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Annual Survey of Virginia Law: Domestic Relations

Donald K. Butler

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DOMESTIC RELATIONS

Donald K. Butler*

I. 1988 Legislation

A. Child Support

In 1988, the Virginia General Assembly made two significant changes with respect to child support awards. First, the authority of the court has been extended so that the court may order support for a child over the age of eighteen who is still attending high school. In order to award support for a child who is no longer a minor, the child must be "(i) a full-time high school senior, (ii) not self-supporting and (iii) living in the home of the parent seeking or receiving child support, until the child reaches the age of nineteen or graduates from high school, whichever occurs first." The second major change provides general, non-binding guidelines for the court to use to determine child support. Despite the promulgation of these guidelines, the court must consider all evidence presented relevant to any issues joined in the proceeding and the factors set out in section 20-107.2 of the Code of Virginia. If the court uses the child support guidelines, it must also consider seven additional factors. These factors are:

1. Actual monetary support for other children, other family members or former family members;

* Partner, Morano, Colan & Butler, Richmond, Virginia; B.A., 1966, University of Richmond; J.D., 1970, T.C. Williams School of Law, University of Richmond.

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2. Id. § 16.1-279(F); accord id. § 20-107.2.
5. Id. § 20-108.1(B).
6. Id.
2. Arrangements regarding custody of the children;

3. Imputed income to a party who is voluntarily unemployed or voluntarily under employed; provided that income may not be imputed to the custodial parent when a child is not in school or where child care services are not available and the cost of such child care services are not included in the computations;

4. Debts of either party arising during the marriage for the benefit of the child;

5. Debts incurred for production of income;

6. Direct payments ordered by the court for health plan coverage, education expenses, or other court-ordered direct payments for the benefit of the child; and

7. Extraordinary capital gains such as capital gains resulting from the sale of the marital abode.7

Section 20-108.2 has been added to set out the actual child support guidelines. The guidelines allow the computation of a basic support obligation based on the combined gross income of both parents.8 "Gross income" is defined as income from all sources including, but not limited to, "income from salaries, wages, commissions, royalties, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, veterans' benefits, spousal support, rental income, gifts, prizes or awards."9 The table in section 20-108.2 sets out a monthly basic child support obligation based upon the combined gross income of the parents and the number of children for whom support is being sought. A total child support obligation may be established by adding extraordinary medical expenses and work related child care costs to the basic child support obligation from the schedule.10 Any determination of the total child support obligation must also take into consideration all of the factors enumerated in section 20-107.2 and section 20-108.1.11 Once the court has determined the total child support obligation, each parent's pro-rata share is computed by multiplying that parent's

7. Id. 8. Id. § 20-108.2. 9. Id. § 20-108.2(F). 10. Id. § 20-108.2(C). 11. Id. § 20-108.2(F). 12. See id. § 20-108.1(B).
percentage of the combined gross income by the total child support obligation.\textsuperscript{13}

The statute also sets out a review procedure to determine the adequacy of the child support guidelines and the effect of the use of the guidelines on the level of support awards.\textsuperscript{14}

**B. Support Enforcement**

The 1988 General Assembly added provisions to strengthen support enforcement, especially enforcement of administrative support orders issued by the Department of Social Services. The Department of Social Services continues to have the authority to issue administrative orders directing the payment of child support and child and spousal support.\textsuperscript{15} In issuing such orders, the Department of Social Services must consider the new child support guidelines.\textsuperscript{16}

Two legislative changes assist the Department in determining the amount of child support. The Department now has the right to subpoena financial records of both the obligor and the obligee.\textsuperscript{17} In addition, the Department may order the parties to disclose financial information and changes in financial situations to each other and to the Department.\textsuperscript{18} The Department of Social Services must continue to make these administrative services available to individuals not receiving public assistance, but may charge a fee of no more than $1.00 for these services.\textsuperscript{19}

These administrative orders provide for immediate withholding from the obligor’s earnings to satisfy current support obligations and liquidation of arrearages.\textsuperscript{20} A court entering an order for child support has the option of ordering an immediate payroll deduction.\textsuperscript{21}

Once an administrative support order is entered and filed with the Juvenile and Domestic Relations District Court, it may be en-
forced by that court in the same manner as if it had been initially entered by the court.\textsuperscript{22} Section 16.1-279(F) of the Code of Virginia\textsuperscript{23} provides that support obligations, as they become due, constitute a judgment by operation of law. This judgment is a lien against real estate only when it is docketed in the jurisdiction where the real estate is located.\textsuperscript{24}

