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Annual Survey of Virginia Law: Domestic Relations

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DOMESTIC RELATIONS

*Peter N. Swisher**

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I. 1985 LEGISLATION***

A. *Virginia Premarital Agreement Act*

Premarital agreements, or antenuptial contracts, are generally favored by the law when prospective spouses privately contract to vary, limit, or relinquish certain rights which they would otherwise acquire in each other's property, or in each other's estate, by reason of their impending marriage. Traditionally, premarital agreements were made by widows, widowers, or divorced older people, who wished to retain control of property acquired in a prior marriage and, upon death, pass such property on to the children of that prior marriage.¹

However, premarital agreements are now becoming more common among young professionals and first marriages since

[w]ith divorce such a commonplace fact of life, it is fair to assume that many prospective marriage partners whose property and familial situation is such as to generate a valid antenuptial agreement settling their property rights upon the death of either, might want to consider and discuss also . . . the disposition of their property and . . . [spousal support] rights . . . in the event their marriage, despite their best efforts, should fail.²

The problem with this "divorce planning" in premarital agree-

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*** Note: Due to pending proposals regarding enforcement and support schedules, the amendments to VA. CODE ANN. § 20-79.1 (Cum. Supp. 1985) will be discussed in a subsequent issue.

1. See H. CLARK, *LAW OF DOMESTIC RELATIONS* 27-31 (1968); A. LINDEY, 2 *SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS* § 90, at 90-50 (1985); Gamble, *The Antenuptial Contract*, 26 U. MIAMI L. REV. 692 (1972).

2. *Posner v. Posner*, 233 So. 2d 381, 384 (Fla. 1970), *quashed on other grounds*, 257 So. 2d 530 (Fla. 1972).

ments is that many courts have held such agreements to be void per se since they may tend to "induce" or "facilitate" divorce in violation of a state's public policy promoting marriage.³

Because of the substantial uncertainty as to the enforceability of these various provisions in premarital agreements, and due to a significant lack of uniformity among the states, the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment in all states The Uniform Premarital Agreement Act (Uniform Act).⁴ This Act was adopted with certain modifications by the Virginia General Assembly in the 1985 Session as the Virginia Premarital Agreement Act (Virginia Act).⁵

The new Virginia Act, assuming it is re-enacted prior to July 1, 1986,⁶ would apply to any premarital agreement executed on or after this date.⁷ The premarital agreement must be in writing and signed by both parties. It will be enforceable without consideration, and effective upon marriage.⁸ However, the premarital agreement is *not* enforceable if the person against whom enforcement is sought proves that the person: (1) did not execute the agreement voluntarily; and (2) was not provided a fair and reasonable financial and property disclosure by the other party, and did not waive in writing the right to that disclosure.⁹

Any issue of unconscionability in such a premarital agreement

3. See Swisher, *Divorce Planning in Antenuptial Agreements: Toward a New Objectivity*, 13 U. RICH. L. REV. 175, 177-89 (1979); see also *Cumming v. Cumming*, 127 Va. 16, 29, 102 S.E. 572, 576 (1920) (alimony provisions in a premarital agreement invalid). *But see Cooley v. Cooley*, 220 Va. 749, 752, 263 S.E.2d 49, 52 (1980) (divorce planning with property in post-nuptial agreements valid); *Capps v. Capps*, 216 Va. 378, 380, 219 S.E.2d 901, 903 (1975) (same).

4. Reprinted in [Reference File] FAM. L. REP. (BNA) 201:0121 (1984) [hereinafter cited as Uniform Act].

5. VA. CODE ANN. §§ 20-147 to -154 (Cum. Supp. 1985) [hereinafter cited as Virginia Premarital Agreement Act].

6. 1985 Va. Acts 434 (3) provides that "this act shall not be effective unless reenacted prior to July 1, 1986."

7. VA. CODE ANN. § 20-147 (Cum. Supp. 1985).

8. *Id.* § 20-149. Actually, the "almost universal view" is that the marriage itself is the consideration for this premarital agreement. Uniform Act, *supra* note 4, § 2 comment.

Since the agreement is effective "on marriage," the intent of the drafters of the Uniform Act was that postnuptial and separation agreements are outside the scope of the Act; non-married related "cohabitation agreements," such as found in *Marvin v. Marvin*, 18 Cal. App. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), *modified*, 122 Cal. App. 3d 871, 176 Cal. Rptr. 555 (1981), are also outside the scope of the Uniform Act. See Uniform Act, *supra* note 4, §§ 1, 4 comments.

9. See VA. CODE ANN. § 20-151(A)(1), (2) (Cum. Supp. 1985). These provisions are similar to § 6(a)(1), (2) of the Uniform Act, *supra* note 4.

would be decided by the court as a matter of law,¹⁰ and recitations

10. VA. CODE ANN. § 20-151(B) (Cum. Supp. 1985). This is similar to the Uniform Act, *supra* note 4, § 6(c). Such issues of unconscionability may well include any breach of fiduciary duty between the parties, or the lack of independent legal counsel to advise each party prior to signing the agreement. *See* *Batleman v. Rubin*, 199 Va. 156, 98 S.E.2d 519 (1957) (competent legal advice a necessary requirement for enforcement of an antenuptial agreement). The test for "unconscionability" under the Uniform Act was drawn from the Uniform Marriage and Divorce Act, § 306, *reprinted in* [Reference File] FAM. L. REP. (BNA) 201:2001 (1984) [hereinafter cited as Uniform Marriage and Divorce Act]. *See* Uniform Act, *supra* note 4, § 6 comment; *see also* *Newman v. Newman*, 653 P.2d 728 (Colo. 1982) (unconscionability in an antenuptial agreement makes it unenforceable on that ground alone); *Ferry v. Ferry*, 586 S.W.2d 782 (Mo. 1979) (circumstances surrounding signing of the agreement made the agreement unenforceable).

