

1989

Annual Survey of Virginia Law: Domestic Relations

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Recommended Citation

Lawrence D. Diehl, *Annual Survey of Virginia Law: Domestic Relations*, 23 U. Rich. L. Rev. 581 (1989).

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DOMESTIC RELATIONS

*Lawrence D. Diehl**

I. 1989 LEGISLATION

A. *Experimental Family Court*

In 1989, the Virginia General Assembly enacted significant legislation authorizing the creation of an experimental family court.¹ The experimental program is an attempt to examine the unification of the circuit court and the juvenile and domestic relations district court's jurisdiction of divorce cases. The program's goals include the elimination of duplicate hearings, the savings of client costs, and the elimination of de novo appeals.²

Effective January 1, 1990, the legislation provides for the establishment of designated juvenile and domestic relations district courts as experimental family courts.³ It further provides for the selection of two circuit court judges and two juvenile and domestic relations court judges, chosen equally from rural and urban locations, to sit as experimental family court judges.⁴ The Judicial Council of Virginia shall select the judges.⁵ The jurisdiction of these family courts will include those matters set forth in section 16.1-241 of the Code of Virginia, as well as jurisdiction over suits for divorce, annulment or affirmation of marriages.⁶ The experi-

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1. VA. CODE ANN. §§ 16.1-241.1, -296.1, 17-116.05:5, 20-96.1, -96.2 (Cum. Supp. 1989).

2. See Condo, *Board of Governors Letter Regarding the Proposed Family Court*, 8 FAM. L. NEWS 22 (1988).

3. VA. CODE ANN. § 20-96.1(A) (Cum. Supp. 1989).

4. *Id.* § 20-96.1(C).

5. *Id.* § 16.1-241.1.

6. *Id.* In cases of divorces and annulments, the procedure set forth in the legislation provides for an order of referral by the circuit court to the experimental family court, to be entered upon the filing of a divorce. The circuit court shall randomly refer to said family court no less than 20% nor more than 50% of all such cases filed. Process will be issued by the experimental family court similar to normal procedures used by the circuit court for such purposes. However, if an objection is filed by either party within twenty-one days of the service of the bill of complaint, the case shall be returned to the circuit court. The legislation does not specify in which court such objection must be filed, but implies that the

mental family court shall thereafter have jurisdiction over all matters relating to the divorce, including pendente lite hearings and preliminary motions.⁷ No case referred to the court shall be referred to a commissioner in chancery,⁸ and the evidence shall be presented ore tenus or by deposition.⁹ Proceedings shall be conducted as in other suits in equity. The family court shall have all the powers and authority in cases referred to it as the designated circuit court would have had in such matters,¹⁰ and shall have the power to modify or enforce previously entered circuit court orders.¹¹

Appeals from the experimental family court shall go directly to the Court of Appeals of Virginia.¹² This is a significant change from the traditional concept of de novo appeals from an order of the juvenile and domestic relations district court to the circuit court. The appellate jurisdiction of cases from experimental family courts includes: appeals from divorce or annulment suits; cases originating in the said court involving custody, visitation, child or spousal support, and termination of residual parental rights; cases for the enforcement or modification of a decree transferred to said court by section 20-79 of the Code of Virginia;¹³ and any interlocutory decree granting injunctive relief in the above-specified category of cases.¹⁴

The authority of the experimental family court to accept new cases will expire on December 31, 1991,¹⁵ with a report of its opera-

objection would be filed in the experimental family court since the case must thereafter "be returned to the circuit court." See *Id.* § 20-96.1(D).

7. *Id.* § 20-96.1(0). All further pleadings and motions shall be filed in the experimental family court. *Id.*

8. For a recent analysis of the use of commissioners in chancery in Virginia family law matters, see Diehl, *Use of Commissioners in Chancery For Equitable Distribution Issues: Results of the 1988 Family Law Section Survey*, 9 FAM. L. NEWS 23 (1988-89).

9. VA. CODE ANN. § 20-96.1(D) (Cum. Supp. 1989).

10. *Id.*

11. *Id.* Although the present expiration date for the experimental family court set forth in the legislation is December 31, 1991, the said court shall have the power to conclude cases pending therein and to enforce and modify such final decrees after said expiration date. *Id.* § 20-96.1(D), (F).

12. VA. CODE ANN. §§ 16.1-296.1, 17-116.05:5.

13. *Id.* § 20-79 (Repl. Vol. 1983 & Cum. Supp. 1989).

14. *Id.* § 17-116.05:5 (Cum. Supp. 1989). "All case documents shall be transferred to the circuit court by January 31, 1992, or at the conclusion of the proceedings, whichever occurs later." Upon such transfer, the cases will resume their status as cases in the circuit court. *Id.* § 20-96.1(F).

15. *Id.* § 20-96.1(F).

tions and its impact on the Commonwealth's judicial system to be reported by the Judicial Council of Virginia to the Governor and the General Assembly by December 31, 1992.¹⁶

B. *Child Support*

1. Child Support Guidelines

In response to the federal legislative requirements of the Family Support Act of 1988,¹⁷ the 1989 General Assembly passed major changes to the Virginia child support guidelines statutes. The most significant amendment is the declaration of a "rebuttable presumption" in any judicial or administrative proceeding for child support that the amount of the award which would result from the application of the guidelines set out in section 20-108.2 of the Code of Virginia shall be the correct amount.¹⁸ To rebut the presumption, the trial court must make a written finding in the order that the application of such guidelines would be "unjust" or "inappropriate" based upon relevant evidence pertaining to the factors set forth in sections 20-107.2 and 20-108.1 of the Code of Virginia.¹⁹ Such written findings may be "incorporated by reference."²⁰ In ad-

16. *Id.* § 20-96.2.

17. Pub. L. No. 100-485, 102 Stat. 2343 (1988) (codified at 42 U.S.C.A. §§ 666 to 669 (West Cum. Supp. 1989)). This legislation amended the federal Child Support Enforcement Amendments of 1984 which required each state to establish child support guidelines by October 1, 1987, in order to remain eligible for federal funding for Aid to Families with Dependent Children. Pub. L. No. 98-378, 98 Stat. 1305, 1321-22 (1984) (codified at 42 U.S.C. § 667 (1982 & Supp. III 1985)). Virginia's child support guidelines complying with this federal legislation were enacted in 1988 and are contained in VA. CODE ANN. §§ 20-108.1, -108.2 (Cum. Supp. 1989). See Butler, *Domestic Relations: Annual Survey of Virginia Law*, 22 U. RICH. L. REV. 565 (1988) (summary of Virginia's 1988 child support guidelines legislation).

18. VA. CODE ANN. § 20-108.1 (Cum. Supp. 1989). The previous Virginia legislation, enacted in 1988, provided merely for the non-binding use of said guidelines by the court. *Id.* §§ 20-108.1(B), -108.2(A).

19. VA. CODE ANN. §§ 20-108.1(B), -108.2(A) (Cum. Supp. 1989). The federal legislation does not define the terms "unjust" or "inappropriate", and permits such findings "as determined under criteria established by the State." Pub. L. No. 100-485, 100 Stat. 2343, 2346 (1988). It would appear that in Virginia, a written finding by the court in a particular case that the factors set forth either in section 20-107.2 or section 20-108.1(B) would create an "unjust" or "inappropriate" result will be sufficient to rebut the guideline computations. VA. CODE ANN. §§ 20-108.1(B), -108(A) (Cum. Supp. 1989).

