University of Richmond Law Review

Volume 29 | Issue 4 Article 7

1995

Annual Survey of Virginia Law: Domestic Relations

Deanna D. Cook

DOMESTIC RELATIONS

*Deanna D. Cook**

I. JUDICIAL DECISIONS (May 1994 - May 1995)

A. *Spousal Support*

1. Non-Conforming Payments

It is well known that non-conforming payments or overpayment of support will not entitle a payor spouse to future credit against his obligations. This continues to be the rule in Virginia. In the case of *Sanford v. Sanford*,[1] the Virginia Court of Appeals reversed the trial court's decision to credit excess spousal support payments made by the husband against his future obligations. The husband agreed to pay spousal support pursuant to a property settlement agreement, which was incorporated into the parties' final divorce decree.[2] The husband was then terminated by his employer, but he received one year severance pay.[3] Based upon this change in circumstances, the parties voluntarily amended their previous agreement and reduced the husband's monthly support to $5,600 per month, the amount of the severance pay.[4] The husband's previous employer was to pay the support directly to the wife.[5]

After the spousal support order was amended, the husband

---

* Bremner & Janus, Richmond, Virginia; B.A., 1988, University of Richmond, Westhampton College; J.D., 1991, University of Richmond, T.C. Williams School of Law.

1. 19 Va. App. 241, 244, 450 S.E.2d 185, 187 (1994).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

obtained a consulting job.[6] He then informed his wife that he would send her an additional $3,100 per month for nine months, and that he intended for these additional payments to be credited against his future monthly support obligations.[7] He also requested that the wife agree to reduce his support obligations to $3,100 per month after the severance pay ended.[8] The wife did not agree to these terms, although she accepted and cashed the additional checks.[9] The husband made the additional payments, noting on each check that the check was written for spousal support for the respective month.[10] After the severance pay ended, the husband continued to pay his wife $3,100 per month through the end of the year.[11] During this time, the court's decree requiring the husband to pay the $5,600 per month remained in effect.[12] In January of the following year, the husband stopped sending any support payments.[13]

The wife filed a petition to show cause alleging that the husband was in arrears in excess of $24,000.[14] The husband claimed that he was entitled to a credit for the additional payments of $3,100 per month that he had made in excess of his court-ordered obligation.[15] The trial court agreed, reasoning that the wife had ratified the agreement by cashing and accepting the payments.[16]

The court of appeals reversed, holding that the wife's actual contractual consent, or her passive acquiescence, did not excuse the husband's non-compliance with the court's alimony decree.[17] The court of appeals reasoned that "[t]o permit [the husband] to increase the amount of the specified payments at one time, reduce them at another, and require an adjustment of the differences in the future, would lead to continuous trouble

---

6. *Id.*
7. *Id.* at 244, 450 S.E.2d at 187-88.
8. *Id.* at 244, 450 S.E.2d at 188.
9. *Id.*
10. *Id.* at 245, 450 S.E.2d at 188.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 248, 450 S.E.2d at 189 (citing Richardson v. Moore, 217 Va. 422, 423, 229 S.E.2d 864, 865 (1976)).

and turmoil.[18] The court also found that this type of arrangement would deprive the wife of the future benefit of the amount of support which the court originally found proper.[19] According to the court, the remedy in these situations continues to be to petition the court for a modification of the decree.[20]

2. Imputed Income

In the case of *Konefal v. Konefal*,[21] the court of appeals affirmed the trial court's award of spousal support to the wife despite the husband's claim that the wife was voluntarily underemployed. The court agreed with the trial court's finding that the wife was not voluntarily underemployed,[22] but reiterated that "a party seeking spousal support must earn as much as he or she reasonably can to reduce the amount of the support needed, and may not choose a low paying position that penalizes the other spouse."[23] The court also stated that under appropriate circumstances a court may impute income to the party seeking spousal support.[24]

3. Lump-Sum Spousal Support

The court of appeals in *Moseley v. Moseley*[25] reversed the trial court's lump sum award of spousal support to the wife where the husband had been discharged of all marital debt by the bankruptcy court. The husband claimed that the record was insufficient to prove he had enough money to pay a lump sum award.[26] The court pointed out that "although the trial judge

18. *Id.* at 246, 450 S.E.2d at 188 (quoting Newton v. Newton, 202 Va. 515, 519, 118 S.E.2d 656, 659 (1961)).

19. *Id.*

20. *Id.* at 246, 450 S.E.2d at 189 (citing Fearon v. Fearon, 207 Va. 927, 931, 154 S.E.2d 165, 168 (1967)).

21. 18 Va. App. 612, 613, 446 S.E.2d 153, 154 (1994).

22. *Id.* at 614, 446 S.E.2d at 154. The wife was continuously earning income from 1973 to 1991, during which time her income increased from $30,100 per year to $72,772 per year. *Id.*

23. *Id.* (citing Srinivasan v. Srinivasan, 10 Va. App. 728, 734, 386 S.E.2d 675, 679 (1990)).

24. *Id.*

25. 19 Va. App. 192, 196, 450 S.E.2d 161, 164 (1994).

26. *Id.*

characterized the award as 'lump sum spousal support,' he specifically listed as its purpose 'to compensate [wife]' for [one-half of the mortgage payments], '[half] of the debt to the credit union and [half] of all other secured and unsecured marital debt.'"[27] The court of appeals found that the trial court's intent to hold the husband financially responsible for one-half of all of the marital debt was clear and that this "would, [in] effect, serve to circumvent the discharge granted by the federal bankruptcy court."[28] Furthermore, the court found that "the evidence before the trial court did not establish that [the] husband had the ability to pay a lump sum award in favor of [the] wife."[29] Therefore, the award was reversed.[30]

B. *Attorney Fees*

In *Gottlieb v. Gottlieb*,[31] the court of appeals remanded the case to determine the amount of attorney's fees to be paid to the wife for defending the husband's appeal. The court of appeals determined that the questions presented and issues raised by the husband were without merit because all were either within the sound discretion of the trial judge with no evidence of an abuse of discretion or were not properly briefed or preserved for appeal.[32] Having made this determination, the court of appeals found that compensation to the wife for having to defend the appeal was appropriate.[33]

---

27. *Id.* at 196-97, 450 S.E.2d at 164.

28. *Id.* at 197, 450 S.E.2d at 164.

29. *Id.* "[T]he trial court 'must consider the relative needs and abilities of the parties.'" *Id.* (quoting Collier v. Collier, 2 Va. App. 125, 129, 341 S.E.2d 827, 829 (1986)). The trial court has "discretion in deciding whether to order periodic or lump sum payments." *Id. See also* VA. CODE ANN. § 20-107.1 (Repl. Vol. 1995). Although periodic payments are the preferred form, "'when courts do make lump sum spousal support awards they do so because of special circumstances or compelling reasons.'" *Moseley*, 19 Va. App. at 197, 450 S.E.2d at 164 (quoting Blank v. Blank, 10 Va. App. 1, 5-6, 389 S.E.2d 723, 725 (1990)).

30. *Moseley*, 19 Va. App. at 198, 450 S.E.2d at 165.

31. 19 Va. App. 77, 95-96, 448 S.E.2d 666, 667 (1994).

32. *Id.* at 95, 448 S.E.2d at 677.

