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Annual Survey of Virginia Law: Domestic Relations

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DOMESTIC RELATIONS

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I. INTRODUCTION

This article reviews some of the important developments in the area of domestic relations law between May 1995 and July 1996. Of particular significance were opinions by the Court of Appeals of Virginia regarding issues of imputed income, the definition of a "day" for shared custody purposes, and the role of marital fault in equitable distribution determinations. The majority of bills passed in the 1996 Session of the General Assembly simply fine-tuned existing law. However, notable statutory revisions were made in the areas of child support and domestic violence. Although the legislature replaced the term "spousal abuse" with "family abuse," child abuse is addressed in another article.¹

II. JUDICIAL OPINIONS

A. *Common-Law Marriage*

If your client wishes to establish a common-law marriage in Virginia, *Kelderhaus v. Kelderhaus*² provides some ground rules. In *Kelderhaus*, a couple married in California, despite the

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1. Robert E. Shepherd, Jr., *Annual Survey of Virginia Law: Legal Issues Involving Children*, 30 U. RICH. L. REV. 1467 (1996).

2. 21 Va. App. 721, 467 S.E.2d 303 (1996).

fact that the husband's divorce from his first wife was not final.³ Shortly thereafter, the couple relocated to Virginia, traveling through Texas and Oklahoma, states that recognize common-law marriages.⁴ When the putative wife filed for divorce, the trial court declined to recognize the common-law marriage and dismissed the action.⁵ The court of appeals affirmed based on the fact that Texas and Oklahoma both require that, in order for a common-law marriage to be recognized in their state, the parties must mutually represent to others while in that state that they are husband and wife.⁶ Simply migrating through these states will not suffice.⁷

B. *Paternity*

The issue presented in *Department of Social Services ex rel. Comptroller of Virginia v. Flaneary*⁸ was whether, in a contested paternity proceeding, Virginia Code section 20-49.1(B) required the trial court to give genetic test results affirming at least a ninety-eight percent probability of paternity the same legal effect as a judgment finding paternity.⁹ The court of appeals found this code section inapplicable to contested paternity disputes, noting that section 20-49.1(B) "applies only when the parties have signed a voluntary acknowledgement of paternity under oath, or after having signed such an acknowledgment have obtained a 'subsequent' genetic test that affirms at least a [ninety-eight percent] probability of paternity."¹⁰ Since the parties in this case had not signed a paternity acknowledgment,¹¹ and paternity was contested, the court of appeals held that the applicable statute was Code section 20-49.4 under which all relevant evidence of paternity is admissible.¹² Thus, DNA test results showing a 99.92% probability of paternity, in conjunc-

3. *Id.* at 724, 467 S.E.2d at 304.

4. *Id.* at 724-25, 467 S.E.2d at 304.

5. *Id.* at 723-24, 467 S.E.2d at 304.

6. *Id.* at 726-27, 467 S.E.2d at 305.

7. *Id.*

8. 22 Va. App. 293, 469 S.E.2d 79 (1996).

9. *Id.* at 296, 469 S.E.2d at 80.

10. *Id.*

11. *Id.* at 304, 469 S.E.2d at 84.

12. *Id.* at 302, 469 S.E.2d at 83.

tion with uncontroverted evidence that the parties had intercourse during the period of conception, constituted clear and convincing evidence of paternity under section 20-49.4.¹³

C. *Property Settlement Agreements*

*Spagnolo v. Spagnolo*¹⁴ dealt with a property settlement agreement in which the parties agreed that, because the husband assumed full responsibility for the child's college education and agreed to pay the child's health insurance until he graduated from college, the husband would pay \$200 per month in child support rather than the amount specified by statutory guidelines.¹⁵ The husband appealed after the trial judge affirmed, ratified, and incorporated by reference the entire property settlement agreement into the final divorce decree, and then ordered the husband to pay, contrary to the property settlement agreement, a significantly higher amount of child support pursuant to the guidelines.¹⁶

The court of appeals reversed and remanded for reconsideration,¹⁷ pointing out that a trial judge is not obligated to accept or adopt the parents' child support agreement if the amount of child support is contested.¹⁸ The court of appeals noted that the trial judge's alternative to adopting the child support agreement was to affirm, ratify, and incorporate the property settlement agreement *except* for the child support provisions "if that result is consistent with the terms of the agreement."¹⁹ This would enable the husband to assert defenses to his obligations under the property settlement agreement to pay the child's post-majority expenses.²⁰ The trial court must first determine child support in accordance with the guidelines,²¹ but may deviate from the presumptive amount of support if the statutory factors make such a deviation justifiable.²² The trial court

13. *Id.* at 306, 469 S.E.2d at 85.

14. 20 Va. App. 736, 460 S.E.2d 616 (1995).

15. *Id.* at 739-40, 460 S.E.2d at 617-18.

16. *Id.* at 741, 460 S.E.2d at 618.

17. *Id.* at 747, 460 S.E.2d at 621.

18. *Id.* at 743, 460 S.E.2d at 619.

19. *Id.* at 744, 460 S.E.2d at 620.

20. *Id.* at 744-45, 460 S.E.2d at 620.

21. VA. CODE ANN. §§ 20-108.1, -108.2 (Cum. Supp. 1996).

22. *Spagnolo*, 20 Va. App. at 744, 460 S.E.2d at 620 (citing *Alexander v. Alex-*

should next consider whether the property settlement agreement reflects statutory factors which provide a basis for deviating from the child support guidelines.²³ Thus, the trial judge must follow either the property settlement agreement or the statutes, but not both.²⁴

*Jones v. Harrison*²⁵ addressed the issue of whether the provisions of a support agreement and property settlement entitled a decedent's children from a previous marriage to impose a constructive trust upon life insurance proceeds.²⁶ The deceased husband and his first wife had a property settlement agreement providing that the husband would, at his election, either continue a life insurance trust agreement for the benefit of the parties' children, or simply make the children beneficiaries of the insurance policies.²⁷ However, less than one year after their divorce, the husband modified his life insurance trust and policies such that, upon his death thirty years later, all of his insurance proceeds were paid to his second wife.²⁸ The decedent's children, claiming that their father breached the property settlement agreement, sued the second wife in her individual capacity and as executrix of the decedent's estate, seeking to impose a constructive trust upon the life insurance proceeds.²⁹

The Supreme Court of Virginia rejected the second wife's argument that the father had only agreed to provide insurance coverage to his children for a limited time, and declined to construe contracts without termination dates to imply a reasonable time for performance.³⁰ Despite the second wife's lack of participation in, or knowledge of the contractual breach, the supreme court held that the father had breached the contract by canceling the children's coverage, and imposed a constructive trust upon \$70,000 of the life insurance proceeds.³¹

ander, 12 Va. App. 691, 695-96, 406 S.E.2d 666, 668 (1991)).

23. *Id.*

24. *Id.* at 746, 460 S.E.2d at 620-21.

25. 250 Va. 64, 458 S.E.2d 766 (1995).

26. *Id.* at 65-66, 458 S.E.2d at 767.

27. *Id.* at 66, 458 S.E.2d at 767-68.

28. *Id.* at 66-67, 458 S.E.2d at 768.

29. *Id.* at 67, 458 S.E.2d at 768.

30. *Id.* at 68-69, 458 S.E.2d at 768-69.

31. *Id.* at 70, 458 S.E.2d at 770.

In 1981, Congress enacted the Foreign Service Act of 1980,³² entitling former spouses of foreign service employees to a retirement annuity of up to fifty percent of the employee's annuity depending on the length of the employee's service and marriage "[u]nless otherwise expressly provided by [a] spousal agreement or court order."³³ In *Nicholson v. Nicholson*,³⁴ the husband, who was employed by the United States Foreign Service throughout the parties' marriage,³⁵ argued unsuccessfully that his wife had waived, in their property settlement agreement, her statutory right to a share of his retirement annuity.³⁶

The general purpose of the Nicholson's property settlement agreement, as stated in its preamble, was "to effect a full and complete settlement of [the parties'] respective property rights."³⁷ According to the court of appeals, the sole consideration was whether the property settlement agreement's terms, when considered together with the preamble's general statement of purpose, satisfied the requirements of the federal statutes³⁸ that the spousal agreement must "expressly" provide for a waiver or relinquishment of the entitlement to a share of the member's retirement annuity.³⁹ The court of appeals acknowledged that a general waiver may be sufficient if the parties' intent to include pension or retirement benefits is clearly stated in the spousal agreement,⁴⁰ but noted that the Nicholson's property settlement agreement mentioned neither pension nor

32. 22 U.S.C. §§ 3901-4226 (1980).

33. *Nicholson v. Nicholson*, 21 Va. App. 231, 235, 463 S.E.2d 334, 336 (1995) (alteration in original) (quoting 22 U.S.C. § 4054(a)(1) (1980)).

34. 21 Va. App. 231, 463 S.E.2d 334 (1995).

35. *Id.* at 235, 463 S.E.2d at 336.

36. *Id.*

37. *Id.* at 236, 463 S.E.2d at 337. The agreement also contained the following language:

5. It is further understood and agreed that both parties shall have the right to sell or otherwise dispose of any and all property, which he or she may now or in the future own personally (and not listed herein) without demand being made upon either of them. . . .

6. Each of the parties does hereby relinquish and release to the other all rights and curtesy or dower that he or she may have in the property hereinafter acquired by either of them

Id.

38. 22 U.S.C. §§ 4054(a)(1), 4060(b)(1)(A) (1994).

39. *Nicholson*, 21 Va. App. at 239, 463 S.E.2d at 338-39.

40. *Id.* at 240, 463 S.E.2d at 339.

retirement benefits, nor the husband's entitlement under the Foreign Services Act.⁴¹ The court of appeals therefore reversed the trial court and held that the wife had not waived any property rights or entitlements she may have had to any portion of her former spouse's pension or any other retirement benefits.⁴²

D. *Support*

1. Spousal Support

a. *Pendente Lite* Support

In *Sargent v. Sargent*,⁴³ the husband argued that spousal support paid to his wife pursuant to a *pendente lite* order was "spousal support paid pursuant to a pre-existing order" and must be included when calculating the wife's income for permanent support purposes.⁴⁴ The court of appeals disagreed, reasoning that the plain meaning of "pre-existing order" in Virginia Code section 20-108.2(C) is an order that has continuing effect and provides a spouse with an income source.⁴⁵ Including the *pendente lite* support amount in the wife's income when calculating the permanent support would effectively charge the wife with income she no longer receives, since a *pendente lite* support award ends when a permanent support order is entered.⁴⁶

b. *Lightburn v. Lightburn*⁴⁷

Lightburn gave the court of appeals the opportunity to remind practitioners that certain circumstances involved in the breakup of a marriage "are appropriate considerations for

41. *Id.* at 241, 463 S.E.2d at 339.

42. *Id.* at 235, 463 S.E.2d at 336.

43. 20 Va. App. 694, 460 S.E.2d 596 (1995).

44. *Id.* at 706, 460 S.E.2d at 601 (quoting VA. CODE ANN. § 20-108.2(C) (Repl. Vol. 1995)).

45. *Id.*

46. *Id.*, 460 S.E.2d at 601-02 (citing VA. CODE ANN. §§ 20-107.1, -108.2 (Repl. Vol. 1995)).