20. VA. CODE ANN. §§ 20-108.1, -108.2 (Cum. Supp. 1989). The mechanics of such incorporation by reference need not be a burden on the trial court. The mere incorporation by reference of the checklist on the reverse side of the Child Support Guidelines Reporting Form, Form DC-638, 7/88, prepared by the Executive Secretary of the Supreme Court of Virginia and the Department of Social Services, will satisfy the "written finding" requirement of the legislation. See *id.* § 20-108.2(H); see also Richardson, *Support Guidelines to be Rebuttable Presumption*, 3 VLW 793, 810 (February 27, 1989) (comments of your

ministrative proceedings, the Department of Social Services shall establish child support by using these guidelines.²¹

The second significant amendment clarifies the relationship between the computation of child support pursuant to the guidelines and the computation of spousal support. In defining "gross income" for purposes of guideline computation, spousal support shall be included in "gross income" only if it is paid pursuant to a pre-existing order or written agreement.²² Spousal support shall be deducted from the "gross income" of the payor when "paid pursuant to a pre-existing order or written agreement between the parties to the present proceeding."²³

Another amendment extends the combined monthly gross income contained in the table in section 20-108.2 of the Code of Virginia.²⁴ The table now provides for guideline computations based upon the monthly gross income of both parties of up to \$10,000.00.²⁵

A further amendment specifies that "extraordinary medical" expenses include "eyeglasses, prescription medication, prostheses and mental health services whether provided by a social worker, psychologist, psychiatrist, or counselor."²⁶

Finally, the statute now provides that the review procedure to determine the adequacy of the child support guidelines and the effect of the use of the guidelines on the levels of support shall be

author).

21. VA. CODE ANN. § 20-108.2(A) (Cum. Supp. 1989).

22. *Id.* § 20-108.2(C). The intent of this amendment as stated by comments on the legislation at a hearing at the Senate Courts of Justice Committee, General Assembly, February 5, 1989, was to ensure that in a joint or initial hearing on the issues of both child and spousal support, that child support would be computed first, without adding spousal support to gross income and thereafter, spousal support would be computed pursuant to section 20-107.1. The previous definition of "gross income" contained in section 20-108.2 included spousal support without limitation. This resulted in confusion by some trial courts in computing spousal support first, in order to arrive at a guideline definition of "gross income" for the recipient spouse and thereafter, the computation of child support. This reversed the traditional priorities and procedures followed in such cases in Virginia.

23. *Id.* In the case where spousal support is paid by a payor to a previous or subsequent spouse, and not pursuant to a pre-existing order or agreement between the same parties to the present proceeding, such payments can still be a factor to be considered by the trial court in its determination to rebut the guidelines computation as being "unjust" or "inappropriate" in a particular case. *Id.* § 20-108.1(B)(1) ("Actual monetary support for . . . other family members or former family members.").

24. *Id.* § 20-108.2(B).

25. *Id.*

26. *Id.* § 20-108.2(D).

made on July 1, 1990, and every four years thereafter.²⁷

2. Child Support for High School Students

Lawmakers modified the authority of the court to order support for a child over the age of eighteen who is still attending high school.²⁸ The statute was amended to change the present limitation of high school "senior" to any high school "student."²⁹ In order to clarify the court's authority to enter a child support award pendente lite under the circumstances set forth in said statute, legislation was enacted to specify the court's authority for such orders pending the suit.³⁰

C. *Equitable Distribution*

Section 20-107.3(D) was amended to provide that any monetary award entered pursuant to this subsection shall not be docketed by the clerk unless the decree so directs.³¹

D. *Procedure*

There are several jurisdictional and procedural changes relevant to domestic relations proceedings. The most significant amendment concerns the jurisdictional effect of the filing of divorces, affirmation of marriages and annulments in the proper venue.³² Section 20-96 of the Code of Virginia has been amended to delete the jurisdictional mandate of filing in such venues,³³ while section 8.01-261, of the Code of Virginia, relating to the preferred venue for the filing of certain actions, has made traditional venues in divorce ac-

27. *Id.* § 20-108.2(G). This provision is in conformity with the federal legislation contained in section 103(b) of the Family Support Act of 1988. Pub. L. No. 100-485, § 103(b) 102 Stat. 2343, 2346 (1988).

28. *See* VA. CODE ANN. § 20-107.2 (Cum. Supp. 1989) providing for support to a child no longer a minor where the child is "(i) a full-time high school student, (ii) not self-supporting and (iii) living in the home of the parent seeking or receiving child support until such child reaches the age of nineteen or graduates from high school, whichever first occurs." *Id.*

29. *Id.* § 20-107.2(i).

30. *Id.* § 20-103(v).

31. VA. CODE ANN. § 20-107.3(D) (Cum Supp. 1989).

32. VA. CODE ANN. § 20-96 (Cum. Supp. 1989). The previous statute has been interpreted to make mandatory and jurisdictional the filing of divorce cases in the proper venue. *See* Colley v. Colley, 204 Va. 225, 129 S.E.2d 630 (1963); Blankenship v. Blankenship, 125 Va. 595, 100 S.E. 538 (1919).

33. *Id.* § 20-96 (Cum. Supp. 1989). The 1989 amendment deleted the designation of the first paragraph as subsection A and deleted subsections B and C pertaining to venue and transfer of suits for annulment, affirmance, or divorce. *Id.*

tions a new category of preferred venue.³⁴ The effect of such legislation will be to legitimize divorces obtained in courts where a divorce has been filed in an improper venue, but no objection or transfer motion has been made by the parties.³⁵

Section 16.1-296 of the Code of Virginia was amended to clarify that where any case has been "transferred" from a circuit court to a juvenile court, and an appeal is taken from an order of the juvenile court, the appeal shall be taken to the circuit court which had original jurisdiction of the case.³⁶

The juvenile court's authority to transfer the venue of a case where appropriate pursuant to section 16.1-243(B) of the Code of Virginia was extended to those cases in which a case, pertaining to support, maintenance, care or custody, was transferred to said juvenile court pursuant to section 20-79(c) of the Code of Virginia.³⁷

In clarifying the concurrent jurisdiction of the juvenile and circuit courts, after a suit for divorce is filed, section 16.1-244(A) of the Code of Virginia was amended to provide that the juvenile courts shall retain jurisdiction to enforce its valid order for any period during which the order was in effect.³⁸ Legislation was further enacted providing that circuit courts and juvenile courts shall have concurrent original jurisdiction of cases relating to the issue of parentage of a child.³⁹

II. JUDICIAL DECISIONS

A. *Equitable Distribution of Marital Property*

1. Classification of Property

The Court of Appeals of Virginia continued its broad expansion of the transmutation doctrine in the case of *Ellington v. Ellington*.⁴⁰ In *Ellington*, the husband owned fifty percent of the stock in a closely held corporation at the time of the marriage. Over the

34. *Id.* § 8.01-261(19). Also amended was section 8.01-259. The 1989 amendment repealed subdivision (b) pertaining to domestic relations proceedings. *Id.* § 8.01-259.

35. *Id.* §§ 8.01-264, -265.

36. *Id.* § 16.1-296. The previous statutory language relating to such appeals was limited to cases which had been "referred" from a circuit court to a juvenile court. *Id.* § 16.1-296 (Repl. Vol. 1988).

37. *Id.* §§ 16.1-243(B)(5), 20-79(c).

38. *Id.* § 16.1-244(A).

39. *Id.* §§ 16.1-241(Q), 20-49.2.

40. 8 Va. App. 48, 378 S.E.2d 626 (1989).

course of the marriage, the corporation increased in value from \$231,000 to \$449,800. The trial court ruled that the value of the stock at the time of the marriage was the husband's separate property, but the increase in value was marital property.⁴¹ In accord with *Smoot v. Smoot*⁴² and *Lambert v. Lambert*,⁴³ the court of appeals reversed the trial court by holding that such a dual classification was erroneous, and that where separate property is commingled with marital property, it loses its separate character and the entire property is transmuted into marital property.⁴⁴ The court further reaffirmed its *Lambert* dicta by specifically holding that separate property may be transmuted into marital property by the active efforts of the parties during the marriage.⁴⁵ The court stated that such a holding was consistent with the unitary concept of property and the goal of increasing the pool of marital property to provide the opportunity of a more equitable property division.⁴⁶

The *Ellington* opinion further held that the trial court erred in awarding the future profits of the husband's other business interests as part of the marital award where there was no present value to such business.⁴⁷ However, the awarding of one-half of the net value of the parties' jointly owned residence over and above the

41. *Id.* at 50-52, 378 S.E.2d at 627-28. The court of appeals noted in its opinion that the trial court's ruling had been made prior to the Supreme Court of Virginia's holding in *Smoot v. Smoot*, 233 Va. 435, 357 S.E.2d 728 (1987) that property cannot consist of a portion that is separate and a portion that is marital. 8 Va. App. at 52-53, 378 S.E.2d at 628-29.