33. *Id.*

C. *Property Settlement Agreements*

1. Separation Agreements

a. College Tuition

Agreements requiring either spouse to pay for a college education must be meticulously drafted. In *Jones v. Jones*,[34] the court of appeals reversed the trial court's ruling ordering a father, pursuant to a separation agreement, to pay for sixty percent of his children's college educations. The father had the right to veto the children's choice of schools under the terms of the agreement, which provided as follows:

> Both parties recognize the issue of college educations for the children, and Husband shall contribute sixty percent (60%) and Wife shall contribute forty percent (40%) to the college education of both children. Both parents shall agree on the college of attendance and the children shall make satisfactory progress in that college program. . . . [35]

The agreement was incorporated into the parties' final divorce decree.[36] At the time the decree was entered, the daughter was already in college.[37] The following year, with the mutual consent of her parents, she transferred to another school.[38] In her junior year, she again changed schools.[39] Although the daughter discussed this additional change with her father and anticipated graduation within the five year period,[40] her father did not consent to her transfer, and thus he refused to pay any portion of her educational expenses at the new institution.[41] Meanwhile, the son also enrolled at a school without his father's approval.[42] Although the father did not consent to

---

34. 19 Va. App. 265, 450 S.E.2d 762 (1994).
35. *Id.* at 266, 450 S.E.2d at 762.
36. *Id.*
37. *Id.* at 267, 450 S.E.2d at 762.
38. *Id.* at 267, 450 S.E.2d at 762-63.
39. *Id.* at 267, 450 S.E.2d at 763.
40. The agreement provided that parental assistance would cease after 5 years. *Id.*
41. *Id.*
42. *Id.* The father rejected the son's choice of school as beyond his financial

the children's schools, the mother acceded to both children's selections.[43]

The mother eventually filed a show cause order against the father in circuit court for his failure to pay his portion of the children's educations.[44] The father testified at trial that "he had become estranged from [his children] and had 'no input' into their college selection process.[45] He maintained that under the separation agreement his consent to the selection of the college was a prerequisite for his contribution.[46] Nevertheless, the trial court ruled that the father had unreasonably withheld his consent to the children's school selections, and ordered him to pay his share.[47]

The court of appeals opined that if the case were based solely on a "fairness" standard, the father should be ordered to pay.[48] However, the court reversed the lower court's decision, ruling that the trial court was not at liberty to supply additional terms to the separation agreement.[49] The language of the contract predicated the father's obligation on his agreement to the selection of the school.[50] Therefore, the father did not have to pay where he had not agreed to his children's choice of school.[51]

b. Child Support Waivers

The Supreme Court of Virginia strengthened the trend toward requiring both parents to contribute to their children's

---

means. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 267-68, 450 S.E.2d at 763.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 268-69, 450 S.E.2d at 764-65.

50. *Id.* at 269-70, 450 S.E.2d at 764. The court distinguished this case from Tiffany v. Tiffany, 1 Va. App. 11, 332 S.E.2d 796 (1985) where the court found that the particular agreement did not provide a "veto" right for the father. The agreement did provide that "as an express condition of the Husband's obligation, the Husband shall be entitled to participate in the decision making process as to the college to be attended." *Jones*, 19 Va. App. at 269, 450 S.E.2d at 764 (quoting *Tiffany*, 1 Va. App. at 16-17, 332 S.E.2d at 800).

51. *Jones*, 19 Va. App. at 270, 450 S.E.2d at 765.

support despite a contrary agreement. In *Kelley v. Kelley*,[52] the supreme court reversed the court of appeals' ruling that a trial court lacked jurisdiction to alter the terms of a property settlement agreement which indemnified and held the husband harmless from paying child support. The parties' final divorce decree incorporated their property settlement agreement which provided that the wife would receive all of the equity in the home in exchange for the husband never having to pay child support.[53] However, several years later, the wife petitioned the trial court for child support.[54] The trial court ordered the husband to pay support and denied his motion to have the wife indemnify and reimburse him.[55] The husband appealed and the court of appeals held that the trial court had no jurisdiction after twenty-one days to modify the terms of the decree.[56]

The Supreme Court reversed, holding that the provision in the agreement was "null and void because it is violative of clearly established law."[57] The court reasoned that "[b]oth parents owe a duty of support to their minor children."[58] Consequently, they cannot contract away their children's rights to support, nor can they preclude a court from exercising its power

---

52. 248 Va. 295, 299, 449 S.E.2d 55, 57 (1994).

53. *See id.* 248 Va. at 296-97, 449 S.E.2d at 55-56. The specific provision reads as follows:

> The parties hereto agree, in consideration of Husband relinquishing all of his equity in the jointly-owned marital home, that Husband shall never be responsible for payment of child support. The [Wife] covenants and agrees never to file a petition in any Court requesting that [Husband] be placed under a child support Order because [Wife] has accepted all of [Husband's] equity in lieu of requesting child support.
>
> In the event [Wife] should ever petition any Court of competent jurisdiction for support and maintenance of [the children], and should a court grant any such child support award, the said [Wife] hereby covenants and agrees to pay directly to [Husband] any amount of support that he is directed to pay to any party. In other words, [Wife] is agreeing to hold harmless Husband from the payment of any amount of child support, regardless of the circumstances under which he is paying same.

Id.

54. *Id.* at 297, 449 S.E.2d at 56.

55. *Id.*

56. *Id.*

57. *Id.* at 298, 449 S.E.2d at 56.

58. *Id.* (citing VA. CODE ANN. § 20-61 (Repl. Vol. 1995); Featherston v. Brooks, 220 Va. 443, 448, 258 S.E.2d 513, 516 (1979)).

to order child support.[59] Therefore, that portion of the agreement was void and could be challenged at any time.[60]

2. Revocation

A provision in a written agreement which provides that the agreement will remain in effect in the event of a reconciliation is enforceable after a reconciliation and subsequent separation. In *Smith v. Smith*,[61] the parties' agreement provided that in the event of a reconciliation and resumption of the marital relationship, the provisions of the agreement would remain in full force and effect. The parties reconciled, and then separated a year later.[62] The court of appeals held that "[a]ny uncertainty on this question has been resolved by [statute]. The Premarital Agreement Act provides that such an agreement 'may be amended or revoked only by a written agreement signed by the parties.'"[63] The court pointed out that "[t]his provision applies also to agreements entered into by married persons."[64] Therefore, when couples reconcile after signing a property settlement agreement, they must terminate that agreement in writing.[65]

3. Premarital Agreements

Premarital agreements that were entered into prior to 1985 are valid if otherwise valid as contracts. In *Carpenter v. Carpenter*,[66] the court of appeals upheld the trial court's decision to nullify a premarital agreement where the husband had not made a full disclosure of his assets to the wife. Since the agree-

---

59. *Id.*

60. *Id.* at 298, 449 S.E.2d at 56.

61. 19 Va. App. 155, 156, 449 S.E.2d 506, 506 (1994).

62. *Id.*

63. *Id.* at 157, 449 S.E.2d at 507 (citing VA. CODE ANN. § 20-153 (Repl. Vol. 1995)).

64. *Id.* Virginia Code § 20-155 provides that "[m]arried persons may enter into agreements with each other for the purpose of settling the rights and obligations of either or both of them, to the same extent, with the same effect, and subject to the same conditions, as provided in §§ 20-147 through 20-154 for agreements between prospective spouses." VA. CODE ANN. § 20-155 (Repl. Vol. 1995).

65. *Smith*, 19 Va. App. at 157, 449 S.E.2d at 507.

66. 19 Va. App. 147, 148-49, 449 S.E.2d 502, 503 (1994).

ment predated the 1985 Premarital Agreement Act,[67] the court of appeals relied on the legal principles set forth in *Batleman v. Rubin*,[68] in determining the validity of the premarital agreement.[69] Prior to the enactment of the Premarital Agreement Act, a premarital agreement had to contain fair and reasonable provisions for the wife, or the husband had to give a full and frank disclosure of his worth to the wife.[70] A premarital agreement also had to be signed freely and voluntarily on competent and independent advice.[71]

The husband in *Carpenter* stipulated that the premarital agreement was signed by his wife without a full disclosure of his assets and without independent legal representation.[72] The agreement made no financial provision for the wife.[73] Therefore, the agreement was not enforceable as a contract, and the trial court was correct in disregarding it and determining equitable distribution.[74]

A different result was reached in *Rogers v. Yourshaw*.[75] In that case, the court of appeals upheld the trial court's finding that the parties' antenuptial agreement was valid.[76] In *Rogers*, the wife, a legal secretary and law student at the time, signed the agreement five days before the wedding ceremony without consulting counsel.[77] Eventually the parties divorced.[78] The trial court ruled that the antenuptial agreement was a valid and enforceable contract.[79] The wife appealed asserting among other things, that the agreement was unconscionable.[80] The

---

67. VA. CODE ANN. §§ 20-147 to -154 (Repl. Vol. 1995).
68. 199 Va. 156, 98 S.E.2d 519 (1957).
69. *Carpenter*, 19 Va. App. at 150, 449 S.E.2d at 503-04.
70. *Id.* (citing *Batleman*, 199 Va. at 158, 98 S.E.2d at 521).
71. *Id.* (citing *Batleman*, 199 Va. at 158, 98 S.E.2d at 521). Since parties engaged to be married are not considered to be dealing at arms length, they are required to make a full and frank disclosure of all facts and circumstances involving the property rights to be affected by such a settlement. *Id.* at 152, 449 S.E.2d at 504-05 (citing *Batleman*, 199 Va. at 160, 98 S.E.2d at 522).
72. *Id.* at 149, 449 S.E.2d at 503.
73. *Id.* at 150, 449 S.E.2d at 504.
74. *Id.* at 151-52, 449 S.E.2d at 504-05.
75. 18 Va. App. 816, 448 S.E.2d 884 (1994).
76. *Id.* at 818, 448 S.E.2d at 885.
77. *Id.* at 818-19, 448 S.E.2d at 885.
78. *Id.* at 819, 448 S.E.2d at 886.
79. *Id.*
80. *Id.* at 822, 448 S.E.2d at 887.

