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## Annual Survey of Virginia Law: Domestic Relations

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## DOMESTIC RELATIONS

*Lynne Marie Kohm\**

### I. INTRODUCTION

Within the past year, there have been changes of formidable importance in many major areas of domestic relations, both nationally and in Virginia. This article will review the major judicial and legislative developments in family law in Virginia in the context of national domestic relations law, with an eye toward trends in Virginia.

The Virginia Court of Appeals considered issues regarding the quantity of evidence required to determine adultery and desertion and clarified that the standard of proof is extremely clear and extremely convincing. In the area of property distribution, the court of appeals analyzed "double-dipping" and division of pensions cases. In custody and child support decisions, choice of law remains a major source of litigation. Virginia circuit courts dealt with many familiar issues, relying on general rules to establish decisions. The previously abolished alienation of affections cause of action<sup>1</sup> has resurfaced in many courts around the country<sup>2</sup> but, thus far, Virginia courts have not heard such cases since the statutory abolition.<sup>3</sup> The cases that

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1. See VA. CODE ANN. § 8.01-220 (Repl. Vol. 1992) (repealing cause of action for alienation of affection).

2. The following five state courts have heard cases involving the causes of action of alienation of affections: Idaho, in *O'Neil v. Schuckardt*, 733 P.2d 693 (Idaho 1986) (abolishing the cause of action); Iowa, in *Fundermann v. Mickelson*, 304 N.W.2d 790 (Iowa 1981) (abolishing the right to recover); Kentucky, in *Hoye v. Hoye*, 824 S.W.2d 422 (Ky. 1992) (abolishing the cause of action for alienation of affections); South Carolina, in *Russo v. Sutton*, 422 S.E.2d 750 (S.C. 1992) (abolishing prospectively the cause of action); and Washington, in *Wyman v. Wallace*, 615 P.2d 452 (Wash. 1980) (noting the common law right was never adopted by the legislation). In each of these cases, the cause of action previously did not exist in the specific state jurisdictions.

3. A motion for judgment alleging alienation of affections and infliction of emo-

follow give insight into trends and values in contemporary domestic relations law and proclivity in family law throughout the Commonwealth of Virginia.

This year, the Virginia General Assembly came in like a political lion but went out like a lamb, as very few major changes occurred. Statutory revisions and additions regarding rehabilitative spousal support, particular aspects of child support, family abuse, and abortion were of particular significance. New laws enacted last year have raised expectations for coming years. In his final State of the Commonwealth Address, now former Governor George Allen discussed renewing respect and support for Virginia families<sup>4</sup> in recent legislation. The 1998 General Assembly Session will continue many initiatives begun in the prior winter term, and highlights of these initiatives will be reviewed as well.

## II. JUDICIAL OPINIONS

The Virginia Court of Appeals and the circuit courts had opportunities to revisit past decisions and look into the future with current decisions. Some of the most significant opinions of record are outlined in the following section.

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tional distress based on heart balm requesting compensatory and punitive damages remains pending in a Virginia Beach Circuit Court. See Motion for Judgment, *McDermott v. Reynolds* (Virginia Beach 1998) (No. CL98-1900); letter from Suzanne L. Bailey, Senior Attorney (July 22, 1998) (on file with author). To date, no court since the 1968 repeal of the cause of action of alienation of affections has allowed a plaintiff to recover damages sustained as a result of third party interference in the marital contract. Two Virginia decisions are worth noting. In *Couture v. Thompson*, a Norfolk Circuit Court dismissed a cause of action for breach of a promise to marry that requested punitive damages. See *Couture v. Thompson*, 13 Va. Cir. 178, 178 (Norfolk 1988). In *Smith v. Teunis*, a Fairfax County Circuit Court, among some excellent dicta regarding the rationale for abolition of the alienation of affections actions, dismissed the heart balm action, pointing out the inconsistency of holding adultery as criminal conduct without civil remedy. See *Smith v. Teunis*, 16 Va. Cir. 135, 138 (Fairfax County 1989); VA. CODE ANN. § 18.2-365 (Repl. Vol. 1996) ("Any person, being married, who voluntarily shall have sexual intercourse with any person not his or her spouse shall be guilty of adultery, punishable as a Class 4 misdemeanor.").

4. Governor Allen specifically referred to the 18-year effort to pass a "true and honest parental notification" law in Virginia. Governor George Allen, The State of the Commonwealth Address to the General Assembly and the People of Virginia (Jan. 14, 1998).

## A. Virginia Court of Appeals

### 1. Divorce

In two important cases this year, the court of appeals considered what evidence is required to determine adultery and what weight that evidence is given. A third case considered desertion evidence thresholds.

In *Romero v. Colbow*,<sup>5</sup> the Chesapeake Circuit Court granted, despite a contrary commissioner's report,<sup>6</sup> a divorce to the husband on the ground of adultery, thereby denying the wife spousal support.<sup>7</sup> The court of appeals, however, held that the strong circumstantial evidence<sup>8</sup> and the wife's inconsistent testimony at the commissioner's hearing<sup>9</sup> was not sufficient to establish "clear and positive and convincing" evidence needed to support the husband's charge of adultery.<sup>10</sup> The salient point is that even evidence raising substantial suspicion does not amount to clear and convincing evidence. The trial court concluded that the proof of adultery was very clear; however, the court of appeals did not agree and stated that "strongly suspicious circumstances are inadequate."<sup>11</sup> In the face of nearly

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5. 27 Va. App. 88, 497 S.E.2d 516 (Ct. App. 1998).

6. See *id.* at 91, 497 S.E.2d at 518. The commissioner's report noted that the wife was not a credible witness after she denied her adulterous relationship and then invoked the Fifth Amendment at significant points later in her testimony. See *id.*

7. See *id.* at 92, 497 S.E.2d at 518.

8. The evidence offered at the hearing and trial included photographs of the wife in the residence of her alleged paramour "dressed only in a sweater, [in which] she appeared to be removing or putting on underclothes." See *id.* at 91, 497 S.E.2d at 517. Also, telephone company replacement records showed numerous calls between the wife and her paramour during her husband's military absence. See *id.* at 90-91, 497 S.E.2d at 517.

9. Wife admitted that she used Ramirez' credit cards in 1992, signed his name, and picked up his laundry. When asked to identify the individual in the picture[s with her], wife asserted her Fifth Amendment privilege against self-incrimination. She testified that she had not had sexual relations with anyone other than husband from before the parties' separation until the time of the commissioner's hearing . . . however, she then recanted her denial and again invoked the Fifth Amendment.

*Id.* at 91, 497 S.E.2d at 518. The court reasoned that because adultery is a crime in Virginia "the presumption of innocence" must apply. *Id.* at 94, 497 S.E.2d at 519 (quoting *Haskins v. Haskins*, 188 Va. 525, 530-31, 50 S.E.2d 437, 439 (1948)).

10. *Id.* at 94, 497 S.E.2d at 519 (citing *Haskins*, 188 Va. at 530-31, 50 S.E.2d at 439 (1948)).

11. *Id.* at 93, 497 S.E.2d at 519 (quoting *Painter v. Painter*, 215 Va. 418, 420,

perfect circumstantial evidence, it appears that an explicit admission coupled with laboratory evidence would have been the only way the petitioner could have met his burden of proof. Moreover, each court declined to comment on the veracity of the witness defendant. The result is that adultery is even more difficult to prove in Virginia after the court of appeal's decision in *Romero*.

In another adultery case, *Armistead v. Armistead*,<sup>12</sup> the court held that a wife's admission of adultery combined with evidence that friends arranged hotel room meetings with her alleged paramour was sufficient to meet the burden of proof for adultery.<sup>13</sup> Curiously, the court stated that the fault had no adverse economic effects but awarded the wife only forty percent of the property and denied her spousal support, despite her showing "that she had been unemployed for the past . . . thirty years, was in poor health, and had become accustomed to having maids and other servants."<sup>14</sup> This case indicates that fault may be a factor in economic awards and is reminiscent of *Theismann v. Theismann*,<sup>15</sup> which held that it is proper to base in part an award of alimony and attorney's fees on the reason for the dissolution of the marriage, such as the husband's adultery.<sup>16</sup> Furthermore, proof of attorney's charges submitted in contemplation of a fee award does not have to include testimony by an expert on the reasonableness of the fee charged.<sup>17</sup>

Finally, the decision in *Preston v. Preston*<sup>18</sup> demonstrated that a spouse must do more than move out of the marital bedroom to prove desertion.<sup>19</sup> When the couple continued to live in the same house, their absence from each other's bedrooms

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211 S.E.2d 37, 38 (1975)).

12. No. 0614-97-3, 1998 WL 37320, at \*1 (Va. Ct. App. Feb. 3, 1998).

13. See *id.* at \*2-3.

14. *Notes on Recent Appellate Cases*, FAM. L. NEWS (Va. State Bar, Richmond, Va.), Spring 1998, at 30.

15. 22 Va. App. 557, 471 S.E.2d 809 (Ct. App. 1996), *aff'd on reh'g*, 23 Va. App. 697, 479 S.E.2d 534 (Ct. App. 1996) (en banc).