42. 233 Va. 435, 357 S.E.2d 728 (1987).

43. 6 Va. App. 94, 367 S.E.2d 184 (1988).

44. *Ellington*, 8 Va. App. at 58, 378 S.E.2d at 632.

45. *Id.* at 53, 378 S.E.2d at 629. Because the trial court's record did not contain sufficient findings as to whether the wife's active efforts were sufficient to permit a finding of transmutation, the case was remanded to the trial court for consideration of the issue. *Id.* at 54-55, 378 S.E.2d at 629-30. However, the court of appeals did not articulate the evidentiary standard that would be required to make such a finding. Guidance may be obtained on the issue by the Illinois case law upon which the *Smoot* decision was based. The Illinois decision of *In Re Marriage of Olson*, 96 Ill. 2d 432, 451 N.E.2d 825 (1983) required a finding of "sufficiently significant" efforts before a finding of transmutation can be made. See Diehl, 1 FAM. L. NEWS ALERT (April 1989).

46. *Ellington*, 8 Va. App. at 54, 378 S.E.2d at 629.

47. *Id.* at 55, 378 S.E.2d at 630. Supporting its ruling, the court of appeals cited *Hodges v. Hodges*, 2 Va. App. 508, 347 S.E.2d 134 (1986), which held that where property is essentially of no value, it is inappropriate to consider it as a basis for a monetary award. *Id.* at 515, 347 S.E.2d at 138. This part of the *Ellington* opinion would also appear consistent with the marital partnership theory expressed by the court of appeals in *Reid v. Reid*, 7 Va. App. 553, 375 S.E.2d 533 (1989) where the court stated, "It is axiomatic that whatever the future may hold for either of the parties has no bearing on the issue of the appropriate division of what has been accumulated by their contributions during the marriage." *Id.* at 565, 375 S.E.2d at 540.

trial date value was not erroneous since the potential for partition and sale of said home still remained.⁴⁸

2. Valuation

In *Trivett v. Trivett*,⁴⁹ the husband executed a note payable to his grandparents as consideration for an interest in a commercial building. The note was unsecured, but after the filing of the divorce action, the husband executed a deed of trust on the commercial property securing the note. The husband contended that the trial court disregarded the lien balance in valuing the commercial building and in computing its monetary award to the wife.⁵⁰ The court of appeals held that where an encumbrance on marital property is created in anticipation of divorce and deliberately made to reduce or eliminate the *value* of such property in order to reduce or eliminate a monetary award to the other spouse, the trial court can disregard the lien and include the unencumbered value of the asset within the "pool" of marital property from which it determines the amount of the award.⁵¹ The case was remanded to the trial court for specific consideration of the issue since the record contained no determinations related to such necessary findings.

The issue of the proper valuation date of a pension was addressed in *Kaufman v. Kaufman*.⁵² Despite the husband's contention that he had made substantial contributions to his pension plan after the separation of the parties, the court of appeals affirmed the trial court's use of the date of the evidentiary hearing as

48. *Ellington*, 8 Va. App. at 57-58, 378 S.E.2d at 631.

49. 7 Va. App. 148, 371 S.E.2d 560 (1980).

50. *Id.* at 150-51, 371 S.E.2d at 561.

51. *Id.* at 155, 371 S.E.2d at 564. The court of appeals carefully distinguished its ruling from *Hodges v. Hodges*, 2 Va. App. 508, 347 S.E.2d 134 (1986) where the court had ruled that where marital property was encumbered with indebtedness which equaled or exceeded its value, then it had no value and could not be the basis of a monetary award. No evidence or allegations were presented to show that the debt was created as a sham or as an attempt to frustrate the purposes of section 20-107.3 of the Code of Virginia. The *Hodges* decision concerned valuation of marital property, not classification. *Trivett*, 7 Va. App. at 151, 371 S.E.2d at 561.

In dissent, Judge Coleman argued that section 20-107.3 did not contemplate a requirement that the court make the finding required by the majority opinion. He argued that whether a debt was secured or unsecured, it still must be considered by the court pursuant to section 20-107.3(E)(7), and that a reduction in value due to secured debts could unjustly deprive a spouse of a fair monetary award. *Trivett*, 7 Va. App. at 156-60, 374 S.E.2d at 564-66 (Coleman, J., dissenting).

52. 7 Va. App. 488, 375 S.E.2d 374 (1988).

the proper valuation date.⁵³

*Holmes v. Holmes*⁵⁴ addressed the proper method of valuation of a military pension. In *Holmes*, the court of appeals restated its holding in *Sawyer v. Sawyer*⁵⁵ that a military pension is subject to equitable distribution under Virginia's statutory scheme. The court further approved the use of the annuity table contained in section 55-269.1⁵⁶ of the Code of Virginia as a proper method to determine the present value of the disposable portion of the pension.⁵⁷

3. Monetary Award and Statutory Factors

The issue of the monetary award and the application of the factors in section 20-107.3⁵⁸ of the Code of Virginia in establishing such an award in equitable distribution proceedings was one of the most active areas of court of appeals decisions over the past year. In *Pledger v. Pledger*,⁵⁹ the court of appeals held that the accrual of interest on the payment of a lump sum retirement benefit payable to the wife begins only upon the date the payment becomes due and continues until the date paid. The wife's argument that the term "judgment," as used in the parties' separation agreement,

53. *Id.* at 499-500, 375 S.E.2d at 380. This was held to be consistent with the ruling in *Mitchell v. Mitchell*, 4 Va. App. 133, 355 S.E.2d 18 (1987). The court in *Kaufman* recognized the statutory amendment to section 20-107.3(A) of the Code of Virginia, effective July 1, 1988, requiring the use of "the date of the evidentiary hearing" as the proper valuation date. For current cases, however, it is submitted that the amendment to section 20-107.3(G) of the Code of Virginia also effective July 1, 1988, would apply and would limit the spouse's share to the "marital share" of such pension, as defined in said subsection. VA. CODE ANN. § 20-107.3(G) (Cum. Supp. 1989). See *Astor v. Gross*, 7 Va. App. 1, 371 S.E.2d 833 (1988).

54. 7 Va. App. 472, 375 S.E.2d 387 (1988).

55. 1 Va. App. 75, 335 S.E.2d 277 (1985).

56. VA. CODE ANN. § 55-269.1 (Repl. Vol. 1986).

57. *Holmes*, 7 Va. App. at 479, 375 S.E.2d at 391. The importance of this specific ruling is arguably reduced based upon the amendment to section 20-107.3(G), effective July 1, 1988, which removes the need to present evidence of the present value of a pension. This amendment permits the trial court to award a percentage of the marital share of such pension, vested or unvested, when actually received by the party against whom an award is made. VA. CODE ANN. § 20-107.3(G) (Cum Supp. 1989).

The court also addressed the husband's contention that the trial court improperly included the disability retirement portion in its monetary and support award. While not specifically ruling on the issue of whether disability pay is properly divisible pursuant to Virginia law, the court approved the trial court's methodology in computing the net pay which excluded the disability component. *Holmes*, 7 Va. App. at 480-81, 375 S.E.2d at 392-93. The court further held that the husband had not met his burden of rebutting the presumption that the monies placed in his bank accounts and commingled with other funds were not marital property. *Id.* at 486, 375 S.E.2d at 395.