evidence substantiated that the wife was of sound and intelligent mind when the parties entered into the agreement.[81] Although the wife was not as legally sophisticated as the husband, the court found that "she was certainly not totally without some knowledge of the law."[82] At the time of the agreement, the wife worked at a law firm and had just completed a course in contract law.[83] Furthermore, the court determined that the husband had not acted in bad faith, misled his wife, or concealed any material provisions of the agreement.[84] The wife also was afforded the opportunity to obtain counsel, but declined to do so.[85]

The court found that "[a]lthough [the] wife's career has taken a different direction than she envisioned when she signed the agreement . . . '[C]ourts cannot relieve one of the consequences of a contract merely because it was unwise.'"[86] Moreover, the subsequent change in the law allowing for equitable distribution did not justify a unilateral rejection of the agreement.[87] The court warned that "[a] *quid pro quo* of entering into a comprehensive agreement is the 'possibility that the law may then change in one's favor.'"[88]

D. *Child Custody*

In the most newsworthy case of the year, the supreme court reversed the court of appeals and upheld the trial court's award of a child's custody to the maternal grandmother rather than the lesbian mother.[89] In *Bottoms v. Bottoms*, the court of ap-

---

81. *Id.* at 823, 448 S.E.2d at 888.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* (quoting Derby v. Derby, 8 Va. App. 19, 30, 378 S.E.2d 74, 80 (1989) and citing Kaufman v. Kaufman, 7 Va. App. 488, 501, 375 S.E.2d 374, 381 (1988) ("A court is not at liberty to rewrite a contract simply because the contract may appear to reach an unfair result.")).

87. *Id.* (citation omitted). The statutes allowing equitable distribution did not come into effect until after the signing of the agreement. *Id.* at 823-24, 448 S.E.2d at 888. *See also* VA. CODE ANN. § 20-107.3 (Repl. Vol. 1995).

88. *Rogers*, 18 Va. App. at 823, 448 S.E.2d at 888 (quoting Bragan v. Bragan, 4 Va. App. 516, 519, 358 S.E.2d 757, 759 (1987)).

89. Bottoms v. Bottoms, 249 Va. 410, 457 S.E.2d 102 (1995), *rev'g*, 18 Va. App.

peals found that "the evidence [was] insufficient to support the trial court's decision to remove custody of a three-year-old child from his natural parent, the mother, and to grant custody to a third party, the child's maternal grandmother."[90] The court of appeals determined that the evidence failed to prove that the child's mother abused or neglected her son.[91] The court also found that the evidence failed to prove that the mother's lesbian relationship had, or would have, "a deleterious effect on her son, or that she was an unfit parent."[92] The court of appeals held the standard involving custody to a third party is that

> unless a parent, by his or her conduct or condition, is unfit or is unable and unwilling to provide or care for a child, a court is not entitled to consider whether a third party might be better able to care for a child . . . Even when the parental level of care may be marginally satisfactory, courts may not take custody of a child from his or her parents simply because a third party may be willing and able to provide better care for the child.[93]

The court of appeals did recognize that "[a] parent's sexual behavior, particularly a parent's sexual indiscretions, in a child's presence is conducted which may render a parent unfit to have custody of a child."[94] Nevertheless, the court of appeals in this case found insufficient evidence that the mother's lesbian relationship had any deleterious effect on the child and reversed the trial court's decision.[95]

481, 444 S.E.2d 276 (1994).

90. 18 Va. App. 481, 484, 444 S.E.2d 276, 278 (1994).

91. *Id.*

92. *Id.*

93. *Id.* at 488, 444 S.E.2d at 280.

94. *Id.* at 490, 444 S.E.2d at 282 (citing Ford v. Ford, 14 Va. App. 551, 554, 419 S.E.2d 415, 417 (1992) and Sutherland v. Sutherland, 14 Va. App. 42, 43, 414 S.E.2d 617, 618 (1992)).

95. *Id.* at 493-94, 444 S.E.2d at 283-84; Doe v. Doe, 222 Va. 736, 746, 284 S.E.2d 799, 805 (1981) (holding that adverse effects of a parent's homosexuality on a child cannot be assumed without specific proof). "The trial court noted that Sharon Bottoms' admission that she engaged in weekly oral sex with her lover violated Code § 18.2-361 ("crimes against nature") which makes sodomy a Class 6 felony." *Bottoms*, 18 Va. App. at 492 n.2, 444 S.E.2d at 282 n.2. However, the court of appeals also recognized that "[i]n *Sutherland*, [it] permitted a mother living in an adulterous relationship to retain custody of her children over the natural father's objections despite the fact that adultery is a crime in Virginia." *Id.* (citing VA. CODE ANN. § 18.2-365 (Repl. Vol. 1988) and Sutherland v. Sutherland, 14 Va. App. at 43, 414 S.E.2d at 618

The Supreme Court of Virginia reversed, finding that "[t]he court of appeals failed to give proper deference upon appellate review to the trial court's factual findings, and misapplied the law to the facts."[96] The supreme court found the record contained more than sufficient information to rebut the parental presumption and prove that the mother was an unfit custodian.[97] The supreme court stated that it has previously ruled that a lesbian mother is not per se an unfit parent.[98] Nevertheless, "[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth . . . thus that conduct is another important consideration in determining custody."[99] The supreme court found that the record showed that although the mother was "devoted to her son," [she] refuses to subordinate her own desires and priorities to the child's welfare."[100]

The court also found that unlike the *Doe* case, the child in *Bottoms* had been harmed by the conditions under which he lived with his mother.[101] The supreme court did not overlook the mother's lesbian relationship, and it repeated its previous position, "that living daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason of the 'social condemnation' attached to such an arrangement, which will inevitably afflict the child's relationships with its 'peers and with the community at large.'"[102]

In *Hughes v. Gentry*,[103] the court of appeals upheld the trial court's decision to change custody from the mother to the father

---

and Brinkley v. Brinkley, 1 Va. App. 222, 224, 336 S.E.2d 901, 902 (1985). ("[A]n adulterous relationship, 'without more, is an insufficient basis upon which to find that a parent is an unfit custodian of his or her child.'")).

96. Bottoms v. Bottoms, 299 Va. 410, 419, 457 S.E.2d 102, 107.

97. *Id.*

98. *Id.* at 419, 457 S.E.2d at 108 (citing Doe v. Doe, 222 Va. 736, 748, 284 S.E.2d 799, 806 (1991)).

99. *Id.*

100. *Id.*

101. *Id.* at 420, 457 S.E.2d at 108.

102. *Id.* (quoting Roe v. Roe, 228 Va. 722, 728, 324 S.E.2d 691, 694 (1985)). Three judges in *Bottoms* dissented, stating that "the trial court made a *per se* finding of unfitness based on the mother's homosexual conduct," and that it would have reversed the decision on the basis that the trial court applied the wrong rule of law. *Id.* at 421-22, 457 S.E.2d at 109.

103. 18 Va. App. 318, 443 S.E.2d 448 (1994).

because the mother was intending to relocate outside the Commonwealth of Virginia. After the parties in *Hughes* separated, custody of both children was awarded to the mother, who subsequently remarried.[104] Two daughters were born during the mother's second marriage.[105] The first husband had liberal visitation with both of his sons; however, this case only concerns itself with one of the children.[106] In upholding the change in custody, the court of appeals restated the "well settled law that a court may forbid a custodial parent from removing a child from the state without the court's permission."[107] The rationale supporting this law is that when "the relocation of the custodial parent is not in the child's best interests, the relocation of the custodial parent constitutes a material change of circumstances."[108]

The mother argued that the child should not be separated from his other siblings and that in order to do so the father had to show "compelling cause."[109] The court found that although the separation of siblings is an important factor to consider, there does not need to be "compelling cause . . . where it is not otherwise in the best interests of the individual child to be placed in separate custody."[110] The court of appeals found that ample evidence existed in the trial court record to show that the change in custody would be in the best interest of the child, despite the fact that he would be separated from his half siblings.[111]

---

104. *Id.* at 320, 443 S.E.2d at 450.