C. Spousal Support

Legislation passed in 1988 eliminates fault as an absolute bar to spousal support.\textsuperscript{25} The court may no longer deny an award of support and maintenance to a spouse merely because a ground for divorce based upon cruelty, desertion or conviction of a felony exists against that spouse.\textsuperscript{26} Adultery remains, however, a statutory bar to spousal support unless the court determines from clear and convincing evidence that a denial of support would constitute a “manifest injustice.”\textsuperscript{27} In making such a determination, the court must consider the respective degrees of fault during the marriage and the relative economic circumstances of the parties.\textsuperscript{28}

Even though fault is no longer an automatic bar to spousal support, the statute now provides that when determining whether to award support and maintenance for a spouse, the court must consider all of the circumstances and factors which contributed to the dissolution of the marriage. This would specifically include fault that qualifies as grounds for divorce.\textsuperscript{29}

D. Equitable Distribution

The 1988 legislature made substantial changes in section 20-107.3 of the Code of Virginia.\textsuperscript{30} Section 20-107.3(A)\textsuperscript{31} has been

\begin{thebibliography}{31}
\bibitem{22} Id. § 16.1-241(B).
\bibitem{23} Id. § 16.1-279(F).
\bibitem{24} Id. Section 20-60.3(9) of the Virginia Code now requires that decrees for support include notification that a support obligation becomes a judgment as it becomes due.
\bibitem{27} Id.
\bibitem{28} Id.
\bibitem{29} Id.
\bibitem{31} Id. § 20-107.3(A).
\end{thebibliography}
amended to provide guidance to determine the date for valuation of marital property. The court shall determine the value of property owned by the parties as of the date of the evidentiary hearing on the valuation issue. A different valuation date may be used, however, “in order to attain the ends of justice.” This amendment is essentially a codification of the rule previously established by the Virginia Court of Appeals.

The definition of marital property in section 20-107.3(A)(2) has been amended to provide a presumption that marital property is “jointly owned unless there is a deed, title or other clear indicia that it is not jointly owned.”

Section 20-107.3(C) now permits the court to order division or transfer of jointly owned marital property. This is a substantial change from the existing law as interpreted by the Virginia Court of Appeals. The court may divide or transfer the jointly owned marital property by ordering the transfer of property, or any interest therein, to one of the parties; permitting one party to purchase the interest of the other if the purchasing party agrees to assume any indebtedness secured by the property; or ordering sale of the property by private or public means.

In addition to ordering division or transfer of the property, the court continues to have the power to grant a monetary award. The amendment to section 20-107.3(D) specifies that the court’s decision to grant a monetary award must be based upon the equities and the rights and interests of each party in the marital property and on the statutory factors. This is a departure from the position taken by the Virginia Court of Appeals.

32. Id.
33. Id.
36. Id.
37. Id. § 20-107.3(C).
38. Id.
41. Id. § 20-107.3(D).
42. Id. The factors are set out in § 20-107.3(E).
Section 20-107.3(D) has also been amended to specify that a monetary award, unless the court orders otherwise, shall constitute a judgment within the meaning of section 8.01-426 and that the interest provisions of section 8.01-382 shall apply to such awards.

Under changes made in 1988, the court may, in addition to making a monetary award, direct payment of a percentage of the marital share of any pension, profit sharing or deferred compensation plan or retirement benefit. The court shall only direct that payment be made as such benefits are payable, and the payments shall not exceed fifty percent of the marital share of the benefits actually received by the party against whom the award is made. The marital share is defined as "that portion of the total interest, the right to which was earned during the marriage and before the last separation of the parties, if at such time or thereafter at least one of the parties intended that the separation be permanent." The present value of pension and retirement benefits has been eliminated as a factor under section 20-107.3(E).

This change makes it clear that a pension is to be treated separately from all of the other marital property, with the award to take effect only when the benefits are received and with the award being in terms of a percentage of the benefit rather than a monetary award.

E. Procedure

The 1988 General Assembly made several jurisdictional and procedural changes relevant to divorce proceedings. Section 20-121 of the Code of Virginia permitted previously a merger of a decree for divorce from bed and board with a decree for divorce from the bond of matrimony after six months separation if there were "no minor children born of the parties." There was no mention of whether a divorce could be granted after a six month separation if there were minor children adopted during the marriage. The 1988...
amendment clarifies this section by stating that a merger after a six-month separation may occur only if there are no minor children "born of either party and adopted by the other or adopted by both parties."\textsuperscript{53}

The 1988 amendment to section 20-121.02\textsuperscript{54} clarifies that either party which seeks a divorce based on a fault ground can, by motion, without amending the Bill of Complaint or Cross-Bill, request a no-fault divorce after the requisite statutory separation period.