16. See *id.* at 572-74, 471 S.E.2d at 816-17.

17. See *Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Ltd. Partnership*, 253 Va. 93, 480 S.E.2d 471 (1997).

18. Nos. 0071-97-4, 0175-97-4, 1998 WL 15137, at \*1 (Va. Ct. App. Jan. 20, 1998) (mem.).

19. See *id.* at \*1.

only effected an emotional desertion not rising to the level of desertion from the marriage.<sup>20</sup> The date of separation was found to be the point of obtaining separate addresses, rather than separate bedrooms.<sup>21</sup>

*Romero, Armistead, and Preston* all show that fault is held to a very high standard of proof, which naturally results in some negative consequences. This high threshold of proof may have the negative effect of causing more parties to file for divorce on no-fault grounds, even though the parties may have been truly damaged by marital misconduct. Trends in reforming no-fault divorce, however, are gaining momentum nationally as society sees the very real personal and economic damages suffered by many innocent spouses in unilateral no-fault divorce.<sup>22</sup>

## 2. Spousal Support

In a case clarifying that separate maintenance ends with a divorce decree, the court of appeals in *Scott v. Scott*<sup>23</sup> asserted that separate maintenance is readily available under Virginia

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20. See *id.* at \*1-2 (citing *Petachenko v. Petachenko*, 232 Va. 296, 298-99, 350 S.E.2d 600, 602 (1986)) ("Desertion requires the break off of marital cohabitation with the intent to desert. Merely ceasing sexual relations does not constitute desertion."); *Jamison v. Jamison*, 3 Va. App. 644, 648, 352 S.E.2d 710, 722 (Ct. App. 1987) ("[W]hen sexual relations are willfully withdrawn without just cause or excuse, desertion requires 'the breach of other significant marital duties.'").

21. See *Preston*, 1998 WL 15137, at \*3.

22. See Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 276 (1997) (exploring ways in which fault-based factors applied to serious marital misconduct may bring about "enhanced social, economic and legal protection to spouses on divorce" and establish greater accountability and responsibility in marriage). See generally Cynthia Starnes, *Reflections on Betty Crocker, Soccer Mom and Divorce: A Message from Detergent Manufacturers*, 1997 WIS. L. REV. 285 (1997) (arguing that no-fault divorce has been an economic disaster for women and children).

Michigan is a good example of the many states that are turning to a non-unilateral no-fault ground that requires both spouses to consent to that divorce before filing for divorce and to "complete, either together or separately, a divorce effects program." H.B. 5217, 89th Leg., Reg. Sess. (Mich. 1997). House Bill 5217, section 5(2) sets out the requirements of a divorce effect program, including responses to divorce, caring for children involved in the action, education about developmental stages, symptoms of maladjustment to divorce, responses to maladjustment, conflict resolution skills, stress reduction and parallel and cooperative parenting techniques. See *id.*

23. 24 Va. App. 364, 482 S.E.2d 110 (Ct. App. 1997). This case has some excellent language regarding some very basic common law principles.

law.<sup>24</sup> Such an award, however, depends on a continued marital relationship.<sup>25</sup> Furthermore, the court held that the lower court had no authority to reopen the wife's earlier separate maintenance suit after the final divorce decree was entered awarding her alimony incidental to the separate maintenance.<sup>26</sup> An award of support cannot be revived or founded on a previous award of separate maintenance once the divorce is final.<sup>27</sup>

One of the most litigated issues with respect to modification of maintenance awards involves a reduction in income of the payor spouse. Two years ago, the court upheld the longstanding rule of voluntariness in *Stubblebine v. Stubblebine*,<sup>28</sup> explaining that a reduction in income due to voluntary retirement does not require a corresponding reduction in support.<sup>29</sup> Similarly, this year in upholding a support award of \$10,000 per month in *McCombs v. McCombs*,<sup>30</sup> the court was following the general rule that adequate consideration must be given to the maintenance of the spouse's standard of living as it was during the marriage. Drawing a distinction between lifestyle based on income rather than on debt, the court of appeals held that the trial court did not abuse its discretion.<sup>31</sup> The court required the wife to share in the cost of maintaining the marital home because she enjoyed exclusive possession.<sup>32</sup> Furthermore, the court required her to share the cost because she would share equally in the profit from the eventual sale of the house.<sup>33</sup>

In *Jaffe v. Jaffe*,<sup>34</sup> the court held that periodic support would not be converted into a lump sum amount of \$50,000 despite the husband's claim that a court order to continue spousal support would prolong a mutually destructive relation-

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24. *See id.* at 370, 482 S.E.2d at 113.

25. *See id.* at 372, 482 S.E.2d at 114.

26. *See id.* at 365-66, 482 S.E.2d at 111.

27. *See id.* at 370, 482 S.E.2d at 113.

28. 22 Va. App. 703, 473 S.E.2d 72 (Ct. App. 1996).

29. *See id.* at 708, 473 S.E.2d at 74.

30. 26 Va. App. 432, 494 S.E.2d 906 (Ct. App. 1998). This appeal, however, was brought by the wife-payee, who argued that the award was not enough.

31. *See id.* at 437, 494 S.E.2d at 908.

32. *See id.* at 438, 494 S.E.2d at 909.

33. *See id.*

34. No. 2348-96-2, 1997 WL 327429, at \*1 (Va. Ct. App. June 17, 1997) (mem.).

ship. Dissolution does not end a bad relationship; rather, it merely brings a legal termination to a marriage. The reality is that emotional and financial consequences can linger for a lifetime.

The peculiar "virtual alimony" decision in *White v. White*<sup>35</sup> was reconsidered and reversed en banc without an opinion. The original decision held the husband responsible for mortgage payments characterized as "maintenance and support."<sup>36</sup> At the second hearing, however, the court held that converting mortgage payments into alimony payments after the sale of the home was wholly improper.<sup>37</sup>

And finally, *Leiffer v. Leiffer*,<sup>38</sup> was a case involving imputed income. The court required the husband to pay spousal support even though he had little income because he refused to accept two different well-paying jobs with his former employer.<sup>39</sup>

### 3. Agreements

In a case regarding the effect of the language used in a post-separation agreement, the court of appeals ruled in *Bergman v. Bergman*<sup>40</sup> that property settlement and spousal support agreements will be interpreted under the same rules as any other contractual agreement.<sup>41</sup> The court held that terms such as "cease" and "reside" shall be interpreted using their plain meaning, rather than viewed as ambiguous terms that allow the

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35. 24 Va. App. 297, 482 S.E.2d 78 (Ct. App. 1997), *withdrawn and vacated on reh'g*, 26 Va. App. 250, 494 S.E.2d 161 (Ct. App. 1997) (en banc).

36. *See White*, 24 Va. App. at 300, 482 S.E.2d at 79.

37. *See White*, 26 Va. App. at 251, 494 S.E.2d at 162. The husband appealed this decision after the court held him in contempt for discontinuing payments when the house was sold. *See White*, 24 Va. App. at 300-01, 482 S.E.2d at 79-80.

38. No. 1035-96-2, 1997 WL 117952, at \*1 (Va. Ct. App. Mar. 18, 1997) (mem.).

39. *See id.* Instead of continuing to work for Sears, his former employer, he decided to go into business for himself making next to nothing in profit. *See id.*

Also, an interesting case that does not warrant attention in the text is *Sjoblom v. Sjoblom*, No. 0204-97-4, 1997 WL 421001, at \*1 (Va. App. July 29, 1997) (unpublished decision). Upon her seventh divorce, the court of appeals approved a \$50,000 lump sum alimony award to the wife. In addition, the court affirmed the trial court's refusal to permit discovery to explore the possibility of wrongdoing by the wife in her prior marriages. *See id.*

40. 25 Va. App. 204, 487 S.E.2d 264 (Ct. App. 1997).

41. *See id.* at 211-12, 487 S.E.2d at 267-68.



admission of parol evidence.<sup>42</sup> The court also held that a separation agreement may terminate spousal support rights upon unmarried cohabitation of the recipient with a person of the opposite sex other than a family member.<sup>43</sup>

In *Street v. Street*,<sup>44</sup> the court determined upon rehearing that a payor's Attention Deficit Disorder and related depression and anxiety were not a change of circumstances sufficient to justify modification of an award of support. The court made this ruling, however, because it did not find the mental health expert's opinion persuasive.<sup>45</sup>

In *Sheppard v. Sheppard*,<sup>46</sup> a wife who would not sign a proposed separation agreement was bound by it nevertheless, because the court determined that she had "agreed in principle," through a series of letters that passed between the parties, and because she had accepted some of the benefits from the agreement.<sup>47</sup> This decision has alarming implications for practitioners who advise clients that an agreement is not binding until signed by the parties.<sup>48</sup>

Finally, in *Pelfrey v. Pelfrey*,<sup>49</sup> the court of appeals reiterated that a party to a separation agreement may not have it set

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42. See *id.* at 208, 212, 214, 487 S.E.2d at 266, 268-69. The court clarified the term "shall cease," stating that it was not an ambiguous term to mean "temporarily suspended" while the wife was residing with an unrelated male. See *id.* at 214, 487 S.E.2d at 269. The court ruled that the wife's support was permanently terminated, rather than temporarily suspended, as the trial court incorrectly had determined. See *id.* at 214, 487 S.E.2d at 269.

43. See *id.* at 214, 487 S.E.2d at 269. For a good overview of the area of cohabitation and spousal support and recent Virginia changes, see Brett R. Turner, *Cohabitation and Spousal Support: An Introductory Look at the 1997 Amendments to Virginia Code § 20-109*, 17 FAM. L. NEWS 8 (1997).

44. 24 Va. App. 2, 480 S.E.2d 112 (Ct. App. 1997), *reh'g en banc*, 25 Va. App. 380, 488 S.E.2d 665 (Ct. App. 1997).