105. *Id.*

106. *Id.*

107. *Id.* at 322, 443 S.E.2d at 451 (citing Carpenter v. Carpenter, 220 Va. 299, 302, 257 S.E.2d 845, 847 (1979)). Alternatively, a court "may permit the child to be removed from the state." *Id.* (citing Gray v. Gray, 228 Va. 696, 698-99, 324 S.E.2d 677, 678 (1985)).

108. *Id.* at 322, 443 S.E.2d at 451 (citing Wilson v. Wilson, 12 Va. App. 1251, 1255, 408 S.E.2d 576, 579 (1991)).

109. *Id.* at 323, 443 S.E.2d at 451.

110. *Id.* at 323-24, 443 S.E.2d at 451-52.

111. *Id.* at 324, 443 S.E.2d at 452.

E. *Child Support*

Although the Code of Virginia provides for the inclusion of capital gains as income when calculating child support, it is not always the rule. In *Smith v. Smith*,[112] the court of appeals affirmed the trial court's child support calculation despite the mother's contention that the trial court had erred in not including capital gains as income to the husband.[113] The mother also appealed the trial court's refusal to order the husband to continue to pay for the child's private school.[114]

The parties filed for divorce in 1991.[115] During 1991, the husband sold marital stocks and realized approximately $165,000 in capital gains but the husband had no capital gains income after September 30, 1991, prior to the support hearing.[116] The court did not consider the capital gains as income to the husband when calculating child support.[117] The court pointed out that the statute requiring the inclusion of capital gains "contains no express contemporaneous requirement, and literal compliance with the terms of the statute could be interpreted to require inclusion of capital gains, bonuses, or other irregular forms of income received many years prior to the support proceedings."[118] However, the court of appeals declined to accept this interpretation, reasoning that "[t]his would result in the artificial inflation of income, which clearly would not affect the intent of the legislature."[119] Therefore, the court held "that where the evidence showed that the realization of capital gains was an irregular occurrence and was not contemporaneous with

---

112. 18 Va. App. 427, 444 S.E.2d 269 (1994).

113. *Id.* at 428, 444 S.E.2d at 271; *see* VA. CODE ANN. § 20-108.2(C) (Repl. Vol. 1995) (stating that "'gross income' . . . shall include . . . commissions, royalties, bonuses, . . . capital gains," and the like).

114. 18 Va. App. at 435, 444 S.E.2d at 275.

115. *Id.* at 429, 444 S.E.2d at 271.

116. *Id.*

117. *Id.* at 434, 444 S.E.2d at 274.

118. *Id.*

119. *Id.* The court further reasoned that "[e]ven if the capital gains at issue had been realized contemporaneously such that the court would have been required to include them, it nevertheless would have been justified in deviating downward from the presumptive amount of support to reach the same result." *Id.* at 435, 444 S.E.2d at 274.

the support proceeding, the trial judge did not abuse his discretion by failing to include the gains in calculating gross monthly income."[120]

The court also upheld the trial court's refusal to order the non-custodial parent to pay for the children's private school.[121] The court held that "[i]mplicit in the statutory scheme is that educational expenses are included in the presumptive amount of child support as calculated under the code."[122]

In *L.C.S. v. S.A.S.*,[123] the court of appeals reversed the trial court's refusal to award child support to the wife where the husband was incarcerated but owned property from which he could derive income. The parties, who had been married for twenty years, had two children, an emancipated daughter and a minor son.[124] The husband, an attorney, had been "the primary income producer for the family."[125] However, "[i]n 1992, the husband was convicted of three felony sexual offenses with minor boys,"[126] for which he received a ten-year sentence and lost his license to practice law.[127]

"The parties stipulated that the marital estate for equitable distribution purposes was $1,027,758.40," which was divided equally between the parties.[128] However, the wife's request for

---

120. *Id.* at 434, 444 S.E.2d at 274.

> Recognizing the possibility that various aspects of the equitable distribution and other divorce proceedings could result in artificial inflation of the parties' gross monthly incomes as calculated under Code § 20-108.2(C), the legislature expressly allowed for downward deviation from the presumptive amount of child support if these calculations included "[e]xtraordinary capital gains such as capital gains resulting from the sale of the marital abode."

Id. at 435, 444 S.E.2d at 274-75 (citing VA. CODE ANN. § 20-108.1(B)(7) (Repl. Vol. 1995)).

121. *Id.* at 435, 444 S.E.2d at 275.

122. *Id.*; *see* VA. CODE ANN. § 20-108.1 (B)(6) (Repl. Vol. 1995) (stating that "[d]irect payments ordered by the court for . . . education" expenses provides grounds to deviate from the presumptive amount of support).

123. 19 Va. App. 709, 453 S.E.2d 580 (1995).

124. *Id.* at 712, 453 S.E.2d at 582.

125. *Id.*

126. *Id.* at 713, 453 S.E.2d at 583. The parties' son also alleged that the father had abused him. *Id.* at 714, 453 S.E.2d at 583.

127. *Id.* at 714, 453 S.E.2d at 583.

128. *Id.*

child and spousal support was denied[129] because the trial court calculated that the husband had no income in accordance with the child support guidelines under section 20-108.2 of the Virginia Code.[130] According to the court of appeals, "[t]he trial judge refused to impute income to [the] husband under Code § 20-108.1(B)(3) because he determined that [the] husband's incarceration was not the equivalent of [the] husband's being 'voluntarily unemployed.'"[131] The court also pointed out that "[e]ven though the [trial] court determined that [the] husband's assets had the potential to generate some income, as much as $15,000 per year, the court refused to deviate from the presumptive amount under Code § 20-108.1(B)."[132]

Although the court of appeals declined to decide whether an incarcerated parent is "voluntarily unemployed" under section 20-108.1(B)(3), the court determined that the trial court abused its discretion in failing to award child support,[133] and, therefore, it remanded the case for consideration of the husband's financial resources in calculating support.[134] In doing so, the court of appeals stated that "[a] court *must* consider the factors in Code § 20-108.1(B) in deciding whether to deviate from the presumptive amount. These factors include (1) '[t]he earning capacity, obligations and needs, and *financial resources* of each parent.'"[135] The court also stated that "[i]n determining the ability of a spouse, and thus a parent, to pay support, a court must consider any assets owned by the spouse or parent as well as their 'actual earnings and his capacity to earn, whether from his personal exertions or his property.'"[136] The court of

---

129. *Id.*

130. *Id.* at 716, 453 S.E.2d at 584.

131. *Id.* at 716, 453 S.E.2d at 583. The trial court found that

> "[t]he acts that have lead to his inability to earn are voluntary acts on his part. But the fact that he is in prison and is unable to earn is not voluntary on his part; he fought it tooth and nail. . . . I don't believe under those circumstances I can impute income to him."

Id.

132. *Id.* at 716, 453 S.E.2d at 584.

133. *Id.* at 719, 453 S.E.2d at 585.

134. *Id.* at 718-19, 453 S.E.2d at 585.

135. *Id.* at 717, 453 S.E.2d at 584-85 (emphasis in original) (citing VA. CODE ANN. § 20-108.1(B)(11) (Repl. Vol. 1995).

136. *Id.* (quoting Robertson v. Robertson, 215 Va. 425, 427, 211 S.E.2d 41, 44 (1975)).

appeals found that the father, even though incarcerated, had definite financial resources, including the value of his assets from the equitable distribution award and the potential income from those assets.[137] The husband's portion of the marital estate could produce at least $15,000 per year in income, and the wife established her need for support.[138] Therefore, even though the presumptive guideline was zero, the father had financial resources to pay support, and a "deviation from the guidelines was appropriate, if not required."[139]

In *Pharo v. Pharo*,[140] the court of appeals reversed the trial court's upward deviation from the shared custody guidelines where there were no written findings or explanations other than the trial court's statement that "application of the statutory 'shared custody calculations would seriously impair the [wife's] ability to maintain minimal adequate housing and provide other basic necessities for the child.'"[141] The court of appeals held that in cases where the shared custody guidelines apply, there is a rebuttable presumption that the amount is correct.[142] Although there can be a deviation, sufficient written findings must exist in the order to justify the deviation.[143] The court's conclusory statements in this case were insufficient to support such deviation.[144]

In *Calvert v. Calvert*,[145] the trial court incorrectly computed the husband's gross income by including depreciation expenses, which he deducted on his federal income tax return. Section 20-108.2(C) defines income that shall be considered for the purpose of determining child support, and includes income "from all sources."[146] The court of appeals stated that "[b]y definition

137. *Id.* at 718, 453 S.E.2d at 585.