Section 20-97\textsuperscript{55} redefines domicile and residential requirements for members of the Armed Forces. If a member of the Armed Forces has been stationed in or has resided in Virginia for six months prior to the commencement of the suit, that person is presumed to have been domiciled in and a \textit{bona fide} resident of the Commonwealth during that period.\textsuperscript{56} Being stationed or residing in the Commonwealth includes being stationed upon a ship having its home port within Virginia or at a military base located within Virginia.\textsuperscript{57}

Section 20-99.1:1\textsuperscript{58} was added to provide for acceptance of service in divorce or annulment actions. The defendant may accept service by signing a proof of service before any officer authorized to administer oaths.\textsuperscript{59} In addition, service of process may be accepted or waived by either party, upon voluntary execution of a notarized writing or by the defendant's filing an answer by counsel in the suit.\textsuperscript{60} Either method of service on a Virginia resident within the Commonwealth has the same effect as if the process had been served personally upon the defendant by a person authorized to serve process.\textsuperscript{61} Acceptance of service pursuant to this section by a non-resident outside the Commonwealth shall have the same effect as an order of publication.\textsuperscript{62}

\begin{footnotes}
\item[53] Id.
\item[54] Id. § 20-121.02.
\item[55] Id. § 20-97.
\item[56] Id.
\item[57] Id.
\item[58] Id. § 20-99.1:1.
\item[59] Id. § 20-99.1:1(A).
\item[60] Id. This section further provides that the form for acceptance of process or waiver of process may be provided in the clerk's office of the circuit court or may be drafted and filed by counsel. Id.
\item[61] Id.
\item[62] Id. § 20-99.1:1(B).
\end{footnotes}
An amendment to section 8.01-328.1 permits long arm jurisdiction over a defendant who conceived or fathered a child in the Commonwealth. Jurisdiction under this section is valid only upon proof of personal service on the non-resident.

Section 20-79 was amended to permit the circuit court in a divorce case to refer to the Juvenile & Domestic Relations District Court any matters pertaining to spousal support and maintenance and child support and custody. Such a transfer may be made to any Juvenile & Domestic Relations District Court within the Commonwealth that constitutes a more appropriate forum.

II. JUDICIAL DECISIONS

A. Equitable Distribution of Marital Property

1. Classification of Property
   a. Transmutation

   The Virginia Court of Appeals has followed and clarified the transmutation doctrine established by the Virginia Supreme Court in Smoot v. Smoot. In Westbrook v. Westbrook, the husband owned unimproved land before the marriage. After the marriage, when the wife signed a construction note and deed of trust for improvements, the husband agreed in writing that the property would be marital. The court held that because the parties treated the real estate as marital property and expressed the intent that it be marital property, it was transmuted to marital property.

   In Lambert v. Lambert, the court indicated that transmutation may also occur when there is active appreciation of separate property during the marriage. The court pointed out that under the

63. Id. § 8.01-328.1.
64. Id.
65. Id. § 20-79.
66. Id. § 20-79(c).
67. Id.
70. Id. at 453-54, 364 S.E.2d at 528.
72. Id. at 104-05, 367 S.E.2d at 190. In Booth v. Booth, No. 0981-86-3 (Va. Ct. App. Feb. 2, 1988), the Virginia Court of Appeals broached the concept of transmutation of separate property to marital property when one of the spouses made significant contributions to the property during the marriage. In Booth, Mr. Booth owned a business before the marriage. During the marriage, the efforts of both parties increased the value of the business. Mr.
unitary concept of property established by *Smoot*, the property cannot consist of a portion that is separate and a portion that is marital. The Virginia equitable distribution statute clearly states that “[i]ncome received from, and the increase in value of, separate property during the marriage is separate property.” However, the *Lambert* court concluded that this statutory admonition does not necessarily apply to all circumstances. Although the statute clearly applies to passive appreciation or appreciation caused by economic factors alone, the court commented:

> [O]ur belief that *Smoot* embraces the doctrine of transmutation leads us to conclude that the statute may not bar the transmutation of separate property to marital property when there is an appreciation in value of the separate property due to the efforts of either or both of the parties during the marriage.

**b. Gifts**

While separate property may be transmuted into marital property, marital property cannot become separate property absent an express agreement of the parties. Even though section 20-107.3(A)(1)(ii) of the Code of Virginia classifies property acquired during the marriage by gift from a source other than the other

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Booth operated the business, and Mrs. Booth made contributions in the form of direct loans to the business, credit guarantees and occasional office assistance. The court held that the contributions of both parties during the marriage transmuted the business to marital property. However, the court of appeals withdrew this decision on February 26, 1988. The withdrawal was not the result of second thoughts on the part of the appellate court, but was at the request of the appellant. The case has been scheduled for reargument and reconsideration. The ultimate “permanent” opinion of the court of appeals will not necessarily change the transmutation approach taken in the first decision in *Booth* and followed in *Lambert*. The court seems content with the concept of transmutation because it “broadens the pool” of assets the court can consider for equitable distribution.