47. 22 Va. App. 612, 472 S.E.2d 281 (1996).

spousal support, not equitable distribution."⁴⁸ In *Lightburn*, the parties separated after just one year of marriage. Eight months into the marriage, the wife, who had a private counseling practice in Blacksburg prior to the marriage, moved to Madison County to live with her husband.⁴⁹ The husband then conveyed a large parcel of land by deed of gift to himself and his wife as tenants by the entirety. The parties lived on this property for two months prior to their separation.⁵⁰ In determining the equitable distribution award, the trial judge considered the brief duration of the marriage to be a significant factor, since it aggravated the wife's problems regarding her move from Blacksburg and her subsequent need to return there when the marriage failed.⁵¹ The trial court thus awarded the wife one-half of the value of the property.⁵² No spousal award was granted at that time because the trial court considered that the monetary award addressed the wife's travails connected with her move.⁵³

The court of appeals reversed on the grounds that the trial court had erroneously considered the short duration of the marriage as a factor in the wife's favor for equitable distribution purposes.⁵⁴ The purpose of Virginia Code section 20-107.3 is "to divide the value of the marital property between spouses based upon each spouse's contribution to the acquisition, preservation, or improvement of property obtained during the marriage."⁵⁵ The wife's hardships stemming from the divorce had no relation to the acquisition, care, and maintenance of the property.⁵⁶ Because equitable distribution is based on different considerations than spousal support, a trial court must determine the distribution of marital property without regard for the considerations of spousal support and the factors in section 20-107.1.⁵⁷ Section 20-107.3 does not provide for consideration of

48. *Id.* at 620, 472 S.E.2d at 285.

49. *Id.* at 614-15, 472 S.E.2d at 282.

50. *Id.* at 615, 472 S.E.2d at 282.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 618, 472 S.E.2d at 284.

55. *Id.* at 619, 472 S.E.2d at 284.

56. *Id.* at 620, 472 S.E.2d at 285.

57. *Id.* at 619, 472 S.E.2d at 284.

evidence of economic or emotional difficulties following divorce.⁵⁸ The court of appeals found that the equitable distribution order was based upon factors that were "better suited to the consideration of spousal support" and implied that the wife's hardships may have made a lump-sum spousal award appropriate.⁵⁹ In sum, a monetary award is "not statutorily designed to address issues properly related to spousal support."⁶⁰

c. Imputed Income

In one of the year's most controversial cases, the court of appeals held that income could be imputed to a retiree at his pre-retirement salary for purposes of determining spousal support. In *Stubblebine v. Stubblebine*,⁶¹ the husband retired from a military career in 1984 and took a job with a private company, retiring again in 1990.⁶² The parties separated in 1991 after thirty-nine years of marriage.⁶³ The husband undertook various independent consulting jobs, the last of which paid \$40,000 per year and ended prior to the divorce filing.⁶⁴ At the time of the divorce trial, the husband, though not gainfully employed, was working up to sixty hours per week without pay for a private organization investigating psychic phenomena, and twenty hours per week without pay helping a female friend organize and manage her psychiatry practice.⁶⁵

The parties agreed that the wife, who was in poor health and unable to work, would receive half of her husband's two pensions, amounting to a monthly income of \$3,058.⁶⁶ In addition, the trial court imputed to the husband a salary of \$40,000 and therefore granted the wife's request for spousal support of \$1,000 per month on the ground that the husband, "contrary to

58. *Id.* at 620, 472 S.E.2d at 285.

59. *Id.* (citing *Blank v. Blank*, 10 Va. App 1, 389 S.E.2d 723 (1990)).

60. *Id.* at 621, 472 S.E.2d at 285.

61. 21 Va. App. 635, 466 S.E.2d 764 (1996). See *Ryan v. Kramer*, 21 Va. App. 212, 463 S.E.2d 328 (1995), *infra* notes 88-92 and accompanying text, for another case involving retirement and imputed income.

62. *Stubblebine*, 21 Va. App. at 638, 466 S.E.2d at 765.

63. *Id.* at 637, 466 S.E.2d at 765.

64. *Id.* at 638, 466 S.E.2d at 765.

65. *Id.*

66. *Id.* at 638-39, 466 S.E.2d at 765.

his assertion, is not retired. . . . Clearly, husband chooses to work but not earn income which could help support his wife. . . .⁶⁷

The court of appeals affirmed the spousal support award despite the husband's argument that such an award would force persons who have reached usual retirement age to continue working.⁶⁸ While declining to establish a bright-line rule, the court of appeals stated that "[e]ven at the age of 65 or later, a payor spouse should not be permitted to unilaterally choose voluntary retirement if this choice places the receiving spouse in peril of poverty."⁶⁹ While acknowledging that courts must consider the expectations associated with retirement, the court of appeals held that Virginia Code section 20-107.1 directed it also to consider that the husband's post-retirement activities demonstrated his ability to be gainfully employed.⁷⁰

In *Reece v. Reece*,⁷¹ the court of appeals was faced with de-

67. *Id.* at 639, 466 S.E.2d at 766.

68. *Id.* at 637, 641, 466 S.E.2d at 765, 767.

69. *Id.* at 641, 466 S.E.2d at 767 (citing *Pimm v. Pimm*, 601 So.2d 534, 537 (Fla. 1992)).

70. *Id.* at 639, 466 S.E.2d at 766. In a blistering dissent, Judge Benton noted that no evidence supported the trial judge's assumption that the husband could find gainful employment. *Id.* at 647-48, 466 S.E.2d at 770 (Benton, J., dissenting).

No evidence proved that any income-producing employment was available for the husband or that other consulting opportunities were available. The record contains unrefuted evidence that the husband's last two consulting contracts were involuntarily terminated. . . . [N]o evidence proved that husband could have obtained employment based on his studies of psychic phenomena. . . . Where, as in this case, the working spouse has retired prior to separation and dissolution of the marriage, the decision to impute income to the working spouse is plainly wrong, absent some proof of bad faith. Moreover, evidence that the retired spouse remains active in the pursuit of hobbies and intellectual interests provides no basis to conclude that the spouse is "working." A spouse should not be penalized for pursuing his interests if they do not produce any income, cannot produce income, are unorthodox, or are even unpopular to others. By imputing a speculative amount of income, the decision penalizes lifestyle, where it is clear no such imputation would have been made had the retired spouse sat around, done nothing, and degenerated. . . . Absent evidence of bad faith, nothing in Code Section 20-107.1 authorizes judges to interfere with decisions made by spouses in a marriage to retire at some point in their lives, to participate in interests special to them, and enjoy benefits for which they have worked their entire lives.

Id. at 647-51, 466 S.E.2d at 770-72 (Benton, J., dissenting).

71. 22 Va. App. 368, 470 S.E.2d 148 (1996).

cluding whether failure to relocate constitutes voluntary unemployment or underemployment for purposes of justifying imputation of income.⁷² Shortly after the parties' separation, the husband was ordered to pay *pendente lite* spousal support to the wife in the amount of \$1000 per month.⁷³ Several months later, the husband's employer eliminated his position but offered him another position at the same salary in Tampa, Florida, which the husband declined.⁷⁴ The trial court granted the husband's motion to decrease his spousal support payments based on a material change in circumstances,⁷⁵ and the wife appealed.⁷⁶

The court of appeals expressly declined to establish a *per se* rule that a supporting spouse always becomes voluntarily unemployed or underemployed when he refuses to accept an offer of comparable employment in another geographic location.⁷⁷ Instead, the court of appeals established a non-exclusive set of factors to be considered in determining whether a refusal to relocate constitutes voluntary unemployment or underemployment:

(1) [T]he supporting spouse's business ties to the community; (2) the supporting spouse's familial ties to the community; (3) whether the supporting spouse's relocation would have an undue deleterious effect upon his or her relationship with his or her children or other family members; (4) the length of time in which the supporting spouse has resided in the community; (5) monetary considerations which would impose an undue hardship upon the supporting spouse if he or she were forced to relocate; (6) the 'quality of life' in the respective communities; (7) the geographic distance between the respective communities; and (8) the severity of the burden which a failure to relocate would have on the obligee spouse.⁷⁸

72. *Id.* at 376, 470 S.E.2d at 152.

73. *Id.* at 371, 470 S.E.2d at 150.

74. *Id.*

75. *Id.* at 372, 470 S.E.2d at 150.

76. *Id.* Although the parties agreed that the husband did not voluntarily choose to leave his job, and that his job was not eliminated due to any fault on his part, the wife argued that income should be imputed to the husband based on his failure to relocate. *Id.* at 374, 470 S.E.2d at 151.

77. *Id.* at 375, 470 S.E.2d at 152.

78. *Id.* at 376, 470 S.E.2d at 152-53.

Applying these factors to the case, the court of appeals found that the trial court did not abuse its discretion by not imputing income to the husband.⁷⁹

2. Child Support

*Auman v. Auman*⁸⁰ presents practitioners with a cautionary tale for clients inclined to voluntarily offer more child support than the guidelines would prescribe, since Mr. Auman's voluntary post-separation support payments were used to determine the standard of living to which the child was entitled.⁸¹ The trial judge held that, because the father had voluntarily left a salaried position for a lower paying job, he was underemployed.⁸² In determining the father's child support obligation, the trial court took his post-separation voluntary support payments into consideration,⁸³ and held that he must maintain for the child the lifestyle that his former income supported.⁸⁴

The court of appeals similarly concluded that a father who switched to a lower-paying job can have income imputed to him even though, when he changed jobs, no court-ordered support obligation existed.⁸⁵ The court of appeals thus broadened the

79. *Id.*, 470 S.E.2d at 153. The husband had strong familial and business ties to Richmond. Moreover, because the wife was neither destitute nor in poor health, a greater amount of financial support was not necessary. The distance between Richmond and Tampa also played a relevant role in the court's consideration. *Id.* at 376-77, 470 S.E.2d at 153. Moreover, the wife failed to show that other comparable jobs were available to the husband, nor did she show that he deliberately minimized his income in order to reduce his support obligation to her. *Id.* at 374-75, 470 S.E.2d at 151-52.

80. 21 Va. App. 275, 464 S.E.2d 154 (1995).

81. *Id.* at 278, 464 S.E.2d at 156.

82. *Id.* Prior to the Auman's separation, the father was laid off. Upon separation, however, the father voluntarily began paying \$100 per child per week in child support. *Id.* at 276, 464 S.E.2d at 155. The father took a job paying \$13.50 per hour, and 9 months later voluntarily switched to a job paying \$9.50 per hour. *Id.* at 277, 464 S.E.2d at 156. The following year, he left this position to become a commissioned salesman. *Id.* The trial court found that the father's income had decreased almost \$3500 in the first year of separation, and that he projected that his income would decrease by approximately another \$8000 the next year. *Id.*

83. *Id.* at 278, 464 S.E.2d at 156.

84. *Id.* at 279, 464 S.E.2d at 156-57.

85. *Id.*

reach of *Antonelli v. Antonelli*,⁸⁶ which addressed the imputation of income after a parent with an existing support order changes jobs.⁸⁷

In *Ryan v. Kramer*,⁸⁸ the court of appeals again relied on *Antonelli*⁸⁹ in deciding that the trial court had properly imputed income to a parent who, at age 51, voluntarily accepted early retirement from his job as an airline pilot.⁹⁰ Since his retirement, the husband's income dropped from over \$12,000 per month to zero as a real estate agent.⁹¹ The court of appeals cited *Antonelli*'s warning that, while a parent is not prohibited from voluntarily changing jobs, "the risk of his success at his new job [is] upon the father, and not upon the children."⁹²

In *Rawlings v. Rawlings*,⁹³ the court of appeals upheld a chancellor's decision that a husband's voluntary participation in a union strike did not constitute underemployment.⁹⁴ Accordingly, the chancellor held that the decrease in the husband's income caused by the strike constituted a material change in circumstances permitting the court to reduce his child support obligation.⁹⁵ The court of appeals noted that the fact that the husband was exercising a protected right to honor the strike "neither mandates nor prohibits a reduction in his child support

86. 242 Va. 152, 409 S.E.2d 117 (1991).

87. *Id.* at 153, 409 S.E.2d at 118. The court of appeals acknowledged that, since Mr. Auman was not under a court order requiring him to pay support at the time he changed jobs, *Antonelli* was "not altogether on point." *Auman*, 21 Va. App. at 278-79, 464 S.E.2d at 156. Nevertheless, the court of appeals found the matter comparable to *Antonelli* to the extent that the breakup of a family does not leave a party free to disregard his dependents' needs. *Id.*

88. 21 Va. App. 217, 463 S.E.2d 328 (1995).