45. See *Street*, 25 Va. App. at 389-90, 488 S.E.2d at 669-70.

46. No. 2497-96-2, 1997 WL 393181, at \*1 (Va. Ct. App. July 15, 1997).

47. See *id.*

48. A good practitioner may want to state plainly and clearly on the document that the provisions embodied in the agreement are not binding until that particular document is completely signed by the parties involved. The Virginia Family Law Section Newsletter offers this practice tip: "Special stationery with a boldface box reading 'NO CONTRACTUAL PROMISES INTENDED AND SUCH ARE EXPRESSLY DISAVOWED UNTIL BOTH PARTIES SIGN THE SAME PIECE OF PAPER' is available from Elden Editions of Arlington, Virginia." FAM. L. NEWS (Va. State Bar, Richmond, Va.), Fall 1997, at 23.

49. 25 Va. App. 239, 487 S.E.2d 281 (Ct. App. 1997).

aside as unconscionable unless there is a gross disparity in the allocation of assets or clear and convincing evidence of duress.<sup>50</sup>

#### 4. Property Distribution

Several cases this year dealt with problems of classification of property. In *Moreno v. Moreno*,<sup>51</sup> the court of appeals determined that it is proper to divide a pension as a marital asset under equitable distribution and, subsequently, to include such income in setting spousal support obligations.<sup>52</sup> The argument of "double-dipping" is still raised when dividing pensions but with much less effect. *Moreno* is reminiscent of *Frazer v. Frazer*,<sup>53</sup> where the court determined that the obligor's voluntary contribution to a retirement account should be included in calculating spousal and child support.<sup>54</sup>

In *Brumskill v. Brumskill*,<sup>55</sup> the policy of judicial expediency justified the court's suspension of a wife's support payments in an effort to make her retain new counsel to finalize the divorce after her counsel withdrew.<sup>56</sup> Also, the husband was awarded a slightly greater share of the marital assets than the wife when the court contrasted the husband's long history of hard work with the wife's failure to seek full time employment during the twenty-five year childless marriage.<sup>57</sup>

The trial judge in *Schill v. Schill*,<sup>58</sup> applying the reasoning of the court in *O'Loughlin v. O'Loughlin*,<sup>59</sup> held that a wife's

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50. *See id.* The husband testified that nine months before he signed the agreement, the wife threatened to kill herself if he did not sign it. The duress alleged by the husband was the result of being advised to get legal counsel of his own, but choosing not to do so: *See id.* at 246-47, 487 S.E.2d at 285.

51. 24 Va. App. 190, 480 S.E.2d 792 (Ct. App. 1997).

52. *See id.*

53. 23 Va. App. 358, 477 S.E.2d 290 (Ct. App. 1996).

54. *See id.* at 378, 477 S.E.2d at 300.

55. No. 0311-97-2, 1997 WL 421000, at \*1 (Va. Ct. App. July 29, 1997) (mem.).

56. *See id.* at \*3.

57. *See id.* The wife said she was under the impression she did not have to work. *See id.* This suggests that full-time employment income may be imputed to any spouse in the dissolution of a marriage without children.

58. No. 1636-96-2, 1997 WL 310062, at \*1 (Va. Ct. App. June 10, 1997) (mem.).

59. 20 Va. App. 522, 528, 458 S.E.2d 323, 326 (Ct. App. 1995) (holding that a monetary award to a spouse cannot be reduced as a means to punish that spouse

alcoholic behavior must be ignored to avoid prejudice to her.<sup>60</sup> The trial court found that there was no negative impact from the alcoholism even though the husband paid the wife's medical expenses and attorney's fees resulting from a drunken driving prosecution against her.<sup>61</sup> The court of appeals upheld the trial court's decision.<sup>62</sup> Judge Benton strongly disagreed, stating that *O'Loughlin* is clear law but it is not designed for such a purpose.<sup>63</sup>

Another case with a persuasive dissent is *Manvell v. Manvell*.<sup>64</sup> The court did not find enough evidence of dissipation of assets when a husband, immediately before leaving the marital home, transferred \$56,000 in marital assets to the couple's oldest child and withdrew another \$16,500 which he lost gambling.<sup>65</sup> The court reasoned that the evidence did not establish that the transfers were made in contemplation of separation, nor did it establish that the husband intended to hurt the marriage by doing so.<sup>66</sup> Judge Fitzpatrick wrote a strong dissent stating that *Manvell* is quite a clear case of dissipation.<sup>67</sup>

## 5. Marital Property Versus Separate Property

In *Rowe v. Rowe*,<sup>68</sup> the court determined that an increase in separate property value during a marriage, which was not attributable to the efforts of either spouse, is not considered an increase in marital assets.<sup>69</sup> Therefore, interest income on sep-

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"for his or her fault without showing such fault had an economic impact on the marriage").

60. See *Schill*, 1997 WL 310062, at \*4.

61. See *id.* at \*5.

62. See *id.* at \*1.

63. See *id.* at \*10 (Benton, J., dissenting). The dissent refers to the distinction made between behavior-related disease and pure medical illness. See *id.*

64. No. 2023-96-4, 1997 WL 309612, at \*1 (Va. Ct. App. June 10, 1997) (mem.).

65. See *id.* at \*2, \*4.

66. See *id.* at \*4.

67. See *id.* (Fitzpatrick, J., dissenting).

68. 24 Va. App. 123, 480 S.E.2d 760 (Ct. App. 1997).

69. See *id.* at 133-35, 480 S.E.2d at 764-66. Although benefits under a retirement plan administered by the Employee Retirement Income Security Act ("ERISA") are not court-assignable, the covered spouse can be ordered to pay from benefits he or she receives or to pay a lump sum in anticipation of future benefits. This assignment can go to the spouse or his or her heir. See *id.*

arate property remains separate property, even if that interest is accrued and acquired during the marriage. Separate property must be traced and clearly identifiable. Otherwise, if commingled with marital funds, the property transmutes, becoming marital property.<sup>70</sup> By contrast, in *Bennett v. Bennett*,<sup>71</sup> the court of appeals held that disability retirement income is a pension to be divided as marital property like any other pension.<sup>72</sup>

The court made some critical determinations about marital and separate property in *Luczkovich v. Luczkovich*.<sup>73</sup> In this matter of first impression, the court ruled that severance pay negotiated and received by the former husband two years after separation was separate property.<sup>74</sup> The court looked to decisions from sister states and stated that “[t]he nature of post-separation severance pay as replacement for post-separation wages supports a classification of separate property.”<sup>75</sup>

Additional cases upheld the concept that property acquired after separation is separate property.<sup>76</sup> Military pensions con-

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70. See, e.g., *Rahbaran v. Rahbaran*, 26 Va. App. 195, 494 S.E.2d 135 (Ct. App. 1997); *von Raab v. von Raab*, 26 Va. App. 239, 494 S.E.2d 156 (Ct. App. 1997).

71. No. 1621-96-4, 1997 WL 583645, at \*1 (Va. Ct. App. Sept. 23, 1991) (mem.).

72. See *id.* at \*2.

73. 26 Va. App. 702, 496 S.E.2d 157 (Ct. App. 1998).

74. See *id.* at 708-11, 496 S.E.2d at 160-61.

75. *Id.* at 708, 496 S.E.2d at 160. “The purpose of the severance agreement was related to the sale of [husband’s interest in a drug store], not to husband’s work during his marriage. Consequently, we hold that wife failed to meet her burden, and the trial court erred in classifying the lump sum payment as marital property.” *Id.*

On other matters before it, the court ruled that mutual funds set up by the husband with marital assets after the separation were shown to be marital property, as was a profit-sharing plan. See *id.* at 702, 496 S.E.2d at 157. The court further ruled that the trial court did not abuse its discretion in classifying an equity-line debt as the husband’s separate responsibility. See *id.* at 702-03, 496 S.E.2d at 157. Similarly, the court did not abuse its discretion in valuing joint accounts as of the date of the evidentiary hearing, rather than at separation, when the wife had the opportunity to update values and withdrew her motion for such a valuation. See *id.* at 703, 496 S.E.2d at 157.

76. See *Hart v. Hart*, 27 Va. App. 46, 497 S.E.2d 496 (Ct. App. 1998) (discussing the implications, rules, and guidelines for abuse of discretion in various property-related rulings); *Smith v. Warme*, No. 1593-97-4, 1998 WL 85404, at \*1 (Va. Ct. App. Mar. 3, 1998) (mem.) (emphasizing that the court of appeals “will not disturb the [trial] court’s classification of property unless the court’s decision shows an abuse of discretion or is unsupported by the evidence.”); *Matthews v. Matthews*, 26 Va. App. 638, 496 S.E.2d 126 (Ct. App. 1998) (holding that the trial court did not abuse its discretion in allocating to the husband the majority of the assets he acquired after

tinued to be a matter of special concern in the courts,<sup>77</sup> and there were some excellent articles written on the subject as well.<sup>78</sup>

## 6. Jurisdiction

The Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA")<sup>79</sup> has been approved by the National Conference of Commissioners on Uniform State Laws, and has been offered to Virginia for adoption.<sup>80</sup> No permanent action has been taken in the General Assembly with respect to this Act. Until the current Virginia Uniform Child Custody Jurisdiction Act ("UCCJA")<sup>81</sup> is amended, emergency jurisdiction remains somewhat vague.

In *Foster-Zahid v. Virginia*<sup>82</sup> the court found that Virginia did have jurisdiction, in the absence of a statute, to prosecute a Wisconsin mother whose interference with child custody impacted the father in Virginia. "The court found that the Virginia custodial interference statute applies to any person who withholds a child outside of Virginia from the child's custodial parent, residing in Virginia, in violation of a Virginia court or-

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separation, and where the wife received \$22.1 million of the \$50.7 million of marital assets).