138. *Id.*

139. *Id.*

140. 19 Va. App. 236, 450 S.E.2d 183 (1994).

141. *Id.* at 239, 450 S.E.2d at 184. Virginia Code § 20-108.2 provides that "[a]ny calculation under this subdivision shall not create or reduce a support obligation to an amount which seriously impairs the custodial parent's ability to maintain minimal adequate housing and provide other basic necessities for the child." VA. CODE ANN. § 20-108.2 (Repl. Vol. 1995).

142. *Pharo*, 19 Va. App. at 238, 450 S.E.2d at 184.

143. *Id.* (citing VA. CODE ANN. § 20-108.2(A) (Repl. Vol. 1995)); *see infra* part II.B.3.

144. *Id.* at 239-40, 450 S.E.2d at 185.

145. 18 Va. App. 781, 785, 447 S.E.2d 875, 877 (1994).

146. VA. CODE ANN. § 20-108.2(A) (Repl. Vol. 1995); *see Calvert* 18 Va. App. at

and under Code § 20-108.2(C), business expenses and depreciation are not income."[147] Moreover, the court explained that "[t]the statute expressly provides that reasonable business expenses shall be deducted from income for a self-employed person when determining gross income."[148]

In an effort to help the wife save money on her tax burden, the court also deviated upward from the child support guidelines and set child support in excess of the guidelines, while lowering the wife's spousal support.[149] The court of appeals held that "[t]he income tax burden of an award of *spousal support* is not an acceptable justification for deviating from the presumptive amount of *child* support."[150]

In *Carter v. Thornhill*,[151] the court of appeals upheld the trial court's order which required a former husband to pay forty-five percent of a child's previously accrued medical expenses even though the court order did not require him to do so. This award was characterized as a prospective, rather than as a retroactive, modification.[152] The trial court held that the non-custodial parent could be held liable for a portion of his daughter's catastrophic medical expenses incurred after child support was set and before the modification petition was filed.[153]

The *Carter* case involved two parties whose sixteen-year-old daughter was involved in a severe automobile accident and received continuing medical care until her death.[154] A child support order was in effect prior to the accident, but it did not order the father to pay any portion of the child's medical expenses.[155] The trial court subsequently entered a final order requiring the father to pay to the mother forty-five percent of

---

785, 447 S.E.2d at 877.

147. *Calvert*, 18 Va. App. at 785, 447 S.E.2d at 877.

148. *Id.*

149. *Id.* at 786, 447 S.E.2d at 877.

150. *Id.* (emphasis in original) (citing Floyd v. Floyd, 17 Va. App. 222, 231-32, 436 S.E.2d 457, 463 (1993) and Dietz v. Dietz, 17 Va. App. 203, 207-08, 436 S.E.2d 463, 466 (1993)).

151. 19 Va. App. 501, 512, 453 S.E.2d 295, 302 (1995).

152. *Id.* at 506, 453 S.E.2d at 298.

153. *Id.* at 503, 453 S.E.2d at 298.

154. *Id.* at 503-04, 453 S.E.2d at 297.

155. *Id.*

the daughter's stipulated medical expenses plus interest.[156] The court of appeals found that this was not an abuse of discretion,[157] and due to the circumstances, the lump sum award was proper.[158] The trial court also held that it would be both illogical and unjust to release a non-custodial parent from the obligation to pay a portion of his or her child's catastrophic medical expenses incurred after a child support order has been set and before a modification petition has been filed.[159]

F. *Bankruptcy*

There is now an exception to the old rule that there was no way to prevent a spouse from discharging his or her obligations under a written agreement. The court of appeals now has made it possible to circumvent the possibility of a payor spouse discharging in bankruptcy obligations under a property settlement agreement.[160] In *Carter v. Carter*, the court of appeals affirmed the trial court's determination of equitable distribution, even though the bankruptcy court had discharged the husband from his obligations under a written property settlement agreement.[161] The parties entered into an agreement, which provided that "[i]f either party fails in the due performance of any of his or her obligations . . . the other shall have the right to sue for damages . . . or to rescind [the] [a]greement."[162]

---

156. *Id.* at 504, 453 S.E.2d at 298.

157. *Id.* at 505, 453 S.E.2d at 298.

158. *Id.* at 507, 453 S.E.2d at 299.

159. *Id.* The court went on to state that "[n]oncustodial parents are not relieved of all obligations to a child other than court-ordered child support merely because they do not have physical custody. It is axiomatic that *parents* are responsible for the cost of necessities provided a child, including necessary medical expenses." *Id.* (citing Moses v. Akers, 203 Va. 130, 132, 122 S.E.2d 864, 866 (1961)). The court also reasoned that if the mother had refused to pay the uninsured expenses, a third party could have sued and obtained a judgment against the father for the full amount. *Id.* Therefore, the father should not be released from his obligation to pay his fair share of the bills simply because the mother had already paid them. *Id.*

160. Carter v. Carter, 18 Va. App. 787, 447 S.E.2d 522 (1994).

161. *Id.* at 789, 447 S.E.2d at 523.

162. *Id.* at 788, 447 S.E.2d at 522.

After entering into the written agreement, the husband filed a voluntary Chapter 7 bankruptcy petition.[163] He was discharged from his debts, including the debt to his wife under the agreement.[164] After the bankruptcy case was closed, the wife filed a petition for divorce and moved to rescind the property settlement agreement.[165] The trial court granted her motion and "ordered the sale of the jointly owned marital home with equal division of the net proceeds."[166] The trial court also ordered the husband to pay the wife a monetary award and a portion of her attorney's fees.[167] The husband appealed, arguing "that he was entitled to the benefit of the separation agreement, which insulated him from obligation to [the wife]" due to the bankruptcy court's discharge.[168]

The court of appeals agreed that the debt was validly discharged by the bankruptcy court.[169] However, the court of appeals held that by accepting the discharge from his obligations under the agreement, the husband had repudiated the agreement, and therefore the wife had the right to rescind the agreement.[170]

G. *Procedure*

The court of appeals in *Decker v. Decker*[171] restated for the first time in many years that when a case is on appeal from the circuit court to the court of appeals, the circuit court loses jurisdiction to modify an award. A trial court may enforce a support and custody order, but it may not modify such an order without leave of the appellate court.[172] The court of appeals

163. *Id.* at 788, 447 S.E.2d at 523.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 789, 447 S.E.2d at 523.
169. *Id.*
170. *Id.* at 790, 447 S.E.2d at 523.
171. 17 Va. App. 562, 563, 440 S.E.2d 411, 411 (1994).
172. *Id.* at 564, 440 S.E.2d at 412 (citing Greene v. Greene, 223 Va. 210, 288 S.E.2d 447 (1982)).

further stated that it would only be likely to grant such a leave under compelling circumstances.[173]

In *Goodman v. Hamman*,[174] the husband appealed the divorce decree granted to his wife, alleging that the pleadings were insufficient. The court of appeals agreed and reversed the decree.[175] The husband had originally filed a bill of complaint for a bed and board divorce, which he later amended to an absolute divorce.[176] The wife responded to the amended bill of complaint, denied any misconduct, and moved to dismiss the husband's complaint; however, she did not file a cross-bill or any other independent complaint.[177] Thereafter, the husband nonsuited his bill of complaint.[178] The wife objected to the nonsuit, arguing that if the husband's nonsuit was granted, she should be permitted to move forward on her earlier "application for a divorce" pursuant to section 20-121.02.[179] The trial court granted the husband's motion for a nonsuit and allowed the wife to proceed on her "application for a divorce."[180] The court of appeals explained that while section 20-121.02 allows either party to move for a divorce under section 20-91 without amending the bill of complaint or cross-bill, the motion itself does not constitute a bill of complaint or cross-bill.[181] The motion depends on the bill of complaint or cross-bill in order to append an added ground for divorce without the costs and inconvenience of an amendment.[182] The court of appeals found that

---

173. *Id.*

174. 19 Va. App. 71, 72, 448 S.E.2d 677, 678 (1994).

175. *Id.*

176. *Id.* at 72-73, 448 S.E.2d at 678.

177. *Id.* at 73, 448 S.E.2d at 678.

178. *Id.* The husband asserted an absolute right to nonsuit his action pursuant to Virginia Code § 8.01-380. *Id.* at 73, 448 S.E.2d at 679.