89. 242 Va. 152, 409 S.E.2d 117 (1991).

90. *Ryan*, 21 Va. App. at 219-20, 463 S.E.2d at 329. The husband had held this job for over 26 years. *Id.* at 219, 463 S.E.2d at 329.

91. *Id.* at 221, 463 S.E.2d at 330.

92. *Id.* at 220, 463 S.E.2d at 329 (quoting *Antonelli*, 242 Va. at 156, 409 S.E.2d at 119).

93. 20 Va. App. 663, 460 S.E.2d 581 (1995).

94. *Id.* at 665-66, 460 S.E.2d at 582.

95. *Id.* at 669, 460 S.E.2d at 584. The court of appeals held that the strike, rather than the father's participation in it, constituted the material change in circumstances permitting review of his child support obligations. *Id.* at 670, 460 S.E.2d at 584.

obligation."⁹⁶ Moreover, the husband's "good faith" in participating in the strike was an insufficient ground for reducing his court-ordered child support.⁹⁷ Nevertheless, the court of appeals found that, because the economic well-being of the family both during and following the marriage was dependent upon the economic fortunes of the union, the husband was not underemployed during the strike.⁹⁸

On the other hand, the court of appeals held in *Department of Social Services ex rel. Ewing v. Ewing*⁹⁹ that a parent who is voluntarily unemployed while pursuing a possible future gain in income,¹⁰⁰ "even if done in good faith," is not entitled to a reduction in child support.¹⁰¹

Pointing out that Virginia Code section 20-108.2(C) defines "gross income" as "*all income from all sources . . . [including] income from salaries [and] wages,*"¹⁰² the court of appeals held in *Carmon v. Department of Social Services ex rel. Jones*¹⁰³ that the trial court had properly imputed \$300 per month in income to a mother who had no cash income, but was compensated in the form of room and board in return for her cleaning services.¹⁰⁴

Yet in *Sargent v. Sargent*,¹⁰⁵ the court of appeals declined to impute income to a mother who, at the beginning of the marriage, had been a factory worker, but had worked for the past

96. *Id.* at 668, 460 S.E.2d at 583.

97. *Id.* at 668-69, 460 S.E.2d at 583-84. *See also* Commonwealth Dept. of Social Serv. v. Ewing, 22 Va. App. 466, 471, 470 S.E.2d 608, 610 (1996). *See generally* Hamel v. Hamel, 18 Va. App. 10, 13, 441 S.E.2d 221, 222 (1994). ("[T]he risk of reduction of income as a result of a parent's intentional act, even if done in good faith, is insufficient grounds for reducing the amount of support due under a pre-existing order.")

98. *Rawlings*, 20 Va. App. at 670, 460 S.E.2d at 584.

99. 22 Va. App. 466, 470 S.E.2d 608 (1996).

100. The father was attending medical school and quit a part-time job as a pharmacist in his third year due to conflicts with his class schedule. *Id.* at 468-69, 470 S.E.2d at 609.

101. *Id.* at 473, 470 S.E.2d at 611-12.

102. *Carmon v. Department of Social Serv. ex rel. Jones*, 21 Va. App. 749, 755, 467 S.E.2d 815, 818 (1996).

103. 21 Va. App. 749, 467 S.E.2d 815 (1996).

104. *Id.* at 755, 467 S.E.2d at 818.

105. 20 Va. App. 694, 460 S.E.2d 596 (1995).

four years as a teacher's aide at her son's school.¹⁰⁶ The court of appeals held that imputation of income is within the trial judge's discretion, and the husband failed to present evidence that factory positions were available, nor did he provide evidence of the hours or shifts that would be required.¹⁰⁷

Although there has been no definitive ruling from the appellate courts,¹⁰⁸ the Clarke County Circuit Court held in *Linster v. Linster*¹⁰⁹ that an incarcerated parent was voluntarily unemployed and therefore imputed income to him of seven dollars an hour,¹¹⁰ his wage prior to incarceration.

E. Custody

1. Relocation

Virginia courts have sent confusing signals this year to parents interested in leaving the Commonwealth with their children. Despite the fact that the mother in *Mortimer v. Mortimer*¹¹¹ moved with her children to California without notifying their father, who had joint custody of the children, the court of appeals upheld the trial court's decision to retain physical custody with the mother. On the other hand, in *Laing v. Walker*,¹¹² a mother lost custody of her children when the court of appeals agreed that a mother's decision *not* to relocate to Egypt, after making extensive plans to do so, constituted a material change in circumstances necessitating a custody modification. The court of appeals explained that the "change of circumstances" test is a broad one, which includes "any myriad of changes that might exist as to [the minor children]."¹¹³ The issue of whether the mother could provide continuing stability

106. *Id.* at 704, 460 S.E.2d at 600-01.

107. *Id.*, 460 S.E.2d at 601.

108. See *L.C.S. v. S.A.S.*, 19 Va. App. 709, 718, 453 S.E.2d 580, 585 (1995) (explicitly refusing to decide whether an incarcerated parent is voluntarily underemployed); see also *Donnell v. Donnell*, 20 Va. App. 37, 455 S.E.2d 256 (1995) (reversing a support award against an incarcerated father).

109. 37 Va. Cir. 382 (Clarke County 1995).

110. *Id.*

111. No. 0418-95-4, 1995 WL 764074 (Va. App. 1995) (mem.).

112. No. 1693-94-3, 1995 WL 421421 (Va. App. 1995) (mem.).

113. *Id.* at *2 (citing *Keel v. Keel*, 225 Va. 606, 612, 303 S.E.2d 917, 921 (1983)).

for the children became a critical issue, both when the mother announced her plans to move to Egypt and when she canceled those plans.

Similarly, in *DeCapri v. DeCapri*,¹¹⁴ the court of appeals upheld the trial court's refusal to grant a mother sole custody of her daughter and allow her to move to Ohio, where the mother's family lived. Although the mother had been accepted at a community college in Ohio, she conceded that she could pursue her education in Richmond. The court of appeals noted that, in addition to having a very close relationship with his daughter that went beyond simply exercising his normal visitation rights, the father was also willing to provide day care for his daughter so the mother could return to school.

2. *In Camera* Interviews

*Haase v. Haase*¹¹⁵ presented the court of appeals with a matter of first impression in Virginia; that is, whether an *in camera* interview conducted with neither parents nor counsel present, and over the objection of one of the parents, violates that parent's due process right of confrontation.¹¹⁶ In *Haase*, the father objected to having his eight- and twelve-year-old children testify regarding their preference as to custody, on the basis that it would be psychologically detrimental to them.¹¹⁷ The commissioner ruled that he would interview both children *in camera* with neither parents nor counsel present.¹¹⁸ The father argued that, absent consent of the parties, this procedure was improper.¹¹⁹ The court of appeals noted that, in child custody disputes, *in camera* interviews are the favored method of

114. No. 0446-95-2, 1996 WL 22363 (Va. App. 1996) (mem.).

115. 20 Va. App. 671, 460 S.E.2d 585 (1995).

116. *Id.* at 681, 460 S.E.2d at 589.

117. *Id.* at 680, 460 S.E.2d at 589.

118. *Id.* at 677, 460 S.E.2d at 587.

119. *Id.* at 677-78, 460 S.E.2d at 587-88. Although the commissioner advised the parties to seek an amendment to the decree of reference if they disagreed with the procedure, the father did not seek a directive, and the children testified *in camera* in the presence of the commissioner only. *Id.* The commissioner subsequently recommended that the mother be granted sole custody, with extended summer vacation for the father. *Id.* at 678, 460 S.E.2d at 588. The chancellor adopted the commissioner's findings and recommendations, and the father appealed. *Id.*

determining a child's views,¹²⁰ and that parents' due process rights must be tempered by the best interests of the child.¹²¹ Although the court of appeals declined to establish a bright-line rule regarding children's testimony in custody disputes, it held that the judicial officer must consider such factors as the child's age and maturity, the matters about which they will be asked to testify, the animosity between the parents, and the likelihood that one or both of the parents might improperly influence the child's testimony.¹²² The court of appeals found that, based on these considerations, it could be appropriate for a judicial officer to conduct an *in camera* interview alone.¹²³ In order to protect the procedural rights of the parents when a judicial officer conducts an interview alone despite a parent's objections, a transcript of the evidence received must be prepared and made available upon request of the parents.¹²⁴

3. Child's Preference

The undisputed preference of a nine-year-old child to live with his father was held not to be controlling in *Sargent v. Sargent*,¹²⁵ and custody was awarded to the mother instead. The trial court was fully aware of the child's wishes, but found that the child was not old enough to express a preference and that other factors favored the mother as custodian.¹²⁶ The court of appeals noted that, while the child's preference should be considered, it is just one factor to be considered and does not control the custody determination.¹²⁷ While the court of

120. *Id.* at 680-81, 460 S.E.2d at 589.

121. *Id.* at 681, 460 S.E.2d at 589-90 (citing *Rader v. Montgomery County Dep't of Soc. Services*, 5 Va. App. 523, 528, 365 S.E.2d 234, 237 (1988) (quoting *Smith v. Pond*, 5 Va. App. 161, 163, 360 S.E.2d 885, 886 (1987))).

122. *Id.* at 682, 460 S.E.2d at 590.

123. *Id.* The court of appeals pointed out that its ruling encompassed only those interviews conducted by commissioners or chancellors, and declined to express an opinion on the applicability of such procedures in cases before the juvenile courts. *Id.* n.3.

124. *Id.* at 683, 460 S.E.2d at 590.

125. 20 Va. App. 694, 460 S.E.2d 596 (1995).

126. *Id.* at 702, 460 S.E.2d at 600.

127. *Id.*, 460 S.E.2d at 599-600. The court of appeals cited Virginia Code § 20-124.3 for the factors the trial court must consider in determining what custody arrangement will be in the child's best interests. *Id.* at 701, 460 S.E.2d at 599. Factor 7 is "[t]he reasonable preference of the child, if the court deems the child to be of

appeals held that the trial court properly considered the statutory factors in awarding custody to the mother, it did not specifically rule on the issue of whether a nine-year-old is too young to express a preference.¹²⁸

4. Jurisdiction under the Uniform Child Custody Jurisdiction Act

A mother successfully argued in *D'Agnese v. D'Agnese*¹²⁹ that, under the Uniform Child Custody Jurisdiction Act (hereinafter "U.C.C.J.A."), a Virginia circuit court could not assume jurisdiction over the issue of child custody in divorce proceedings because a custody proceeding was already pending in an Illinois court.¹³⁰ After filing for divorce in Virginia, the mother took her four children to live in Illinois and filed for an emergency protective order with an Illinois court, claiming that their father was abusive towards them.¹³¹ The Illinois court granted the protective order and granted temporary custody to the mother,¹³² who subsequently voluntarily dismissed her Virginia divorce petition.¹³³ The wife then filed for divorce in Illinois, and several days later the father filed for divorce in Virginia.¹³⁴ The husband failed to respond to the Illinois divorce petition, and the wife was awarded a divorce and custody of the children.¹³⁵

During the pendency of both the Virginia and Illinois proceedings, the wife filed a motion for abstention in Virginia requesting that the circuit court refrain from exercising jurisdiction due to the Illinois proceedings.¹³⁶ Despite the fact that

reasonable intelligence, understanding, age and experience to express such a preference." *Id.* at 702, 460 S.E.2d at 599 (emphasis omitted).

128. *Id.* at 702-03, 460 S.E.2d at 600.

129. 22 Va. App. 147, 468 S.E.2d 140 (1996).

130. *Id.* at 151, 468 S.E.2d at 142.