Section 306 of the Uniform Marriage and Divorce Act provides as follows:

Section 306. [*Separation Agreement.*]

- (a) To promote amicable settlement of disputes between parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for disposition of any property owned by either of them, maintenance of either of them, and support, custody, and visitation of their children.
- (b) In a proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement, except those providing for the support, custody, and visitation of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable.
- (c) If the court finds the separation agreement unconscionable, it may request the parties to submit a revised separation agreement or may make orders for the disposition of property, maintenance, and support.
- (d) If the court finds that the separation agreement is not unconscionable as to disposition of property or maintenance, and not unsatisfactory as to support:
 - (1) unless the separation agreement provides to the contrary, its terms shall be set forth in the decree of dissolution or legal separation and the parties shall be ordered to perform them, or
 - (2) if the separation agreement provides that its terms shall not be set forth in the decree, the decree shall identify the separation agreement and state that the court has found the terms not unconscionable.
- (e) Terms of the agreement set forth in the decree are enforceable by all remedies available for enforcement of a judgment, including contempt, and are enforceable as contract terms.
- (f) Except for terms concerning the support, custody, or visitation of children, the decree may expressly preclude or limit modification of terms set forth in the decree if the separation agreement so provides. Otherwise, terms of a separation agreement set forth in the decree are automatically modified by modification of the decree.

Id.

The problem with this interpretation is that under Virginia law, separation agreements, and arguably premarital agreements, are fixed—not modifiable, as they are in most states—regarding spousal support. *See* VA. CODE ANN. § 20-107.3(H) (Cum. Supp. 1984); *id.* § 20-109 (Repl. Vol. 1983). But if the premarital agreement is unfair to the parties or to either of them, a Virginia judge still has the option to void the premarital agreement in whole or in part. *See, e.g., Batleman*, 199 Va. 156, 98 S.E.2d 519; *see also* VA. CODE ANN. § 20-154 (Cum. Supp. 1985) (Va. Premarital Agreement Act's severability clause).

in the agreement would create a prima facie presumption that they are factually correct.¹¹ Any statute of limitations applicable during the action is tolled during the marriage, but equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party.¹²

What may be included in a premarital agreement under the Virginia Act? Parties to a premarital agreement under the Virginia Act may contract regarding: (1) the right to manage and control property, whenever and wherever acquired or located; (2) the disposition of property upon "separation, marital dissolution,¹³ death, or the occurrence or nonoccurrence of any other event"; (3) spousal support; (4) the making of a will, trust, or other agreement; (5) life insurance ownership rights; (6) the choice of law governing the agreement; and (7) "any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty."¹⁴

It is also important to note that the Virginia Act did *not* adopt all its provisions directly from the Uniform Act; and noticeably altered were those provisions relating to spousal and child support. For example, where the Uniform Act allows the parties to contract with respect to "the modification or elimination of spousal support,"¹⁵ the Virginia Act only speaks of "spousal support" generally.¹⁶ What was the Virginia legislative intent in making this change? Since modification or elimination of spousal support is one of the key factors in premarital agreement divorce planning,¹⁷

11. VA. CODE ANN. § 20-151(b) (Cum. Supp. 1985). There is no similar provision in the Uniform Act. If the recitations were fraudulently made in the premarital agreement, however, the presumption that they are "factually correct" could still be overcome. *See, e.g., In re Estate of Harris*, 431 Pa. 293, 245 A.2d 647 (1968), *cert. denied*, 393 U.S. 1065 (1969) (misrepresentation of a party's worth in an antenuptial agreement voided that agreement).

12. VA. CODE ANN. § 20-152 (Cum. Supp. 1985).

13. The Uniform Act, *supra* note 4, uses the term "marital dissolution" to mean divorce. However, in Virginia the word "dissolution" generally means annulment. *See, e.g., Henderson v. Henderson*, 187 Va. 121, 46 S.E.2d 10 (1948) (the meaning of the word "dissolve" is to annul); VA. CODE ANN. 20-107.1 to -107.3 (Cum. Supp. 1985). It would have been better to add the word "divorce" in the Virginia Premarital Agreement Act to avoid any possible ambiguity, but perhaps "any other matter" is a catch-all term which would also cover divorce under VA. CODE ANN. § 20-150 (Cum. Supp. 1983). This was, possibly, a legislative oversight.

14. VA. CODE ANN. § 20-150 (Cum. Supp. 1985) (a modification of the Uniform Act, *supra* note 4, § 3).

15. Uniform Act, *supra* note 4, § 3(a)(4).

16. VA. CODE ANN. § 20-150(4) (Cum. Supp. 1985).

17. *See Swisher, supra* note 3, at 183-85.

and apparently was one of the primary motives for the Uniform Act,¹⁸ it would be unfortunate if a judge narrowly construed the Virginia Act's "spousal support" provision to *prohibit* any modification or elimination of spousal support. It could be argued that the general term "spousal support" includes, but is not limited to, its modification and possible elimination, and that the legislative intent for this change might have been to promote the concept of spousal support generally, rather than specifically to emphasize its modification or elimination. Alternately, a judge might still hold the modification or elimination of spousal support in a premarital agreement to be valid under the Virginia Act section 20-150(8).¹⁹ The Virginia Act's spousal support provision thus will require further clarification.

The Virginia Act also deleted section 6(b) of the Uniform Act which provides:

If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.²⁰

Again, there is no express legislative intent explaining why this provision was omitted in the Virginia Act and what effect, if any, this omitted provision has on the Virginia Act's spousal support provision.²¹

Finally, the Uniform Act provides under section 3(b) that "the right of a child to support may not be adversely affected by a premarital agreement,"²² but the Virginia Act omits this provision. The rule in Virginia, and in almost all states, is that courts gener-

18. See *supra* note 4 and accompanying text.

19. VA. CODE ANN. § 20-150(8) (Cum. Supp. 1985) provides that the parties to a premarital agreement may contract with respect to "[a]ny other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty." But compare the divorce planning public policy arguments in *Cumming v. Cumming*, 127 Va. 16, 102 S.E. 572 (1920) (any antenuptial agreement encouraging a divorce is void) with *Capps v. Capps*, 216 Va. 378, 219 S.E.2d 901 (1975) (such agreements are not void unless collusive or made to facilitate a separation or divorce).