58. VA. CODE ANN. § 20-107.3 (Repl. Vol. 1983 & Cum. Supp. 1989).

59. 6 Va. App. 627, 371 S.E.2d 43 (1988).

should be construed to permit the accrual of interest from the date of the entry of a final decree was rejected.⁶⁰

One of the most anticipated opinions of the past year was the court of appeals second decision in *Booth v. Booth*.⁶¹ The court first held that the equitable distribution statutes apply to all actions filed after its effective date, regardless of when the cause of action arose or when marital property was acquired.⁶² The court then held that the trial court may consider the "waste,"⁶³ or "negative" contribution of marital assets, as a factor in its monetary award pursuant to section 20-107.3(E)(2) of the Code of Virginia.⁶⁴ Finally, consistent with numerous previous court of appeals decisions,⁶⁵ the court held that the trial court erred in ordering the wife to transfer her interest in the jointly owned marital home to the husband.

Addressing the issue of the proper consideration by the trial court of the section 20-107.3(E) factors, the court of appeals in *Astor v. Gross*⁶⁶ held that an award of thirty-five percent of the marital property and twenty percent of the husband's pension to the wife, was not erroneous. Citing *Papuchis v. Papuchis*,⁶⁷ the court reaffirmed the principle that Virginia's equitable distribution statute does not contain a presumption favoring the equal division of property.⁶⁸ Where the record evidenced a full consideration of all factors by the trial court, including the substantial monetary contributions of the husband, the percentage award was proper.⁶⁹ The

60. *Id.* at 629, 371 S.E.2d at 45.

61. 7 Va. App. 22, 371 S.E.2d 569 (1988). The earlier opinion rendered in this matter on February 2, 1988 was vacated on February 26, 1988 after certain issues had been withdrawn by the appellant after oral argument. *Id.* at 24, 371 S.E.2d at 571.

62. *Id.* at 27, 371 S.E.2d at 572. The court stated that the intent of the General Assembly was shown from the language of the statute and the consequences of the act. To hold otherwise would require application of "outmoded" principles of laws to cases, a result the legislature could not have intended. *Id.* at 26, 371 S.E.2d at 571.

63. "Waste" is defined as "the dissipation of marital funds in anticipation of divorce or separation for a purpose unrelated to the marriage and in derogation of the marital relationship at a time when the marriage is in jeopardy." *Id.* at 27, 371 S.E.2d at 572.

64. The court specifically stated that "equity can only be accomplished if the party who last had the funds is held accountable for them." *Id.* at 28, 371 S.E.2d at 573.

65. *See, e.g.,* Venable v. Venable, 2 Va. App. 178, 342 S.E.2d 646 (1986). *But see* the amendments to § 20-107.3 effective July 1, 1988 (permitting the court to order such a transfer or division in certain circumstances).

66. 7 Va. App. 1, 371 S.E.2d 833 (1988).

67. 2 Va. App. 130, 341 S.E.2d 829 (1986).

68. 7 Va. App. at 8, 371 S.E.2d at 837.

69. *Id.* at 6, 371 S.E.2d at 836. The court reversed the pension award, however, due to the erroneous date of valuation which was used by the trial court. The proper trial date was that

court of appeals further affirmed the trial court's discretion permitting the expert testimony of a certified public accountant to value the husband's orthodontist business, holding that the admission of such testimony is within the discretion of the trial court.⁷⁰

In *Pommerenke v. Pommerenke*,⁷¹ the court of appeals upheld the trial court's monetary award of the total amount of the husband's down payment of separate funds towards the marital residence, holding that while the court is not *required* to reimburse such a contribution, it is not error to do so where all section 20-107.3(E) of the Code of Virginia factors are considered by the trial court.⁷² The court further reaffirmed Virginia's law that in the equitable distribution of property no "equal" division presumption exists, but that an initial assumption of equality when used as a "starting point" in the court's evaluation of the statutory factors is proper.⁷³

The mere fact that a party's financial condition is no worse when the marriage is dissolved than when the party entered into a marriage was held to be an improper basis for the denial of a monetary award in *Keyser v. Keyser*.⁷⁴ The court of appeals in *Keyser* stated the mere fact that the marriage was of short duration and that the wife had maintained her net worth were insufficient grounds to deny her a share in the husband's pension earned during the marriage. The court was required to consider all statutory factors and the case was remanded for the trial court's consideration of such factors.⁷⁵

In *Kaufman v. Kaufman*,⁷⁶ the wife had retained ownership of

closest to the equitable distribution hearing, rather than one month prior to the date of the parties' separation. *Id.* at 5, 371 S.E.2d at 835; *see also* *Mitchell v. Mitchell*, 4 Va. App. 133, 355 S.E.2d 18 (1987) (where the court promulgated guidelines for determining the date of valuation).

70. *Astor*, 7 Va. App. at 6-7, 371 S.E.2d at 837. *Astor* also upheld the trial court's authority to value a business at a sum basically halfway between two conflicting valuations. Where faced with conflicting values of \$31,000 and \$280,000 on the business, the court's finding of a value of \$121,000 for the business was upheld in this opinion. *Id.* at 9, 371 S.E.2d at 837.

71. 7 Va. App. 241, 372 S.E.2d 630 (1988).

72. *Id.* at 251, 372 S.E.2d at 635. The court of appeals clarified that *Smoot v. Smoot*, 233 Va. 435, 357 S.E.2d 728 (1987), did not mandate a reimbursement of separate funds which are transmuted to the "pool" of marital assets, but that restoration of such funds may be proper in a case to fashion an ultimate equitable award. *Id.*

73. *Id.* at 250, 372 S.E.2d at 634-35. *But see supra* notes 40-48 and accompanying text.

74. 7 Va. App. 405, 374 S.E.2d 698 (1988).

75. *Id.* at 414, 374 S.E.2d at 703.

76. 7 Va. App. 488, 375 S.E.2d 374 (1988).

marital property, both realty and personalty, she received during the marriage. The trial court ordered the husband to pay the wife a monetary award equal to one-half of the value of the equity of such property. The court of appeals reversed this award, stating as follows:

The question we must now resolve is whether the trial court may require husband to pay a sum equal to one-half the value of marital property given to wife when she retains ownership of the items during the marriage. We hold that it may not. The primary objective of statutory construction is to ascertain and give effect to legislative intent. *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983). The legislature intended to provide that all marital property be considered in making a monetary award but it did not intend that a spouse receive an award which included a percentage of the value of property he or she separately owned. To sustain the trial court on this record we would have to declare that the legislature intended husband to pay wife a monetary award equal to an additional fifty percent of the value of the gifts given her by him during the marriage, the ownership of which she retains. We decline to give Code § 20-107.3 a construction which would result in that inequity.⁷⁷

The court of appeals further noted that where the record lacked any justification for the disproportionate award made by the trial court, the award must be reversed and remanded for further consideration.⁷⁸

In one of the most interesting opinions relating to the trial court's proper application of the statutory factors in fashioning a monetary award, the court of appeals in *Reid v. Reid*⁷⁹ held that the earning capacity of one spouse or the future ability of a spouse to acquire property or a consideration of a spouse's future housing needs are not proper factors to be considered in making a monetary award.⁸⁰ The court's opinion was based upon both the clear language of the statutory factors set out in the code,⁸¹ as well as the marital partnership theory of equitable distribution. As to the latter, the court stated as follows:

77. *Id.* at 496-97, 375 S.E.2d at 378.

78. *Id.* at 498, 375 S.E.2d at 379.

79. 7 Va. App. 553, 375 S.E.2d 533 (1989).