131. The Illinois court rejected the father's motion to dismiss, in which he claimed Illinois was not a proper forum, and extended the emergency order several times. *Id.* at 152, 468 S.E.2d at 142.

132. *Id.* at 151-52, 468 S.E.2d at 142.

133. *Id.* at 151, 468 S.E.2d at 142.

134. *Id.* at 152, 468 S.E.2d at 142. Father's appeal of the Illinois court's judgment was dismissed. *Id.*

135. *Id.*, 468 S.E.2d at 142-43.

136. *Id.* at 152-53, 468 S.E.2d at 142-43.

the Illinois judge had made findings of abuse under the "emergency jurisdiction" section of the U.C.C.J.A.,¹³⁷ which the husband did not challenge,¹³⁸ the Virginia circuit court judge concluded that both courts could take jurisdiction of the matter, and that the issue was whether one of the courts should decline jurisdiction at that point.¹³⁹ The Virginia judge then ruled that, because Virginia was the children's home state, Virginia was the proper forum to exercise jurisdiction under the U.C.C.J.A.¹⁴⁰ The Virginia court denied the wife's motion to dismiss the husband's petition for lack of jurisdiction and issued a divorce decree, granted custody to the wife, and later ordered supervised visitation.¹⁴¹ The wife appealed, claiming the Virginia circuit court had no jurisdiction over the children.¹⁴²

The court of appeals agreed with the wife, and held that once the Virginia court found that the Illinois court had obtained emergency jurisdiction, it was required under Virginia Code section 20-129(A) to defer to the Illinois court,¹⁴³ and any objection by the husband to the Illinois court's jurisdiction had to be made in Illinois.¹⁴⁴ Thus, the Virginia court's judgment assuming jurisdiction over the children was reversed and the visitation order vacated.¹⁴⁵

5. Shared Custody

In a decision that is certain to have a strong impact on the practice of family law, the Virginia court of appeals strictly

137. See VA. CODE ANN. § 20-126(A)(3) (Repl. Vol. 1995).

138. *D'Agnese*, 22 Va. App. at 153, 468 S.E.2d at 143.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 155, 468 S.E.2d at 144. Virginia Code section 20-129(A) states that the Commonwealth shall not exercise jurisdiction when, at the time the petition is filed, a proceeding concerning child custody is pending in the court of another state "exercising jurisdiction substantially in conformity with this chapter." VA. CODE ANN. § 20-129(A) (Repl. Vol. 1995). Although this rule does not apply if the other state court decides to stay its proceeding in favor of Virginia's court, in this case, the Illinois court declined to do so. *D'Agnese*, 22 Va. App. at 154, 468 S.E.2d at 143.

144. *D'Agnese*, 22 Va. App. at 156, 468 S.E.2d at 145.

145. *Id.*

defined a "day" for purposes of interpreting the shared custody provisions of Virginia Code section 20-108.2(G)(3)(c).¹⁴⁶ In *Ewing v. Ewing*,¹⁴⁷ the husband disputed the trial court's refusal to apply the shared custody support guidelines,¹⁴⁸ arguing unsuccessfully that, during periods in which he had visitation for less than twenty-four hours, he was entitled to credit for a "day" for purposes of establishing shared custody pursuant to code section 20-108.2(G)(3)(c).¹⁴⁹ The court of appeals held that the legislative intent behind section 20-108.2(G)(3)(c) was that a "day" should be defined as "any continuous twenty-four hour period."¹⁵⁰ Thus, the husband was not entitled to application of the shared custody provisions of section 20-108.2. The dissent rejected the majority's strict definition of a day, stating that the definition of a "day" should equitably account for the actual time each parent spends with his or her child.¹⁵¹

F. *Equitable Distribution*

1. Jurisdiction

The Supreme Court of Virginia ruled in *Toomey v. Toomey*¹⁵² that an out-of-state resident, who was personally served with a bill of complaint for divorce and failed to respond to it, lost her rights to equitable distribution in a Virginia court.¹⁵³ The wife could have requested that the circuit court determine her rights prior to entering the divorce decree, or that it retain its jurisdiction and adjudicate her equitable distribution rights after entering the decree.¹⁵⁴ The wife's failure to

146. Virginia code section 20-108.2(G)(3)(c) reads in part, "[t]he shared custody rules set forth herein apply when each parent has physical custody of a child or children born of the parties . . . for more than 110 *days* of the year." VA. CODE ANN. § 20-108.2(G)(3)(c) (Cum. Supp. 1996) (emphasis added).

147. 21 Va. App. 34, 461 S.E.2d 417 (1995).

148. *Id.* at 35, 461 S.E.2d at 417.

149. *Id.* at 37, 461 S.E.2d at 418.

150. *Id.*

151. *Id.* at 38-39, 461 S.E.2d at 418-19 (Elder, J., joined by Benton, J., and Koontz, J., dissenting). The dissent noted that the majority of states that have addressed this issue have used an "overnight" standard to determine the applicability of shared custody. *Id.* at 39, 461 S.E.2d at 419 (Elder, J., dissenting).

152. 251 Va. 168, 465 S.E.2d 838 (1996).

153. *Id.* at 172, 465 S.E.2d at 840.

154. *Id.*

assert her rights to equitable distribution prior to the entry of the final decree meant the Virginia circuit court lost its jurisdiction to adjudicate such a claim once it entered the final divorce decree.¹⁵⁵

2. Fault

*O'Loughlin v. O'Loughlin*¹⁵⁶ is significant for its introduction of the theory of "negative nonmonetary contributions," which in this case justified making an equitable distribution award in favor of the wife.¹⁵⁷ In *O'Loughlin*, the court of appeals upheld an award of 60% of the marital property to a wife whose husband had numerous affairs during the marriage,¹⁵⁸ thus illustrating how a party's marital fault can be shown to have made a "negative contribution" to the marriage or marital property.

The husband contended on appeal that the trial court's consideration of his "negative nonmonetary contributions" to the family was a "back door approach" used to punish him for his infidelity.¹⁵⁹ The court of appeals disagreed, stating that the trial court had properly considered all the factors in Virginia Code section 20-107.3 for the purposes of fairly dividing the marital assets,¹⁶⁰ and had specifically declined to consider his lavish spending on paramours as a factor, due to lack of evidence to support a finding of dissipation.¹⁶¹ Nevertheless, the trial court recognized that the husband's infidelity had a negative impact on the family's well-being.¹⁶² The court of appeals acknowledged that punishment for fault would be "in contravention of well-established case law" directing courts to consider the circumstances that affected the *economic* condition of the marriage.¹⁶³ Nevertheless, *Aster v. Gross*¹⁶⁴ did not preclude

155. *Id.* at 172, 465 S.E.2d at 839-40.

156. 20 Va. App. 522, 458 S.E.2d 323 (1995).

157. *Id.* at 524, 458 S.E.2d at 324.

158. *Id.* at 526, 458 S.E.2d at 325.

159. *Id.* at 525, 458 S.E.2d at 324-25.

160. *Id.* at 524-29, 458 S.E.2d at 324-26.

161. *Id.* at 526, 458 S.E.2d at 325.

162. *Id.*

163. *Id.* Absent a showing that marital property was used for the benefit of one spouse, for purposes unrelated to the marriage, in anticipation of separation or divorce, and during a period when the marriage in jeopardy, "no finding of waste or

consideration of negative actions of one party that brought about the dissolution of the marriage.¹⁶⁵ Thus, "while equitable distribution is not a vehicle to punish behavior, the statutory guidelines authorize consideration of such behavior as having an adverse effect on the marriage and justifying an award that favors one spouse over the other."¹⁶⁶

3. Gifts

*Theismann v. Theismann*¹⁶⁷ focused on whether a husband¹⁶⁸ intended to give his wife substantial gifts. Shortly after his 1991 marriage, Mr. Theismann had his farm in Leesburg, Virginia, deeded jointly to himself and his wife as tenants by the entireties.¹⁶⁹ In addition, he added his wife's name to a Goldman Sachs account and created a Merrill Lynch account in the couple's joint names.¹⁷⁰ In 1994, the wife filed for divorce based on her husband's adultery.¹⁷¹ The trial court found that these retitlings of property constituted a gift entitling her to a monetary award of \$130,000 and spousal support of \$3500 per month.¹⁷² Upon the wife's motion to reconsider, which claimed that the court had not properly considered the marital gifts, the trial court increased the monetary award to \$950,000 on the ground that the previous award failed to give due weight to the marital gifts.¹⁷³ Both parties appealed.¹⁷⁴

The court of appeals held that the trial court did not abuse its discretion in making a significant monetary award to the wife in spite of the short duration of the marriage and the fact that the husband made most of the financial contributions to

dissipation may be considered as a factor which weighs against the party at fault." *Id.* (citations omitted).

164. 7 Va. App. 1, 371 S.E.2d 833 (1988).

165. *O'Loughlin*, 20 Va. App. at 527, 458 S.E.2d at 325.

166. *Id.* at 526-27, 458 S.E.2d at 325 (citing *Smith v. Smith*, 18 Va. App. 427, 431-32, 444 S.E.2d 269, 273 (1994)).

167. 22 Va. App. 557, 471 S.E.2d 809 (1996).

168. Former Washington Redskins quarterback Joe Theismann.

169. *Theismann*, 22 Va. App. at 563, 471 S.E.2d at 812.

170. *Id.*

171. *Id.*

172. *Id.* at 564, 471 S.E.2d at 812.

173. *Id.*

174. *Id.*

the marriage.¹⁷⁵ The wife proved that her husband intended to make a gift of the three retitled properties by presenting evidence that he gave her cards in which he said that the farm was now "our home" and that the money was hers to spend, and that he bragged he had made her a "millionaire."¹⁷⁶ Moreover, the husband placed no reservations on the title transfers allowing him to reclaim the property upon divorce.¹⁷⁷ The court of appeals held that the trial court's relatively equal distribution of the gifted property was consistent with Virginia Code sections 20-107.3(D) and (E) and therefore was not an abuse of discretion.¹⁷⁸ The husband argued that the trial court's "fifty/fifty" division of the gifted assets between the parties was based on its erroneous interpretation of *McClanahan v. McClanahan*,¹⁷⁹ which established the principle of the equality of spouses' equities, rights, and interests in an interspousal gift of jointly titled property under section 20-107.3(D). The court of appeals pointed out that, in fact, the wife did not get an exact fifty percent interest which would have been \$1.018 million.¹⁸⁰ Moreover, the court of appeals ruled that the trial court had properly relied on *McClanahan* in considering the parties' equities and rights in the gifted property.¹⁸¹

The court of appeals expressly declined to adopt the husband's proposed rule that an interspousal gift constitutes marital property in the event of divorce only if the parties affirmatively so contemplated at the time the gift was made.¹⁸² Such a rule, observed the court, "would permit donor spouses to disavow their gifts in practically all cases."¹⁸³

175. *Id.* at 565, 471 S.E.2d at 813. "Monetary contributions do not necessarily carry greater weight than nonmonetary contributions." *Id.*, 471 S.E.2d at 812 (citing *L.C.S. v. S.A.S.*, 19 Va. App. 709, 721, 453 S.E.2d 580, 586 (1995)).

176. *Id.* at 566, 471 S.E.2d at 813.

177. *Id.*

178. *Id.* at 568, 471 S.E.2d at 814.

179. 19 Va. App. 399, 451 S.E.2d 691 (1994).

180. *Theismann*, 22 Va. App. at 566 n.3, 471 S.E.2d at 813, n.3.

181. *Id.* at 568, 471 S.E.2d at 814.

182. *Id.* at 566 n.2, 471 S.E.2d at 813, n.2 (citing VA. CODE ANN. § 20-107.3(A)(3)(f) (Repl. Vol. 1995 & Cum. Supp. 1996)).