179. *Id.* The wife objected on the grounds that: (1) she had travelled from Texas; (2) significant resources had been expended in preparation for trial; and (3) her consent to the nonsuit was required. *Id.*

180. *Id.* at 74, 448 S.E.2d at 679.

181. *Id.* at 75, 448 S.E.2d at 679. Virginia Code § 20-121.02 permits either party in "any divorce suit wherein a bill of complaint or cross-bill prays for a divorce . . . under § 20-91 or . . . § 20-95, at such time as there exists in either party's favor grounds for a divorce under § 20-919 . . . [to] move the court . . . for a divorce . . . on the grounds set out in § 20-919 without amending the bill of complaint or cross-bill." VA. CODE ANN. § 20-121.02 (Repl. Vol. 1995).

182. *Goodman*, 19 Va. App. at 75, 448 S.E.2d at 679 (citing McCausey v. McCausey, 221 Va. 500, 502, 272 S.E.2d 36, 36-37 (1980)).

the wife's "application for a divorce" was insufficient to satisfy the procedural requirements of a cross-bill.[183] As the bill of complaint was nonsuited, no bill of complaint or cross-bill was before the court, and therefore the wife was unable to pursue her request for a divorce.[184]

In *Toomey v. Toomey*,[185] the court of appeals upheld the trial court's award of equitable distribution to the wife eleven months after the parties' divorce decree became final. The husband filed a bill of complaint requesting a divorce from his wife on the ground that the parties lived separate and apart for more than one year.[186] His wife was a non-resident of Virginia, but was personally served out of state with the complaint.[187] The wife filed no responsive pleadings, and depositions were taken without notice to the wife.[188] The final divorce decree, which was silent as to spousal support, child custody, or reservation of equitable distribution, also was entered without notice to the wife.[189] Although the wife did not appear before the decree dissolving the marriage was entered, the trial court granted the wife leave to file a cross-bill seeking equitable distribution of the husband's military retirement eleven months later.[190]

The court of appeals affirmed the decision, noting that personal service on the wife had the same effect as an order of publication.[191] When the ex parte divorce was granted, it was binding only insofar as it terminated the parties' marital status.[192] The court stated that personal rights, including proper-

183. *Id.* at 75, 448 S.E.2d at 680 (citing Moore v. Moore, 218 Va. 790, 796, 240 S.E.2d 535, 538-39 (1978)).

184. *Id.*

185. 19 Va. App. 756, 757, 454 S.E.2d 735, 736 (1995).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 757-58, 454 S.E.2d at 736.

190. *Id.* at 758, 454 S.E.2d at 736.

191. *Id.* Virginia Code § 8.01-320 provides that personal service may be made upon a non-resident person outside the Commonwealth. VA. CODE ANN. § 8.01-320 (Repl. Vol. 1992). According to the court, service was made in accordance with the statute. *Toomey*, 19 Va. App. at 758, 454 S.E.2d at 736. However, the statute provides that such service "shall have the same effect, and no other, as an order of publication duly executed." VA. CODE ANN. § 8.01-320 (Repl. Vol. 1992).

192. *Toomey*, 19 Va. App. at 759, 454 S.E.2d at 737.

ty and support rights, cannot be adjudicated by the court unless it has in personam jurisdiction.[193] Since the court lacked in personam jurisdiction over the wife prior to entry of the final decree, the wife's right to pursue equitable distribution was not terminated.[194]

In *Parish v. Spaulding*,[195] the court of appeals clarified the standards governing an appeal from the juvenile and domestic relations district court to the circuit court. In the *Parish* appeal, the circuit court excluded evidence of events occurring after the juvenile court hearing.[196] The court of appeals reversed, holding that "the circuit court was required to consider all relevant evidence arising prior to the [new] trial."[197] The court of appeals defined a de novo hearing as "'*trial anew*, with the burden of proof remaining upon the party with whom it rested in the juvenile court.'"[198] According to the court of appeals, "[a]n appeal to the circuit court . . . annuls the judgment of the [juvenile court] as completely as if there had been no previous trial."[199] The court stated that by statute, the trial de novo grants every advantage to a litigant that would have been available if the case been tried originally in the circuit court.[200] Therefore, the trial court is required to consider any relevant evidence that developed prior to the hearing date.[201]

H. *Paternity*

In *Jones v. Division of Child Support Enforcement*,[202] the mother's action to determine paternity and seek child support against a putative father was reversed and dismissed by the court of appeals for lack of jurisdiction. The Division of Child Support Enforcement ("Division"), on behalf of the mother,

193. *Id.* (citing Gibson v. Gibson, 5 Va. App. 426, 429, 364 S.E.2d 518, 519 (1988)).
194. *Id.*
195. 20 Va. App. 130, 455 S.E.2d 728 (1995).
196. *Id.* at 131, 455 S.E.2d at 729.
197. *Id.*
198. *Id.* at 132, 455 S.E.2d at 729 (quoting Box v. Talley, 1 Va. App. 289, 292, 338 S.E.2d 349, 351 (1986)).
199. *Id.* (internal quotations marks omitted) (citations omitted).
200. *Id.*
201. *Id.* at 132-33, 455 S.E.2d at 729.
202. 19 Va. App. 184, 186, 450 S.E.2d 172, 174 (1994).

brought an action in juvenile court against the putative father.[203] The juvenile court dismissed the action.[204] The Division appealed, and the circuit court ruled that Jones was the putative father and ordered him to pay child support.[205] The father appealed to the court of appeals alleging that the circuit court never acquired jurisdiction over the appeal from the juvenile court because the notice of appeal was not signed by an attorney for the Division or by the mother.[206] The court of appeals agreed and dismissed the case, explaining that Rule 8:20 of the Rules of the Supreme Court of Virginia governs the procedure for appealing a judgment from the juvenile court.[207] The Division argued that the notice was signed by a "regular [and] bona-fide employee of the Division."[208] The court of appeals held that "[t]he rule specifically refers to a 'party' or 'the attorney for such party'" and therefore the rule was not properly followed.[209] The court reiterated that "dismissal will continue to be the price of failure to comply with mandatory rule provisions."[210] Even though the father did not raise this argument at the trial court level, he was allowed to do so on appeal because he was contesting jurisdiction.[211]

In *Brooks v. Rogers*,[212] Rogers, the mother, brought a petition in juvenile court against a putative father and requested establishment of paternity and child support. The juvenile court ordered the parties to submit to DNA and HLA blood test-

203. *Id.*

204. *Id.* "[T]he juvenile court [judge] dismissed the case because the Division had not timely filed the blood test results in the juvenile court." *Id.*

205. *Id.* at 186-87, 450 S.E.2d at 174.

206. *Id.* at 191, 450 S.E.2d at 176.

207. *Id.* at 191, 450 S.E.2d at 176-77. Rule 8:20 provides that "[a]ll appeals shall be noted in writing. An appeal is noted only upon timely receipt in the clerk's office of the writing. An appeal may be noted by a party or by the attorney for such party." *Id.* at 190-91, 450 S.E.2d at 176 (quoting VA. S. CT. R. 8:20).

208. *Id.* at 190, 450 S.E.2d at 176.

209. *Id.* at 191, 450 S.E.2d at 176.

210. *Id.* at 191, 450 S.E.2d at 176-77 (quoting Towler v. Commonwealth, 216 Va. 533, 535, 221 S.E.2d 119, 121 (1976)).

211. *Id.* at 191, 450 S.E.2d at 177. "Jurisdiction of a court may be raised by any party, or by the court, at any time." *Id.* (citing Martin v. Pittsylvania County Dep't of Social Servs., 3 Va. App. 15, 22, 348 S.E.2d 13, 17 (1986)).

212. 18 Va. App. 585, 587, 445 S.E.2d 725, 726 (1994).

ing.[213] Following a subsequent ore tenus hearing, the court concluded that Brooks was the father, so Brooks appealed.[214]

At the circuit court hearing, Brooks presented evidence that he had undergone a vasectomy in 1984.[215] He also denied having "intimate contact of any kind with the mother."[216] Additionally, he "produced medical records which suggested that [the child] was conceived between January 10 and 17, 1986, prior to his alleged trysts with Rogers."[217] However, the blood test results showed a 99.75% probability that Brooks was indeed the child's father.[218] The court of appeals ruled that because the trial court had considered all of the relevant evidence presented to it on the issue of paternity, its finding was not an abuse of discretion.[219] The court of appeals held that the record disclosed that the trial judge "simply [did not] believe that there was a vasectomy."[220] Furthermore, the genetic evidence was consistent with the mother's testimony and was compelling proof of paternity.[221] The court of appeals found that the record showed by clear and convincing evidence that Brooks was indeed the father.[222]

---

213. *Id.*
214. *Id.*
215. *Id.* at 589, 445 S.E.2d at 727.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 590, 445 S.E.2d at 727. The court stated that it must adhere to sections 20-49.1 through 20-49.4 when determining paternity and quoted directly from section 20-49.4 of the Virginia Code. *Id.* at 589, 445 S.E.2d at 727.