80. *Id.* at 565, 375 S.E.2d at 540. The court of appeals specifically rejected the wife's contention that such factors are proper for consideration under section 20-107.3(E)(11). *Id.*

81. VA. CODE ANN. § 20-107.3 (Cum. Supp. 1988).

Specifically, we hold that Code § 20-107.3(E)(11) does not contemplate consideration of earning capacity of one spouse and support needs of the other spouse, which are expressly embodied in Code § 20-107.1 and are more appropriately determined under the latter statute. Code § 20-107.3 provides for the equitable distribution of the accumulated marital wealth between the marital parties; it does not contemplate consideration of the future ability of one spouse to accumulate what will be separate property or the future needs of the other spouse. In short, the marital partnership notion terminates with the termination of the marriage and whatever marital wealth has been accumulated is to be equitably distributed at that time. It is axiomatic that whatever the future may hold for either of the parties has no bearing on the issue of the appropriate division of what has been accumulated by their contributions during the marriage.⁸²

4. Consideration of Fault

This year in the area of equitable distribution, the court of appeals, in *Astor v. Gross*,⁸³ held that circumstances leading to the dissolution of the marriage, but having no effect on the marital property, its value or otherwise, are not relevant to determining the monetary award and may not be considered.⁸⁴ In *Astor*, the wife claimed that the trial court erroneously refused to permit her to amend her bill of complaint to add counts of adultery by her husband with seven different persons. The court of appeals held that the trial court properly exercised its discretion in refusing to permit the amended bill of complaint because the allegations of marital misconduct have no relation to the value of the parties' assets and the court had generally considered fault in its award. The court of appeals, by implication, held that the effects of the misconduct on the "economic consequences" of the parties must be alleged to justify such a consideration by the trial court.⁸⁵

82. *Reid*, 7 Va. App. at 565, 375 S.E.2d at 540. Legislation in other states specifically includes these types of factors as proper consideration in equitable distribution divisions. See, e.g., Wisconsin's statutory provision, WIS. STAT. ANN. § 767.255 (West 1981 & Cum. Supp. 1988) permitting the court's consideration of the future housing needs of the custodial spouse and children.

83. 7 Va. App. 1, 371 S.E.2d 833 (1988).

84. *Id.* at 5-6, 371 S.E.2d at 836. The court stressed the marital partnership theory and said the factor of dissolution as contained in section 20-107.3(E)(5) relates to "economic" fault, with an equitable economic division of the property being the goal and policy of such proceedings. *Id.* at 5, 371 S.E.2d at 836.

85. *Id.* at 6, 371 S.E.2d at 837.

5. Method of Distribution

In *Fitchett v. Fitchett*,⁸⁶ the court of appeals addressed the evidentiary requirement to permit entry of an order of partition of marital property in equitable distribution proceedings. While recognizing the authority of the court to partition marital property, the court of appeals held that there must be evidentiary findings in the record to justify such authority in accordance with normal partition suit procedures.⁸⁷ The court of appeals further ruled that it was an error for the trial court to defer the partition sale of the residence in order to provide a residence for the wife and her children. Absent specific statutory authority authorizing such a deferral, the trial court could not make such an order in a partition suit.⁸⁸

6. Procedural Aspects

In *Gologanoff v. Gologanoff*,⁸⁹ the Court of Appeals of Virginia held that the parties were still required to present evidence on the classification and value of all other property of the parties as a condition to the equitable distribution of the disputed property where the sole property in dispute was a military retirement plan of the husband. The parties had entered into a written separation agreement which settled all issues except the pension. The trial court refused to grant the wife's request for the equitable distribution of the pension, since the evidence on all other properties was lacking.⁹⁰ The court of appeals affirmed the trial court's holding

86. 6 Va. App. 562, 370 S.E.2d 318 (1988).

87. *Id.* at 565, 370 S.E.2d at 320. The court of appeals, consistent with *Morris v. Morris*, 3 Va. App. 303, 349 S.E.2d 661 (1986), recognized that the general partition procedures set forth in VA. CODE ANN. §§ 8.01-81 to -93 (Repl. Vol. 1984 & Cum. Supp. 1988) applied to section 20-107.3 dealing with equitable distribution procedures. See the amendments to section 20-107.3(C), effective July 1, 1988 permitting the division or transfer of jointly owned property, or the sale thereof "[b]y private sale by the parties, through such agent as the court shall direct, or by public sale as the court shall direct without the necessity for partition." *Id.* This amendment provides alternative methods of disposing of jointly owned marital properties in lieu of partition, but would not remove the evidentiary requirements of *Fitchett* where partition is still desired by the parties.

88. *Id.* at 566, 370 S.E.2d at 320. Such legislative authority is not contained in section 20-107.3(E) factors in Virginia, but is contained in the statutory schemes of many other states. Wisconsin, for example, permits the court to consider the "desirability of awarding the family home or the right to live therein for a reasonable period to the party having custody of any children." WIS. STAT. ANN. § 767.255 (West 1981 & Cum. Supp. 1988).

89. 6 Va. App. 340, 369 S.E.2d 446 (1988).

90. The trial court relied on section 20-107.3(A) which requires the court to determine the

based on the lack of such evidence. The court in *Gologanoff* further held that the wife's request for a determination of marital property rights filed by a separate motion within the time period for a response to the husband's bill of complaint was sufficient to permit the court to consider such an issue. The failure to include such a request in her answer and cross-bill was not fatal.⁹¹

The court of appeals held in *Kleinfield v. Veruki*⁹² that there was no authority to award spousal support or make an equitable distribution award where the trial court determined that an alleged marriage between the parties was void.

B. Divorce

1. In General

Interpreting the proper place of last cohabitation between the parties was addressed by the court of appeals in *Rock v. Rock*.⁹³ The parties spent the majority of their time in Middlesex County, which was their primary residence. However, they had also occupied a condominium that they owned in Richmond, where the parties had been living at the time of their separation.⁹⁴ Reversing the Circuit Court of the City of Richmond's dismissal of the case, the court of appeals held that the term "last cohabited" meant the location where the parties last dwelled together under the same roof with more or less permanency.⁹⁵ The "place of last cohabitation" was not determined by where the parties had their last sexual relations.⁹⁶ Therefore, since the parties had "last lived together" in their condominium in Richmond, the City of Richmond was the proper forum for the suit.⁹⁷

"ownership and value of all property." VA. CODE ANN. § 20-107.3 (Cum. Supp. 1988).

91. 6 Va. App. at 347-48, 369 S.E.2d at 450. The court of appeals looked at the substance of the pleading as in compliance with the intent of section 20-107.3 in "requesting" the equitable distribution of the property. The court stated that "to hold otherwise would be to put form over substance, which we refuse to do." *Id.* at 348, 369 S.E.2d at 450.

92. 7 Va. App. 183, 372 S.E.2d 407 (1988).

93. 7 Va. App. 198, 372 S.E.2d 211 (1988).

94. The issue was the proper jurisdiction of the court for purposes of divorce actions pursuant to section 20-96(B) of the Code of Virginia, which states, in part, that a suit for divorce must be brought in the county or corporation in which the parties last cohabited. The court of appeals noted that the proper filing in such a venue was mandatory in divorce proceedings. *Rock*, 7 Va. App. at 201, 372 S.E.2d at 213 (citing *Netzer v. Reynolds*, 231 Va. 444, 345 S.E.2d 291 (1986)). See, however, the amendment to section 20-96(B) effective July 1, 1989 making such choice of venue preferred pursuant to section 8.01-261, *et seq.*, but not mandatory, thus changing the practical impact of the *Rock* case.

95. 7 Va. App. at 201, 372 S.E.2d at 213.

96. *Id.*

97. *Id.* at 202, 372 S.E.2d at 214.