183. *Id.* The husband also argued that the trial court improperly considered his marital fault in making its award to the wife. *Id.* at 569, 471 S.E.2d at 815. Although the trial court's first opinion found fault irrelevant to the equitable distribution, as it had no economic impact on the marital property, the second opinion increased the award because, among other things, it would be inequitable to allow the

4. Tax Liability

The court of appeals held in *Arbuckle v. Arbuckle*¹⁸⁴ that the trial court erred in discounting the value of the husband's dental practice by the amount of capital gains tax liability that would have accrued in a hypothetical sale of the practice.¹⁸⁵ The court of appeals rejected the husband's reliance on *Barnes v. Barnes*,¹⁸⁶ which deemed permissible the consideration of the tax consequences attributable to a potential future sale of the marital home,¹⁸⁷ by noting that the *Barnes* court had not employed hypothetical tax consequences in determining the value of the home.¹⁸⁸ Instead, *Barnes* simply recognized that transferring jointly owned property to the husband shifted to him a potential tax liability stemming from the wife's present ownership interest, and then considered that information in determining the amounts of the *division* and the *monetary award*.¹⁸⁹ Therefore, the trial court in *Arbuckle* erred in basing its appraisal of the dental practice on a potential liability resulting from a hypothetical sale rather than on the present fair market value of the property.¹⁹⁰

husband to use the divorce, caused by his own marital fault, as a means of revoking an unconditional gift. *Id.*, 471 S.E.2d at 814. The court of appeals reaffirmed its holdings in *Aster* and *O'Loughlin* that, although fault cannot be used to punish an offending spouse, it should be viewed in terms of its "economic impact on the marital estate" and its negative impact on "non-economic aspects of the marriage in determining a monetary award." *Id.*, 471 S.E.2d at 815. Denying that the trial court increased the monetary award based on the husband's adultery, the court of appeals held that the award was modified because the trial court initially "failed to give due consideration to [the wife's] interest in the gifted property." *Id.* The court of appeals also held that the trial court properly considered the husband's fault in determining that the wife was entitled to spousal support. *Id.* at 572, 471 S.E.2d at 816. At press time, however, the Virginia Court of Appeals had granted a rehearing of this case. Paul Fletcher, *Court is Refining the Rules on Gifts and E.D. Awards*, VA. LAW. WKLY. Aug. 19, 1996, at 1.

184. 22 Va. App. 362, 470 S.E.2d 146 (1996).

185. *Id.* at 364, 470 S.E.2d at 147. Because the husband had no intention of selling his practice, the trial court acknowledged that considering potential capital gains taxes would indulge a legal fiction. *Id.* at 365, 470 S.E.2d at 147.

186. 16 Va. App. 98, 428 S.E.2d 294 (1993).

187. *Arbuckle*, 22 Va. App. at 366, 470 S.E.2d at 148.

188. *Id.* at 367, 470 S.E.2d at 148.

189. *Id.*

190. *Id.*

5. Repayment of Non-Marital Debts

In *Hayes v. Hayes*¹⁹¹ the court of appeals held that Virginia Code section 20-107.3(C)¹⁹² authorizes the trial judge to order the parties to repay each other for non-marital debts.¹⁹³ In *Hayes*, a husband borrowed money from his wife to pay child support to his former spouse and to improve his separate property, both of which were found to be separate debts.¹⁹⁴ The trial judge held that the court did not have the authority to order repayment of these non-marital debts.¹⁹⁵

The court of appeals found the language in section 20-107.3 relating to debt unambiguous, and held that the term "debt" is not limited to marital debt.¹⁹⁶ Thus, once a trial court finds that a debt is a separate debt, it has the authority to order repayment of the debt after considering the factors specified in section 20-107.3(E).¹⁹⁷

6. Classification of Property

In *Stumbo v. Stumbo*,¹⁹⁸ the court of appeals reversed a \$30,000 lump-sum award to a wife on the grounds that the trial court failed to make findings necessary under Virginia Code section 20-107.3 to properly classify or value marital and separate property, and to classify or apportion marital debt.¹⁹⁹ Because the trial court did not properly consider the rights and equities of the parties in the marital property or debts, the

191. 21 Va. App. 515, 465 S.E.2d 590 (1996).

192. Virginia Code § 20-107.3(C) states in part: "The court shall also have the authority to apportion and order the payment of the debts of the parties, or either of them, that are incurred prior to the dissolution of the marriage, based upon the factors listed in subsection E." VA. CODE ANN. § 20-107.3(c) (Repl. Vol. 1995 & Cum. Supp. 1996).

193. *Hayes*, 21 Va. App. at 518, 465 S.E.2d at 592.

194. *Id.* at 519, 465 S.E.2d at 592.

195. *Id.* at 516, 465 S.E.2d at 591.

196. *Id.* at 518, 465 S.E.2d at 592. Under § 20-107.3, the authority to require payment of non-marital debt is limited only to the extent that the factors in subsection E must be considered. VA. CODE ANN. § 20-107.3 (Repl. Vol. 1995 & Cum. Supp. 1996).

197. 21 Va. App. at 519, 465 S.E.2d at 592.

198. 20 Va. App. 685, 460 S.E.2d 591 (1995).

199. *Id.* at 693, 460 S.E.2d at 595.

court of appeals was unable to determine from the record on what basis the trial court made the \$30,000 equitable distribution award.²⁰⁰ While the trial court classified and valued some property as marital, the total value of that property was insufficient to support a \$30,000 award.²⁰¹ Moreover, the trial court did not determine how much of the debt was incurred prior to the breakup of the marriage, the basis for the debts, or which property could serve as security for the debts.²⁰²

The Supreme Court of Virginia ruled in *Sprouse v. Griffin*²⁰³ that, where a party to a pending divorce action died after the couple's marital home was sold but prior to the division of the proceeds being held in escrow, the funds became the wife's sole property.²⁰⁴ In *Sprouse*, while the divorce was pending, the parties sold their marital home which they owned as tenants by the entireties.²⁰⁵ When the parties could not agree on the disposition of the proceeds, the trial court ordered that the fund be held in escrow until further order of the court.²⁰⁶ When the husband died intestate shortly thereafter, his administrator questioned the trial court's jurisdiction to determine the proper disposition of the escrow fund.²⁰⁷ The trial court's ruling that it had jurisdiction was reversed by the court of appeals on the ground that the husband's death had "divested" the trial court of its jurisdiction to determine the proper disposition of the funds.²⁰⁸ The Supreme Court of Virginia reversed.²⁰⁹

The supreme court noted that the husband's death terminated the marriage and thus abated the divorce suit.²¹⁰ However, the trial court's order establishing the escrow fund "until further order of the Court" remained valid, and the circuit court, being a court of general jurisdiction, retained the power to

200. *Id.*

201. *Id.*

202. *Id.*

203. 250 Va. 46, 458 S.E.2d 770 (1995).

204. *Id.* at 51, 458 S.E.2d at 773.

205. *Id.* at 47, 458 S.E.2d at 771.

206. *Id.*

207. *Id.* at 49, 458 S.E.2d at 772.

208. *Id.*

209. *Id.* at 50, 458 S.E.2d at 772.

210. *Id.*

determine the disposition of the escrow fund it had created.²¹¹ The husband's administrator argued that, upon deposit, the escrowed funds gained as a result of the sale of the marital home lost their character as property held as tenants by the entirety.²¹² The supreme court disagreed, noting that while selling real estate owned by a married couple as tenants by the entirety terminates that estate in that property, the proceeds from the sale of that property are not prohibited from being an estate by the entirety.²¹³ In fact, "[i]n the absence of an agreement or understanding to the contrary, the proceeds derived from a voluntary sale of real estate held by the entirety are likewise held by the entirety."²¹⁴ Thus, the trial court properly ruled that, upon the husband's death, the escrow funds became the wife's sole property.²¹⁵

7. Retirement Plans

*Mann v. Mann*²¹⁶ dealt with an issue of first impression in Virginia: whether section 20-107.3(A) and its tracing provisions control the classification of a husband's defined contribution plan.²¹⁷ The husband's defined contribution plan was worth \$23,370 when the parties married, and \$163,467 when they separated.²¹⁸ Despite the testimony of the husband's accounting expert that the value of the husband's pre-marital contributions had grown to \$61,097 during the marriage as a result of earnings attributable solely to those funds, the trial court re-

211. *Id.* at 50, 458 S.E.2d at 773.

212. *Id.* at 50-51, 458 S.E.2d at 772.

213. *Id.* at 51, 458 S.E.2d at 773.

214. *Id.* (quoting *Oliver v. Givens*, 204 Va. 123, 126-27, 129 S.E.2d 661, 663 (1963)).

215. *Id.*

216. 22 Va. App. 459, 470 S.E.2d 605 (1996).

217. The court of appeals stated:

A defined contribution plan is comprised of funds held in an account established by the employee through his employer. [It] is one in which "the employee and the employer both make contributions to a retirement plan account, and the employee's benefits are expressed in terms of the present balance in his account . . . Thus, upon retirement, a defined contribution plan gives an employee the funds remaining in his plan account. . . ."

Id. at 461, 470 S.E.2d at 605-06 (citations omitted).

218. *Id.* at 461-62, 470 S.E.2d at 606.

fused to classify the passively earned income on his pre-marital contribution as the husband's separate property.²¹⁹ The court of appeals reversed and remanded.

On appeal, the wife argued unsuccessfully that the husband should not be permitted to retrace income gained passively from his retirement plan, because Virginia's equitable distribution law treats retirement plans "as a unique species of property."²²⁰ The wife therefore contended that retirement plans should not be subject to the classification and distribution rules applicable to non-retirement plan assets.²²¹

The court of appeals disagreed that the legislature intended to exclude retirement plans from the equitable distribution classification process.²²² In accordance with section 20-107.3(A), the marital share of the retirement plan is first determined under section 20-107.3(G).²²³ This share then fits the definition of marital property for purposes of tracing separate property under the equitable distribution provisions of section 20-107.3(A)(3)(b).²²⁴ Income earned passively during the marriage from separate funds contributed to a defined contribution plan must be classified like pension funds, which remain presumptively marital "*in the absence of satisfactory evidence that the property is separate.*"²²⁵ The court of appeals noted that this is equivalent to the statutory provision that separate property commingled with marital property retains its separate character if it can be retraced by a preponderance of the evidence.²²⁶ The court of appeals rejected the wife's argument that section 20-107.3(G)(1)'s definition of the marital share of a pension requires the court to treat all funds earned by the pension plan during the marriage as marital property.²²⁷

219. *Id.* at 462, 470 S.E.2d at 606.

220. *Id.* at 463, 470 S.E.2d at 606.

221. *Id.*

222. *Id.*

223. VA. CODE ANN. § 20-107.3 (Repl. Vol. 1995 & Cum. Supp. 1996).

224. *Id.*

225. *Mann*, 22 Va. App. at 464, 470 S.E.2d at 607 (citing VA. CODE ANN. § 20-107.3(A)(2) (Repl. Vol. 1995 & Cum. Supp. 1996)).

226. *Id.*

227. *Id.*

Thus, the trial court erred in failing to classify as separate the income passively earned by husband's separate contributions.²²⁸

G. Attorney's Fees

In *Bogart v. Bogart*,²²⁹ the wife successfully argued that the trial court violated Rule 1:1²³⁰ when it modified its equitable distribution order and awarded attorney's fees to the husband more than twenty-one days after issuance of the order.²³¹ Although the equitable distribution order denied the husband's request for attorney's fees, the trial court granted the husband's motion for reconsideration and granted him attorney's fees.²³² The trial court requested that the husband prepare an order reflecting this, to be entered within ten days.²³³ However, the trial court did not enter the final order awarding such fees until twenty-two days after entry of the original order.²³⁴ Rule 1:1 mandates that, at the expiration of twenty-one days after the date of an order's entry, the trial court loses jurisdiction to alter a final judgment, order, or decree, with certain exceptions under section 8.01-428.²³⁵ Because in this case no exceptions applied, the trial court lacked jurisdiction to disturb the order after the twenty-first day.²³⁶

H. Bankruptcy

The court of appeals also held in *Bogart* that the trial court had jurisdiction to incorporate a property settlement agreement in its final equitable distribution order, despite a federal bank-

228. *Id.* at 465, 470 S.E.2d at 608.