> The standard of proof in any action to establish parenthood shall be clear and convincing evidence. All relevant evidence on the issue of paternity shall be admissible. Such evidence may include, but shall not be limited to, the following: (1) Evidence of . . . sexual intercourse between the known parent and the alleged parent at the probable time of conception; (2) Medical . . . evidence relating to the alleged parentage of the child based on tests performed by experts . . . ; (3) The results of scientifically reliable genetic tests, including blood tests, if available, weighted with all the evidence. . . .

VA. CODE ANN. § 20-49.4 (Repl. Vol. 1995).
220. *Brooks*, 18 Va. App. at 590, 445 S.E.2d at 728.
221. *Id.*
222. *Id.*

I. *Equitable Distribution*

1. Waste

The court of appeals adhered strictly to its past definition of waste. In *L.S.C. v. S.A.S.*,[223] the court of appeals upheld the trial court's finding that the husband's use of marital funds for his criminal defense was not waste. The father, who had been convicted of three felony sexual offenses with minor boys,[224] "withdrew $20,000 from a marital money market account to cover a portion of his criminal defense fees."[225] The court found that the expenditure was not waste because the husband's success or failure in defending himself affected the rights of his family, and the money was spent on an attempt to try to maintain his freedom and ability to earn.[226] The court of appeals affirmed, reasoning that it had previously "approved the use of marital funds for living expenses and attorney's fees in divorce proceedings."[227]

The refusal to find "waste" was taken even further in *Smith v. Smith*.[228] In *Smith*, the "husband admitted to a fifteen-year extramarital affair with a woman, whom he saw at least once a year in a variety of locations."[229] The wife contended "that the trial court erred in fashioning the equitable distribution award by refusing to consider [the] husband's dissipation of marital assets, which she allege[d] occurred as a result of and during the course of his fifteen-year extramarital affair."[230] The court

---

223. 19 Va. App. 709, 720, 453 S.E.2d 580, 586 (1995); *see supra* notes 124-139 and accompanying text.

224. *L.S.C.*, 19 Va. App. at 713, 453 S.E.2d at 583.

225. *Id.* at 719, 453 S.E.2d at 585-86.

226. *Id.*

227. *Id.* at 720, 453 S.E.2d at 586. The court stated that "'[o]nce the aggrieved spouse shows that marital funds were either withdrawn or used after the breakdown, the burden rests with the party charged with dissipation to prove that the money was spent for a proper purpose.'" *Id.* at 719, 453 S.E.2d at 586 (quoting Clements v. Clements, 10 Va. App. 580, 586, 397 S.E.2d 257, 261 (1990). The court also stated that "[a]n improper purpose is one that is 'unrelated to the marriage and in derogation of the marital relationship at a time when the marriage is in jeopardy.'" *Id.* (quoting Alphin v. Alphin, 15 Va. App. 395, 402, 424 S.E.2d 572, 576 (1992)).

228. 18 Va. App. 427, 444 S.E.2d 269 (1994).

229. *Id.* at 429, 444 S.E.2d at 271.

230. *Id.* at 430, 444 S.E.2d at 272.

of appeals, relying on *Booth v. Booth*,[231] held that "the challenged use of funds must be 'in anticipation of divorce or separation . . . [and] at a time when the marriage is in jeopardy.'"[232] The court declined the wife's request to expand this definition, confirming that dissipation only occurs when funds are spent contemporaneously with the marital breakdown.[233] Therefore, "expenditures made for a fifteen-year period which were not specifically for the purpose of depleting the marital estate and where . . . there was an irreconcilable breakdown of the marriage" are not waste.[234]

2. Fault

In *Donnell v. Donnell*,[235] the court of appeals found that the trial court abused its discretion in awarding the majority of the parties' assets to the wife. In *Donnell*, the "[w]ife was awarded a divorce on the ground of cruelty based upon [the] husband's misconduct in coercing sexual acts against the parties' daughters."[236] The husband pled guilty to a misdemeanor and was incarcerated for one year.[237] He was serving his sentence at the time of the equitable distribution hearing.[238] The court took note that "[d]uring the parties' thirty-four year marriage, [the] husband contributed seventy-five percent of the cash contributions to the marriage, [while the] wife contributed the re-

231. 7 Va. App. 22, 371 S.E.2d 569 (1988).

232. *Smith*, 18 Va. App. at 430, 444 S.E.2d at 272 (quoting *Booth*, 7 Va. App. at 27, 371 S.E.2d at 572).

233. *Id.* at 431, 444 S.E.2d at 272.

234. *Id.* at 431, 444 S.E.2d at 272-73. The court of appeals stated that "[o]ur holding does not allow the husband to benefit financially from his continuing deceit," but found that the

> husband's pre-separation use of marital funds in pursuit of his extended extramarital affair would be 'more appropriately addressed with the circumstances and factors which contributed to the dissolution of the marriage,' as required under Code § 20-107.3(E)(5), to the extent that it had any significant impact on the value of the marital estate.

Id. (citing Aster v. Gross, 7 Va. App. 1, 5-6, 371 S.E.2d 833, 836 (1988)). The court of appeals also found that "[t]he court may also could consider the negative impact of the affair on the well-being of the family . . . and the mental condition of the parties." *Id.* (citing VA. CODE ANN §§ 20-107.3(E)(1), -107.3(E)(4) (Repl. Vol. 1995).

235. 20 Va. App. 37, 39, 455 S.E.2d 256, 257 (1995).

236. *Id.*

237. *Id.*

238. *Id.*

mainder and virtually all of the non-monetary contributions."[239] Despite the husband's contributions, the trial court gave almost all of the assets to the wife, including a monetary award in the amount of the husband's half of the net equity in the house.[240]

The court of appeals reversed, stating that the record did not support the equitable distribution award in this case.[241] Relying on *Aster v. Gross*,[242] the court reasoned that "[e]quitable distribution is predicated upon the philosophy that marriage represents an economic partnership . . . [and] circumstances that lead to the dissolution of the marriage but have no effect upon marital property, its value, or otherwise are not relevant to determining a monetary award, and need not be considered."[243] Furthermore, no evidence in the record supported a $75,000 monetary award to the wife.[244]

3. Transmutation

In *McDavid v. McDavid*,[245] the court of appeals upheld the trial court's finding that real estate purchased by the parties as tenants by the entirety was sufficiently transmuted to the husband's separate property. However, a stock, which the husband and wife originally held as tenants by the entirety, was not transmuted from marital to separate property by a later transfer to the husband.[246]

One piece of real estate at issue was acquired by the parties as tenants by the entirety.[247] The wife subsequently deeded her interest in the property to the husband.[248] The court noted that "[she] testified that she did so based on [the] husband's representations that it was necessary to facilitate a marital

239. *Id.*
240. *Id.* at 40, 455 S.E.2d at 257.
241. *Id.* at 43, 455 S.E.2d at 258.
242. 7 Va. App. 1, 371 S.E.2d 833 (1988).
243. *Donnell*, 20 Va. App. at 41-42, 455 S.E.2d at 258.
244. *Id.*
245. 19 Va. App. 406, 411-12, 451 S.E.2d 713, 717 (1994).
246. *Id.* at 412, 451 S.E.2d at 717-18.
247. *Id.* at 408, 451 S.E.2d at 715.
248. *Id.*

trust he had established several years earlier."[249] The court of appeals found that the property was transmuted to the husband's separate property because the wife had signed a deed of gift transferring her interests to the husband.[250] The court explained that "property which is marital may become separate only through a 'valid, express agreement by the parties.'"[251] The deed "provided that the property was to be held by [the] husband 'in his own right as his separate and equitable estate as if he were an unmarried man . . . free from the control and marital rights of his present . . . spouse.'"[252] The court of appeals found that because this transaction occurred after the enactment of section 20-155, it was sufficient to rebut the presumption that property acquired during the marriage with marital funds is marital property.[253]

However, the trial court found, and the court of appeals upheld the ruling, that the wife's stock transfer to the husband in the marital company was insufficient to transmute the property to the husband's separate property.[254] The parties originally owned the stock as tenants by the entirety, and the wife was an active participant in the business.[255] The husband testified that the company's stock was transferred without compensation in order to make it easier to negotiate with investors, sell the stock to outsiders, and protect the wife from the company's creditors.[256] The court of appeals found that the contents of the stock transfer agreement, because it contained no language relating to the disposition of property upon separation or divorce, was insufficient to transmute the stock from marital to

249. *Id.*

250. *Id.* at 412, 451 S.E.2d at 717.

