed four years after wage earner's death rather than two years as required by statute and because Virginia did not recognize doctrine of equitable adoption).

353. ___ Va. ___, 265 S.E.2d 692 (1980).

354. The term "legal custody" is defined in § 16.1-228(O) of the Virginia Juvenile and Domestic Relations District Court Law as follows:

> [A] legal status created by court order which vests in a custodian the right to have physical custody of the child, to determine where and with whom he shall live, the right and duty to protect, train and discipline him and to provide him with food, shelter, education and ordinary medical care, all subject to any residual parental rights and responsibilities.

VA. CODE ANN. § 16.1-228(O) (Cum. Supp. 1980).

355. The term "residual parental rights and responsibilities" is defined in § 16.1-228(5) of the Virginia Juvenile and Domestic Relations District Court Law as follows:

283(C)(2),[357] the trial court entered orders terminating the residual parental rights of Mr. and Mrs. Weaver and awarded those rights, including the right to consent to an adoption, to the Roanoke Department of Human Services. The Weavers appealed on the ground that the evidence was insufficient to support the termination of their residual parental rights.[358]

In reviewing its line of decisions on the termination of residual parental rights, the court in *Weaver* noted that the termination of the legal relationship between parent and child is a grave proceeding whether it occurs in the context of an adoption or as a separate proceeding. The court cited the *Shank* holding that a court order terminating parental rights renders the parent "a legal stranger to the child" and severs "all parental rights."[359] But the court also indicated that the statutes terminating the legal relationship between parent and child should be interpreted consistently with the governmental objective of preserving, when possible, the parent-child relationship.[360]

Although the Department stressed the significance of prior court orders

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> [A]ll rights and responsibilities remaining with the parent after the transfer of legal custody or guardianship of the person, including but not limited to the right of visitation, consent to adoption, the right to determine religious affiliation and the responsibility for support.

VA. CODE ANN. § 16.1-228(5) (Cum. Supp. 1980). *See also* Hopper & Slayton, *The Revision of Virginia's Juvenile Court Law*, 13 U. RICH. L. REV. 847 (1979).

356. ___ Va. at ___, 265 S.E.2d at 694-95.

357. VA. CODE ANN. § 16.1-283 (Cum. Supp. 1980) allows for the termination of residual parental rights on the grounds of neglect, abuse, abandonment, and voluntary relinquishment. 1977 Va. Acts, ch. 559 at 863. The trial court in *Weaver* relied specifically on VA. CODE ANN. § 16.1-283(C)(2) (Cum. Supp. 1980) which authorizes the termination of parental rights if the court finds that such termination is in the best interests of the child and that the "parent or parents, without good cause, have been unwilling or unable within a reasonable period to remedy substantially the conditions which led to the child's foster care placement, notwithstanding the reasonable and appropriate efforts of social, medical, mental health or other rehabilitative agencies to such end."

358. ___ Va. at ___, 265 S.E.2d at 693. The parties were married in 1969 and separated in 1974 after the birth of two children. The children were placed in a foster home for a brief time and several couples unsuccessfully attempted to adopt the children. Mr. Weaver petitioned to be relieved of custody, due to his financial inability to provide support, and custody of both children was granted to the Human Resources Department for placement in foster care in 1976. Although the Department developed a plan to transfer custody to either parent, neither parent was able to meet its requirements. Both parents continued to visit the children. In 1979, the trial court found that it was in the best interests of the children to terminate the Weavers' residual parental rights because their homes were unstable and inadequate for placement of the children. *Id.* at ___, 265 S.E.2d at 693-94.

359. *Id.* at ___, 265 S.E.2d at 695.