73. *Smoot*, 233 Va. at 441, 357 S.E.2d at 730-31.
74. *Lambert*, 6 Va. App. at 104, 367 S.E.2d at 190. In reaching this conclusion, the court cited *Phillips v. Phillips*, 73 N.C. App. 68, 326 S.E.2d 57 (1985), and *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260 (1985). These cases hold that active appreciation of separate property is marital property. Active appreciation is defined as appreciation “resulting from the contributions, monetary or otherwise, by one or both of the spouses.” *Wade*, 72 N.C. App. at 378-80, 325 S.E.2d at 268.
77. *Id.* at 104-05, 367 S.E.2d at 190.
partner as separate property, the Virginia Court of Appeals has recognized in at least four recent decisions\(^80\) that such transactions must actually be gifts to one partner for the property to be classified as separate property. In *Brown v. Brown*,\(^81\) as an estate planning device, the husband's father transferred an interest in real estate to the husband for less than its full value. For this reason, the trial court found that only 82% of the real estate was marital property. The Virginia Court of Appeals reversed, holding that it is improper to treat property as part separate and part marital.\(^82\)

In *Wagner v. Wagner*,\(^83\) the transaction was structured as a purchase, with the wife executing a note to her father which he later forgave. The wife argued that the property was a gift from her father because she did not "acquire" it when she obtained title to it but rather when she paid for it. The court of appeals disagreed, holding that the wife acquired the property when she obtained the title and not when the debt was discharged.\(^84\) The character of property as separate or marital must be determined as of the date it is acquired.\(^85\)

In *Cousins v. Cousins*,\(^86\) the wife argued that the marital home, titled in the names of both parties as tenants by the entirety, was her separate property because it was an advancement on her inheritance from her parents. The court of appeals held that property titled in the names of both parties cannot be classified as separate property.\(^87\)

c. Disability Benefits

The Virginia Court of Appeals had the opportunity to address classification of disability income as a marital asset in *Brinkley v. Brinkley*.\(^88\) The *Brinkley* opinion touched upon the issue of disability income and noted that there is a split of authority on this

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\(^82\) *Id.* at 243, 361 S.E.2d at 367.

\(^83\) 4 Va. App. 397, 358 S.E.2d 407.

\(^84\) *Id.* at 404, 358 S.E.2d at 410.

\(^85\) *Id.*


\(^87\) *Id.* at 159, 360 S.E.2d at 884.

issue in other jurisdictions. However, there was insufficient evidence in the record to determine whether and to what extent disability benefits could be considered as marital property, and therefore, the court was unable to make a specific ruling.

d. Effect of Classification

The Virginia Court of Appeals has made it clear that classification of arguably separate property as marital property does not necessarily mean that spouses have equal interests in that marital property. Classification of the property as marital merely enlarges the pool of marital assets and permits the court to make a more equitable monetary award. The court must consider the manner in which the asset was acquired in determining the amount of the monetary award.

2. Valuation

Under the recent statutory amendment to section 20-107.3, the date of valuation for purposes of equitable distribution is the date of the evidentiary hearing unless an alternate date is necessary to meet the ends of justice. This statutory change is a slight modification of the rule set out by the Virginia Court of Appeals in Mitchell v. Mitchell. In Wagner v. Wagner, the court restated the Mitchell rule by holding that the trial court did not abuse its discretion in valuing property as of the date of the evidentiary hearing. The Wagner court commented that the date of the evidentiary hearing may not have been the proper date for valuation had either party impaired or taken any action otherwise affecting the value of the property during the separation of the parties.

89. Id. at 140, 361 S.E.2d at 143 (citing Morrison v. Morrison, 286 Ark. 353, 692 S.W.2d 601 (1985); Freeman v. Freeman, 468 So. 2d 326 (Fla. Dist. Ct. App. 1985); Lookingbill v. Lookingbill, 301 Md. 283, 483 A.2d 1 (1984); Stroshine v. Stroshine, 98 N.M. 742, 652 P.2d 1183 (1982); Leighton v. Leighton, 81 Wis. 2d 620, 261 N.W.2d 457 (1978)).
90. Brinkley, 5 Va. App. at 140, 361 S.E.2d at 143.
92. Westbrook, 5 Va. App. at 446, 364 S.E.2d at 528.
95. See supra text accompanying notes 30-51.
98. Id. at 406, 358 S.E.2d at 411.
Further, if there were peculiar facts or circumstances which would produce an unfair result, the use of the date of the evidentiary hearing may not be appropriate.99

Whatever valuation date is used, it is clear that the burden is on each party to present sufficient evidence of valuation. In Bowers v. Bowers,100 the court held that because the wife did not meet her burden of proof in showing the value of the husband's retirement plan, the trial court did not abuse its discretion in making a monetary award without considering the value of those benefits.101

