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## Annual Survey of Virginia Law: Family Law

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## FAMILY LAW

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### I. INTRODUCTION

The most significant case decisions regarding family law issues in Virginia this year are those cases involving the preemptive effect of federal law on equitable distribution issues. These cases held that federal law preempts state law when beneficiary provisions of certain insurance policies and retirement plans are being determined. Other important decisions struck down the self-executing provisions of property settlement agreements regarding the payment of child support. Additionally, a decision by the Court of Appeals of Virginia would have abrogated all property settlement agreements endorsed prior to 1998 were it not for a subsequent statutory modification.

Meanwhile, the Virginia General Assembly passed several significant family law bills. Once again, the General Assembly failed to pass any legislation dealing with the issue of equitable distribution.<sup>1</sup> Continued attempts to enhance the custody rights of fathers<sup>2</sup> and to make it more difficult to obtain a divorce<sup>3</sup> failed as well. Although Virginia does not compile its legislative history, there are, on occasion, formal legislative reports that accompany

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1. See H.B. 1502, Va. Gen. Assembly (Reg. Sess. 2001).

2. See H.B. 2262, Va. Gen. Assembly (Reg. Sess. 2001); H.B. 2513, Va. Gen. Assembly (Reg. Sess. 2001); H.B. 2545, Va. Gen. Assembly (Reg. Sess. 2001).

3. See H.B. 2132, Va. Gen. Assembly (Reg. Sess. 2001).

certain bills. This year, however, no such reports accompanied the bills that were passed addressing family law issues.<sup>4</sup>

Additional examples of failed legislative attempts include: (1) a bill that would have permitted equal parental access to minor children unless a court determined that such an arrangement would be detrimental to the children;<sup>5</sup> (2) two bills that addressed the issue of relocation in custody cases;<sup>6</sup> (3) legislation that would have extended the waiting period for a no-fault divorce to two years;<sup>7</sup> and (4) a proposal to establish a rebuttable presumption of joint custody in divorce cases.<sup>8</sup> These bills were introduced previously and will no doubt be introduced again. The extent to which they will ever be passed depends upon the composition of the General Assembly and the evolution of general societal values.

There are three significant pieces of legislation that the General Assembly did pass: (1) the Uniform Child Custody and Jurisdiction and Enforcement Act ("UCCJEA");<sup>9</sup> (2) the statute to correct the *Rubio v. Rubio*<sup>10</sup> decision relating to the modification of spousal support awards;<sup>11</sup> and (3) the adoption of the "Colorado Rule" in child support guidelines as it relates to the support of children who are not the subject of the proceeding.<sup>12</sup> These statutes are discussed in more detail below. It is important to note that, although the following discussion focuses on the most influential legislation passed in the 2001 session, other less influential legislation may also affect practitioners and their clients.

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4. For a complete history of bills in the Virginia General Assembly, or to view the amendments made to a bill's language, visit <http://leg1.state.va.us>.

5. H.B. 1972, Va. Gen. Assembly (Reg. Sess. 2001).

6. H.B. 1674, Va. Gen. Assembly (Reg. Sess. 2001); H.B. 1973, Va. Gen. Assembly (Reg. Sess. 2001).

7. H.B. 2132, Va. Gen. Assembly (Reg. Sess. 2001).

8. H.B. 2545, Va. Gen. Assembly (Reg. Sess. 2001).

9. S.B. 462, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 20, 2001, ch. 305, 2001 Va. Acts 267) (codified at VA. CODE ANN. §§ 20-146.1 to -146.38 (Cum. Supp. 2001) (repealing VA. CODE ANN. §§ 20-125 to -146 (Repl. Vol. 2000)).

10. 33 Va. App. 74, 531 S.E.2d 612 (Ct. App. 2000) (en banc), *reh'g granted en banc*, 33 Va. App. 440, 534 S.E.2d 536 (Ct. App. 2000), *rev'd*, 36 Va. App. 248, 549 S.E.2d 610 (Ct. App. 2001). For further discussion of *Rubio*, see *infra* Part V.A.1.

11. H.B. 2215, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 27, 2001, ch. 725, 2001 Va. Acts 984) (codified as amended at VA. CODE ANN. § 20-109 (Cum. Supp. 2001)).

12. H.B. 2290, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Apr. 9, 2001, ch. 809, 2001 Va. Acts 1112) (codified as amended at VA. CODE ANN. §§ 20-108.1 to -108.2 (Cum. Supp. 2001)).