77. See *Sharbutt-Ridge v. Ridge*, Nos. 0736-97-1, 0870-97-1, 1998 WL 74306, at \*1 (Va. Ct. App. Feb. 24, 1998) (mem.) (discussing the court's lack of jurisdiction over the tax consequences and intended effect of the Uniformed Service Former Spouses Protection Act on an incorporated separation agreement); *Wisdom v. Hyler*, No. 0368-97-3, 1998 WL 8512, at \*1 (Va. Ct. App. Jan. 13, 1998) (mem.) (finding that a Qualified Domestic Relations Order was not a substantive change, and the trial court's interpretation of the decree was both legally and factually supported).

78. See generally *The 1997 Marital Property Rights Symposium*, 31 FAM. L. Q. 1 (1997) (containing articles such as Margaret F. Brinig, *Property Distribution Physics: The Talisman of Time and Middle Class Law*; William A. Reppy, Jr., *Apportioning Business Profits Generated by Spousal Labor and Capital Owned Over Time by Shifting Fractional Shares of the Separate and Community/Marital Estates*; Jane B. Singer, *Husbands, Wives, and Human Capital: Why the Shoe Won't Fit*; Mark E. Sullivan, *Military Pension Division: Crossing the Minefield*; William M. Troyan, *An Update of Pension Evaluation*).

79. UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT §§ 101-405, 9 U.L.A. 250 (Supp. 1998).

80. Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: A Search for Definitions and Policy*, 31 FAM. L.Q. 613, 634 (1998).

81. VA. CODE ANN. §§ 20-125 to -146 (Repl. Vol. 1995).

82. 23 Va. App. 430, 477 S.E.2d 759 (Ct. App. 1996).

der.<sup>83</sup> In this case, the noncustodial parent refused to return the child from visitation in Wisconsin.<sup>84</sup>

Also, a Virginia trial court and the Division of Child Support Enforcement ("DCSE") had jurisdiction over a husband living in another country, due to the fact that his family sought help from the American Embassy by returning to the United States from Africa, entering into Virginia, and remaining residents since that time.<sup>85</sup> In *Franklin v. Virginia*, service of process on the husband via service on his company's United States office and several mailed notices were sufficient to generate jurisdiction over him for enforcing child support, thus upholding an Administrative Support Order.<sup>86</sup> The court also had authority to affirm an "*ex parte* emergency custody order preventing either parent from removing the children from Virginia."<sup>87</sup> Essentially, when the husband requested a show cause ruling on the issue of visitation, he automatically waived any jurisdictional objection.<sup>88</sup> Most good attorneys understand that any petitioning of the court is a waiver of jurisdictional objection.

This case, however, is most significant because it analyzed the scope of Virginia Code section 20-88.35(5), which is an issue of first impression in Virginia. The section provides that jurisdiction may be obtained over an individual who has performed an affirmative act in the state or invoked the laws of the state.<sup>89</sup> The husband stated that he never directed his wife to move to Virginia, but the court found that in ordering the family to leave the marital home in Africa, his children did become residents of Virginia.<sup>90</sup> This allowed Virginia to exercise personal jurisdiction over him. Alternatively, the court held that the state could exercise personal jurisdiction over the husband

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83. Elrod & Spector, *supra* note 80, at 635 (discussing *Foster-Zahid v. Virginia*, 23 Va. App. 430, 477 S.E.2d 759 (Ct. App. 1996)).

84. *See id.*

85. *See Franklin v. Virginia*, 27 Va. App. 136, 147, 497 S.E.2d 881, 886 (Ct. App. 1998).

86. *See id.* at 140, 497 S.E.2d at 883.

87. *Id.* ("Pursuant to the Uniform Child Custody Jurisdiction Act (UCCJA), Code § 20-126, the JDR court assumed jurisdiction to decide custody and issued an emergency order.").

88. *See id.* at 142, 497 S.E.2d at 884.

89. *See VA. CODE ANN.* § 20-88.35(5) (Repl. Vol. 1995).

90. *See Franklin*, 27 Va. App. at 142-43, 497 S.E.2d at 884.

because he filed a responsive document, thus "having the effect of waiving any contest to personal jurisdiction."<sup>91</sup>

## 7. Custody and Visitation

When a consent order clearly states the terms of custody, no foreign order will change the terms, regardless of where the child resides. In *Johnson v. Johnson*,<sup>92</sup> a consent order provided that a child would live in Sweden for two years, then in Virginia for two years. The order further provided that Virginia would remain the child's home state, and no other petition for custody could be filed anywhere without the Virginia court's permission.<sup>93</sup> Even when a Swedish court gave the mother sole custody, the Virginia court did not have to afford that decision any comity, and such a modification was tantamount to "child snatching."<sup>94</sup>

The general rule that only a change of circumstances impacting the best interests of the child can bring about a modification in custody was challenged and somewhat twisted in *Parish v. Spaulding*.<sup>95</sup> Although a prior court order distinctly stated that the children could not be moved out of the area without court approval, the custodial parent moved the children to a distant state when her new spouse was transferred there. The court apparently viewed this as a pure relocation case, applying the best interest standards to the changed circumstances.<sup>96</sup> This case clearly illustrates how actions of contempt of court could work to the benefit of the offender, effectively denying the non-offending parent normal visitation with his children. This ruling certainly will have further ramifications in the future, if it is not distinguished as unique.

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91. *Id.* at 146, 497 S.E.2d at 886.

92. 26 Va. App. 135, 493 S.E.2d 668 (Ct. App. 1997).

93. *See id.* at 148, 493 S.E.2d at 674.

94. *See id.* at 148-49, 493 S.E.2d at 674. The court of appeals also rejected the mother's argument that Virginia Code section 20-129 prohibited the Virginia court from hearing the case while the Swedish case was pending; the trial court's earlier order gave the Virginia court "priority in time." *Id.* at 151, 493 S.E.2d at 675.

95. 26 Va. App. 566, 496 S.E.2d 91 (Ct. App. 1998).

96. *See id.* at 570, 496 S.E.2d at 93.

In *Jones v. Jones*,<sup>97</sup> the court of appeals reversed the lower court's decision, granting sole custody back to one of joint custody. The lower court had overturned a commissioner's report without writing a detailed explanation which should have included evidence regarding the change of a joint custody decision to sole custody. Strangely, the court cited in its rationale "recent legislation encouraging joint custody in appropriate cases."<sup>98</sup> Such legislation, however, does not exist in Virginia. Although a proposal for joint custody comes up in nearly every legislative session, it is always set aside. The fact remains that there is no joint custody presumption in Virginia.<sup>99</sup>

*Bottoms v. Bottoms*<sup>100</sup> surfaced again, as many visitation cases do, and this year the court ruled that it is inappropriate to overly restrict a parent's visitation. Restriction is proper only insofar as the parent's conduct detrimentally effects the best interests of the child.<sup>101</sup> This is a general rule which had been established previously. Several other cases confirmed that the court only will reverse trial court decisions when there is a clear abuse of discretion,<sup>102</sup> and the burden is on the appellant to provide trial court transcripts<sup>103</sup> or to show merit of appellate review.<sup>104</sup>

## 8. Grandparents

Grandparent visitation remains a hot issue throughout the nation as many legislatures struggle with statutory visitation

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97. 26 Va. App. 689, 496 S.E.2d 150 (Ct. App. 1998).

98. *Id.* at 695, 496 S.E.2d at 153.

99. For an interesting article on the important matter of joint custody, see Margaret F. Brinig and F.H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L.J. 393 (1998).

100. No. 2157-96-2, 1997 WL 421218, at \*1 (Va. Ct. App. July 29, 1997).

101. *See id.* at \*3.

102. *See Tucker v. Tucker*, No. 2014-97-3, 1998 WL 127465, at \*2 (Va. Ct. App. Mar. 28, 1998) (mem.); *Green v. Morgan*, No. 1281-97-4, 1998 WL 15140, at \*2 (Va. Ct. App. Jan. 20, 1998) (mem.); *Ryan v. Ryan*, No. 0266-97-4, 1997 WL 433717, at \*1 (Va. Ct. App. Aug. 5, 1997) (mem.) (showing sufficient use of the two part test for modification of visitation).

103. *See Diaz v. Morrissey*, No. 0654-97-4, 1998 WL 127477, at \*1 (Va. Ct. App. Mar. 24, 1998) (mem.).

104. *See Mahler v. Mahler*, No. 0739-97-3, 1998 WL 25148, at \*1 (Va. Ct. App. Jan. 27, 1998) (mem.).



laws for grandparents.<sup>105</sup> The language of these statutes was examined in Virginia in *Williams v. Williams*.<sup>106</sup> Here, both parents were unified in their choice to deny visitation rights to the grandparents. The court of appeals held that the parents have a fundamental right to deny visitation based on the Fourteenth Amendment;<sup>107</sup> therefore, any interference in the parent-child relationship can only be justified by a compelling state interest, such as precluding activity that would prove harmful or detrimental to the child's health or welfare.<sup>108</sup> For the court to order visitation, it must determine that denial of nonparent visitation would be harmful to the welfare of the child.<sup>109</sup>

In another case, by broadly construing visitation laws to include any person with a legitimate interest, the court allowed standing for the visitation action of a sibling and the grandparents of three children who were adopted by nonrelatives.<sup>110</sup> The court's rationale was that the blood relationship was not terminated by adoption.<sup>111</sup>

## 9. Adoption

In 1997, probably the most important adoption case in Virginia was *Hickman v. Fuddy*.<sup>112</sup> The court limited the construction of Virginia Code section 63.1-225.1,<sup>113</sup> holding that the new statute is a codification of existing case law addressing the standard of proof necessary to terminate parental rights and to adopt despite a parent's objection.<sup>114</sup> The court found that when the parents withhold their consent to terminate their pa-

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105. North Carolina is one example. After much debate, this year, the North Carolina legislature did not carry over a proposal entitled "Grandparent Visitation," H.R. 82, Reg. Sess. (N.C. 1987) (providing an expansion of rights under existing law pertaining to grandparent visitation).