3. Monetary Award

In Brinkley v. Brinkley,102 the Virginia Court of Appeals attempted to provide guidance to trial courts in making equitable distribution monetary awards by setting out certain steps which the court must follow. First, the court must determine the legal title, ownership, and value of all property and whether that property is marital or separate.103 Second, the court must determine the rights and interests of each party in the marital property. Third, the court must determine, based upon the equities and rights and interests of each party in the marital property, whether a monetary award in favor of either party is warranted.104 Finally, after the court has determined that a monetary award is warranted, it must determine the amount of the award and the method of payment after consideration of the eleven statutory factors set out in section 20-107.3(E) of the Virginia Code.105

The Brinkley court discussed further the manner in which a lump-sum award may be made. In Brinkley, the trial court had ordered the husband to pay the wife a lump-sum monetary award of $3,000 and also had ordered him to pay her an amount equal to thirty-six percent of the total of his monthly pensions. The court

99. Id.
101. Id. at 620, 359 S.E.2d at 552.
103. Id. at 136, 361 S.E.2d at 140.
104. Id.
105. Id. at 137, 361 S.E.2d at 141. The 1988 General Assembly changed this approach and made it clear that the court's decision to grant a monetary award must also be based on consideration of the statutory factors. Va. Code Ann. § 20-107.3(E) (Cum. Supp. 1988). It should also be noted that a 1988 amendment deleted the present value of pension and retirement benefits as a factor under § 20-107.3(E) so that there are now only ten statutory factors. See supra text accompanying notes 30-51.
of appeals held that it was error to order a lump-sum monetary award as well as payment of a percentage of the pensions. In so holding the court observed that the effect of the trial court's order was to give the wife two monetary awards, while the equitable distribution statute permits only one monetary award.106

4. Consideration of Fault

Among the factors which the court must consider in making a monetary award are the “circumstances and factors which contributed to the dissolution of the marriage, specifically including any ground for divorce under the provisions of section 20-91(1), (3) or (6) or section 20-95.”107 In Cousins v. Cousins,108 the husband argued that where the final divorce was granted on the “no-fault” ground of a one year separation, the court was barred from any finding of fault. Therefore, he contended that the court was precluded from considering fault when making an equitable distribution award. The Virginia Court of Appeals held that under the statutory directive to consider factors which may have contributed to the dissolution of the marriage, the court may consider more than the grounds for divorce.109 Accordingly, the trial court properly considered evidence of the husband’s fault, which contributed to the dissolution of the marriage, when making an equitable distribution award.110

5. Methods of Distribution

Several recent decisions have clarified the limits of the court’s authority to order or permit the actual distribution of property. It is clear that prior to the 1988 legislative changes111 the court did not have authority to order a party to convey an interest in jointly owned marital property.112 In Wagner v. Wagner,113 the Virginia

109. Id. at 159, 360 S.E.2d at 884.
110. Id.
Court of Appeals held that the trial court cannot give one party the right to purchase the other's share of jointly owned property because that would have the same effect as ordering a transfer of jointly owned property. In addition, the court cannot order a husband's corporation to transfer property to the wife.\(^{114}\)

Although the court can partition marital property in divorce cases,\(^{115}\) such partition must conform to section 8.01-81\(^{116}\) of the Virginia Code so that an owner is paid a sum of money that reflects his interest in the property.\(^{117}\) The divorce court cannot equalize the assets of the parties under the guise of partition without consideration of all of the factors relevant to partition cases.\(^{118}\) The court cannot partition assets not in existence at the time of the divorce.\(^{119}\)

Under the provisions of section 20-107.3(D),\(^{120}\) a spouse, against whom a monetary award is made, may satisfy the award by a conveyance of property, and the consent of the recipient of the award is not required.\(^{121}\) The court, however, should not approve a transfer which will place the burden of selling the property on the receiving spouse and which will net the receiving spouse less than the monetary award.\(^{122}\) Thus, in Payne v. Payne,\(^{123}\) the court of appeals held that the trial court erred in approving the husband's election to transfer California real estate to the wife. The wife would have had the burden of selling property located several thousand miles from her current residence and would have incurred expenses connected with the sale, such as a real estate commission, pro-rated taxes and other incidental expenses.\(^{124}\)


\(^{117}\) Clayberg, 4 Va. App. at 221-22, 355 S.E.2d at 904.

\(^{118}\) Id.

\(^{119}\) Taylor, 5 Va. App. at 442, 364 S.E.2d at 247 (holding that the court had no authority to order the husband to reimburse the wife for one-half the proceeds of jointly held certificates of deposit spent by the husband during the separation; the court could consider the certificates as marital property in making a monetary award).


\(^{122}\) Id. at 367, 363 S.E.2d at 432.

\(^{123}\) Id. at 367, 363 S.E.2d at 433.