229. 21 Va. App. 280, 464 S.E.2d 157 (1995).

230. VA. SUP. CT. R. 1:1.

231. *Bogart*, 21 Va. App. at 283, 464 S.E.2d at 158.

232. *Id.* at 289, 464 S.E.2d at 161.

233. *Id.*

234. *Id.*

235. *Id.* at 290, 464 S.E.2d at 161. Rule 1:1 of the Rules of the Supreme Court states, "[a]ll final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer." VA. SUP. CT. R. 1:1.

236. *Bogart*, 21 Va. App. at 290, 464 S.E.2d at 162.

ruptcy court's refusal to approve the property settlement agreement.²³⁷ After filing for divorce, the wife filed a Chapter 11 petition for bankruptcy, which led to an automatic stay of the divorce proceedings.²³⁸ Shortly thereafter, the parties resolved their equitable distribution and spousal support issues by executing a letter agreement.²³⁹ The bankruptcy court lifted the automatic stay, allowing the divorce to proceed, but retained jurisdiction to determine the allowance of claims against the wife's estate "as the estate shall be constituted pursuant to the Order of the State Courts."²⁴⁰ The bankruptcy court refused to approve the letter agreement terms on the basis that it was "not in the best interests of [the wife] and her creditors."²⁴¹

When the parties subsequently appeared in state court to resolve the equitable distribution issues, the wife argued that the bankruptcy court's decision regarding the validity of the letter agreement was final and binding on all parties and state courts.²⁴² She then moved unsuccessfully for an injunction in the bankruptcy court to prevent her husband from seeking approval of the agreement from the state court.²⁴³ When the trial court incorporated the terms of the letter agreement into its final order, the wife appealed.²⁴⁴ The court of appeals affirmed the trial court's ruling by stating that the bankruptcy court's actions revealed that the bankruptcy court had retained limited jurisdiction,²⁴⁵ and it was therefore within the trial court's jurisdiction to determine whether the agreement was enforceable and to incorporate the agreement in its final equitable distribution decree.²⁴⁶

237. *Id.* at 289, 464 S.E.2d at 161.

238. *Id.* at 283, 464 S.E.2d at 158.

239. *Id.* at 284, 464 S.E.2d at 158.

240. *Id.*, 464 S.E.2d at 159.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 284-85, 464 S.E.2d at 159.

245. *Id.* at 287, 464 S.E.2d at 160.

246. *Id.* at 289, 464 S.E.2d at 161.

III. 1996 LEGISLATION

A. *Family Court*

Passed in 1993, the legislation establishing the parameters of the family court system in Virginia changed the jurisdiction of both the Juvenile and Domestic Relations General District Court and the Circuit Court by transferring all divorce and family law matters to the Juvenile Court, thereby creating the "family court."²⁴⁷ The implementation of the family court system was delayed this year until June 1, 1998, contingent upon funding.²⁴⁸

B. *Divorce*

The only bill introduced regarding obtaining a divorce in Virginia was carried over to the 1997 Session of the General Assembly.²⁴⁹ The bill would *prohibit* no-fault divorces if there were children born of the marriage. If the parties did not have children, the bill would require a one-year waiting period and the *consent* of *both* parties to obtain a no-fault divorce.²⁵⁰ This bill would make getting a divorce based on living separate and apart impossible for many, and very difficult for others,²⁵¹ probably increasing the volume of fault litigation.

247. VA. CODE ANN. § 20-96 (Repl. Vol. 1995 & Cum. Supp. 1996).

248. *Id.*

249. H.B. 1188, Va. Gen. Assembly, (Reg. Sess. 1996).

250. *Id.*

251. Currently, a no-fault divorce can be obtained by parties with children after a one-year separation, and by parties without children after a six-month separation with a property settlement agreement. VA. CODE ANN. § 20-91(9)(a) (Repl. Vol. 1995 & Cum. Supp. 1996).

C. *Support*

1. Spousal Support

a. Department of Child Support Enforcement's Authority

One bill amending several sections of the Virginia Code regarding the Department of Social Services' Division of Child Support Enforcement's ("DCSE") jurisdiction and authority passed the legislature.²⁵² The DCSE's lack of authority to either establish or enforce an order dealing only with spousal support was clarified by this bill.²⁵³ The bill directs the DCSE to forward any such order to the appropriate juvenile and domestic relations or family court.²⁵⁴

b. Rehabilitative Alimony

Widely debated this year, rehabilitative alimony is the subject of a study being done by the Virginia State Bar.²⁵⁵ Additionally, a bill giving the court authority to order periodic payments to a spouse over a specific period of time was carried over to the next session.²⁵⁶ Currently, the court's authority is limited to ordering spousal support in a lump sum or periodic payments over an indefinite time period.²⁵⁷

c. Termination/Modification of Spousal Support

Another bill carried over to the 1997 session would add unmarried cohabitation to the statutory list of conditions permitting termination or modification of spousal support.²⁵⁸ Currently, although remarriage is a terminating condition, cohabi-

252. VA. CODE ANN. § 20-88.39, -88.48 (Cum. Supp. 1996).

253. VA. CODE ANN. § 20-88.39(G) (Cum. Supp. 1996).

254. VA. CODE ANN. § 20-88.48(A) (Cum. Supp. 1996).

255. H.J. Res. 69, Va. Gen. Assembly, (Reg. Sess. 1996). The General Assembly continued the authorization for this study. A report is due to the Governor and the 1997 Session of the General Assembly.

256. H.B. 941, Va. Gen. Assembly, (Reg. Sess. 1996).

257. VA. CODE ANN. § 20-107.1 (Repl. Vol. 1995 & Cum. Supp. 1996).

258. H.B. 1341, Va. Gen. Assembly, (Reg. Sess. 1996).

tation is not; therefore, an individual can avoid having their spousal support terminated or modified simply by not marrying the person with whom they are cohabitating.²⁵⁹ A third bill regarding the retroactive adjustment of spousal support did not pass this session.²⁶⁰

2. Child Support

The issue of child support was at the heart of most of the bills regarding domestic relations introduced and passed this session.²⁶¹ The bills introduced encompassed topics such as: establishing child support retroactively, modifying child support, continuing support for children over the age of eighteen, continuing support for disabled children, establishing minimum support payments, increasing the amount of attorney's fees, and delineating certain costs the DCSE can recover in enforcement actions.

a. Retroactive Child Support

The legislature modified several sections of the Virginia Code relating to retroactive child support. The first modification gives the court authority to establish liability for child support back

259. VA. CODE ANN. § 20-109 (Repl. Vol. 1995 & Cum. Supp. 1996).

260. H.B. 1128, Va. Gen. Assembly, (Reg. Sess. 1996). The bill allowed for retroactive adjustment of spousal support when a support award is reversed on appeal allowing payments made in the interim to be reimbursed to the payor or credited to future payments. *Id.* This bill would have reversed case law which held that the court lacked the authority to retroactively modify a support award, even though the court had overturned the award on appeal. *See Reid v. Reid*, 245 Va. 409, 429 S.E.2d 208 (1993). The supreme court held that the only statutory provision for retroactive modification involved proceedings to increase, decrease, or terminate support. *Id.* at 412, 429 S.E.2d at 210. In an unpublished opinion, the Virginia Court of Appeals followed *Reid* and applied it to a case resulting in an overpayment of over \$100,000 by the husband to the wife after she remarried. *MacNelly v. MacNelly*, No. 1985-94-4 1995 Va. App. LEXIS 496 (June 6, 1995). The court held that it did *not* have the statutory authority to offset the husband's payments of spousal support during the appellate phase of his case regarding these payments against the equitable distribution awarded to his wife. *Id.*

261. Approximately one-third of the Domestic Relations bills introduced in the 1996 Session of the Virginia General Assembly concerned child support. Of those introduced, approximately two-thirds passed. H.B. Sess. Summaries Nos. 1-9, Va. Gen. Assembly, (Reg. Sess. 1996).

to the filing date of an action to determine parentage and/or child support.²⁶² The court or administrative agency may determine the liability for this period by using the "gross monthly income of the parties averaged over the period of retroactivity."²⁶³ Prior to this legislation, retroactivity applied only to modification and not initial support determination.²⁶⁴ However, practitioners may have experienced cases in which retroactive support was applied to initial support petitions.

Balancing the early determination of liability permitted by this statute is an additional requirement that the "complainant exercise[] due diligence in the service of the respondent,"²⁶⁵ which applies explicitly to actions filed in court.²⁶⁶ Therefore, it is arguable that the "due diligence requirement" does not apply to an *administrative determination* of child support liability.²⁶⁷ Retroactive liability in an administrative action is established as of "the date the order directing payment is delivered to the sheriff or process server for service on the obligor."²⁶⁸ There is no mention of "due diligence." Nor is there any mention of the payee's obligation to give the DCSE accurate information regarding the payor's location.

The legislature did not change the statute relating to the court's ability to retroactively modify child support.²⁶⁹ Therefore, practitioners should note that the date used for retroactive *modification* is different than the new date established for retroactive *initial determination* of child support. Thus, the court may only retroactively modify child support back to the date "during which there is a pending petition for modification, but only from the date that notice of such petition has been given to the responding party."²⁷⁰

262. VA. CODE ANN. § 20-49.8, -108.2 (Cum. Supp. 1996).

263. VA. CODE ANN. § 20-108.2(C) (Cum. Supp. 1996).

264. The title of this section is "Revision and alteration of such decrees." VA. CODE ANN. § 20-108 (Repl. Vol. 1995 & Cum. Supp. 1996). By reading the entire section, it appears that it only applies to retroactive modification of existing support orders, and not to an initial determination of support.

265. VA. CODE ANN. § 20-49.8(A) (Cum. Supp. 1996).

266. *Id.*

267. *See* VA. CODE ANN. § 63.1-250.1 (Repl. Vol. 1995 & Cum. Supp. 1996).

268. VA. CODE ANN. § 63.1-250.1(A) (Cum. Supp. 1996).

269. VA. CODE ANN. § 20-108 (Repl. Vol. 1995 & Cum. Supp. 1996).

270. *Id.*

The legislature's two changes to the statute regarding administrative modification of child support obligations make the amended section more applicable to administrative procedures.²⁷¹ The section now reads that notice of the administrative proceeding is "pursuant to [section] 8.01-296"²⁷² and given to the "nonrequesting party."²⁷³ Previously the notice was given to the "responding party."²⁷⁴ Furthermore, when filing a proposed modified order of child support, the DCSE now has the authority to choose between the original court or the court having current jurisdiction.²⁷⁵

b. Child Support Guidelines

The legislature amended the child support guidelines to clarify that the minimum child support obligation is sixty-five dollars a month.²⁷⁶ Although the statute does not provide an exception for reasons such as unemployment or illness, the presumptive amount can be rebutted with the statutory factors for deviation.²⁷⁷

Also, the legislature gave the DCSE the authority to impute income when a person is "voluntarily unemployed or fails to provide verification of income upon request of the Department. . . ."²⁷⁸ However, the DCSE cannot impute income to the custodial parent, if: "(i) a child is not regularly attending school, (ii) child care services are not available, or (iii) the cost

271. VA. CODE ANN. § 63.1-252.1 (Cum. Supp. 1996).

272. VA. CODE ANN. § 8.01-296 (Repl. Vol. 1992 & Cum. Supp. 1996). This section deals with the manner of serving process upon natural persons.

273. VA. CODE ANN. § 63.1-252.1 (Cum. Supp. 1996). Additionally, "notice pursuant to § 8.01-296" was added to make the DCSE's notice requirements consistent when initiating reviews of certain orders. VA. CODE ANN. § 63.1-252.2 (Cum. Supp. 1996).