In *Kleinfield v. Veruki*,⁹⁸ the validity of a marriage was the basis for the denial of a divorce petition. The court of appeals found that the wife's second marriage was bigamous and void where she had previously entered into a voidable, but not void, "green card marriage"⁹⁹ in New Jersey. Since under Virginia law any marriage entered into prior to the dissolution of an earlier marriage is void, the wife's petition for divorce would be dismissed.¹⁰⁰

2. Adultery

Three opinions have been rendered by the Court of Appeals of Virginia over the past year which have addressed the issue of the sufficiency of the evidence to support a finding of adultery.

In *Thompson v. Thompson*,¹⁰¹ the court of appeals held that the testimony of a private investigator relating to one overnight observation, when combined with further evidence that the man and woman held themselves out as husband and wife, that the man executed a joint lease for the woman's residence, and that the man paid the woman's telephone bill and possessed a mailbox key, supported the commissioner's finding of adultery.¹⁰² While restating the rule that the standard of proof in adultery cases is "clear and convincing"¹⁰³ evidence, the court of appeals found that the evidence in the record was "substantial, competent and credible" to support the adultery finding.¹⁰⁴

The court of appeals continued its realistic approach to the sufficiency of proof of adultery in *Pommerenke v. Pommerenke*.¹⁰⁵ The wife in *Pommerenke* admitted committing adultery, but argued

98. 7 Va. App. 183, 372 S.E.2d 407 (1988).

99. The wife had married one William Garcia to permit him to obtain naturalized citizen status in the United States. The trial court had ruled such marriage voidable, rather than void. The court of appeals agreed and interpreted New Jersey law as permitting ratification of such a marriage. Since the prior marriage was voidable, but not void, a valid New Jersey marriage existed, thus triggering the application of Virginia's law that a subsequent marriage entered into prior to dissolution of a prior marriage is a nullity. *Id.* at 187-89, 372 S.E.2d at 409-10.

100. *Id.* at 190, 372 S.E.2d at 411.

101. 6 Va. App. 277, 367 S.E.2d 747 (1988).

102. *Id.* at 280, 367 S.E.2d at 749.

103. *Id.* (citing *Coe v. Coe*, 225 Va. 616, 303 S.E.2d 923 (1983)).

104. *Id.*

105. 7 Va. App. 241, 372 S.E.2d 630 (1988).

that the evidence of diary entries and observations of her sunbathing topless with the alleged paramour, who was nude or in his underwear, were insufficient corroboration to permit a finding of adultery.¹⁰⁶ The court stated that the purpose of corroboration was to avoid collusion, and that since no evidence of collusion was in the record, a "common sense approach"¹⁰⁷ to the sufficiency of the evidence adequately established the adultery.

Finally, in *Derby v. Derby*,¹⁰⁸ the court of appeals held that, although the testimony of a private investigator should be carefully scrutinized where it is offered to prove adultery, the credibility and weight of such testimony is for the trial court's proper evaluation.¹⁰⁹ Where the evidence showed that the wife and paramour spent several nights together in the same house and behaved affectionately in public, the evidence was credible and supported the finding of adultery despite the wife's denials.¹¹⁰

3. Desertion and Cruelty

Referring to the rule as an "outmoded expectation," the Court of Appeals of Virginia, in *Kerr v. Kerr*,¹¹¹ abrogated the principle that a wife must follow her husband to his new home or risk being found to have deserted the marriage. The evidence established that the husband had moved from Chesapeake to Fredericksburg in 1985 at his employer's request. The wife refused to move to the husband's new residence and filed for divorce on the grounds of constructive desertion.¹¹² Carefully distinguishing between the justification for leaving a marital home¹¹³ and the misconduct neces-

106. The court of appeals rejected the wife's argument that this was a normal custom for a Dutchwoman and should not imply any wrongdoings. In an almost humorous analysis, the court stated that while her sunbathing "topless" may be a custom practiced without objection in foreign countries, the court was unaware of any "custom that would explain Van Weel's presumption that he could feel free to be in his 'underwear' or nude in the presence of the host's wife and in the absence of the host." *Id.* at 246, 372 S.E.2d at 632-33.

107. *Id.* at 246, 372 S.E.2d at 632.

108. 8 Va. App. 19, 378 S.E.2d 74 (1989).

109. *Id.* at 24, 378 S.E.2d at 76.

110. *Id.*

111. 6 Va. App. 620, 371 S.E.2d 30 (1988).

112. The wife specifically alleged that the relationship of the parties had deteriorated prior to their separation, that they slept in different rooms, that husband would go out every night and return intoxicated, and that he frequently profanely insulted her. *Id.* at 622, 371 S.E.2d at 30.

113. *See, e.g., Rowand v. Rowand*, 215 Va. 344, 210 S.E.2d 149 (1974); *Brawand v. Brawand*, 1 Va. App. 305, 338 S.E.2d 651 (1985).

sary to establish grounds for a divorce,¹¹⁴ the court held that such standards would also be applied to a spouse who refuses to move from the marital home when the other spouse, because of a job opportunity, establishes a new home. Whether desertion has occurred depends upon the justification for one spouse's decision to establish a new residence, and the other spouse's refusal to follow.¹¹⁵ The court upheld the trial court's finding that the wife, due to the husband's conduct, was justified in not joining him in his new marital abode.¹¹⁶

In *Dexter v. Dexter*,¹¹⁷ the court of appeals held that the evidence was insufficient to establish the desertion of the husband by the wife. The facts showed that the wife had asked for a separation and had secured an apartment for the husband. The husband agreed to move into the apartment because he did not want the wife to undergo stress and because it was the "gentlemanly thing" to do.¹¹⁸ The court carefully distinguished between the desire to separate and the intent to "desert" the marriage,¹¹⁹ and found that the record did not support the husband's allegations that the wife's conduct was a withdrawal of all marital duties or responsibilities.¹²⁰ The court found that the evidence established that the parties had separated by mutual agreement.¹²¹

Alcoholism, as it relates to a finding of cruelty and constructive desertion, was the issue in *Seehorn v. Seehorn*.¹²² In *Seehorn*, the wife left the marital abode allegedly due to the alcoholism of her husband.¹²³ However, the court of appeals held that the mere evidence of alcoholism, as a matter of law, was insufficient to prove that the cohabitation of the parties was unsafe, or that the life and health of the wife was endangered. Thus, the wife failed to meet her burden of proof on the issue of constructive desertion.¹²⁴

114. See, e.g., *Sprott v. Sprott*, 233 Va. 238, 355 S.E.2d 881 (1987).

115. *Kerr*, 6 Va. App. at 625, 371 S.E.2d at 33.

116. *Id.*

117. 7 Va. App. 36, 371 S.E.2d 816 (1988).

118. *Id.*

119. *Id.* at 43, 371 S.E.2d at 819.

120. *Id.* at 44, 371 S.E.2d at 820. The court restated the general rule that the burden of proof to prove desertion required evidence of conduct that rendered the marital state intolerable and impossible to be endured. *Id.*

121. *Id.* at 45, 371 S.E.2d at 821.

122. 7 Va. App. 375, 375 S.E.2d 7 (1988).

123. *Id.* at 378, 375 S.E.2d at 8.