\(^{124}\) Id.
6. Enforcement of Award

Once the court has ordered a monetary award, that award is the equivalent of a money judgment, but payment cannot be enforced through the court's contempt powers. In Brown v. Brown, the trial court ordered the husband to pay a monetary award of $173,310.65 to the wife within 120 days. The Virginia Court of Appeals held that while the trial court has discretion to fix a date upon which an award is due and payable, it lacks authority to order mandatory payment subject to enforcement by its contempt powers. The court distinguished between a spousal support award and a monetary award. Spousal support involves a legal duty flowing from one spouse to the other by virtue of the marriage relationship. A monetary award, on the other hand, involves an adjustment of the equities, rights, and interests of the parties in marital property. Thus, the trial court exceeded its authority in making the monetary award subject to enforcement by contempt.

7. Waiver

In Bragan v. Bragan, the Virginia Court of Appeals held that there can be a waiver of rights to equitable distribution. The parties had executed a property settlement agreement before the adoption of section 20-107.3 of the Code of Virginia. That agreement contained a broad provision wherein both parties agreed that they would not seek "provision for support or division of property in addition or in substitution of the provisions in this Agreement in a decree of divorce." Section 20-107.3 was in effect at the time the bill of complaint for divorce was filed. The wife claimed that she was entitled to a monetary award based on the value of the husband's pension plan, because disposition of the pension was not expressly provided for in the agreement. She asserted that her right to the pension plan was one acquired after execution of the agreement.

126. Id.
127. Id. at 247, 361 S.E.2d at 369.
128. Id. at 246, 361 S.E.2d at 368.
129. Id.
agreement when the equitable distribution statute was enacted. The court held that the intent of the agreement would be thwarted if the wife were permitted to repudiate her release, and that the subsequent change in the law does not permit the unilateral rejection of an agreement.133

B. Spousal Support

1. Amount of Award

In Payne v. Payne,134 the Virginia Court of Appeals stated once again that a spouse entitled to spousal support has the right to be maintained in the standard of living established during the marriage.135 The needs of the supported spouse, however, must be balanced against the supporting spouse's financial ability to pay.136 An award of spousal support must be based upon all of the factors set out in section 20-107.1 of the Code of Virginia.137

Pursuant to section 20-107.1,138 one of the factors which the court must consider in awarding spousal support is the distribution of property under section 20-107.3.139 The monetary award should be considered only as an asset from which potential income may be derived.140 The court may not consider the principal of the monetary award as income to the spouse seeking support.141 In Ray v. Ray,142 the wife's share of marital property was to be partially satisfied by five annual cash payments of $29,000 each. The trial court found that the monetary award was sufficient to meet the wife's needs and determined that she was not entitled to any more income in the form of spousal support. The court of appeals reversed, holding that the wife was not required to invade her estate to relieve the support obligation of her former husband.143

In determining the supporting spouse's ability to pay, the court

133. Id. at 518-19, 358 S.E.2d at 759.
135. Id. at 363, 363 S.E.2d at 430 (quoting Dukelow v. Dukelow, 2 Va. App. 21, 26, 341 S.E.2d 208, 210 (1986)).
136. Id. at 363, 363 S.E.2d at 430.
139. Id. § 20-107.3(8).
141. Id. at 513-14, 358 S.E.2d at 756-57.
143. Id. at 514, 358 S.E.2d at 757 (quoting Klotz v. Klotz, 203 Va. 677, 680, 127 S.E.2d 104, 106 (1962)).
may consider that spouse's earning capacity and all sources of in-
come.\textsuperscript{144} Earning capacity must be based upon circumstances in ev-
dence at the time of the award.\textsuperscript{145} In \textit{Payne v. Payne},\textsuperscript{146} the court awar-
ded $1,000 per month spousal support and $400 per month child support, even though the husband's net disposable income from his self-employment was approximately $1,600 per month.\textsuperscript{147} The trial judge commented that he expected the husband's income to change because the husband was capable of making more money.\textsuperscript{148} The court of appeals reversed, holding that there was no evidence that the husband could increase his income.\textsuperscript{149} The court commented that although the trial court may consider earning ca-
pacity as well as actual earnings, a support award cannot be based upon anticipated future circumstances.\textsuperscript{150}

2. Waiver

In \textit{Brown v. Brown},\textsuperscript{151} the Virginia Court of Appeals considered the issue of waiver of spousal support. In \textit{Brown}, the wife's counsel stated in open court, "Your Honor, we are not seeking spousal sup-
port."\textsuperscript{152} The wife's testimony reiterated her attorney's statement. The court held that having waived spousal support, the wife was barred from raising the issue on remand.\textsuperscript{153}