274. VA. CODE ANN. § 63.1-252.1 (Repl. Vol. 1995).

275. VA. CODE ANN. § 63.1-252.2 (Cum. Supp. 1996). The DCSE was previously limited to filing in the court that originally entered the order. *See* VA. CODE ANN. § 63.1-252.2 (Repl. Vol. 1995).

276. VA. CODE ANN. § 20-108.2(B) (Cum. Supp. 1996). This statute makes clear that courts cannot prorate support obligations based on where the income falls within the \$0-599 range in the child support table. *Id.* A rebuttable minimum of \$65 is now established. VA. CODE ANN. § 20-108.2 (Cum. Supp. 1996).

277. VA. CODE ANN. § 20-108.1 (Cum. Supp. 1996). Rebuttal of presumptive child support obligation amounts can be done using the factors in this section.

278. VA. CODE ANN. § 63.1-264.2 (Cum. Supp. 1996).

of such child care services are not added to the basic child support obligation."²⁷⁹

c. Extension of Child Support Beyond Age Eighteen

Four bills passed regarding the extension of child support, thus amending several sections of the Virginia Code.²⁸⁰ These amendments clarified the court's authority to continue support for a child over the age of eighteen if the child meets the other necessary requirements, including being a full-time student and living at home.²⁸¹ Additionally, the legislature provided the court with the authority to continue support for disabled children.²⁸² Support for disabled children is continued past the age of eighteen if the child is: "(i) severely and permanently mentally or physically disabled, (ii) unable to live independently and support himself, and (iii) resides in the home of the parent seeking or receiving child support."²⁸³ If a disabled adult child receiving social security or other government support meets these conditions, then the support obligation cannot be terminated on the basis that he is "earning a living."²⁸⁴ Section 20-124.2 applies to *continuing* support, but does not give the court authority to make an initial determination of support if an adult becomes disabled, or if a child has temporary conditions caused by physical or mental ailments.²⁸⁵ In addition to separate child support proceedings these changes were incorporated into the sections giving the court authority to make orders regarding these issues in pending suits for divorce, annulment, and separate maintenance.²⁸⁶

279. *Id.* The court's authority to impute income is broader than the administrative body's authority. VA. CODE ANN. § 20-108.1(B)(3) (Cum. Supp. 1996).

280. *See* VA. CODE ANN. § 20-103-124.2 (Cum. Supp. 1996); VA. CODE ANN. § 16.1-278.15 (Repl. Vol. 1996).

281. VA. CODE ANN. § 20-124.2(C) (Cum. Supp. 1996); VA. CODE ANN. § 16.1-278.15 (Repl. Vol. 1996). The child continues to get support until he/she is nineteen or graduates from high school, whichever occurs first.

282. VA. CODE ANN. § 20-124.2(C) (Cum. Supp. 1996).

283. *Id.*

284. VA. CODE ANN. § 20-61 (Repl. Vol. 1995). Prior to this amendment this section could have been interpreted to terminate support when a disabled adult is receiving governmental support.

285. VA. CODE ANN. § 20-124.2 (Cum. Supp. 1996).

286. VA. CODE ANN. § 20-103 (Cum. Supp. 1996). Subsection (A)(v) directs the court "to provide support for any child of the parties to whom a duty of support is

d. Department of Social Services: Division of Child Support Enforcement's Authority

Previously, large employers were not required to make more than a single payment to the DCSE covering all of the payroll withholding orders for their individual employees.²⁸⁷ Now, when orders come from a support enforcement agency outside the Commonwealth, the employer must honor each individually.²⁸⁸

When physical custody changes, the DCSE now has the authority to change the payee of child support payments without requesting such a change from the court, which should create a more efficient process.²⁸⁹ The DCSE can take this action when "an assignment of rights has been made to the Department or an application for services has been made by . . . [a] caretaker, relative, or individual with the DCSE."²⁹⁰

The most significant bill passed pertaining to the DCSE expands its ability to recover attorney's fees and actual costs in enforcement actions.²⁹¹ Although the DCSE could previously recover attorney's fees if it prevailed,²⁹² it was restricted to a maximum equal to court-appointed rates, which are minimal and controlled by statute.²⁹³ Now, the DCSE can recover "reasonable attorney's fees."²⁹⁴ In addition, the DCSE may now recover costs of "service of process and seizure and sale pursuant to a levy on a judgment."²⁹⁵ The recovery of "costs" permitted by this statute should arguably be limited to those specifically delineated.

A new section provides guidelines for a pilot program to

owed *and* to continue to support any child over the age of eighteen who meets the requirements set forth in subsection(C) of § 20-124.2." VA. CODE ANN. § 20-103(A) (Cum. Supp. 1996) (emphasis added).

287. VA. CODE ANN. § 20-60.5(E), -79.3(A)(16) (Repl. Vol. 1995).

288. VA. CODE ANN. § 20-60.5(E), -79.3(A)(16), -79.3(B) (Cum. Supp. 1996).

289. VA. CODE ANN. § 63.1-250.1(B) (Cum. Supp. 1996).

290. *Id.*

291. VA. CODE ANN. § 63.1-274.10 (Cum. Supp. 1996).

292. VA. CODE ANN. § 63.1-274.10 (Repl. Vol. 1995).

293. VA. CODE ANN. § 19.2-163 (Repl. Vol. 1995).

294. VA. CODE ANN. § 63.1-274.10 (Cum. Supp. 1996).

295. *Id.* The costs are specifically delineated.

privatize child support enforcement.²⁹⁶ It includes a preference for contracting with individuals who lose their positions with the DCSE due to its privatization,²⁹⁷ and directs the State Board to establish guidelines regarding the DCSE's responsibilities under this section.²⁹⁸ The Attorney General is directed to provide and supervise DCSE's legal services, and is given the authority to contract with private attorneys and collection agencies.²⁹⁹

e. Restricted Driver's License Jurisdiction

The jurisdiction has changed for petitioning the court for a restricted license when an individual loses his license because of child support delinquency.³⁰⁰ If the DCSE suspends or refuses to renew an individual's license for this reason, the individual now must petition the juvenile court rather than the general district court.³⁰¹

f. Separate Maintenance and Annulment Authority

Circuit courts have been given the authority to make a further decree regarding the support of a minor in a decree for separate maintenance.³⁰² The court was also given the authority to affirm, ratify, and incorporate by reference a decree regarding the support of a minor in a decree entered for annulment or separate maintenance.³⁰³

296. VA. CODE ANN. § 63.1-249.1, -249.1(A) (Cum. Supp. 1996). A detailed report evaluating this pilot project from the Office of the Attorney General and the DCSE is due to the General Assembly by July 1, 1997 and each year thereafter. VA. CODE ANN. § 63.1-249.1(D) (Cum. Supp. 1996).

297. VA. CODE ANN. § 63.1-249.1(A) (Cum. Supp. 1996).

298. VA. CODE ANN. § 63.1-249.1(B) (Cum. Supp. 1996).

299. VA. CODE ANN. § 63.1-249.1(C) (Cum. Supp. 1996).

300. VA. CODE ANN. § 46.2-320 (Repl. Vol. 1996).

301. *Id.*

302. VA. CODE ANN. § 20-107.2 (Cum. Supp. 1996).

303. VA. CODE ANN. § 20-109.1 (Cum. Supp. 1996).

g. Legislation Carried Over to 1997 Session

Two bills regarding child support were carried over to the next session.³⁰⁴ The first, entitled "The Child Support Security Deposit Act," authorizes the court to require a delinquent parent to deposit assets equal to the lesser of one year of child support payments or \$6,000.³⁰⁵ The assets would be managed by either a trustee appointed by the court or the DCSE.³⁰⁶ This type of action would only apply to those parties against whom the court cannot order wage withholding, such as self-employed individuals and those for whom an assignment of wages would not be sufficient to cover the child support obligation.³⁰⁷

The second bill was proposed in response to the Virginia Court of Appeal's recent decision regarding the definition of a "day" for purposes of determining the amount one pays based on shared custody situations.³⁰⁸ The bill would define a "day" to include overnight stays rather than a continuous twenty-four-

304. H.B. 1106, Va. Gen. Assembly, (Reg. Sess. 1996); S.B. 496, Va. Gen. Assembly, (Reg. Sess. 1996). Four other bills were killed this session: H.B. 995, Va. Gen. Assembly, (Reg. Sess. 1996); H.B. 52, Va. Gen. Assembly, (Reg. Sess. 1996); H.B. 1321, Va. Gen. Assembly, (Reg. Sess. 1996); S.B. 68, Va. Gen. Assembly, (Reg. Sess. 1996). One bill would have given a court of equity the authority to order an accounting of a custodial parent's or guardian's use of child support monies based on good cause shown. H.B. 995, Va. Gen. Assembly, (Reg. Sess. 1996).

Several bills which would have increased criminal penalties for nonpayment of child support by adding felony provisions failed this session: H.B. 52, Va. Gen. Assembly, (Reg. Sess. 1996); H.B. 1321, Va. Gen. Assembly, (Reg. Sess. 1996); S.B. 68, Va. Gen. Assembly, (Reg. Sess. 1996). Currently the code makes provisions only for misdemeanor convictions. VA. CODE ANN. § 20-60.1 (Repl. Vol. 1995).

305. H.B. 1106, Va. Gen. Assembly, (Reg. Sess. 1996). This bill would only apply if an individual was sixty days or more in arrears. *Id.* The bill also provides for the sale of assets which are not readily convertible into money. *Id.* The bill creates a rebuttable presumption that a failure to pay is willful and then lists defenses to an order for depositing assets. *Id.*

306. *Id.*

307. *Id.*

308. H.B. 854, Va. Gen. Assembly, (Reg. Sess. 1996). In *Ewing v. Ewing*, 21 Va. App. 34, 461 S.E.2d 417 (1995), the court held that the General Assembly intended for a day to mean a 24-hour continuous period of time in determining whether a custody arrangement meets the shared custody definition. *Id.* at 37, 461 S.E.2d at 418; see *supra* notes 146-51 and accompanying text.

hour period.³⁰⁹ This definition would likely broaden the usage of shared custody guidelines.

D. *Child Custody*

Of the four bills that were introduced regarding custody this year, one passed,³¹⁰ two were carried over to next year,³¹¹ and the last failed.³¹² The bill which passed was referred to earlier under child support, and gave the court the authority to make a decree regarding the custody of a minor in a decree for separate maintenance.³¹³ It also gave the court the authority to affirm, ratify, and incorporate by reference a decree regarding the custody of a minor in a decree entered for annulment or separate maintenance.³¹⁴

Introduced in both the house and senate, the bill that was carried over would create a rebuttable presumption of joint physical and legal custody in divorce proceedings as being in the best interest of the child.³¹⁵ With many courts already inclined towards joint custody, sole custody could become difficult to obtain for a client.

309. H.B. 854, Va. Gen. Assembly, (Reg. Sess. 1996).

310. VA. CODE ANN. § 20-107.2 (Cum. Supp. 1996).

311. H.B. 992, Va. Gen. Assembly, (Reg. Sess. 1996); S.B. 496, Va. Gen. Assembly, (Reg. Sess. 1996).

312. S.B. 358, Va. Gen. Assembly, (Reg. Sess. 1996). The bill, which failed by being passed by indefinitely by the house, provided that a petition in either the juvenile and domestic relations district court or the circuit court would divest the other court of jurisdiction. *Id.* Once a petition is filed in the juvenile and domestic relations court, the court would have had to give the other party notice, and that party could have transferred the matter to the circuit court. *Id.* Further, any custody matters decided by the juvenile and domestic relations district court would have been appealed for *de novo* review in the court of appeals rather than the circuit court. *Id.* The ability to transfer a custody matter to circuit court prior to a determination by the juvenile and domestic relations district court could be very useful to the practitioner. On the other hand, as a practical matter, custody and support issues are tried concurrently in many cases and the different avenues for appeal or rights of transfer could be very confusing and wasteful.