124. *Id.* The court clearly stated that mere alcoholism does not justify the departure of the other spouse. It implied that in presenting a case involving an alcoholic spouse, the

In *Reid v. Reid*,¹²⁵ the court of appeals restated the general rule that the mere gradual breakdown of the marital relationship between the parties does not justify a spouse's departure from the marital home. The wife was found to have deserted her husband based upon the extensive record reviewed by the court.¹²⁶ The mere differences in the personalities of the parties and the wife's unhappiness were insufficient to justify her departure from the marital home and were not "caused" solely by her husband.¹²⁷

The court of appeals analyzed the general rule that a single act of physical cruelty will not constitute grounds of divorce in *Davis v. Davis*.¹²⁸ In *Davis*, the record showed that the wife had previously deserted the husband. While the parties were separated, the husband shot the wife in the back, paralyzing her from the waist down, thus confining her to a wheelchair.¹²⁹ The husband asserted that he could not be guilty of cruelty for misconduct occurring after the date of separation.¹³⁰ The court of appeals disagreed and held specifically that misconduct in the form of cruelty occurring while the parties are living separate and apart may constitute grounds of divorce.¹³¹ The court further stated that, as applied to the facts of this case, a single act of physical cruelty may constitute grounds for a divorce if it is so severe and atrocious as to endanger life, indicates an intention to do serious bodily harm, causes apprehension of serious danger in the future or if the circumstances show that the acts are likely to be repeated.¹³² Since both parties were guilty of fault grounds, under the doctrine of recrimination, the court of appeals affirmed the trial court's granting of a no-fault divorce to the parties.¹³³

effects of such alcoholism in justifying the departure, for example, physical abuse, extreme cruelty or conduct adversely affecting the other spouse's mental health, must be presented. *Id.* at 379, 375 S.E.2d at 9.

125. 7 Va. App. 553, 375 S.E.2d 533 (1989).

126. *Id.* at 562, 375 S.E.2d at 538. The court of appeals carefully analyzed the extensive record in which the wife claimed that her husband was not intimate with her, that the careers of the parties had caused stress in the marriage, that she felt unhappy and unfulfilled in her role as homemaker, and that she felt her emotional health was in danger. *Id.* at 561-62, 375 S.E.2d at 538.

127. While assuming that the wife "believed" that her emotional health was endangered, the court stated that the record did not establish that the "cause" of the breakdown was due solely to the conduct of husband. *Id.* at 562, 375 S.E.2d at 538; *see also* *Sprott v. Sprott*, 233 Va. 238, 355 S.E.2d 881 (1987) ("one spouse is not legally justified in leaving the other spouse merely because there has been a gradual breakdown in the marital relationship").

128. 8 Va. App. 12, 377 S.E.2d at 640 (1989).

129. *Id.* at 14, 377 S.E.2d at 641.

130. *Id.* at 15, 377 S.E.2d at 642.

131. *Id.*

132. *Id.*

133. *Id.* at 15-17, 377 S.E.2d at 643.

C. *Spousal Support*

In *Hollowell v. Hollowell*,¹³⁴ the court of appeals ruled that post-marital conduct, such as illicit sexual relations or cohabitation, does not terminate spousal support.¹³⁵ The court further stated that where changed circumstances are adequately proven, a spouse is entitled to a consideration of spousal support. In *Hollowell*, the spouse, who had previously been awarded spousal support of one dollar in the final decree, petitioned the court for an increase due to her disability.¹³⁶ The court stated that the term "changed circumstances" has no relevance to post-marital conduct as the term is contained in section 20-109 of the Code of Virginia,¹³⁷ rather the circumstances which justify "an increase, reduction or creation of spousal support . . . are financial and economic ones."¹³⁸

In *Mallery-Sayre v. Mallery*,¹³⁹ the parties had entered into a separation agreement providing for a lump-sum spousal support payment of \$100,800 payable in one payment of \$10,000, and the balance payable in 108 installments of \$835 per month.¹⁴⁰ The agreement was incorporated in the final decree of divorce.¹⁴¹ The wife remarried prior to the completion of the payments provided by the agreement, whereupon husband filed a petition to terminate the payments. The court of appeals reversed the trial court's granting of the petition, ruling that the amount specified, whether classified as spousal support or property settlement, was a fixed right and payable regardless of wife's remarriage.¹⁴²

The issue of the authority of a juvenile court to modify a prior

134. 6 Va. App. 417, 369 S.E.2d 451 (1988).

135. *Id.* at 419, 369 S.E.2d at 452.

136. *Id.*

137. VA. CODE ANN. § 20-109 (Cum. Supp. 1989).

138. *Id.* The court carefully noted that had the legislature intended illicit cohabitation to terminate spousal support, it could have so provided in the legislation. *Id.*

139. 6 Va. App. 471, 370 S.E.2d 113 (1988).

140. *Id.* at 473, 370 S.E.2d at 115.

141. *Id.*

142. *Id.* The court specifically held that sections 20-109 and -109.1 of the Code of Virginia had no bearing on the award of a lump sum of spousal support for an amount certain which is due *when awarded*, but for which the obligation of payment is deferred by future installments. *Id.* Another factor looked at by the court was the provision of their agreement that the obligation would survive the death of both parties and be payable to the estate of wife. *Id.* at 475, 370 S.E.2d at 116.

order while the appeal of such order was pending was addressed in *Martin v. Bales*.¹⁴³ In *Martin*, an order for spousal support was entered by the juvenile court against the husband, who appealed the order to the circuit court.¹⁴⁴ The final decree of divorce between the parties was silent on the issue of spousal support. Pursuant to the Uniform Reciprocal Enforcement of Support Act¹⁴⁵ ("URESA"), the wife then filed a petition in New York for spousal support arrearage. Due to her nonappearance, this petition was dismissed. However, the wife later filed a direct petition in the district court on the issue, which ruled in the husband's favor. The wife appealed to the circuit court. The court of appeals, in affirming the trial court's ruling, held that due to the husband's initial appeal of the district court order, the juvenile court was without jurisdiction to modify and vacate the spousal support order.¹⁴⁶ The order finding the husband in arrears to the wife was affirmed.

In *Goetz v. Goetz*,¹⁴⁷ the court of appeals held that the Commissioner's conclusion that a wife should file for bankruptcy was an inappropriate basis for failing to consider the amount of marital debt in establishing a support award.¹⁴⁸ The case was remanded to the trial court for proper application of the factors set forth in section 20-107.1 of the Code of Virginia¹⁴⁹ to determine if a lump-sum award was appropriate.¹⁵⁰

The court of appeals addressed the relationship between the equitable distribution monetary award of section 20-107.3,¹⁵¹ and spousal and child support pursuant to section 20-107.1 and section 20-107.2 of the Code of Virginia.¹⁵² In *Kaufman v. Kaufman*,¹⁵³ the court found that the trial court's award of support without consideration of the income which could result from a possible monetary

143. 7 Va. App. 141, 371 S.E.2d 823 (1988).

144. *Id.* at 143, 371 S.E.2d at 824.

145. Codified in New York at N.Y. DOM. REL. LAW §§ 30-43 (McKinney 1988) and in Virginia at VA. CODE ANN. §§ 20-88.12 to -88.31 (1983 & Cum. Supp. 1989).

146. 7 Va. App. at 145, 371 S.E.2d at 825-26. The court relied upon section 16.1-298 of the Code of Virginia, VA. CODE ANN. § 16.1-298 (Repl. Vol. 1988), in recognizing that the filing of a divorce case divested the juvenile court of any authority to enter any further orders, except to *enforce* its orders entered prior to any circuit court order. 7 Va. App. at 145, 371 S.E.2d at 825-26.

147. 7 Va. App. 50, 371 S.E.2d 567 (1988).

148. *Id.* at 53, 371 S.E.2d at 568.

149. VA. CODE ANN. § 20-107.1 (Cum. Supp. 1989).

150. 7 Va. App. at 54, 371 S.E.2d at 569.

151. VA. CODE ANN. § 20-107.3 (Cum. Supp. 1989).

152. *Id.* § 20-107.2.