20. Uniform Act, *supra* note 4, § 6(b).

21. See *infra* notes 55-59 and accompanying text.

22. Uniform Act, *supra* note 4, § 3.

ally are *not* bound by marital agreements affecting child support,²³ and therefore section 3(b) of the Uniform Act would not appear to be in conflict with Virginia law. Perhaps the provision was omitted from the Virginia Act because it might have been superfluous or ambiguous. Whatever the reasons may be for these deviations from the Uniform Act, the Virginia Act will merit closer scrutiny and need further clarification.

B. *Equitable Distribution Statutory Modifications*²⁴

The 1985 General Assembly made some important changes in the Virginia equitable distribution statute.²⁵ Except for changing the word *motion* to *request* in the statute's introduction,²⁶ and adding a provision which allows a court to retain jurisdiction to later partition marital property which is titled in the names of both parties,²⁷ the modifications made to the statute all relate to pensions.

The primary motivation in revising section 20-107.3 of the Code of Virginia was to override a Virginia Attorney General's opinion,²⁸ followed by some judges and rejected by others, which concluded that a pension division by the court was not authorized under the statute.²⁹ Under the revisions, "all property *including that portion of pensions, profit sharing or retirement plans of whatever nature*" was added to the definition of marital property.³⁰ Addition-

23. See, e.g., *Hammers v. Hammers*, 216 Va. 30, 216 S.E.2d 20 (1975) (court has continuing jurisdiction to modify contract for child support); *Carter v. Carter*, 215 Va. 475, 211 S.E.2d 253 (1975) (court unquestionably has the power to modify agreements concerning child support); *Gloth v. Gloth*, 154 Va. 511, 153 S.E. 879 (1930); VA. CODE ANN. § 20-108 (Repl. Vol. 1983). These cases, however, dealt with separation agreements rather than premarital agreements.

24. The authors gratefully acknowledge a helpful analysis of this statutory modification written by Richard E. Crouch, Esq., of Arlington, Virginia. See Crouch, *1985 Legislation Changes Rules on Dividing Pension*, 6 VA. FAM. L. NEWS 8 (1985) (the Newsletter of the Family Law Section of the Va. State Bar).

25. H. 358, 1985 Va. Acts 5, *amending and re-enacting* VA. CODE ANN. § 20-107.3 relating to property of the parties upon divorce or annulment.

26. VA. CODE ANN. § 20-107.3(A) (Cum. Supp. 1985). The change in wording from "motion" to "request" for a decree as to the property of the parties on divorce or annulment was reportedly made because some judges were requiring counsel to file notice and calendar separate motions for property division as a precondition to equitable distribution, and some surprised attorneys heard these judges tell them that they had "no motions" before them for equitable distribution. See Crouch, *supra* note 24, at 10.

27. VA. CODE ANN. § 20-107.3(C) (Cum. Supp. 1985).

28. 1982-83 Op. Att'y Gen. 209 (Va. 1983).

29. Crouch, *supra* note 24, at 8.

30. VA. CODE ANN. § 20-107.3(A)(2) (Cum. Supp. 1985) (emphasis added).

ally, subsection G of the statute was re-written to provide that

*the court may direct payment of a percentage of pension, profit sharing or retirement benefits, whether vested or nonvested, payable in a lump sum or over a period of time and only as benefits are payable. No such payment shall exceed fifty percent of the cash benefits actually received by the party against whom such award is made.*³¹

Finally, subsection C of the statute, providing that the court shall have no authority to order a conveyance of separate property, or of marital property not titled in the names of both parties, was amended to read: "*This subsection shall not be construed to prevent the court from directing payment of a percentage of pension, profit sharing or retirement benefits as authorized under subsection G. . . .*"³²

These changes in the statute were wise and helpful, because interpreting substantive items of property—like pensions, profit-sharing and retirement benefits—as criteria rather than as marital property per se³³ made the former Virginia statute peculiar to authorities outside the state, and difficult to explain to judges.³⁴ Moreover, such an interpretation under the former statute might have left the question of whether pensions and other retirement plans are marital property open to litigation on a case-by-case analysis, and some courts in states that have not defined pension and retirement plans as marital property by statute have held that such pensions were *not* marital property.³⁵

Overall, the present statute still presents some unresolved questions. Under the revised subsection G, "[t]he court may direct payment of a portion of the wage earner spouse's pension to the other spouse *only when those benefits become due.*"³⁶ The former sub-

31. *Id.* § 20-107.3(G) (emphasis added).

32. *Id.* § 20-107.3(C) (emphasis added).

33. *See, e.g., id.* § 20-107.3(E)(8). Under the former statute, pensions and profit sharing and retirement plans were not explicitly included in the definition of marital property in subsection (B)(2), but were only included under subsection (E)(8) as criteria for the court to consider in making an award. Under the new statute, however, marital property is defined, under subsection (B)(2), to include these items.

34. Crouch, *supra* note 24, at 8.

35. *See, e.g., Grant v. Grant*, 9 Kan. App. 2d 671, 685 P.2d 32 (1984) (military retirement pay not a marital asset); *Smith v. Smith*, 280 S.C. 257, 312 S.E.2d 560 (1984) (pension fund of husband not marital property).

36. VA. CODE ANN. § 10-107.3(G) (Cum. Supp. 1985) (emphasis added).

section G, however, apparently went further in prohibiting any monetary award which was in any way "based upon the value of pension or retirement benefits . . . until the party against whom such award is made actually begins to receive such benefits."³⁷ Thus under the revised statute a judge may arguably award *the equivalent* of up to half the value of the pension or retirement benefits to the non-employee spouse in cash under section 20-107.3(D) before the wage-earner spouse actually receives those benefits. In so doing, the judge would technically *not* be "directing payment of a percentage of pension, profit sharing or retirement benefits" in violation of subsection G.³⁸ An opposing argument to this approach is that even "awarding" the pension to a *wage-earner spouse* is controlled by the language of subsection G, and cannot be done by silence or implication. The theory behind this second approach would be based on the court's statutory duty under section 20-107.3(A) to put a "price tag" on every marital asset in preparation for making a monetary award authorized by section 20-107.3(D).³⁹ In choosing either approach, given the wording of section 20-107.3(D), the judge would not seem to be very limited in his or her ultimate decision.⁴⁰

II. JUDICIAL CASES

A. *Federal Jurisdiction in Father-Son Intentional Infliction of Emotional Distress Case*

For the past two hundred years, American domestic relations matters have largely been subject to the control of the individual states,⁴¹ rather than the federal courts. Although federal courts are not constitutionally prohibited from hearing domestic relations matters,⁴² the United States Supreme Court has stated in dicta that federal courts should not exercise jurisdiction in domestic relations matters,⁴³ unless incidental to some primary property or

37. *Id.* § 20-107.3(G) (Repl. Vol. 1983) (emphasis added).