3. Jurisdiction

The court may award spousal support only when it has the req-
uisite \textit{in personam} jurisdiction to do so.\textsuperscript{154} In \textit{Morris v. Morris},\textsuperscript{155} the Virginia Court of Appeals found that the portion of the divorce decree awarding spousal support was invalid, because the court did not have \textit{in personam} jurisdiction of the husband.\textsuperscript{156} In \textit{Morris}, the

\begin{itemize}
\item \textsuperscript{144} Id. at 513, 358 S.E.2d at 756.
\item \textsuperscript{146} 5 Va. App. 359, 363 S.E.2d 430 (1987).
\item \textsuperscript{147} Id. at 362-63, 363 S.E.2d at 430.
\item \textsuperscript{148} Id. at 364, 363 S.E.2d at 431.
\item \textsuperscript{149} Id. at 363, 363 S.E.2d at 430.
\item \textsuperscript{150} Id. at 364, 363 S.E.2d at 430.
\item \textsuperscript{151} 5 Va. App. 238, 361 S.E.2d 364 (1987).
\item \textsuperscript{152} Id. at 245, 361 S.E.2d at 368.
\item \textsuperscript{153} Id.
\item \textsuperscript{155} 4 Va. App. 539, 359 S.E.2d 104 (1987).
\item \textsuperscript{156} A copy of the complaint was also mailed but was returned as undeliverable. Id. at 541, 359 S.E.2d at 105.
\end{itemize}
wife had filed an affidavit giving the husband's last known address in North Carolina and obtained service by publication. She was granted a divorce which incorporated the parties' property settlement agreement. The property settlement agreement provided for spousal support.

The court of appeals recognized that pursuant to section 8.01-328.1(A)(8) of the Code of Virginia a court may exercise personal jurisdiction over a person who has executed a support agreement in Virginia. Service under this section, however, must be made personally, not by order of publication. Service on a non-resident by order of publication vests the court with in rem jurisdiction only. Where the court has in rem jurisdiction and not in personam jurisdiction over a party, it has no authority to enter an award of spousal support against that party. Thus, the trial court improperly awarded spousal support to the wife.

In *Gibson v. Gibson*, the court of appeals addressed the question of the full faith and credit which must be accorded to a foreign divorce decree. The court concluded that spousal support and maintenance and property rights in Virginia are cognizable legal obligations which survive an ex parte foreign divorce decree.

In *Gibson*, divorce proceedings were filed by the wife in Virginia and by the husband in Tennessee. The Tennessee court granted Mr. Gibson a default divorce judgment on fault grounds at a hearing held without notice to his wife. However, the Tennessee court later granted Mrs. Gibson's motion to set aside that part of the decree pertaining to support and property rights, but not that part pertaining to fault. Mr. Gibson argued that the Virginia court had to give full faith and credit to the Tennessee divorce decree and not award spousal support because the Tennessee court had found Mrs. Gibson at fault. The court of appeals disagreed, holding that because Mrs. Gibson did not receive proper notice and was prevented from appearing and litigating the issue of fault, the Tennessee court did not have in personam jurisdiction on that issue.

158. 4 Va. App. at 542, 359 S.E.2d at 106.
159. Id. at 543, 359 S.E.2d at 106-07.
160. Id.
161. Id. at 542, 359 S.E.2d at 106.
163. Id. at 428, 364 S.E.2d at 519.
164. Id. at 434, 364 S.E.2d at 522.
Accordingly, the court held that "the finding of fault by the Tennessee court, while entitled to full faith and credit in determining parties' marital status, is not binding upon the parties when considering spousal support pursuant to Code section 20-107.1."  

4. Recrimination

In *Surbey v. Surbey*, the court of appeals applied the doctrine of recrimination and affirmed an award of spousal support to a wife who had committed adultery. The trial court had found that both parties were at fault in causing the separation and that both had been guilty of adultery subsequent to the separation. Accordingly, under the recrimination doctrine, neither the husband nor the wife could use adultery as a ground for divorce, and the divorce was granted on the ground of separation without cohabitation for more than one year.

The *Surbey* court was required to interpret section 20-91(9)(c), which provides that a no-fault divorce "shall in no way lessen any obligation any party may otherwise have to support the spouse unless such party shall prove that there exists in the favor of such party some other ground of divorce under this section or [section] 20-95." The court held that

because neither party is entitled to successfully assert adultery as a ground for divorce, and because there was a finding supported by the evidence that both parties were at fault in causing the separation, there did not exist a ground for divorce under any other section of the Code except [section] 20-91(9)(a).

The court construed the term "fault" to mean "grounds which legally may be used by one party as a basis for obtaining a divorce from the other party." Under this construction, the fault bar to spousal support was inapplicable, and the trial court did not err in granting spousal support.
C. Grounds for Divorce

In *Graves v. Graves*, the court of appeals held that the trial court erred in granting a divorce based upon a one year separation. At the Commissioner's hearing on October 1, 1984, the wife testified that the parties had been living separate and apart without interruption since October 3, 1983. No evidence was presented to the trial court concerning whether the parties had remained separated after the Commissioner's hearing, even though counsel represented to the court that the separation had continued. The court of appeals held that mere representations of counsel were not evidence. Any agreed stipulations of fact must be submitted to the court as such and received by it in lieu of evidence of these facts. Because the court did not receive counsel's representations as a stipulation, there was no evidentiary basis for concluding that the parties had lived separate and apart for a period in excess of one year.