313. VA. CODE ANN. § 20-107.2 (Cum. Supp. 1996). See *supra* note 302 and accompanying text.

314. VA. CODE ANN. § 20-109.1 (Cum. Supp. 1996). See *supra* note 303 and accompanying text.

315. H.B. 992, Va. Gen. Assembly, (Reg. Sess. 1996); S.B. 496, Va. Gen. Assembly, (Reg. Sess. 1996).

E. *Domestic Violence*

1. Legislation Effective July 1, 1996

To bring state law into compliance with the federal Violence Against Women Act of 1994,³¹⁶ the legislature passed a bill giving foreign protective orders full faith and credit, and delineating the procedural method to follow.³¹⁷

2. Legislation Effective July 1, 1997

Over the past several years, attention has been focused on the topic of domestic violence. In 1993, Chief Justice Carrico started the Domestic Violence Coordinating Council, and in 1994, the General Assembly established the Commission on Family Violence Prevention to continue the work begun by the Council.³¹⁸ The Commission was charged "to study family violence, identify existing services and resources to address family violence, investigate ways to coordinate the delivery of services and resources, increase public awareness of available services, and determine services, resources and legislation needed to address, prevent and treat family violence."³¹⁹ The legislature's response to the 1996 Commission report was the enactment of sweeping legislation in the area of domestic violence.³²⁰ This section focuses on civil protective orders arising from domestic violence.³²¹

316. Violence Against Women Act of 1994, Pub L. No. 103-322, Title IV, 108 Stat. 1902 to 1955 (codified in scattered sections of 18 U.S.C. and 42 U.S.C.).

317. VA. CODE ANN. § 16.1-279.1(E) (Cum. Supp. 1996).

318. REPORT OF THE COMMISSION STUDYING FAMILY VIOLENCE PREVENTION, H. Doc. No. 50 at 3 (1996); H.J. Res. 279, Va. Gen. Assembly, (Reg. Sess. 1994).

319. REPORT OF THE COMMISSION STUDYING FAMILY VIOLENCE PREVENTION, H. Doc. No. 50 at 3 (1996).

320. VA. CODE ANN. § 9-170 (Cum. Supp. 1996); VA. CODE ANN. § 16.1-243, -245.1, -253, -253.1, -253.2, -253.4, -278.14, -279.1, -296, -298 (Repl. Vol. 1996); VA. CODE ANN. § 18.2-57.2, -60.3, -308.1:4 (Repl. Vol. 1996); VA. CODE ANN. § 19.2-81, -81.3, -81.4 (Cum. Supp. 1996); VA. CODE ANN. § 20-103 (Cum. Supp. 1996); H.J. Res. 229, Va. Gen. Assembly, (Reg. Sess. 1996).

321. Beyond the scope of this article are the many statutory amendments addressing criminal penalties for perpetrators of domestic violence. VA. CODE ANN. § 18.2-57.2, -60.3, -308.1:4 (Repl. Vol. 1996); VA. CODE ANN. § 19.2-81, -81.3 (Cum. Supp. 1996). However, it should be noted that a bill invalidating the court's ability to

First and foremost, reflecting a shift in philosophy regarding abuse, the legislature changed the statutory language from "spousal abuse" to "family abuse."³²² Significantly, the term "family abuse" could be interpreted to include all aspects of abuse, including elder abuse. The legislature also added or changed language in various sections to reflect that protective orders can cover not only the petitioner, but also family or household members of the petitioner.³²³

Moreover, the legislature deleted any reference to rehabilitation of the respondent and/or reconciliation of the family as a goal of a protective order.³²⁴ Instead, the need for a protective order is now based solely on the health and safety of the petitioner and/or the family or household members of the petitioner, making it easier for an individual to obtain an emergency protective order.³²⁵ The amendment allows the allegedly abused person to get an emergency protective order directly from the magistrate or judge, who *must* issue the emergency protective order if he finds "reasonable grounds to believe that (i) the respondent has committed family abuse and (ii) there is probable danger of a further such offense against a family or household member by the respondent."³²⁶ In contrast, the current provision requires the probability that an assault and battery has occurred, and makes the issuance of a protective permissive rather than mandatory.³²⁷

The legislature also added new grounds permitting the issuance of a preliminary protective order and extended the length of time an emergency protective order remains in effect. Currently, preliminary protective orders can only be issued on the grounds of "immediate and present danger of family abuse."³²⁸

accept a satisfaction and discharge in cases of domestic assault, defined as an assault against a family or household member, was carried over to the 1997 session. H.B. 150, Va. Gen. Assembly, (Reg. Sess. 1996).

322. VA. CODE ANN. § 16.1-243(A)(3), -245.1, -253.1, -296, -298 (Repl. Vol. 1996) (excepting VA. CODE ANN. § 16.1-253.1, -296 (effective July 1, 1997)).

323. VA. CODE ANN. § 16.1-253, -253.1, -253.4, -278.14, -279.1 (Repl. Vol. 1996); VA. CODE ANN. § 20-103 (Cum. Supp. 1996).

324. VA. CODE ANN. § 16.1-279.1 (Repl. Vol. 1996).

325. *Id.*

326. VA. CODE ANN. § 16.1-253.4(B) (Repl. Vol. 1996) (effective July 1, 1997).

327. VA. CODE ANN. § 16.1-253.4(B) (Repl. Vol. 1996).

328. VA. CODE ANN. § 16.1-253.1(A) (Repl. Vol. 1996).

Beginning in July, 1997, the court may issue an *ex parte* preliminary protective order based on "[i]mmediate and present danger of family abuse or evidence sufficient to establish probable cause that family abuse has recently occurred."³²⁹

The latter standard is easier to meet. Currently, an emergency protective order can only remain in effect until 5:00 p.m. the next business day.³³⁰ The new legislation allows the order to remain in effect until 5:00 p.m. the next business day, or up to seventy-two hours, whichever is longer.³³¹

Several changes were made to the statutory provisions regarding the content of protective orders. The new provisions extend the life of the protective order from one year to a maximum of two years.³³² In addition, a new provision allows the court to temporarily grant possession and exclusive use of a jointly owned automobile without affecting the vehicle's title.³³³ A delineation of the court's authority to make provisions for temporary custody and/or visitation of a minor child pursuant to the protective order was also included in the amendments,³³⁴ modifying the current provision that broadly permits the court to order any other relief necessary for the protection of minor children.³³⁵

To further facilitate obtaining a protective order, the legislature has changed the venue requirements. As of July 1, 1997, to improve consistency in adjudication, a petitioner can return to the court which issued a protective order that is current for future proceedings resulting from new family abuse.³³⁶

329. VA. CODE ANN. § 16.1-253.1 (Repl. Vol. 1996) (effective July 1, 1997).

330. VA. CODE ANN. § 16.1-253.4(C) (Cum. Supp. 1995).

331. VA. CODE ANN. § 16.1-253.4(C) (Repl. Vol. 1996) (effective July 1, 1997).

332. VA. CODE ANN. § 16.1-279.1 (Repl. Vol. 1996) (effective July 1, 1997). Existing language states that the "order of protection *shall* be issued for a specified period not to exceed one year." VA. CODE ANN. § 16.1-279.1(B) (Cum. Supp. 1995) (emphasis added). New language states that the protective order "*may* be issued for a specified period, however, unless otherwise authorized by law, a protective order may not be issued under this section for a period longer than two years." VA. CODE ANN. § 16.1-279.1(B) (Repl. Vol. 1996) (effective July 1, 1996) (emphasis added).

333. VA. CODE ANN. § 16.1-279.1(A)(4) (Repl. Vol. 1996) (effective July 1, 1997).

334. VA. CODE ANN. § 16.1-279.1(A)(7) (Repl. Vol. 1996) (effective July 1, 1997).

335. VA. CODE ANN. § 16.1-279.1(A)(6) (Repl. Vol. 1996).

336. VA. CODE ANN. § 16.1-243(A)(3) (Repl. Vol. 1996) (effective July 1, 1997).

3. Legislation Carried Over to 1997 Session

Carried over was a bill duplicating many of the same provisions already passed in the legislation which becomes effective July 1, 1997.³³⁷ However, this bill contains two notable differences from the enacted legislation. First, this bill specifically permits family members, such as parents, children, siblings, or grandparents, whether or not they live in the same household as the petitioner, to be identified within the protective order.³³⁸ Second, venue would be continuous in any court that had previously entered a protective order even if there was no current order in effect.³³⁹

F. *Procedural*

Several sections were modified to require that the petitioner or applicant pay the cost of publication when the court orders that notice be given by publication.³⁴⁰

G. *Marriage, Termination of Parental Rights/Paternity, Equitable Distribution*

The two bills introduced this session directly relating to marriage,³⁴¹ and the only bill regarding terminating the parent-

337. H.B. 155, Va. Gen. Assembly, (Reg. Sess. 1996).

338. *Id.*; cf. VA. CODE ANN. § 16.1-253.4, -279.1 (Repl. Vol. 1996).

339. H.B. 155, Va. Gen. Assembly, (Reg. Sess. 1996); cf. VA. CODE ANN. § 16.1-243 (Repl. Vol. 1996).

340. VA. CODE ANN. § 8.01-316, -317 (Cum. Supp. 1996); VA. CODE ANN. § 20-104 (Cum. Supp. 1996).

341. One bill would have overturned Virginia's current recognition of some marriages entered into lawfully in other states that would otherwise be void or voidable if entered into in Virginia. H.B. 1189, Va. Gen. Assembly, (Reg. Sess. 1996). Virginia currently recognizes some marriages entered into lawfully in other states; however this does not apply when the marriage goes against Virginia's public policy. *Greenhow v. James*, 80 Va. 636, 56 Am. Rep. 603 (1885). Virginia probably would not recognize same sex marriages since they are against public policy and statutorily prohibited, even if another state held such marriage valid. *See* VA. CODE ANN. § 20-45.2 (Repl. Vol. 1995). Even so, Representative McClure's bill would have made void *all* marriages which could not be entered lawfully into in Virginia. H.B. 1189, Va. Gen. Assembly, (Reg. Sess. 1996). While this bill did not pass, it is expected that the current trend towards conservatism will be influential in the legislature.

child relationship, did not pass.³⁴² There were no bills regarding equitable distribution introduced this session.

IV. CONCLUSION

Controversial judicial opinions regarding imputed income indicate that this is likely to remain a hotly litigated issue. While numerous legislative changes were made in 1996 in the areas of child support and domestic violence, some of these amendments will not become effective until 1997. It is important to note that the legislature delayed acting on important issues such as rehabilitative alimony, prohibition of no-fault divorces, and the definition of a "day" relating to shared custody. Moreover, funding considerations continue to jeopardize implementation of the family court.

The other proposed bill reflects the legislature's aggressive response to the issue of domestic violence. H.B. 616, Va. Gen. Assembly, (Reg. Sess. 1996). The bill would have required the Department of Vital Statistics to add wording regarding family abuse in its pamphlet of marriage requirements received by individuals applying for a marriage license. *Id.*

342. The bill would have allowed a parent-child relationship to be terminated if a subsequent blood test showed a 98% probability that a man is not the biological father. H.B. 781, Va. Gen. Assembly, (Reg. Sess. 1996). This amendment to the termination statute could have influenced paternity terminations. Current case law holds that a man may be collaterally estopped from challenging paternity once he has acknowledged paternity. *Slagle v. Slagle*, 11 Va. App. 341, 398 S.E. 2d 346 (1990). This amendment could have been used to allow a man to petition the court to terminate his residual parental rights, including the obligation of child support, based on a subsequent blood test. H.B. 781, Va. Gen. Assembly, (Reg. Sess. 1996).