## II. EQUITABLE DISTRIBUTION

A. *Beneficiary Status*

The United States Supreme Court decided one of the year's most important family law cases in *Egelhoff v. Egelhoff*.<sup>13</sup> During his marriage, Mr. Egelhoff designated his wife as the beneficiary of the life insurance policy and pension plan provided by his employer and governed by the Employee Retirement Income Security Act ("ERISA").<sup>14</sup> The parties separated, and Mr. Egelhoff died intestate shortly after the divorce was finalized.<sup>15</sup> Mr. Egelhoff's children from a prior marriage sought to recover the insurance proceeds and pension plan benefits of their father.<sup>16</sup> The children argued that they were entitled to the proceeds of both the insurance policy and pension plan because a Washington statute, which provided that upon divorce, any beneficiary designation of a spouse is automatically revoked,<sup>17</sup> was not preempted by ERISA.<sup>18</sup> The Supreme Court of Washington agreed that its state statute was not preempted by ERISA.<sup>19</sup>

The Supreme Court reversed, holding that the statute in question was expressly preempted by ERISA.<sup>20</sup> The Court reasoned that the Washington statute pertained to the payment of beneficiary benefits, a key component of the plan, and, therefore, the statute interfered with the nationally uniform administration of ERISA plans.<sup>21</sup> Further, the Court held that choosing appropriate beneficiaries was too burdensome on plan administrators.<sup>22</sup> Therefore, the ex-spouse was entitled to recover the benefits since Mr. Egelhoff never changed the name of the beneficiary.<sup>23</sup>

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13. 121 S. Ct. 1322 (2001).

14. *Id.* at 1326. The full text of ERISA begins at 29 U.S.C. § 1001 (Supp. V 1999).

15. *Egelhoff*, 121 S. Ct. at 1326.

16. *Id.*

17. See WASH. REV. CODE § 11.07.010(2) (Supp. 2001). This statute applied to beneficiaries of both life insurance plans and employment benefit plans. *Id.* at § 11.07.010(5)(a) (Supp. 2001).

18. *Egelhoff*, 121 S. Ct. at 1326.

19. *Egelhoff v. Egelhoff*, 989 P.2d 80 (Wash. 1999), *rev'd*, 121 S. Ct. 1322 (2001).

20. *Egelhoff*, 121 S. Ct. at 1329; see also 29 U.S.C. § 1144(a) (1994) (outlining ERISA's preemption provisions).

21. *Egelhoff*, 121 S. Ct. at 1329.

22. *Id.*

23. See *id.* at 1325-26.

The Supreme Court of Virginia also addressed federal preemption of state beneficiary law during the past year. *Dugan v. Childers*<sup>24</sup> involved the determination of the beneficiary of a husband's military retirement benefits.<sup>25</sup> In that case, the first wife sought to impose a constructive trust on the surviving second wife to recover the survivor benefits from her ex-husband's military retirement benefits.<sup>26</sup>

The first wife was named the beneficiary during the parties' marriage.<sup>27</sup> They were later separated and eventually divorced.<sup>28</sup> The property settlement agreement was incorporated into the divorce decree, and it stipulated that the first wife was entitled to one-half of the husband's retirement benefits.<sup>29</sup> The first wife also was the named beneficiary of the survivor benefits under the terms of the husband's military retirement.<sup>30</sup> Shortly after the divorce, Mr. Childers remarried and named his second wife as the beneficiary of his retirement benefits.<sup>31</sup> Subsequently, he was found to be in contempt of the divorce decree and was directed by the Fairfax Circuit Court to change the survivor beneficiary from his second wife to his first wife.<sup>32</sup> The husband died without making that change.<sup>33</sup>

The court examined the Survivor Benefits Plan ("SBP")<sup>34</sup> under federal military retirement benefits law.<sup>35</sup> The SBP provides that if a military retiree does not make the appropriate beneficiary election per a court order, the retiree will be deemed to have made the election provided the former spouse requests such designation within one year of the date of the pertinent court order.<sup>36</sup>

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24. 261 Va. 3, 539 S.E.2d 723 (2001).

25. *Id.* at 8, 539 S.E.2d at 725.

26. *Id.* at 5, 539 S.E.2d at 723.

27. *Id.*

28. *Id.*

29. *Id.* at 6, 539 S.E.2d at 723.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 6, 539 S.E.2d at 724.

34. 10 U.S.C. §§ 1447-1455 (1994).

35. *Dugan*, 261 Va. at 6, 539 S.E.2d at 724. Provisions regarding Federal military retirement benefits can be found at 10 U.S.C. §§ 1431-1455, 1461-1467 (1994 & Supp. V 1999).

36. 10 U.S.C. § 1450(f)(3) (1994).