38. *Id.* § 20-107.3(G) (Cum. Supp. 1985).

39. Crouch, *supra* note 24, at 10.

40. *Id.*

41. See *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (legislature of state or territory controls marriage requirements); see also *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971).

42. See U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C.A. § 1332 (West Cum. Supp. 1985) (jurisdiction of district courts based on diversity of citizenship).

43. See, e.g., *In re Burrus*, 136 U.S. 586 (1890) (disclaimer of jurisdiction in child custody determinations); *Barber v. Barber*, 62 U.S. (21 How.) 582 (1859) (disclaimer of any jurisdiction for divorce).

tort claim. This traditional federal "hands off" rule has become known as the "domestic relations exception" to federal diversity jurisdiction.

Recently, however, decisions by the Fourth Circuit Court of Appeals⁴⁴ and other federal courts⁴⁵ have been eroding this jurisdictional exception to the point where it soon may no longer be an exception at all.⁴⁶ *Raftery v. Scott*,⁴⁷ a recent case in point, exemplifies this trend.

In *Raftery*, the former husband, a New York resident, sought damages for intentional infliction of emotional distress from his former wife, a Virginia resident, by reason of the wife's alleged intentional efforts to destroy the father-son relationship. The United States District Court for the Eastern District of Virginia rendered judgment in favor of the former husband and against the former wife for forty thousand dollars in compensatory damages and ten thousand dollars in punitive damages—a judgment affirmed by the Fourth Circuit Court of Appeals.⁴⁸

The wife's attorney argued that the domestic relations exception should apply to defeat federal jurisdiction. The Fourth Circuit court, however, paraphrasing the language of *Cole v. Cole*,⁴⁹ held that a federal district court "may not simply avoid all diversity cases having intrafamily aspects. Rather it must consider the exact nature of the rights asserted or of the breaches alleged."⁵⁰ Also citing from *Wasserman v. Wasserman*,⁵¹ the *Raftery* court noted, "the torts of child enticement and intentional infliction of emotional distress are in no way dependent on a present or prior family relationship. . . . Most importantly, appellant [wife] is not seeking a determination of entitlement to custody or any other adjustment of family status. . . ."⁵²

The *Raftery* court was very careful, however, not to explicitly

44. See, e.g., *Wasserman v. Wasserman*, 671 F.2d 832 (4th Cir. 1982); *Cole v. Cole*, 633 F.2d 1083 (4th Cir. 1980).

45. See, e.g., *Bennett v. Bennett*, 682 F.2d 1039 (D.C. Cir. 1982); *Fenslage v. Dawkins*, 629 F.2d 1107 (5th Cir. 1980).

46. See *Raftery v. Scott*, 756 F.2d 335, 341-44 (4th Cir. 1985) (Michael, J., concurring).

47. 756 F.2d 335 (4th Cir. 1985) (applying Virginia law in federal diversity of citizenship action).

48. *Id.* at 336.

49. 633 F.2d 1083 (4th Cir. 1980).

50. *Raftery*, 756 F.2d at 338 (paraphrasing the language of *Cole*, 633 F.2d at 1087).

51. 671 F.2d 832 (4th Cir. 1982).

52. 756 F.2d at 338 (quoting *Wasserman*, 671 F.2d at 834-35).

undermine the domestic relations exception. It stated that a federal court decision "not requiring the adjustment of family status or establishing familial duties or determining the existence of a breach of such duties, does not contravene the domestic relations exception to federal diversity jurisdiction"⁵³—a consideration especially applicable in *Raftery* since the tort complained of was *not* "alienation of affection," but rather a claim for intentional infliction of emotional distress.⁵⁴

Nevertheless, in a lengthy concurring opinion, Judge Michael questioned whether the facts of *Raftery* adequately distinguished it from cases in which the domestic relations exception was properly applicable:

It is true that on a technical basis the tort of intentional infliction of emotional distress can be successfully prosecuted without any reference to the marital relation, and it is on this pivot that *Cole*, *Wasserman*, and the instant majority opinion turn.

Yet, the record below clearly shows that the jury was advised of the former domestic relationship and of the actions of the mother toward the child and against the interests of the father. Only the most meticulous honing of the differentiation sought to be set out by these three cases can support the leap in logic which says that the domestic relationship between the parties is of no moment in the prosecution of the instant case.⁵⁵

Presenting a hypothetical situation of a husband in Bluefield, Virginia, who moves two blocks away from his wife into Bluefield, West Virginia, and then sues for divorce in federal court, Judge Michael surmised:

Even if we assume that what remains of the domestic relations exception after *Cole*, *Wasserman*, and the instant case do[es] not permit the federal court to grant the divorce, the narrow circumscription of that doctrine by those opinions might just as well permit the district court to go to that extent, since essentially the evidence appropriate to determining the status of the parties as to divorce will then be before the court. After all, federal courts still retain chancery jurisdiction. U.S. Const., art. III, § 2, cl. 1. Since the Federal

53. *Id.* (citing with approval *Kelser v. Anne Arundel County Dep't of Social Servs.*, 679 F.2d 1092 (4th Cir. 1982)).

54. *Id.* at 338-39.

55. *Id.* at 342 (Michael, J., concurring).

Court will be sitting with diversity jurisdiction, applying the law of the Commonwealth of Virginia in this assumed case, the only bar to the granting of a divorce is whatever remains of the domestic relations exception after *Cole*, *Wasserman*, and the instant case.⁵⁶

If a narrowing of the domestic relations exception is to be brought about, concluded Judge Michael, it should be done by congressional action rather than by a judicial "whittling away process."⁵⁷

Whether federal jurisdiction in domestic relations-oriented cases "will be a rare occasion or one of increasing frequency"⁵⁸ will have a substantial impact on this important area of the law, and this author shares the belief that federal jurisdiction in this area is definitely increasing. As to whether this trend will be beneficial or detrimental, only time will tell.