360. *Id.*

divesting both parents of their custodial rights and responsibilities,[361] the supreme court noted that the proceeding in *Weaver* concerned the termination of residual parental rights as well as custody of the children. The court held that "[a] final order terminating *custodial* rights does not sever *residual* parental rights."[362] The court then allocated the burden of proof in the respective proceedings and stated that "the court order divesting [the Weavers] of *custodial* rights did not place upon [them] the burden of demonstrating that their *residual parental* rights should not be terminated."[363]

After examining the record and the requirements of code section 16.1-283(C)(2), the court concluded that the evidence was insufficient to justify the termination of either parent's residual rights. As to Mr. Weaver, the orders terminating his residual parental rights were reversed because the record contained no evidence of what measures, if any, were taken by rehabilitative agencies to provide him with assistance in remedying his financial difficulties. The court held that "[i]n the absence of evidence indicating that 'reasonable and appropriate efforts' were taken by social agencies to remedy the conditions leading to foster care, residual parental rights cannot be terminated under Code § 16.1-283(C)(2)."[364] The orders terminating Mrs. Weaver's residual parental rights were likewise reversed because there was no evidence to indicate whether she had been offered any assistance in remedying her financial inability to provide for her children. The court also stressed that since she had not entered into a voluntary entrustment plan as had her husband, it was unclear how she could have remedied the children's foster care placement.[365]

C. Miscellaneous

1. Name Changes of Married Women

In re Strikwerda[366] presented the Virginia Supreme Court with the novel question of whether the petitions of two married women to resume their maiden names, pursuant to former code section 8-577.1,[367] could be

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361. *See* cases cited in note 333 *supra*.

362. ___ Va. at ___, 265 S.E.2d at 695 (emphasis added).

363. *Id.* (emphasis added).

364. *Id.* at ___, 265 S.E.2d at 697.

365. *Id.*

366. 216 Va. 470, 220 S.E.2d 245 (1975). For an extensive comment on the subject of married women's names, see Comment, *Married Women and the Name Game*, 11 U. RICH. L. REV. 121 (1976).

367. VA. CODE ANN. § 8-577.1 (Cum. Supp. 1973) (currently codified at VA. CODE ANN. § 8.01-217 (Cum. Supp. 1980)).

denied absent a finding of an illegal purpose. The trial court denied the petitions, in which the husbands had joined, having found that *only* code section 20-107 afforded a married woman the right to resume her maiden name.[368] In *Strikwerda* the supreme court summarily rejected the trial court's reasoning and held that there was no conflict or inconsistency between former code sections 8-577.1 and 20-107. The court also held that code section 20-107 was not intended to be the exclusive authority for such a name change and that no statute prohibited a married woman from resuming her maiden name.[369] Since the trial court found that neither party had filed her petition for an illegal, fraudulent or immoral purpose, the trial court abused its discretion in denying the petitions of the applicants to resume their maiden names.[370] The court accordingly reversed the judgment of the trial court and remanded the case for entry of orders granting the petitions for change of name.[371]

The principles enunciated in *Strikwerda* were dispositive in *In re Miller*,[372] where a married woman petitioned to resume her maiden name. There were no children of the marriage and the husband and wife agreed that any children would bear the father's name. A number of creditors had extended credit to the couple as husband and wife under the husband's surname but the wife indicated that she intended to notify their creditors of the name change. The lower court distinguished *Strikwerda* on various grounds and denied the petition.[373] The supreme court re-

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368. 216 Va. at 472, 220 S.E.2d at 246. The second sentence of § 20-107 which concerned resuming a former name was repealed by 1979 Va. Acts, ch. 1. VA. CODE ANN. § 20-121.4 (Cum. Supp. 1980) currently providing that:

> Upon decreeing a divorce from the bond of matrimony the court shall, upon motion of a party who changed his or her name by reason of marriage, restore such party's former name either as part of the final decree or, upon request of such party, by separate order meeting the requirements of § 8.01-217.

369. 216 Va. at 472, 220 S.E.2d at 246.

370. *Id.* at 473, 220 S.E.2d at 247.