153. 7 Va. App. 489, 375 S.E.2d 374 (1988).

award to which wife would be entitled, was reversible error.¹⁵⁴ The support award should have been made in light of the wife's needs and the ability of the husband to pay after the monetary award had been determined.¹⁵⁵

D. *Property Settlement Agreements*

Prior to the enactment of section 20-155¹⁵⁶ of the Code of Virginia relating to the execution of marital agreements, postnuptial agreements required consideration and could not be entered into for the purpose of encouraging or facilitating divorce or separation.¹⁵⁷ In *Dexter v. Dexter*,¹⁵⁸ the parties entered into a written marital agreement five days after their marriage, which provided the wife with \$1,000 per month spousal support from the date of any separation or divorce.¹⁵⁹ The parties separated seven years later and the trial court ruled that the agreement was invalid due to lack of consideration.¹⁶⁰ The court of appeals affirmed, stating that to uphold an agreement entered into seven years prior to the separation between the parties would facilitate divorce,¹⁶¹ and that the issue of spousal support would be controlled solely by the provisions of section 20-107.1.¹⁶²

The court of appeals provided an exhaustive review of the law relating to duress, fraud and the unconscionability of a separation

154. *Id.* at 493-94, 375 S.E.2d at 377.

155. *Id.*

156. VA. CODE ANN. § 20-155 (Cum. Supp. 1989). This was an amendment to the Virginia Premarital Agreement Act, *id.* §§ 20-147 to -154 (Repl. Vol. 1983 & Cum. Supp. 1989), effective July 1, 1986 which permits contracts relating to spousal support to be entered into without consideration by parties prior to the marriage of parties. The 1987 amendment permits such contracts to be entered into by married persons to the same extent as prospective spouses and does not require consideration to support an agreement relating to spousal support.

157. *See* Capps v. Capps, 216 Va. 378, 219 S.E.2d 901 (1975).

158. 7 Va. App. 36, 371 S.E.2d 816 (1988).

159. *Id.*

160. *Id.* at 46, 371 S.E.2d at 821. The court of appeals noted that since the wife had no further right to spousal support from her prior spouse upon her remarriage, and that no divorce or separation was anticipated at the time the present agreement was executed, the wife did not forfeit any right in exchange for the mutual promise contained in the agreement. Thus, there was no consideration to support the agreement. *Id.* at 47, 371 S.E.2d at 822.

161. *Id.* The court of appeals indicated that its holding on this issue would have differed had the agreement been entered into after the date of the enactment of section 20-155 of the Code of Virginia, which requires no consideration to support its validity. *Id.*

162. VA. CODE ANN. § 20-107.1 (Cum. Supp. 1989).

agreement in *Derby v. Derby*.¹⁶³ In this case, a separation agreement was set aside based upon the unconscionability of its terms.¹⁶⁴ The facts showed that the wife had approached her husband with the separation agreement in a parking lot presumably before her husband had discussed its terms with his attorney. The agreement contained a gross disparity in the property division which the court described as "shocking."¹⁶⁵ While disagreeing with the trial court that the agreement was void due to duress, constructive fraud or lack of consideration,¹⁶⁶ the court of appeals focused on the disparity of its terms, especially in light of the wife's misrepresentation of an adulterous relationship, the wife's "playing on the weaknesses" of her husband who desired a reconciliation, the husband's emotional and mental state at the time of its execution, and the circumstances under which the agreement was prepared, negotiated and executed.¹⁶⁷ The court thus affirmed the trial court's refusal to validate, ratify or incorporate the agreement in the divorce decree.¹⁶⁸

E. Child Support

The most significant case relating to child support over the past year was a reaffirmation of the well established rule in Virginia that parties cannot contractually modify the terms of child support without a court order.¹⁶⁹ In *Goodpasture v. Goodpasture*,¹⁷⁰ the fa-

163. 8 Va. App. 19, 378 S.E.2d 74 (1989).

164. *Id.* at 29, 378 S.E.2d at 78-80.

165. *Id.* at 30, 378 S.E.2d at 80. The trial court had noted that in the agreement, the husband had essentially given up everything he had earned during his lifetime, and he further waived his rights of spousal support against the wife. *Id.*

166. *Id.* at 26-28, 378 S.E.2d at 78. The court of appeals noted that there was no evidence of actual misrepresentation, concealment or deceit to suggest *actual* fraud. As to *constructive* fraud, the court restated its holding in *Barnes v. Barnes*, 231 Va. 39, 340 S.E.2d 803 (1986), that separated spouses owe no fiduciary duty as to disclosure in their negotiations for a marital agreement. The wife's procurement of the agreement where she knew of the husband's hope of a reconciliation, and failure to disclose her infidelity, were not acts of fraud to void the agreement where the agreement, on its face, contained recitals that acknowledged a divorce was pending. 8 Va. App. at 26-28, 378 S.E.2d at 78.

167. *Id.* at 30-33, 378 S.E.2d at 80-81. The court noted that fraud is determined by reviewing the conduct of the parties in relation to their legal and equitable duties towards each other, while unconscionability is more concerned with the intrinsic fairness of the terms of an agreement in relation to all attendant circumstances. The court noted that in the case of marriage and divorce, the relationship is specially susceptible to overreaching and oppression. *Id.* at 28, 378 S.E.2d at 78-79.

168. *Id.* at 33, 378 S.E.2d at 81.

169. *See, e.g., Capell v. Capell*, 164 Va. 45, 178 S.E.2d 894 (1935); *Acree v. Acree*, 2 Va. App. 151, 342 S.E.2d 68 (1986).

ther was ordered in 1976 to pay child support; the order was increased by the court in 1978. In 1981, the mother moved to Louisiana and wrote the father's attorney relieving him of any support obligation, whereupon the father stopped paying support. Neither party petitioned the court for a modification of its order.¹⁷¹ In 1987, the wife brought contempt charges against the father for the arrearage accrued since 1981. The trial court found an arrearage in favor of the wife, but credited the father with direct payments he had made on the child's behalf, and for the payments accruing after the wife's letter to his attorney.

The court of appeals reversed the trial court's retroactive modification of the support order.¹⁷² Consistent with the general rule that past due support installments become vested as they accrue and are thereafter immune from change, the court further held that a party's passive acquiescence in nonpayment of support does not bar a later claim for support arrearage.¹⁷³ The only remedy available to a party is to petition the court for a change of the order.¹⁷⁴ The court of appeals carefully distinguished this case from its holding in *Acree v. Acree*,¹⁷⁵ stating that since no custody change had been effectuated between the parties, the child had gone without the support originally ordered by the court. The court further held that the trial court erred in allowing credits for payments made directly on the child's behalf, stating that such payments are considered gifts and are not to be credited against support arrearage.¹⁷⁶

In *Anderson v. Van Landingham*,¹⁷⁷ the Supreme Court of Virginia held that the modification of a divorce decree which had previously incorporated the parties' contractual agreement relating to

170. 7 Va. App. 55, 371 S.E.2d 845 (1988).

171. *Id.* at 56, 371 S.E.2d at 846.

172. *Id.*

173. *Id.* at 58, 371 S.E.2d at 847.

174. *Id.*

175. 2 Va. App. 151, 342 S.E.2d 68 (1986). In *Acree*, permanent physical custody of the child had been transferred to the father. The father's support of his child satisfied the intent of the order of the court, thus relieving the father from his alleged nonperformance of the strict terms of the order. *Id.*

176. 7 Va. App. at 59, 371 S.E.2d at 847-48. The court of appeals noted that a payor cannot vary the terms of a support order to suit his convenience. To do so would lead to continuous "trouble and turmoil." *Id.* The lesson of this case is clear to trial practitioners: payors must strictly pay support in accordance with the terms of the order and if any agreement between the parties is contemplated, get a court order to specifically incorporate these changes.

177. 236 Va. 85, 372 S.E.2d 137 (1988).

child support payments, in order to eliminate a requirement for additional child support payments by the husband, was a modification of both the decree and underlying contract.¹⁷⁸ The wife's subsequent independent action for support arrearage based on the contract would, therefore, be dismissed.¹⁷⁹

178. *Id.* at 86, 372 S.E.2d at 138. The Supreme Court of Virginia restated the general rule that an appropriate court has continuing jurisdiction to modify a decree as to child support, notwithstanding the existence of a contract between the parents. *Id.*

179. *Id.*