B. *Spousal Rape*

Two recent Virginia Supreme Court cases have established a very limited exception to the common law concept of spousal rape immunity: *Weishaupt v. Commonwealth*⁵⁹ and *Kizer v. Commonwealth*.⁶⁰ In *Weishaupt*, the husband and wife had maintained separate residences, refraining from any sexual contact and speaking only on matters concerning their infant daughter. After approximately eleven months of continuous separation, the husband attempted to have sexual relations with his estranged wife. He was indicted for rape, and his motion to dismiss based on the common law spousal exemption to rape was denied. A jury found Mr. *Weishaupt* guilty of attempted rape. On appeal, the Virginia Supreme Court examined "whether a husband can be guilty of raping his wife . . . where, at the time of the alleged offense the parties were living separate and apart."⁶¹

It was Mr. *Weishaupt's* contention that the English common law contained an absolute marital rape exemption which should apply in Virginia.⁶² The court, however, rejected that contention, holding

56. *Id.*

57. *Id.* at 343.

58. *Id.* at 342.

59. 227 Va. 389, 315 S.E.2d 847 (1984).

60. 228 Va. 256, 321 S.E.2d 291 (1984).

61. *Weishaupt*, 227 Va. at 392, 315 S.E.2d at 847.

62. *Id.* at 395, 315 S.E.2d at 849. In support of this position, he advanced three arguments: (1) because no state statute specifically alters the common law rule, it is still in

that the implied consent to sexual relations in a marriage could be revoked. Tracing this notion through three English cases,⁶³ the court stated: "[T]he true state of English common law was that marriage carried with it the implied consent to sexual intercourse; but that consent could be revoked. The requirement for revocation was that there exist either a court order of separation or one limiting contact, or that there exist a separation agreement entered into by both husband and wife."⁶⁴

The English courts thus did not recognize that a woman could *unilaterally* revoke the implied consent by moving out and filing for a divorce. The Virginia Supreme Court, however, reasoned that in interpreting relevant statutory and case law, only those principles of common law not repugnant to the "nature and character of our political system" should be adopted.⁶⁵ In light of recent cases in Virginia establishing a woman's independent control over her property, the court concluded she should have the same protection and control over her physical person.⁶⁶

The court also found that the Virginia no-fault divorce statute "embodies a legislative endorsement of a woman's unilateral right to withdraw an implied consent to marital sex."⁶⁷ If the state failed to recognize the wife's ability to unilaterally withdraw the implied consent to marital sex, then it would have to also deny the wife's

effect; (2) the Virginia Supreme Court's past usage of the word "unlawful" in defining rape indicates an acceptance of the common law exemption for marital rape; and (3) denying spousal exemption to rape charges would necessarily destroy any possibilities for reconciliation. *Id.* at 395, 315 S.E.2d at 850.

63. The three English cases were *Regina v. Clarke*, [1949] 2 All E.R. 448 (order of separation revoked wife's consent); *Regina v. Miller*, [1954] 2 All E.R. 529 (despite fact wife had filed for divorce, no court order existed, and therefore consent not revoked); *Regina v. O'Brien*, [1974] 3 All E.R. 663 (entry by court of *decree nisi* operated to revoke wife's implied consent to marital intercourse).

64. *Weishaupt*, 227 Va. at 399, 315 S.E.2d at 852.

65. *Id.* (quoting *Foster v. Commonwealth*, 96 Va. 306, 310, 31 S.E. 503, 505 (1898)). After the court refused to adopt the English common law approach, *Weishaupt's* first argument was summarily dismissed. In regard to his second contention, the court noted that it had not used the word "unlawful" in a rape case since 1956, despite deciding approximately 150 such cases since then. Thus, if the use of that word had meant acceptance of the English rule, then the more recent elimination of "unlawful" must have meant rejection of the rule. The court dismissed the third contention as absurd, reasoning that where a marriage had deteriorated to the point that intercourse must be had by violence, there would be little hope for reconciliation. *Weishaupt*, 227 Va. at 404, 315 S.E.2d at 855; *see supra* note 22.

66. *Id.* at 403, 315 S.E.2d at 853.

67. *Weishaupt*, 227 Va. at 402-03, 315 S.E.2d at 854; *see* VA. CODE ANN. § 20-91(9) (Repl. Vol. 1983).

statutory right to withdraw from the marriage contract.⁶⁸

The *Weishaupt* court concluded that, as there was no challenge to the sufficiency of the evidence to prove the crime of attempted rape, Mr. Weishaupt's conviction should be affirmed. In so holding, the court stressed three requirements for the recognition of unilateral revocation of consent:

[A] wife can unilaterally revoke her implied consent to marital sex [despite the fact that no legal divorce or separation has occurred] where, as here, she has made manifest her intent to terminate the marital relationship by living separate and apart from her husband; refraining from voluntary sexual intercourse with her husband; and, in light of all the circumstances, conducting herself in a manner that establishes a *de facto* end to the marriage.⁶⁹

Recently, however, in *Kizer v. Commonwealth*,⁷⁰ the Virginia Supreme Court clarified *Weishaupt* so as to significantly limit the impact of that decision. In *Kizer*, the couple had not consistently maintained separate residences, though they were living apart at the time of the alleged rape. The marital history was replete with trial separations and attempts to make the marriage work. At one point the couple sought legal advice concerning a final separation, but no further action was taken. After a lengthy separation period, the husband gained entrance to the apartment and had forcible sexual intercourse with his wife. The husband was later indicted and convicted of rape.⁷¹

In considering whether the commonwealth had established beyond a reasonable doubt the elements necessary to sustain a conviction for marital rape, the court relied on a broad interpretation of its *Weishaupt* holding. The majority opinion noted that, under *Weishaupt*, the wife's revocation of consent must be demonstrated by her manifest intent to terminate the marital relationship. The requisite intent could only be shown by meeting the three factual requirements discussed in *Weishaupt*.⁷²

The court found sufficient evidence to show a violation of the rape statute, but insufficient evidence to satisfy the third

68. *Weishaupt*, 227 Va. at 404, 315 S.E.2d at 855.