106. 24 Va. App. 778, 485 S.E.2d 651 (Ct. App. 1997).

107. U.S. CONST. amend. XIV.

108. See *Williams*, 24 Va. App. at 783, 485 S.E.2d at 654.

109. See *id.* at 784-85, 485 S.E.2d at 654. The opinion gives no evidence of the parents' unfitness or inability to make good choices for their children.

110. See *Thrift v. Baldwin*, 23 Va. App. 18, 20, 473 S.E.2d 715, 716 (Ct. App. 1996).

111. See *id.*

112. 25 Va. App. 420, 489 S.E.2d 232 (Ct. App. 1997).

113. VA. CODE ANN. § 63.1-225.1 (Repl. Vol. 1995).

114. See *Hickman*, 25 Va. App. at 431-32, 489 S.E.2d at 237.

rental rights, and a continuing relationship between parent and child will prove to be detrimental to the child, such withholding is contrary to the child's best interests.<sup>115</sup> This case is significant because the disposition of the appeal turned on a construction and application of Virginia Code section 63.1-225.1, which had not been addressed in prior cases. The court found that the section "codifies the standard promulgated by the Virginia appellate courts in cases decided under prior law and that the evidence in the present case supports the circuit court's finding under that standard."<sup>116</sup> As a result, this court concluded that the parent "withheld her consent to the adoption contrary to the child's best interests."<sup>117</sup>

A very clear case of unreasonably withheld consent, however, was *Winfield v. Urquhart*.<sup>118</sup> The court found that when a father withholds his consent to adoption after he murdered the children's mother, that consent clearly is withheld unreasonably and contrary to the best interests of the child.<sup>119</sup>

## 10. Child Support

Choice of law with child support is still a viscid area, even in light of the Federal Child Support Recovery Act<sup>120</sup> and the Uniform Interstate Family Support Act ("UIFSA").<sup>121</sup> In

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115. *See id.*

116. *Id.* at 422, 489 S.E.2d at 233. A thorough reading of the case reveals extended analysis of Virginia Code section 63.1-225.1, as well as a history of the case law in Virginia. Some commentators may believe that this decision overly burdens parent's rights; however, the opinion states that the parent's negative choices in her relationship with the child clearly demonstrated that the mother was "unable or unwilling to care for the child," rendering this case more of a "best interests" ruling. *Id.* at 433-34, 489 S.E.2d at 238.

117. *Id.* at 433-34, 489 S.E.2d at 238.

118. 25 Va. App. 688, 492 S.E.2d 464 (Ct. App. 1997).

119. *See id.* at 696, 492 S.E.2d at 467.

120. 18 U.S.C. § 228 (1992).

121. UNIF. INTERSTATE FAMILY SUPPORT ACT §§ 101-905, 9 U.L.A. 322 (Supp. 1998). UIFSA does not give child support jurisdiction where there is no personal jurisdiction over the payor, but according to the U.S. Court of Appeals for the Fourth Circuit, an Oklahoma father who had never lived in Virginia or been ordered to make any child support payments, can be criminally prosecuted in federal court in Virginia because the mother and child had moved there. *See United States v. Murphy*, 117 F.3d 137, 140 (4th Cir. 1997).

*Saleem v. Saleem*,<sup>122</sup> the parties specifically agreed to apply New York law. The trial court erred in awarding "child support based on New York law without first determining whether the presumptive amount of support calculated pursuant to Virginia child support guidelines was inappropriate."<sup>123</sup> The court explained that Virginia law must be applied first, after which New York law could then be viewed as a factor in considering any deviation.<sup>124</sup>

In *Layman v. Layman*,<sup>125</sup> the court of appeals determined that an obligor may not avoid child support because of his or her imprisonment. The court opined that an obligor's incarceration is considered "voluntary unemployment" and does not warrant a reduction of child support obligation.<sup>126</sup> In another case, the court of appeals held that when child support amounts are set in an agreement, unless the amounts constitute a significant deviation from the presumptively correct amounts delineated in the guidelines, the agreement does not justify a substantial deviation at a later point in time.<sup>127</sup> Again, the court reiterated that it will not overturn a trial court's decision without a clear abuse of discretion.<sup>128</sup>

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122. 26 Va. App. 384, 494 S.E.2d 883 (Ct. App. 1998).

123. *Id.* at 393, 494 S.E.2d at 888.

124. *See id.* at 391-92, 494 S.E.2d at 887. The court finally determined that the cutoff age of 18 years provided in the Virginia agreement and not the 21 years age of support in New York would apply. *See Virginia Law Applied to Establish Child Support Despite Contrary Agreement*, 2 Fax News UPDATE (ABA Family Law Section Newsletter), Mar. 1998, at 1 (discussing the case).

125. 25 Va. App. 365, 488 S.E.2d 658 (Ct. App. 1997).

126. *See id.* at 367-68, 488 S.E.2d at 659.

127. *See Zientek v. Zientek*, No. 1358-97-2, 1998 WL 85396, at \*1 (Va. Ct. App. Mar. 3, 1998) (mem.). The trial court had granted the father's motion to reduce his child support, setting it at an amount that still exceeded the guidelines by \$727. *See id.* at \*9. The trial court however, based its decision on evidence of the parties' intent in a separation agreement. *See id.* at \*9-10.

128. *See Byrd v. Byrd*, No. 2435-96-4, 1998 WL 136434, at \*1 (Va. Ct. App. Mar. 28, 1998) (mem.). The petitioner relied on *Frazer v. Frazer*, 23 Va. App. 358, 477 S.E.2d (Ct. App. 1996), to show that the trial court failed first to determine equitable distribution, then spousal support. The petitioner argued that this sequence is necessary to determine the gross income upon which to base child support. The *Byrd* court, however, rejected this argument, stating that *Frazer* was decided after this trial, and "Mr. Byrd did not object to the sequence until the motion to reconsider when he had retained new counsel. He will not be heard to object to that in which he had previously acquiesced." *Byrd*, 1998 WL 136434, at \*1, (citing *Lee v. Lee*, 12 Va. App. 512, 404 S.E.2d 736 (Ct. App. 1991)); *see also* VA. SUP. CT. R. 5A:18.

*Walker v. May*<sup>129</sup> declared that a court order or a specific agreement provision is needed to modify support if one of the children turns eighteen and a single combined amount is listed as the child support obligation for two or more children.<sup>130</sup> As a result of this ruling, downward modification of support is not automatic, absent specific language in an order or an agreement.

Finally, laches can apply to bar paternity actions. For example, in *Payne v. Lynchburg DSS*,<sup>131</sup> a father's inexcusable delays in asserting paternity for more than ten years kept him from claiming any rights he might have as a parent. Also worth noting is *Pavlick v. Pavlick*,<sup>132</sup> where the court clarified that intra-family immunity does not apply when the death of an unemancipated child results from the intentional act of his parent.<sup>133</sup>

## B. Circuit Court Opinions

### 1. Marriage

Several interesting cases in the circuit courts dealt with marriage, one specifically reflecting unique cultural issues of first impression in Virginia. *Derakhshan v. Derakhshan*<sup>134</sup> involved the equitable distribution of a "marriage portion" created to be part of a marriage contract, which is common among Iranians living in the United States. Being part of a marriage contract marriage, the marriage portion promise was binding as a nuptial agreement. Accordingly, the marriage portion of twenty million Rials was ruled to be separate and exclusive property once it was paid to the recipient upon the consummation of the marriage, even when consummation occurred incidental to the promise to marry.<sup>135</sup>

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129. No. 1266-97-4, 1998 WL 37313, at \*1 (Va. Ct. App. Feb. 3, 1998) (mem.).

130. *See id.* at \*1.

131. No. 2536-96-3, 1997 WL 310058, at \*1 (Va. Ct. App. June 10, 1997) (mem.). The children were 11 and 12 at the time that the putative father eventually made a personal appearance in court.

132. 254 Va. 176, 491 S.E.2d 602 (1997).

133. *See id.* at 182, 491 S.E.2d at 604. This rule does bar recovery in unintentional non-automobile or non-business related situations.

134. 42 Va. Cir. 411 (Fairfax County 1997).

135. *See id.* at 412. The reasoning was that sexual intercourse between married

Another case regarding a marital agreement was *McCall v. McCall*.<sup>136</sup> In that case, the court held that an agreement may only be revoked by a written document signed by the parties, assuming the parties entered into the agreement of their own free will and free of duress.<sup>137</sup> The doctrine of estoppel is still available in all proceedings related to settlement agreements and marital dissolution.<sup>138</sup>

## 2. Dissolution and Property Distribution

When husbands and wives are matched unevenly in their financial abilities, that disparity shows up in equitable distribution and dissolution. *Kennedy v. Kennedy*<sup>139</sup> illustrates this point. The wife handled the financial affairs for the family, from paying mortgage payments to holding a note on sold real estate. She did not keep good records and could not adequately "trace" her separate property contributions; therefore, her separate payments on the marital home were classified as marital property.<sup>140</sup> Furthermore, even though the husband's auto repair business failed, the court determined that his mismanagement did not amount to dissipation.<sup>141</sup> The court ruled that the wife's earnings were critical in maintaining the family and upheld a seventy to thirty percent split of the marital assets in her favor.<sup>142</sup>

General rules regarding the extinguishment of joint tenancies and tenancies by the entirety upon divorce were upheld in *McDaniel v. May*.<sup>143</sup> The general rule regarding use of parol evidence to aid in the interpretation of an ambiguous property

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couples is necessary to consummate a marriage, thus making the sexual requirement of the marriage portion promise non-meretricious because they were married. *See id.*

136. 43 Va. Cir. 296 (Rockingham County 1997).