251. *Id.* at 411, 457 S.E.2d at 716 (quoting Wagner v. Wagner, 4 Va. App. 397, 404, 358 S.E.2d 407, 410 (1987)).

252. *Id.* Virginia Code § 20-155 is part of the Premarital Agreement Act, which allows parties to "enter into agreements . . . settling their rights and obligations." VA. CODE ANN. § 20-155 (Repl. Vol. 1995); *see McDavid*, 19 Va. App. at 411 n.1, 451 S.E.2d at 717 n.1.

253. *McDavid*, 19 Va. App. at 411-12, 451 S.E.2d at 717.

254. *Id.* at 412, 451 S.E.2d at 717-18.

255. *Id.* at 408, 451 S.E.2d at 715.

256. *Id.*

separate property as allowed by *Wagner*[257] and section 20-155.[258]

In *McClanahan v. McClanahan*,[259] a husband's testimony that he caused property to be titled in his and his wife's name "as a matter of heart" acknowledged an irrevocable gift to the wife.[260] The court of appeals reversed the monetary award to the husband based on his contribution to the real property that he alleged was separate property.[261] The husband's parents conveyed the property in question to the husband and wife as tenants by the entirety.[262] The husband testified that his parents intended the gift only for him, and that it was his choice to title the property jointly.[263] Reversing the trial court, the court of appeals held that the words testified to by the husband, "as a matter of heart," were comparable to the legal consideration of "love and affection," and as such acknowledged an irrevocable gift.[264] The court found that it was not a partial gift, but rather was a complete gift as to the entire property when it was made.[265] Therefore, the trial court was not authorized to "revoke [an] irrevocable gift by entry of a monetary award based upon [the] husband's contribution to that gift."[266]

4. Military Pensions

In *Cook v. Cook*,[267] the court of appeals stated that "[i]t is well settled in Virginia that all pensions, including military pensions, may be classified as marital property subject to equi-

257. Wagner v. Wagner, 4 Va. App. 397, 358 S.E.2d 407 (1987).

258. *McDavid*, 19 Va. App. at 412, 451 S.E.2d at 717-18.

259. 19 Va. App. 399, 451 S.E.2d 691 (1994).

260. *Id.* at 404, 451 S.E.2d at 694 (citing Enright v. Bannister, 195 Va. 76, 81, 77 S.E.2d 377, 380 (1953)).

261. *Id.* at 405, 451 S.E.2d at 694.

262. *Id.* at 401-02, 451 S.E.2d at 692.

263. *Id.* at 403, 451 S.E.2d at 693.

264. *Id.* at 404, 451 S.E.2d at 694 (citing Enright v. Bannister, 195 Va. 76, 81, 77 S.E.2d 377, 380 (1953)).

265. *Id.*

266. *Id.* This case was decided at a time when the "parties' property could not be divided into part marital and part separate." *Id.* at 403, 451 S.E.2d at 693 (citing Smoot v. Smoot, 233 Va. 435, 439, 357 S.E.2d 728, 730 (1987)); *see* VA. CODE ANN. § 107.3(f) (Repl. Vol. 1995) (allowing for retracing of separate property).

267. 18 Va. App. 726, 728, 446 S.E.2d 894, 895 (1994).

table distribution." In a case of first impression, the court addressed the husband's assertion that because he was only married to his wife for a period of ten years, she was not entitled to any portion of his pension plan.[268] The court of appeals held that although the husband and wife had not met the "military" ten year requirement, it was not a barrier to the court for dividing the retirement; it was only "a 'factor in determining how the entitlement will be collected.'"[269] Therefore, the trial court did not err in awarding the wife seventeen percent of the husband's pension payment notwithstanding the fact that the husband and wife were married for less than ten years.[270]

II. STATUTORY CHANGES EFFECTIVE JULY 1, 1995

A. *Marriage and Marriage Licenses*

Virginia Code section 20-14 was amended to allow marriage licenses to be obtained at any circuit court, regardless of the county or city of residence.[271]

Virginia Code section 20-13.1 repealed the section of the code establishing marriage to a person not domiciled in the Commonwealth as determinative of the residency of the other spouse.[272]

---

268. *Id.* at 730, 446 S.E.2d at 896.

269. *Id.* (quoting Carranza v. Carranza, 765 S.W.2d 32, 33-34 (Ky. Ct. App. 1989)). The U.S.F.S.P.A. (Uniform Services Former Spouses Protection Act), 10 U.S.C. § 1408(a) (1994) "created the 'direct payment mechanism' in § 1408(d)(1) and authorized the appropriate military finance center to pay the court ordered apportioned share of a former spouse's military retirement benefits directly to a former spouse if certain requirements are met." *Id.* (footnote omitted) (citing Carmody v. Secretary of Navy, 886 F.2d 678, 679 (4th Cir. 1989)). "In *Carmody*, the Fourth Circuit held that direct payment of a former spouse's military retirement pay, pursuant to 10 U.S.C. § 1408(d)(1)-(2), is contingent upon a marriage of at least ten years." *Id.* (citation omitted). Direct payment is permitted "only if a former spouse has been 'married to a military member for at least ten years, and obtain[ed] a court order that is final and regular on its face that provides for the payment of a specified amount or percentage of the service member's retirement pay.'" *Id.* (citation omitted).

270. *Id.* at 731, 446 S.E.2d at 896.

271. VA. CODE ANN. § 20-14 (Repl. Vol. 1995).

272. Act of Mar. 18, 1995, ch. 355, cl. 2.

B. *Child Support*

1. Support Arrearages

A court is now required to include an amount for interest on an arrearage at the judgment interest rate in court-ordered spousal and child support payments.[273] Formerly, the request for interest was left to the person to whom the arrearage was owed.[274] This new law also requires the Commissioner of Social Services to collect interest on past due support, and specifies the method for computing interest.[275]

2. Wage Withholding

All new initial child support orders must now include a provision for wage withholding, unless both parties agree in writing to an alternate arrangement.[276] Wage withholding can also be avoided if a party demonstrates, and the court finds, "good cause" for not imposing it.[277] This provision expands the previous requirement involving all cases in which the Department of Social Services provides support services, to all cases involving court ordered support. Modification orders may also include a wage withholding order.[278]

3. Child Support Guidelines

The legislature has added another deviation factor to rebut the child support guidelines.[279] Now, when two parties, in person or by counsel, agree to a pendente lite amount of child

---

273. VA. CODE ANN. § 20-78.2 (Repl. Vol. 1995).
274. *Id.*
275. VA. CODE ANN. § 63.1-267 (Repl. Vol. 1995).
276. VA. CODE ANN. § 20-79.2 (Repl. Vol. 1995).
277. *Id.* In determining good cause, "the court shall consider the obligor's past financial responsibilities, history of prior payment under any support order, and any other matter the court considers relevant." *Id.*
278. *Id.*
279. *See* VA. CODE ANN. § 20-108.1 (Repl. Vol. 1995).

support, that amount can later be used to rebut the presumptive application of the guidelines.[280]

Before setting the presumptive amount of child support, the court, when appropriate, must now consider the willingness and availability of the noncustodial parent to personally provide child care for purposes of determining whether child care costs are necessary or excessive.[281]

The largest change to the child support guidelines will significantly reduce child support amounts where gross monthly income exceeds $10,000 per month.[282] The legislature has lowered the percentages used in calculating a payor's support over this income threshold, which has the effect of reducing the amount of the payor's obligation.[283]

The court can now also order a person to perform community service for failure to pay support or willful refusal to comply with an order entered pursuant to section 20-103 or 20-107.3.[284]

C. *Divorce*

Section 20-103 now gives a court authority to order divorcing parents to attend educational or informational seminars on the effects of divorce on minor children.[285] Neither parent can use statements made during the course of these sessions in any subsequent proceeding.[286]

---

280. *Id.*
281. *Id.* § 20-108.2(F).
282. *Id.* § 20-108.2(B).
283. *Id.*
284. *Id.* § 20-115.
285. *Id.* § 20-103(A).
286. *Id.*