Unfortunately, the first wife in *Dugan* did not make this request before the one-year deadline.<sup>37</sup>

Finally, the court addressed the issue of whether the SBP preempts state law regarding a former spouse's entitlement to survivor benefits of a military retiree.<sup>38</sup> The court ruled against the first wife, finding that federal law preempts state law and that the imposition of a constructive trust was not a viable remedy under these circumstances.<sup>39</sup> While constructive trusts may be imposed on the proceeds of private insurance contracts, the court ruled that they cannot be imposed on military retirement benefits.<sup>40</sup> Federal preemption, therefore, has been considered by both the United States Supreme Court and the Supreme Court of Virginia.

### B. Valuation of Property

The lower courts of the Commonwealth decided several cases regarding property valuation over the past year. On remand, *Holden v. Holden*<sup>41</sup> addressed the necessity of revaluing a marital asset.<sup>42</sup>

The second *Holden* appeal considered whether a trial court must, on remand, revalue stock that has significantly changed in value since the trial court's original valuation.<sup>43</sup> In this case, stock from the husband's business was originally valued in 1998, at the time of the first divorce trial.<sup>44</sup> The stock's value declined considerably after 1998, but its value was not assessed after the case was remanded by the court of appeals.<sup>45</sup> On the second remand, the trial court awarded all of the stock to the husband.<sup>46</sup>

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37. *Dugan*, 261 Va. at 7, 539 S.E.2d at 724.

38. *Id.*

39. *Id.* at 9, 539 S.E.2d at 726.

40. *Id.* at 7, 539 S.E.2d at 724.

41. 35 Va. App. 315, 544 S.E.2d 884 (Ct. App. 2001).

42. *Id.* at 324, 544 S.E.2d at 888.

43. *Id.* at 325, 544 S.E.2d at 888.

44. *Id.* at 322, 544 S.E.2d at 887.

45. *Id.* at 320, 544 S.E.2d at 886.

46. *Id.* at 320-21, 544 S.E.2d at 886.

According to the court of appeals, the trial court erred in failing to revalue this asset at the time of its remand hearing.<sup>47</sup>

Another case in which the parties filed multiple appeals was *Hart v. Hart*.<sup>48</sup> The second appeal concerned the trial court's errors in determining equitable distribution after the original remand.<sup>49</sup> The original *Hart*<sup>50</sup> decision is often cited by practitioners for the proposition that, when calculating increases in real estate value created by improvements to real property, a trial court must consider the value added to the property, not merely the cost of the improvements.<sup>51</sup>

The first issue raised in *Hart II* was whether the trial court erred on remand in redefining an easement on the husband's real estate that had been granted to him in his first divorce decree.<sup>52</sup> The appellate court reasoned that the original easement grant in the divorce decree had not been appealed.<sup>53</sup> Therefore, pursuant to Rule 1:1 of the Supreme Court of Virginia and Virginia Code section 8.01-428(b), the trial court was without jurisdiction to supplement a description of the easement when such supplementation was not a clerical mistake.<sup>54</sup> Moreover, the trial court's supplementation of the easement exceeded the scope of its remand jurisdiction.<sup>55</sup>

The second issue raised in *Hart II* was whether the trial court erred on remand by permitting the husband to introduce evidence of additional improvements to separate property he owned in New York.<sup>56</sup> The appellate court ruled in the affirmative.<sup>57</sup> The scope of the remand was limited to a determination of the increase in value of only the property addressed in the original di-

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47. *Id.* at 327-28, 544 S.E.2d at 890.

48. 35 Va. App. 221, 544 S.E.2d 366 (Ct. App. 2001) [hereinafter *Hart II*].

49. *Id.*

50. *Hart v. Hart*, 27 Va. App. 46, 497 S.E.2d 496 (Ct. App. 1998).

51. *See id.* at 60, 497 S.E.2d at 502-03.

52. *Hart II*, 35 Va. App. at 227-28, 544 S.E.2d at 369.

53. *Id.* at 229-30, 544 S.E.2d at 370.

54. *Id.*

55. *Id.* at 231, 544 S.E.2d at 371.

56. *Id.*

57. *Id.* at 233, 544 S.E.2d at 372.

voiced proceeding.<sup>58</sup> Therefore, it was inappropriate on remand to allow testimony about other improvements.<sup>59</sup>

In an issue of first impression, the court in *Hart II* also determined whether the wife had exercised an option to buy the husband's interest in a parcel of real estate.<sup>60</sup> The trial court found that, although the wife had tendered partial payment and had given notice of her intention to exercise that option, the wife had not exercised her option because she failed to tender the full purchase price.<sup>61</sup>

The Court of Appeals of Virginia ruled that tendered payment is a method for exercising an option so long as the parties specify such a requirement; otherwise, "tender is not necessary in order to exercise the option."<sup>62</sup> The court relied on the general rule that payment for an option is not a requirement for the exercise of the option; it is merely an act required of the optionee in performance of his part of the bilateral contract.<sup>63</sup> The court held that when

an agreement granting an option to purchase a particular tract of land requires that it be exercised on or prior to a designated date, but is silent as to the time at which payment of the stipulated purchase price is to be made, the option may be exercised by the optionee without making or tendering payment at the time of, or coincident with, such exercise.<sup>64</sup>

The court of appeals apparently did not want to negate a transaction based on overly technical arguments.