371. *Id.* The court also noted that a married woman is under no legal compulsion to assume her husband's surname. *Id.* at 472, 220 S.E.2d at 246-47. *Strikwerda* is in line with the decisions of other jurisdictions. *See* Marshall v. State, 301 So. 2d 477 (Fla. Dist. Ct. App. 1974); Petition of Hauptly, 262 Ind. 150, 312 N.E.2d 857 (1974); Secretary of Commonwealth v. City Clerk, 373 Mass. 178, 366 N.E.2d 717, 722 (1977); Piotrowski v. Piotrowski, 71 Mich. App. 213, 247 N.W.2d 458 (1975); *In re* Application of Lawrence, 133 N.J. Super. 408, 337 A.2d 49 (1975); Application of Halligan, 46 A.D.2d 170, 361 N.Y.S.2d 458 (1974); Kruzel v. Podell, 67 Wis. 2d 138, 226 N.W.2d 458 (1975). *See also* Comment, *Married Women and the Name Game, supra* note 366 at 143-45.

372. 218 Va. 939, 243 S.E.2d 464 (1978).

373. *Id.* at 941-42, 243 S.E.2d at 466-67. The trial court assigned the following reasons for denying Miller's petition to resume her maiden name (Brewer): (1) *Strikwerda* was not controlling because it did not involve joint debts of husband and wife. Even though Miller

versed and remanded, holding that *Strikwerda* was controlling and that notice to creditors was not an express requirement of former code section 8-577.1.[374]

Additionally, the court noted that there was nothing in that section, or in the common law, which required a showing of a compelling need to justify a change of name. "Such a requirement would be inconsistent with the common-law principle that names may be changed in the absence of a fraudulent purpose."[375] The supreme court noted that the discretion of the trial court to deny the applicant's petition was not unbridled but rather had to be based on evidence, not speculation, that a change of name would infringe upon the rights of others. Since the decision to deny the applicant's petition was not based on a finding that the name change was for an illegal, fraudulent or immoral purpose, the trial court therefore abused its discretion in denying Miller's petition to resume her maiden name.[376]

2. Name Changes of Children of Divorced Parents

The Virginia Supreme Court applies a test different than *Strikwerda* in

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announced her intention to notify her creditors of the name change, the creditors would not have adequate protection if she failed to notify them and thereafter changed her residence. (2) There was no compelling need for a name change. (3) The proposed name change contravened society's substantial interest in the easy identification of married persons. (4) Miller's future children would be substantially burdened in explaining why they did not have their mother's name and why their mother and father had different names. (5) The applicant could satisfy her desire for a separate professional career under the provisions of § 59.1-69, relating to transaction of business under an assumed name.

374. *Id.* at 942-43, 243 S.E.2d at 467. The Virginia Supreme Court held that the trial court's characterization of *Strikwerda* was not meaningful. The inevitable confusion and possibility of damage to a creditor which might result from a married woman resuming her maiden name, or when a divorced woman or widow remarries and takes her husband's surname, or when a single woman marries and takes the surname of her husband, were not sufficient to deny an application for a change of name not sought for a fraudulent purpose since the damage to creditors must be based on facts, not speculation. *Id.* at 943, 243 S.E.2d at 467 (citing Matter of Natale, 527 S.W.2d 402, 406 (Mo. Ct. App. 1975)).

375. 218 Va. at 943, 243 S.E.2d at 467 (citing Application of Hallingan, 46 A.D.2d 170, 171, 361 N.Y.S.2d 458, 460 (1974)).

376. 218 Va. at 944, 243 S.E.2d at 468. The court also disposed of the other reasons cited by the trial court for denying Miller's petition: (1) The reasoning that the proposed name change contravened society's substantial interest in the easy recognition of persons was premised on erroneous compelling need standard and was inconsistent with *Strikwerda*. (2) It was purely speculation to reason that a name change of the mother would have an embarrassing effect on her children. (3) The applicant was entitled to statutory protection of former code § 8-577.1 (now VA. CODE ANN. § 8.01-217 (Cum. Supp. 1980)) even though there were statutory provisions which might offer a similar form of relief, *i.e.*, VA. CODE ANN. § 59.1-69 (Cum. Supp. 1980). 218 Va. at 943, 243 S.E.2d at 468.