137. *See id.* at 301.

138. *See id.* The opinion stated that "[t]he Courts in Virginia have long held that the doctrine of estoppel or equitable estoppel is available in all proceedings including those relating to property settlement agreements and the dissolution of marriages." *Id.* (citing *Webb v. Webb*, 16 Va. App. 486, 428 S.E. 2d 762 (Ct. App. 1993)); *Emrich v. Emrich*, 9 Va. App. 288, 387 S.E.2d 274 (Ct. App. 1989)).

139. No. CH 91-71, VA. LAW. WKLY. (January 5, 1998).

140. *See id.*

141. *See id.*

142. *See id.*

143. 43 Va. Cir. 589 (Spotsylvania County 1997).

settlement agreement was invoked in *Charles v. Pippert*.<sup>144</sup> Also, *Forsythe v. Forsythe*<sup>145</sup> held that stock options which were paid out or exercised, as well as bonuses and inheritances, are considered gross income under Virginia Code section 20-108.2(C).<sup>146</sup>

In *Rutledge v. Rutledge*,<sup>147</sup> the court held that because equitable distribution of marital property envisions a complete division of assets when an award of retirement benefits would be de minimis, the court should not make such an award.<sup>148</sup> In *Rebhun v. Rebhun*,<sup>149</sup> the court determined that a mutual oversight in a stipulation at an equitable distribution hearing, later incorporated in a divorce decree may be corrected by the court under Virginia Code section 8.01-428(B).<sup>150</sup>

### 3. Spousal Support

General rules were again followed in *Patterson v. Patterson*,<sup>151</sup> in which the court held that voluntary unemployment or underemployment does not relieve an obligor of spousal support because income will be imputed to that obligor. Voluntary underemployment and arguments as to imputation of

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144. 41 Va. Cir. 494, 496 (Stafford County 1997).

145. 41 Va. Cir. 82 (Fairfax County 1996).

146. *See id.* at 83.

147. 41 Va. Cir. 89 (Spotsylvania County 1996).

148. *See id.* at 91.

149. 40 Va. Cir. 385 (Fairfax County 1996).

150. *See id.* at 386.

151. 41 Va. Cir. 353 (Richmond City 1997). This case was particularly interesting because the husband was an equity partner in the Richmond law firm of McGuire, Woods, Battle & Boothe, LL.P. who was given a one-year contract due to his less than acceptable performance. He told the court he planned to open a cigar store in Savannah, Georgia, sometime in the spring of 1997, rather than look for another legal position with a law firm. The attorney estimated his expected monthly salary to be nearly \$7,000 less than what he made at the firm. *See id.* at 353. The court said that the husband's efforts to find new employment were insufficient to warrant a reduction in a spousal support obligation. *See id.* at 357. Evidence came to light that suggested the husband's problems at work were linked to a romantic affair that led to his divorce. *See id.* at 355. The court imputed to the husband one-half of his salary at the law firm and ordered him to pay spousal support in the amount of \$2,000 per month. This was done despite the fact that his expenses were \$3,600 per month, and his wife's projected expenses were \$9,000 per month. The court explained that, "[i]n light of Patterson's loss of employment, however, both of them will have to make do with less." *Id.* at 358.

income likewise may be considered in a motion for *pendente lite* spousal support.<sup>152</sup>

When a fraudulent dilution of a corporation's stock is determined to be a fraudulent conveyance, the spouse entitled to support or equitable distribution may sue to set aside that fraudulent conveyance.<sup>153</sup> In addition, an ex-wife "is not required . . . to exhaust her separate estate prior to receiving an increase"<sup>154</sup> in spousal support, as long as she can show "by a preponderance of the evidence that there has been a material change in circumstances . . . that . . . warrants modification in the level of support."<sup>155</sup>

With respect to attorney's fees, the court has determined that an attorney's lien on alimony payments is contrary to public policy and unenforceable, even though liens can be established by contract alone.<sup>156</sup> Furthermore, a claim for separate maintenance is within the jurisdiction of a court of equity.<sup>157</sup> Such a court may determine incidental issues of child support and child custody.<sup>158</sup>

#### 4. Child Custody and Visitation

When "a court of competent jurisdiction has made an award of custody, the party seeking to change the custody has the burden of showing a material change of circumstances before the custody award will be changed."<sup>159</sup> "The fact that a parent lives with someone in a romantic relationship who is not his or her spouse" can be considered as such a change.<sup>160</sup> As a matter of law, adult children cannot be denied visitation with a parent who desires visitation even when the parent's spouse

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152. See *Eisenach v. Eisenach*, 41 Va. Cir. 94, 95 (Fairfax County 1996). In this case the wife was found to be voluntarily underemployed and income was imputed to her. See *id.* at 99.

153. See *Efessiou v. Efessiou*, 41 Va. Cir. 142, 144-45 (Fairfax County 1996).

154. *Smith v. Smith*, 43 Va. Cir. 93, 94 (Loudoun County 1997).

155. *Id.* at 93.

156. See *Fiske v. Fiske*, 43 Va. Cir. 62, 64 (Alexandria City 1997).

157. See *Hart v. Hart*, 41 Va. Cir. 456, 457 (Virginia Beach City 1997).

158. See *id.*

159. *In re Junious*, 43 Va. Cir. 440, 440 (Richmond City 1997) (citing *Keel v. Keel*, 225 Va. 606, 611, 303 S.E.2d 917 (1983)).

160. *Id.* at 441-42.

seeks to prevent and restrict such visitation.<sup>161</sup> However, an eight-year-old child is too young to determine his own visitation schedule with his noncustodial parent.<sup>162</sup>

When Virginia is the child's home state, Virginia courts should exercise jurisdiction. However, neither the Uniform Child Custody Jurisdiction Act ("UCCJA") nor the Parental Kidnapping Protection Act ("PKPA") applies to child custody proceedings in a state other than the child's home state.<sup>163</sup> In addition, a Virginia court does not have jurisdiction when it is not the child's home state, or when the matter has no significant connection to Virginia.<sup>164</sup>

## 5. Child Support

As revealed in earlier court decisions, when a parent obligor experiences a loss of income resulting from imprisonment following a conviction of a crime, a reduction in child support is not justified.<sup>165</sup> A person who is incarcerated for the commission of a crime is voluntarily unemployed for the purposes of calculating child support.<sup>166</sup>

"As a general rule, a court should not impute to a person income from more than one job" in calculating child support.<sup>167</sup> The party desiring to have such income imputed bears the burden of proof.<sup>168</sup> Furthermore, "the equitable defense of laches is not a defense to the failure to comply with the terms of a [child] support [order],"<sup>169</sup> and "an award of attorney's fees in a child support enforcement proceeding may be excepted from [a bankruptcy] discharge" where the fees are in the nature

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161. See *Smith v. Markham*, 41 Va. Cir. 166, 169 (Fairfax County 1996).

162. See *Schafer v. Kibling*, 43 Va. Cir. 614 (Fairfax County 1997).

163. See *Wheaton v. Wheaton*, 42 Va. Cir. 139, 139 (Fairfax County 1997).

164. See *Taylor v. Taylor*, 42 Va. Cir. 190, 191 (Fairfax County 1997).

165. See *Gouterman v. Gouterman*, 41 Va. Cir. 331, 331 (Fairfax County 1997).

166. See *Division of Child Support Enforcement v. Huddleston*, 42 Va. Cir. 443, 445 (Salem City 1997).

167. *Callahan v. Crupper*, 43 Va. Cir. 215, 217 (Loudoun County 1997) (citing *Cochran v. Cochran*, 14 Va. App. 827, 830, 419 S.E.2d 419, 421 (Ct. App. 1992)).

168. See *id.* at 218.

169. *Carter v. Hall*, 42 Va. Cir. 437, 438 (Roanoke City 1997) (citing *Wheeler v. Wheeler*, 1994 Va. App. LEXIS 426 (Ct. App. 1994) (unpublished); *Richardson v. Moore*, 217 Va. 422, 423-24, 229 S.E.2d 864, 866 (1976)).



of child support.<sup>170</sup> Finally, a third party who is alleged to be the natural father of a child born to a woman who is married to the complainant cannot be joined in a suit for divorce and child support.<sup>171</sup>

### C. *Summary*

This year, the judiciary generally followed well established general rules but it deviated in the areas of very heightened proof for fault grounds, the weight given to parents' rights, and opportunistic custodial modification circumstances. Petitioner claims are becoming more unique, while good legal strategy remains solidly based on rules rather than political rhetoric.

## III. LEGISLATIVE DEVELOPMENTS

In the Virginia General Assembly, the January term started out politically volatile, which took much energy away from legislative proposals. A few interesting and strategic bills were proposed, and some eventually became law. Others were tabled or carried over to the 1999 term.

### A. *Major Legislative Changes*

More than sixty bills pertaining to family law were introduced in the 1998 legislative session, nineteen of which were enacted. No amendments were made to divorce or equitable distribution this past year, but there were numerous technical amendments to the application of child support guidelines. These amendments included court authority to order child tax exemptions,<sup>172</sup> establishment of a State Case Registry within the Department of Social Services for all child support case

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170. *Moreno v. Moreno*, 43 Va. Cir. 576, 576 (Loudoun County 1997).

171. *See Schreiber v. Schreiber*, 43 Va. Cir. 274, 275-76 (Fairfax County 1997).