69. *Id.*

70. 228 Va. 256, 321 S.E.2d 291 (1984).

71. *Id.* at 258-60, 321 S.E.2d at 292-293.

72. *Id.* at 260, 321 S.E.2d at 293 (1984); see *supra* text accompanying note 69.

Weishaupt factor required to show the requisite intent. Although the couple had lived separate and apart and refrained from voluntary, sexual intercourse, the commonwealth failed to demonstrate that the wife had, in light of all the circumstances, conducted herself in a manner that established a *de facto* (or actual) end to the marriage. The attempts to reconcile, the wife's remaining in a jointly rented apartment, and the aborted trip to her attorney indicated a lack of objective intent to terminate the marital relationship on the part of the wife.⁷³

In deciding the case on the basis of the failure to meet the third *Weishaupt* factor, the court concomitantly clarified what it had meant by that requirement. Though recognizing that it was clear the wife in *Kizer* had *subjectively* considered their marriage "fractured beyond repair,"⁷⁴ the court stressed that her intent was not manifested objectively *to her husband*. The majority concluded that a wife's conduct must be such that the husband perceived, or reasonably should have perceived, that the marriage actually was ended in order to meet the third *Weishaupt* requirement.⁷⁵ Thus Mr. Kizer's conviction was reversed.

Virginia has essentially adopted the notion of a rebuttable presumption of consent by the wife-victim. This theory was first advanced in *State v. Smith*.⁷⁶ In that case, the prosecution argued that the presumption of consent could be rebutted by proving the use of "more than minimal" physical violence by the husband.⁷⁷ The idea behind such a compromising notion is that it protects the wife's interest in prosecution, while retaining the theory of implied consent.⁷⁸ Accordingly, under the *Smith* court's approach, a presumption of consent by the wife-victim exists until evidence of violence is shown.

73. *Kizer*, 228 Va. at 260-61, 321 S.E.2d at 293-94.

74. *Id.* at 261, 321 S.E.2d at 294.

75. *Id.* In a vigorous dissent, Justice Thomas, joined by Justice Carrico, argued that the majority had, in fact, added another required condition. *Weishaupt*, he argued, had only required that the wife's intent to terminate the marriage be clear to the objective observer—not necessarily to the husband. The result of this shift means the court must stand in the shoes of the husband, a biased perspective as compared to the court's traditional role as an objective observer of the facts. Justice Thomas reasoned that this charge will ultimately work to make it more difficult for a wife to establish the necessary requirements for a conviction of spousal rape. *Id.* at 263-64, 321 S.E.2d at 295-96 (Thomas, J., dissenting).

76. 148 N.J. Super. 219, 372 A.2d 386 (Essex County Ct. 1977), *aff'd*, 169 N.J. Super. 98, 404 A.2d 331 (App. Div. 1979), *rev'd on other grounds*, 85 N.J. 193, 426 A.2d 38 (1981).

77. 148 N.J. Super. at ____, 372 A.2d at 392.

78. Comment, *Spousal Exemption to Rape*, 65 MARQ. L. REV. 120, 126 (1981).

In Virginia, the additional proof of violence required to rebut the presumption of consent is replaced by the requirement that a wife manifest her intent to end the marriage. A married woman must not only provide sufficient evidence to sustain a conviction under the rape statute, but must also prove the requisite intent by satisfying the three factual requirements established in *Weishaupt*. The result of the supreme court's clarification of that third requirement, however, is to place a much more arduous burden on a victim of spousal rape than that borne by a victim of rape by a stranger or even a fiancée.⁷⁹

C. *Child Custody Decisions*

Two recent Virginia Supreme Court cases help delineate the boundaries of what classifies an individual as an unfit parent. In *Roe v. Roe*,⁸⁰ a mother sued to regain custody of her nine-year-old daughter after discovering her ex-husband was openly involved in a homosexual relationship. Despite findings that the daughter was "a very happy child [who] seemed to be well adjusted and outgoing,"⁸¹ the court awarded sole custody to the mother. In the court's opinion, the exposure of the child to the homosexual relationship formed the basis of finding the father an unfit parent.

The court relied on *Brown v. Brown*,⁸² where removal of two boys, ages four and seven, was requested because the mother had been openly living in an adulterous relationship. The court explained that it was not the relationship in the abstract that made the mother a morally unfit parent, but her "exposure of the children to an immoral and illicit relationship which rendered her an unfit and improper person to have their custody."⁸³

Thus, in *Roe*, it was not the father's sexual preference that formed the basis for removal, but *the exposure of the child to that preference* which provided evidence of the father's unfitness. The court considered it in the best interests of the child to remove her from a situation that would "inevitably afflict her relationships with her peers and with the community at large."⁸⁴ Custody was

79. *Kizer*, 228 Va. 256, 263, 321 S.E.2d 291, 295 (1984).

80. 228 Va. 722, 324 S.E.2d 691 (1985).

81. *Roe*, 228 Va. at 725, 324 S.E.2d at 692.

82. 218 Va. 196, 237 S.E.2d 89 (1977).

83. *Roe*, 228 Va. at 727, 324 S.E.2d at 697.

84. *Id.* at 728, 324 S.E.2d at 694.

awarded to the mother, and visitation by the father was to be determined by the trial court with the limitation that no visitation occur in the father's home or in the presence of the homosexual lover.