In *Wagner v. Wagner*, the court of appeals held that the trial court erred in granting the husband a divorce on the ground of desertion. The Commissioner found, based on the testimony of the parties and witnesses, that the husband agreed to the wife's departure from the marital home. The court held that separation by mutual consent is not desertion.

D. Procedural Aspects of Divorce Cases

The trial court has authority, pursuant to section 20-103 of the Code of Virginia, to enter orders to compel a spouse to pay any sums necessary for spousal or child support, to provide for use and possession of the family residence, and to preserve the estate of either spouse. In *Taylor v. Taylor*, the Virginia Court of Appeals

174. *Id.* at 332, 357 S.E.2d at 557-58.
175. *Id.* at 332, 357 S.E.2d at 558.
176. *Id.*
177. *Id.*
178. *Id.*
180. *Id.* at 407, 358 S.E.2d at 412.
181. *Id.* at 409, 358 S.E.2d at 413 (citing *Arrington v. Arrington*, 196 Va. 86, 82 S.E.2d 548 (1954)).
held that this statute gives the trial judge authority to make provisions for the payment of the family mortgage during the pendency of the suit. Such authority begins with the filing of the suit and terminates upon the final adjudication of all issues, including a hearing on remand. The Taylor court commented that when the court orders one of the parties to make the mortgage payments on jointly owned real estate, it should indicate whether the payments are to be considered spousal support, child support, or a provision for the use and possession of the marital estate. Such a designation would be helpful in subsequent partition proceedings on the question of whether credit should be given to the party making the payments.

In Westbrook v. Westbrook, the court of appeals considered the application of the "clean hands" doctrine in equitable distribution proceedings. In a deposition, the wife denied committing adultery during the marriage. At the Commissioner's hearing, she admitted that she had lied in the deposition. The husband claimed that since the wife perjured herself in the depositions, her bill of complaint should be dismissed.

The court of appeals held that the "clean hands" doctrine is unavailable when it is asserted in the context of equitable distribution proceedings pursuant to section 20-107.3(A); the court must consider which property is separate and which is marital. This is a mandatory duty placed upon the trial court by statute and does not provide for any equitable considerations such as the "clean hands" doctrine. Neither equitable maxims nor perjury are included among the eleven factors which the court must consider in making a monetary award. The wife's untruthfulness had no bearing on property classification or upon the equities and rights and interests of the parties in that property. Accordingly,

184. Id.
185. Id.
186. Id. at 442, 364 S.E.2d at 247.
188. Id. at 455, 364 S.E.2d at 529.
189. Id. at 457, 364 S.E.2d at 530.
192. Id.
193. Id.
the trial court properly refused to dismiss the wife’s suit upon such grounds.\textsuperscript{194}

E. Child Support

In making a child support award, the court must consider all the statutory factors set forth in section 20-107.2(2) of the Code of Virginia.\textsuperscript{195} As with consideration of the spousal support factors, the court does not have to quantify or elaborate what weight or consideration it has given to each statutory factor.\textsuperscript{196} All that is necessary is that the court’s findings have some foundation based on the evidence presented.\textsuperscript{197}

In \textit{Yohay v. Ryan},\textsuperscript{198} the Virginia Court of Appeals held that in a support modification proceeding, the trial court is not required to consider all of the factors which the court must consider in an initial support proceeding.\textsuperscript{199} Instead, the party moving for modification must prove both a material change in circumstances and that such change justifies an alteration of the amount of support.\textsuperscript{200} In addition, a party moving for a reduction must show that his lack of ability to pay is not due to his own voluntary act.\textsuperscript{201} The party moving for reduction is not, however, required to prove that the reduction is in the best interests of the children.\textsuperscript{202}

\textsuperscript{194} Id. at 458, 364 S.E.2d at 530.
\textsuperscript{196} Id. at 410, 358 S.E.2d at 413 (quoting Wooley v. Wooley, 3 Va. App. 337, 345, 349 S.E.2d 422, 426 (1986) for the proposition that in determining spousal support, the trial court need not quantify or elaborate exactly what weight or consideration it has given to each of the statutory factors).
\textsuperscript{197} Id. at 410, 358 S.E.2d at 414.
\textsuperscript{199} Id. at 567, 359 S.E.2d at 325. The support factors to which the court referred are set out in VA. CODE ANN. § 20-107.2(2) (Cum. Supp. 1988).
\textsuperscript{200} Yohay, 4 Va. App. at 566, 359 S.E.2d at 324.
\textsuperscript{201} Id.
\textsuperscript{202} Id.