172. *See* VA. CODE ANN. § 2D-108.1 (Cum. Supp. 1998). The Virginia General Assembly enacted Virginia Code section 20-108.1(E), authorizing the court to require "one party to execute all appropriate tax forms or waivers to grant to the other party the right to take the income tax dependency exemption for any tax year or future years, for any child or children of the parties for federal and state tax purposes." *Id.*

records, paternity establishment and support,<sup>173</sup> and statutory computation of support where disability insurance is received.<sup>174</sup> The most important changes, however, are detailed below.

## 1. Spousal Support

The most significant family law legislation enacted in the past year was House Bill 517,<sup>175</sup> addressing rehabilitative alimony. The bill, amending Virginia Code sections 20-107.1 and 20-109,<sup>176</sup> authorizes a court to order alimony for a specific duration of time, with or without reservations. These new rules<sup>177</sup> apply to spousal support matters in both circuit courts and in Juvenile and Domestic Relations District Courts. Specifically, the statute provides "for a defined duration, or in periodic payments for an undefined duration, or in a lump sum, or in any combination thereof."<sup>178</sup> The factors relating to the impact of fault on spousal support were not changed by the statute, but the statutory factors to be considered by the court in determining any spousal support award, including rehabilitative support were updated. The significant factors include "any special circumstances of the family,"<sup>179</sup> and "the extent to which the age, physical or mental condition or special circumstances of

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173. See VA. CODE ANN. § 63.1-250.1:3 (Cum. Supp. 1998).

174. See VA. CODE ANN. § 20-108.2 (Cum. Supp. 1998) (stating that gross income includes disability insurance benefits).

175. H.B. 517, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr. 15, 1998, ch. 604, 1998 Va. Acts 1410).

176. VA. CODE ANN. §§ 20-107.1, -109 (Cum. Supp. 1998).

177. The language and application of these spousal support provisions were largely the result of the study and report of the Family Law Section of the Virginia State Bar on Rehabilitative Alimony and the Reservation of Spousal Support in Divorce Proceedings. See H.D. 55, Va. Gen. Assembly (Reg. Sess. 1997).

178. VA. CODE ANN. § 20-107.1(C). "Defined duration" is defined in section 20-107.1(G) as a period of time having a "specific beginning and ending date, or specified in relation to the occurrence or cessation of an event or condition." *Id.* § 20-107.1(G).

179. *Id.* § 20-107.1(E)(4).

any child of the parties would make it appropriate that a party not seek employment outside of the home."<sup>180</sup>

These changes appear consistent with the concept that spouses are not only mutually obligated and dependent on each other financially, but families are interdependent as well. In light of this fact, economics should follow accordingly. Although this concept is important, the court, in making a spousal support award, is required to consider the decisions made during the marriage regarding parenting arrangements and career opportunities and the length of time a party is absent from the job market.<sup>181</sup> This reflects a legislative recognition of the importance of past and present family unity in the midst of apparent family breakdown.

Other amendments address career opportunities, the parties' history, and the costs of acquiring vocational and educational or employment skills.<sup>182</sup> This allows a spouse to obtain an award for the education or training that might be necessary to enable him or her to be financially self-sufficient. The court also has the authority to consider a party's contribution to the other's education or career training.<sup>183</sup>

Furthermore, one subsection of the statute provides that a court may reserve the right of spousal support, but there remains a rebuttable presumption that the reservation will continue for a period equal to one half the duration of the marriage.<sup>184</sup> Essentially, the court now has the authority to increase, decrease or terminate "the amount or duration of any" award.<sup>185</sup> In other words, the court may also modify an award of rehabilitative spousal support. That modification must be based upon a finding that there has been a material change of circumstances that were "not reasonably in the contemplation of the parties when the award was made."<sup>186</sup> This statutory

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180. *Id.* § 20-107.1(E)(5).

181. *See id.* § 20-107.1(E)(11).

182. *See id.* § 20-107.1(E)(9).

183. *See id.* § 20-107.1(E)(12).

184. *See id.* § 20-107.1(D). The duration of a marriage is considered the time from the date of marriage to the date of separation, and once granted, the period of reservation "shall not be subject to modification." *Id.*

185. *Id.* § 20-109(A).

186. *Id.* § 20-109(B).

change appears to indicate a trend in Virginia away from the concept of spousal support in perpetuity toward economic self-sufficiency. This would be true even for a man or a woman who may have entered into a marriage relying otherwise, without the expectation of economic self-sufficiency much less a legal necessity. Today any such reliance is blind ignorance and will only work to the detriment of the non-income producing spouse.

## 2. Domestic Violence

The scope of protective orders, particularly in the case of family abuse or stalking, was expanded pursuant to the codification of House Bill 291.<sup>187</sup> This new law permits the filing of an emergency protective order petition by a law enforcement officer on behalf of a party who is mentally or physically incapable of filing the petition.<sup>188</sup> This law also gives priority on the docket to abuse petitions.<sup>189</sup> Virginia appears to be putting strong measures in place to take a stand against family violence.

## 3. Reconciliation in Marital Agreements

According to Virginia's application of the Premarital Agreement Act, in order for a party who seeks to reconcile with his or her estranged spouse to continue to receive the protections of the separation agreement, the terms of the agreement must permit such an arrangement.<sup>190</sup> Recognizing the opportunity and potential for reconciliation may encourage some parties to reach an agreement when they otherwise would not, and it may even encourage family rebuilding where appropriate.

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187. H.B. 291, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr. 16, 1998, ch. 677, 1998 Va. Acts 1551).

188. See VA. CODE ANN. § 16.1-253.4 (Cum. Supp. 1998).

189. See *id.* Emergency protective orders are valid for 72 hours after issuance or shall be extended to 5:00 p.m. on the next business day that the Juvenile Domestic Relation Court is in session.

190. See VA. CODE ANN. § 20-147-155 (Repl. Vol. 1995). This was implied by dicta in *Smith v. Smith*, 19 Va. App. 155, 449 S.E.2d 506 (Ct. App. 1994) regarding property settlement agreements and tentative reconciliation. When drafting an agreement for clients experiencing emotional confusion while settling their property differences, it is always helpful to consider any and all possibilities.

#### 4. Marriage

In 1997, Virginia reiterated that marriage is limited to the legally sanctioned union of a man and a woman.<sup>191</sup> In light of the national passage of the Defense of Marriage Act (DOMA)<sup>192</sup> which anticipated litigation over same-sex marriage under the Full Faith and Credit Clause,<sup>193</sup> Virginia has responded with a traditional and historical definition of marriage. The statute reads that “[a] marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.”<sup>194</sup> The validity of the current institution of marriage itself continues to face opposition, and new innovations to strengthen and uphold marriage in its traditional context are demanding attention.

#### 5. Miscellaneous

Both houses of the Virginia General Assembly proposed bills to add to Virginia Code section 18.2-74.2, which bans partial birth abortions.<sup>195</sup> Governor Gilmore signed the Senate bill on April 13, 1998.<sup>196</sup> A ban on assisted suicide passed both houses.<sup>197</sup> Also, a bill expanding the definition of infant neglect to

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191. See VA. CODE ANN. § 20-45.2 (Cum. Supp. 1998).

192. 28 U.S.C.A. § 1738(c) (West Supp. 1997).

193. U.S. CONST. art. IV, § 1.

194. VA. CODE ANN. § 20-45.2 (Cum. Supp. 1997). The second sentence was added in the 1997 session of the Virginia General Assembly.

195. See H.B. 1154, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr. 15, 1998, ch. 579, 1998 Va. Acts 1366); S.B. 552, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr. 13, 1998, ch. 448, 1998 Va. Acts 625). A different bill, H.B. 1371, Va. Gen. Assembly (Reg. Sess. 1998), regarding informed consent, required abortion providers to give mothers “all information regarding alternative procedures and side effects at least 24 hours before performing an abortion.” THE FAMILY FOUNDATION, PRO-FAMILY GAINS & LOSSES: 1998 GENERAL ASSEMBLY 1 (Apr. 14, 1998). This bill passed the House but was defeated in the Senate Education and Health Committee by a vote of nine to six. See *id.* at 3.

196. See Andrew Cain, *Gilmore Signs Bill to Ban Partial-Birth Abortions*, WASH. TIMES, Apr. 14, 1998, at C3. “Not only will this save the lives of many unborn children, it will safeguard the lives and the health of women in Virginia as well,” Mr. Gilmore said.” *Id.*

197. See H.B. 1378, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr.

include in utero substance abuse by a mother became law this year.<sup>198</sup> A bill to decriminalize "crimes against nature" was defeated,<sup>199</sup> and a bill to add "sexual orientation" to the list of classes protected from hate crimes was also defeated.<sup>200</sup> Parental consent to abortion laws were implemented this year,<sup>201</sup> and courts are enforcing the provision allowing a minor to avoid the required parental notice by seeking judicial authorization instead.<sup>202</sup> The court will immediately appoint a guardian ad litem to represent the child seeking the abortion, thereby providing legal representation to the minor child as she makes life-changing decisions.<sup>203</sup>

## B. *Carried Over Bills*

### 1. Marriage and Divorce

The Virginia Covenant Marriage Act<sup>204</sup> received a tremendous amount of attention this past year, and it largely follows the trend in many states toward buttressing marriage. Allowing couples to choose a form of marriage that would provide safeguards on the timeliness and manner of divorce, this law is perhaps the most positive and innovative of its kind the Assembly has seen. "Although widely reported as abolishing 'No-Fault' divorce for those couples who choose this form of marriage, the Act still allows a divorce after living separate and apart for two years."<sup>205</sup> The statute requires the parties to a marriage to "recite and sign a declaration of intent"<sup>206</sup> acknowledging that marriage is a lifetime commitment. The statute further requires counseling for couples contemplating marriage, "concerning the

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15, 1998, ch. 624, 1998 Va. Acts 1456).