It appears from the holdings in both *Roe* and *Brown* that the dividing line between fit and unfit is determined by deciding whether or not the child is exposed to the "immoral" relationship. Of particular interest was the *Roe* court's quick notation that in both cases the relationships involved activities punishable by law; adultery as a class four misdemeanor, and sodomy as a class six felony.⁸⁵ Even more important to the court was the social condemnation associated with the father's homosexual relationship. *Roe* may seem at first to indicate that as society's opinion and expectations change, a different result may occur. However, this is unlikely in light of the court's definitive statement that "[t]he father's continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law."⁸⁶

In *Patrick v. Byerley*,⁸⁷ the court found that abandonment of a child without justification also establishes parental unfitness. The mother had left her son so she could live with another man. She later sought custody from the stepmother, Byerley, who had provided a home for the boy since his father's disappearance. Following initiation of the custody suit the boy told both the court and an examining psychiatrist that he wished to stay with Byerley whom he loved very much.⁸⁸

The court recognized that under *Judd v. Van Horn*⁸⁹ the law presumes the child's best interest will be served when in the custody of its parent. However, the *Byerley* court held that the mother's voluntary abandonment of the boy at age four and one-half months adequately rebutted the *Judd* presumption. This fact provided clear, cogent and convincing evidence that the natural mother was an unfit parent as a matter of law. In addition, the trial court found that Byerley cared for the boy as a member of her own family for the last three and one-half years, that the Byerley home provided the only stable environment the boy had ever experienced, and that the child expressed his preference to remain

85. *Id.*

86. *Id.*

87. 228 Va. 691, 325 S.E.2d 99 (1985).

88. *Id.* at 694, 325 S.E.2d at 100.

89. 195 Va. 988, 81 S.E.2d 432 (1954).

with Byerley. These factors persuaded the supreme court to affirm the holding awarding Byerley custody.⁹⁰

In *James v. James*,⁹¹ however, the court held that the *Judd* presumption had not been rebutted simply by a showing that the child's parents exhibited open hostility toward each other. The chancellor had found both parents to be unfit because of their open hostility and had awarded custody of the divorced couple's children to their grandparents. The supreme court, however, ruled that such hostility was common in divorce cases and did not constitute "an extraordinary reason for taking a child away from its parent, or parents."⁹²

The cases of *Gray v. Gray*⁹³ and *Armistead v. Armistead*⁹⁴ involved varied determinations concerning custodial hearings. In *Gray* the mother sought court permission to move with her children to Arizona. The chancellor found that such a move would be in the best interests of the children, but that in light of *Carpenter v. Carpenter*⁹⁵ he could not permit such a move. In *Carpenter* the mother had wished to move from Norfolk, Virginia, to New York City. The court considered all relevant factors and found "the best interest of the children would not be served by moving them to New York."⁹⁶ However, in *Gray*, the trial court had already made the determination that the move would, in fact, be in the best interests of the children—a determination which was not even an issue on appeal. The supreme court therefore concluded it was error to deny her request as, "*Carpenter* merely holds that before a court permits a custodial parent to remove children from the Commonwealth, it must determine that removal is in the children's best interest."⁹⁷

Armistead involved the question of whether a chancellor may limit the evidence given at a custodial hearing. A temporary disposition of custody was made and proved unsatisfactory, requiring a second attempt for a final determination by the court. The chancellor found that at the time of the temporary order all issues con-

90. *Id.* at 995-96, 81 S.E.2d at 436.

91. 230 Va. ___, 2 V.L.R. 139 (1985).

92. *Id.* at ___, 2 V.L.R. at 142 (quoting *Wilkerson v. Wilkerson*, 214 Va. 395, 397-99, 200 S.E.2d 581, 583 (1973)).

93. 228 Va. 696, 324 S.E.2d 677 (1985).

94. 228 Va. 352, 322 S.E.2d 836 (1984).

95. 220 Va. 299, 257 S.E.2d 845 (1979).

96. *Id.* at 302, 257 S.E.2d at 848.

97. *Gray*, 228 Va. at 698, 324 S.E.2d at 678.

cerning the mother's fitness as a parent had been determined.⁹⁸

On appeal, the supreme court found that the temporary order did not have a conclusive effect sufficient to preclude reconsideration of the mother's fitness as a parent. Instead, the court held that all evidence relevant to the determination of the best interests of the child must be reviewed. The court applied the holding of *Keel v. Keel*,⁹⁹ involving similar circumstances, which stated:

It would serve no useful purpose for us to examine the evidence bit by bit to determine what was relevant and what was not. Suffice it to say that we are convinced from the record that the most appropriate action is for the trial court to reexamine all the evidence in light of this opinion.¹⁰⁰

Accordingly, the supreme court ordered that "all the evidence already in the record as well as any new evidence the parties may submit relevant to the determination of Judith's [the child's] best interests" be reviewed.¹⁰¹

D. *Procedural Issues*

In *Mitchell v. Mitchell*,¹⁰² the Virginia Supreme Court considered whether a woman who had been personally served but failed to appear before the court for divorce proceedings was entitled to a rehearing under the provision of section 8.01-322 of the Code of Virginia.¹⁰³ The court carefully reviewed the historical perspective of the relevant section and concluded that under the Code of Virginia "a petition for rehearing could only be filed by one against whom service was made by publication."¹⁰⁴ The purpose of section 8.01-322 was to protect a party who has no knowledge of litigation affecting him or her, by allowing that party a two-year period following the judgment during which he or she may file a petition for rehearing.¹⁰⁵ As the wife had been served personally, however, the

98. *Armistead*, 228 Va. at 355, 322 S.E.2d at 837.

99. 225 Va. 606, 303 S.E.2d 917 (1983).

100. *Id.* at 613, 303 S.E.2d at 922.

101. *Armistead*, 228 Va. at 357, 322 S.E.2d at 838.

102. 227 Va. 31, 314 S.E.2d 45 (1984).

103. VA. CODE ANN. § 8.01-322 (Repl. Vol. 1984).

104. *Mitchell*, 227 Va. at 36, 314 S.E.2d at 48.