name changes of children where a divorced father objects. In *Flowers v. Cain*,[377] a mother who had custody of her minor children from a previous marriage sought to change the children's name to the surname of her present husband in order to avoid confusion and embarrassment to the children. The trial court granted the mother's request over the father's objection. Applying the best interest of the child test used by other courts, the supreme court reversed the order and dismissed the name change order.[378] *Strikwerda* was not controlling due to its dissimilar factual and legal basis. However, the court noted that *Strikwerda* and other cases recognized a father's interest in having his child continue to use his name and the relevance of his interest to a determination of the child's best interest.[379]

The court also held that the burden was upon the mother, rather than the father, to prove by satisfactory evidence that a change in the children's names would be in their best interest. But, regardless of where the burden was placed, the court found that the trial court erred in ordering the change of names.[380] The mother was the only witness to testify in support of the name change application and she offered only slight evidence showing nothing more than "minor inconvenience or embarrassment" to support her application. On the other hand, the court found the evidence overwhelming that the objecting father had not abandoned the natural ties with his children, that he had not engaged in misconduct which would embarrass the children in the continued use of his name, and that it would not be detrimental to the children to continue to bear his name. Under these circumstances, the court held that a change of names was not warranted.[381]

IV. Conclusion

The Virginia Supreme Court was very active in the area of domestic

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377. 218 Va. 234, 237 S.E.2d 111 (1977).

378. *Id.* at 235-37, 237 S.E.2d at 113-14.

379. *Id.* at 236, 237 S.E.2d at 112-13.

380. 218 Va. at 237, 237 S.E.2d at 113. The Virginia Supreme Court noted that courts elsewhere, in the aftermath of divorce, were reluctant to change a child's name over the objection of a devoted father for fear that the change would further damage the already strained father-child relationship. Thus, while applying the best interest test, other courts declined to change a child's name over the natural father's objection unless substantial reasons existed for the change. *Id.* at 236-37, 237 S.E.2d at 113. *See, e.g.*, West v. Wright, 263 Md. 297, 302-03, 283 A.2d 401, 404 (1971); Robinson v. Hansel, 302 Minn. 34, 36, 223 N.W.2d 138, 140 (1974). *See generally* Annot., 53 A.L.R.2d 914 (1957).

381. 218 Va. at 237-39, 237 S.E.2d at 113-15. For a critical analysis of *Flowers*, *see 1977-1978 Virginia Survey*, *supra* note 145, at 1444-45.

relations and family law between 1970 and 1980, and it is somewhat difficult to summarize the major trend in these cases. As the foregoing discussion indicates, however, many of the court's significant decisions during the 1970's involved child custody or adoption issues where the court undertook to examine closely the best interests of a child or children as well as the various competing interests of those seeking custody or termination of parental rights. This author would therefore suggest the following statement from *Malpass v. Morgan* as an appropriate nutshell of the court's major development during the past decade: "Parental rights are to be respected if at all consonant with the best interests of the child." This summarization reflects the court's transformation of the "tender years" doctrine from a maternal presumption to a tie breaking factor in child custody as well as the court's protection of the rights of illegitimate children despite their parents' moral vicissitudes. Decisions during the 1970's on adoption and the termination of parental rights otherwise illustrate the court's attempt to strike a balance, whenever possible, between the best interests of the child and the rights of the natural parents as well as the rights of the state and the adoptive parent.

Other noteworthy developments in the area of Virginia domestic relations between 1970 and 1980 include the increased utilization of the nonfault separation statute, the recognition of the divisible divorce concept, the awarding and apportionment of lump sum awards upon divorce, the "de-sexing" of alimony, the enactment of the Uniform Child Custody Jurisdiction Act, and the application of the Revised Uniform Reciprocal Enforcement Support Act. Also, the Virginia Supreme Court has remained in step with the majority of decisions by disallowing alimony after a spouse's second voidable marriage and by allowing married women to resume their maiden names without a showing of compelling cause.

On the other hand, Virginia continues to follow the minority of states which do not permit the equitable distribution of marital property upon divorce and which deny support and maintenance to a spouse at fault. In light of the progressive advancements discussed above, it therefore remains to be seen if the Virginia Supreme Court and the Virginia General Assembly will continue to follow these minority positions during the next decade, or if the court, in conjunction with the legislature, will adopt the majority position.