198. See S.B. 557, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr. 16, 1998, ch. 704, 1998 Va. Acts 1629).

199. See S.B. 583, Va. Gen. Assembly (Reg. Sess. 1998).

200. See H.B. 310, 311, Va. Gen. Assembly (Reg. Sess. 1998); S.B. 159, Va. Gen. Assembly (Reg. Sess. 1998).

201. See VA. CODE ANN. § 16.1-241 (Cum. Supp. 1998).

202. See *id.*

203. See *id.*

204. H.B. 1056, Va. Gen. Assembly (Reg. Sess. 1998) (continued to 1999).

205. Elrod & Spector, *supra* note 80, at 647.

206. VA. CODE ANN. § 20-37.4 (Cum. Supp. 1998).

nature and responsibilities of a marital relationship.<sup>207</sup> Counseling prior to filing for divorce is required as well, promoting discussion about "the nature, purpose and responsibilities of a marital relationship and the legal grounds for terminating a covenant marriage by divorce."<sup>208</sup> In the midst of a myriad of laws governing the dissolution of marriage, this statute promotes marriage as a lifetime relationship of rights as well as responsibilities, encouraging couples to contemplate the institution and commitment seriously before entering into marriage, thereby buttressing marital stability.<sup>209</sup> Furthermore, Virginia Code section 20-37.4 allows all other divorce grounds to remain the same and forces no one to stay in a marital relationship that would endanger his or her safety and well-being. The statute is a manifestation of Virginia's desire to build strong marriages from the outset, and will be reviewed and voted on again in December 1998.

The McClure Bill was a separate proposal designed to protect children of divorce and limit the loss of bargaining power of the victim spouse in a no-fault divorce.<sup>210</sup> This bill proposed to add sub-subsection (d) to section 20-91(9) of the Virginia Code, governing no-fault divorce, which renders subsection (9) inapplicable when there are minor children born to or adopted by the parties.<sup>211</sup> This statute requires the victim's spouse to file a written objection to the no-fault divorce "within twenty-one days of service of the initial pleading requesting a [no-fault] divorce."<sup>212</sup> A minor amendment that can provide major relief, this bill's most salient feature is that it allows the innocent

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207. *Id.*

208. *Id.*

209. Persons who are already married may redesignate their marriage as a covenant marriage after they obtain marital counseling and execute a declaration of intent. *See id.* Some attorneys may see this bill as being bad for business or bad for women and children, but just the opposite is true. Divorce is still allowable for all the usual reasons in Virginia, with no-fault grounds requiring a two-year waiting period, rather than the current one year with children and six months without children. Women and children, in particular, benefit when the parties to the marriage approach their own responsibilities to the other family members as a lifetime commitment, rather than a convenience or economic burden.

210. H.B. 2624, Va. Gen. Assembly (Reg. Sess. 1997).

211. *See id.*

212. VA. CODE ANN. § 20-91(9) (Cum. Supp. 1998); *see also So What's All This About a Divorce Reform Bill?*, FAM. L. NEWS (Va. State Bar, Richmond, Va.), Fall 1997, at 27-28.

party a forum not otherwise afforded, giving him or her some bargaining power in reaching an agreement where appropriate.

A bill regarding divorce will also be before the General Assembly in December of 1998. The bill requires the court to order parties with a minor child to attend an educational program on the effects of divorce on children and requires "the parties to submit a unified parenting plan to the court, which shall outline the rights and duties of each parent, along with a residential schedule for each child."<sup>213</sup> Like the Covenant Marriage Act,<sup>214</sup> this bill does not materially change divorce grounds, nor does it mandate state interference in parenting; rather, it places the responsibility for the children's health and well being with the parents.

Finally, a bill requiring the filing of a final divorce decree as proof of dissolution of a prior marriage when applying for a marriage license will be reviewed again in December.<sup>215</sup> This has been a matter of law in numerous state jurisdictions for a long time. This bill greatly assists in record-keeping procedures, while also thwarting potential fraud.

## 2. Joint or Shared Custody

The custody carry-over bill defines a "day" for purposes of applying the shared custody rules of the child support guidelines to mean an overnight stay, including periods when a parent has visitation with a child.<sup>216</sup> This bill would effectively overrule the majority opinion in *Ewing v. Ewing*,<sup>217</sup> which held that a day is a continuous twenty-four-hour period of time. A bill codifying a presumption of joint custody, something not yet adopted in Virginia, uses the term "shared parenting" to replace the "best interests" standard in custody and visitation

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213. H.B. 1235, Va. Gen. Assembly (Reg. Sess. 1998) (continued to 1999). "If the parties cannot agree on a unified plan, each . . . submit[s]" his or her own to the court for judicial review and determination. *Id.*

214. H.B. 1056, Va. Gen. Assembly (Reg. Sess. 1998) (continued to 1999).

215. See H.B. 452, Va. Gen. Assembly (Reg. Sess. 1998) (continued to 1999).

216. See S.B. 471, Va. Gen. Assembly (Reg. Sess. 1998) (continued to 1999).

217. 21 Va. App. 34, 461 S.E.2d 417 (1995).



cases.<sup>218</sup> There are no plans to bring this bill back in December, but it continues to surface regularly.

### 3. Adoption

Two significant bills regarding adoption and birth fathers were carried over to the December session, namely the putative father registry,<sup>219</sup> and a bill nullifying the paternal consent to adoption requirement if the father has been convicted of sex crimes or child abuse and neglect crimes.<sup>220</sup> Currently, consent of the birth father to an adoption is waived only if the child was conceived when he raped the child's mother.<sup>221</sup> Many states across the country, including Arizona and New York, have adopted the putative father registry with great success.<sup>222</sup> In Virginia, this bill would create a registry within the Department of Social Services which would contain names of men who have acknowledged paternity either through personal acknowledgement, a court order, or some other public record.<sup>223</sup> This registry places all the names of potential birth fathers who could be a party to an adoption proceeding in one location.<sup>224</sup> The goal is to provide putative fathers with the opportunity, within a statutory period of time, to assert their parental rights prior to or during an adoption proceeding, affording them with adequate notice and hearing. The registry also holds appropriate parties responsible for their children. The putative father registry would help to avoid adoption nightmares like that of the high profile cases of Baby Richard<sup>225</sup> and Baby Jessica.<sup>226</sup>

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218. See H.B. 1239, Va. Gen. Assembly (Reg. Sess. 1998); S.B. 507, 671, Va. Gen. Assembly (Reg. Sess. 1998).

219. See H.B. 840, Va. Gen. Assembly (Reg. Sess. 1998) (continued to 1999).

220. See H.B. 910, Va. Gen. Assembly (Reg. Sess. 1998) (continued to 1999).

221. See VA. CODE ANN. § 63.1-220.2 (Repl. Vol. 1995 & Cum. Supp. 1998).

222. The putative father registry statute is codified in Arizona and in New York among other states. See ARIZ. REV. STAT. ANN. § 8-106.01 (West Supp. 1997); N.Y. DOM. REL. § 111-a (Consol. Supp. 1998). It has offered great success in assuring that birth fathers who are interested in preserving their parental rights have an opportunity to do so.

223. See H.B. 840, Va. Gen. Assembly (Reg. Sess. 1998) (continued to 1999).

224. See *id.*

225. See *Baby Richard v. Kirschner*, 515 U.S. 1152 (1995).

226. See *DeBoer v. Schmidt*, 509 U.S. 938 (1993).

### C. Summary

The Virginia legislature is apparently a family friendly institution, favoring initiatives that uphold marriage and family as positive ideals in our culture. Much attention has been given to the harm of divorce, particularly to children, but no empirical studies anywhere in the country have been done on that topic to date. One such study was proposed this year to the Virginia Legislature but, unfortunately, was disregarded by the current Assembly. When the United States Census Bureau reports that between 1970 and 1996 "[t]he number of divorced persons has more than quadrupled, from 4.3 million . . . to 18.3 million,"<sup>227</sup> there should be some cause for concern for re-stabilization of a continually progressive society whose divorce patterns are wreaking havoc on the lives of children. The bills passed into law and carried over to the next legislative session, however, are positive steps to remedy this problem of massive marital and, thus, family breakdown.

### IV. CONCLUSION

The past year has been extremely important in the history of the Commonwealth both judicially and legislatively. Virginia has stated a clear commitment to family, and it appears that as the national debate continues over the definition of marriage, Virginia is making a strong statement to respect stable families that are building solid citizens for the state's future. While Virginia is moving more honorably toward these basic institutions, the national legal community appears to be working overtime to provide broader definitions of marriage and broader approaches to no-fault divorce and faultless property distribution.<sup>228</sup> "Debates are likely over the effects of a 'no fault' system as social science data continues to show the economic and emotional harms to children (and thus to society) from parental

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227. Arlene F. Salvter & Terry A. Lugaila, *Marital States and Living Arrangements: March 1996* (visited June 17, 1998) <<http://www.census.gov/prod/3/98/pubs/p20-496.pdf>>.

228. American Law Institute proposals contain such broader avenues for no-fault divorce. See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (Tentative Draft May 1996).

conflict and divorce."<sup>229</sup> Virginia can continue to be a point of light for the rest of the nation by continuing to pursue its time honored commitment to the family.

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229. Elrod & Spector, *supra* note 80, at 659. "But in today's climate of advancing technology, more nontraditional families, and more struggles between the rights of individuals and the rights of the 'family,' policymakers face even greater challenges in the years ahead." *Id.*