105. *Id.* at 38, 314 S.E.2d at 48. That two-year period may be shortened to one year if the party is actually served with notice of the *judgment* more than one year prior to the end of the two-year term.

statute was not applicable and she was not allowed to petition for a rehearing, regardless of whether she met that section's two-year statute of limitations requirement. The court held that a defendant who has received personal service and fails to protect his or her interests "accepts the risk of an unfavorable result" and is "beyond the intendment of the statute."¹⁰⁶

*Burts v. Burts*¹⁰⁷ presented another procedural issue concerning child and spousal support provisions in a final divorce decree. The supreme court reviewed whether a woman was denied due process by a trial court which excluded her from proceedings concerning those provisions and which allowed only the attorneys for each side to attend. The court found that the procedure adopted denied the wife her opportunity to be heard, and the case was remanded to determine a final decree for child and spousal support.¹⁰⁸

*Wells v. Weston*¹⁰⁹ presented the court with the opportunity to review the circumstances leading to a spousal support agreement. Upon remarriage by the wife, her ex-husband stopped support payments which the agreement provided should continue as long as the wife was alive. Because the court found no impropriety or unethical conduct on the part of the drafting attorney, no evidence of constructive fraud existed. Without clear, cogent and convincing evidence of constructive fraud, the settlement was enforceable.¹¹⁰

In addition, the court found that mutual assent by the parties had occurred. Because the husband was aware of the provisions requiring support payments to continue until the wife's death, he could not later claim mutual assent was lacking. He executed the agreement which was not obscure or technical in meaning. The court concluded his signature manifested a reasonable intent to be bound, and a party's mental reservation could not impair the contract purported to be entered.¹¹¹

E. *Recent Court Decisions on Equitable Distribution*

As of this writing, the Virginia Supreme Court has yet to decide any equitable distribution divorce cases interpreting section 20-

106. *Id.* at 38, 314 S.E.2d at 48-49.

107. 227 Va. 618, 316 S.E.2d 745 (1984).

108. *Id.* at 620, 316 S.E.2d at 746.

109. 229 Va. 72, 326 S.E.2d 672 (1985).

110. *Id.* at 77, 326 S.E.2d at 675.

111. *Id.* at 74, 326 S.E.2d at 677.

107.3 of the Code of Virginia.¹¹² However, two Virginia circuit court decisions, *Gold v. Gold*¹¹³ and *Smoot v. Smoot*,¹¹⁴ have received wide attention in Virginia State Bar newsletters¹¹⁵ and continuing legal education seminars,¹¹⁶ and are worthy of note in this survey.

In *Gold*, a Virginia two-man oral surgery practice was evaluated in a divorce proceeding under equitable distribution concepts, and a question arose as to whether or not the "professional goodwill" of this dental practice constituted marital property under section 20-107.3 of the Code of Virginia. Although other states have split in determining whether or not professional goodwill constitutes marital property,¹¹⁷ Judge Trabue cited from *Wood v. Pender-Doxey Grocery Co.*¹¹⁸ and *Dugan v. Dugan*,¹¹⁹ holding that professional goodwill would constitute marital property in the context of a dental practice.¹²⁰

Judge Trabue accepted the opinions of Dr. Gold's accountants that professional goodwill should be considered as part of the total property evaluation, and the court accepted a modified book value approach (taking into account what a willing buyer would pay and a willing seller would accept) as the proper criterion to be used in evaluating this professional practice.¹²¹

In *Smoot*, the husband was reimbursed out of the proceeds of the jointly-titled marital home for his contribution from former separate property received by him prior to the marriage. In this case, Judge Sarver relied on a "source of the funds" rule as enunciated in the Maryland case of *Harper v. Harper* which held that

112. VA. CODE ANN. § 20-107.3 (Cum. Supp. 1985).

113. Ch. No. 631-1982 (Cir. Ct. Roanoke County; Nov. 10, 1983), reprinted in 1 Va. Cir. 390 (1985).

114. Ch. No. 2232 (Cir. Ct. Shenandoah County; May 29, 1984), reprinted in 6 VA. FAM. L. NEWS 7 (1985).

115. *Gold*, supra note 113, was also reprinted in 5 VA. FAM. L. NEWS 10 (1984).

116. *Gold*, supra note 113, and *Smoot*, supra note 74, were also reprinted in materials for the 1985 Virginia Trial Lawyers Association Annual Seminar.

117. Compare *Dugan v. Dugan*, 92 N.J. 423, 457 A.2d 1 (1983) (professional goodwill constitutes marital property) with *Holbrook v. Holbrook*, 103 Wis. 2d 327, 309 N.W.2d 343 (1981) (professional goodwill does not constitute marital property).

118. 151 Va. 706, 144 S.E. 635 (1928). "[G]ood will is one of those intangible assets of an established business difficult to describe and impossible of valuing with mathematical precision, but, with all, of very real existence and of substantial value." *Id.* at 712, 144 S.E.2d at 637.

119. 92 N.J. 423, 457 A.2d 1 (1983); see supra note 117.

120. *Gold*, 1 Va. Cir. at 397-400.

121. *Id.* at 396, 400.

when property is acquired by an expenditure of both nonmarital and marital property, the property is characterized as part nonmarital and part marital.¹²² A spouse contributing nonmarital property is therefore entitled to an interest in the ratio of the nonmarital investment to the total nonmarital and marital investment in the property, and the remaining property is characterized as marital property subject to equitable distribution.¹²³ However, this "source of the funds" theory contrasts with an "inception of title" theory adopted by some courts, which states that property can be either separate or marital, but not both.¹²⁴

It is not clear which of these two theories the Virginia Supreme Court will adopt. *Smoot* can be distinguished from *Harper*, since the *Smoot* property was jointly titled and definitely marital, whereas the *Harper* property in Maryland dealt with separately titled property to which the other party claimed contribution. Moreover, Virginia Code section 20-107.3(A)(1) provides: "Income received from, and the increase in value of, separate property during the marriage is separate property," assuming this hypothetical property is maintained as separate property.¹²⁵ Arguably, this statute implies that a Virginia court might have to apply the "inception of title" doctrine in such a situation, but this question will have to be clarified by the Virginia Supreme Court.

122. 294 Md. 54, —, 448 A.2d 916, 929 (1982); see also *Tibbetts v. Tibbetts*, 406 A.2d 70, 77 (Me. 1979) ("[W]here marital together with non-marital funds are invested, the marital estate is entitled to a proportionate return on its investment.").

123. *Smoot*, 6 VA. FAM. L. NEWS at 7-8 (an appeal of *Smoot* is presently pending in the Virginia Supreme Court).

124. See, e.g., *Fisher v. Fisher*, 86 Idaho 131, 383 P.2d 840 (1963); *In re Marriage of Smith*, 86 Ill. 2d 518, 427 N.E.2d 1239 (1981); *Cain v. Cain*, 536 S.W.2d 866 (Mo. Ct. App. 1976).

125. VA. CODE ANN. § 20-107.3(A)(1) (Cum. Supp. 1985).