It appears that the saga of *Rowe v. Rowe*<sup>65</sup> is never ending. The case concerned the increased value of the shares of stock in a local Fredericksburg newspaper of which the husband was a principal stockholder.<sup>66</sup> In the original *Rowe*<sup>67</sup> decision, which had been appealed and remanded, the trial court properly increased the value of the newspaper stock but erred by classifying the en-

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58. *Id.* at 232, 544 S.E.2d at 371.

59. *Id.* at 233, 544 S.E.2d at 372.

60. *Id.* at 235-36, 544 S.E.2d at 373.

61. *Id.* at 235, 544 S.E.2d at 373.

62. *Id.* at 236, 544 S.E.2d at 373.

63. *Id.* at 235-36, 544 S.E.2d at 373.

64. *Id.* at 237, 544 S.E.2d at 374.

65. 33 Va. App. 250, 532 S.E.2d 908 (Ct. App. 2000) [hereinafter *Rowe II*].

66. *Id.* at 254-55, 532 S.E.2d at 910-11.

67. *Rowe v. Rowe*, 24 Va. App. 123, 480 S.E.2d 750 (Ct. App. 1997).



ture increase as marital property.<sup>68</sup> The trial court ignored the appellate court's direction to consider that a significant portion of the increase in the value of the husband's stock was based on either passive appreciation or the personal efforts of the husband's brother but not the husband's personal efforts.<sup>69</sup> In a stinging appellate decision, the court of appeals advised the trial court that it had no discretion to disregard the lawful mandate of the appellate court.<sup>70</sup>

In addition, pending the appeal, the husband sold the stock to his brother for approximately \$41,000 per share, compared to the value of \$9,500 per share determined at the original divorce hearing.<sup>71</sup> Again, the appellate court found that the trial court had abused its discretion in failing to revalue a stock had that been sold at such a significantly increased value.<sup>72</sup> On the second remand, the trial court was again instructed to determine the portion of the increased value of the stock that should be classified as marital property and to consider evidence of the stock's sale price.<sup>73</sup> In a ruling that could keep this case in the appellate process for many years, the court of appeals ordered the trial judge to consider the premium sale price of the stock at the time of the marriage, since it was sold at a premium price subsequent to the last hearing.<sup>74</sup> The court found that using the estimated value of \$500 per share of the stock at the time of the 1970 marriage without considering the premium value of the stock at the time of the marriage would unjustifiably inflate the stock's appreciation.<sup>75</sup> This case demonstrates the difficulty of evaluating and litigating the marital appreciation of a separately owned, closely held company.

The court of appeals also addressed the issue of stock valuation in *Ott v. Ott*.<sup>76</sup> In that case, the husband was awarded 230 shares

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68. *Id.* at 130, 480 S.E.2d at 763.

69. *Rowe II*, 33 Va. App. at 257, 532 S.E.2d at 912.

70. *Id.* at 255, 532 S.E.2d at 911.

71. *Id.* at 263, 532 S.E.2d at 914-15.

72. *Id.* at 263, 532 S.E.2d at 915.

73. *Id.* at 264, 532 S.E.2d at 915.

74. *Id.* at 267, 532 S.E.2d at 917.

75. *Id.*

76. No. 0614-00-1, 2001 Va. App. LEXIS 10 (Ct. App. Jan. 6, 2001) (unpublished decision).

of stock in his employer's company after the parties' separation.<sup>77</sup> The presumption that this stock was separate property was successfully rebutted by the wife, who established that the shares were given to the husband as a bonus for work he had done both before and after the parties' separation.<sup>78</sup> The trial court properly prorated the bonus by using the number of months the parties lived together during the year in which they separated.<sup>79</sup>

### C. *Composition of the Marital Estate*

Before a marital estate can be divided, a court must determine its contents. In *Asgari v. Asgari*,<sup>80</sup> the court of appeals considered whether the husband's disability benefit was in fact a disability benefit or a retirement benefit.<sup>81</sup> In *Asgari*, the husband became disabled during the marriage and, since he was unable to work, received benefits from the Virginia Retirement System ("VRS").<sup>82</sup> The VRS plan permitted any member to retire because of a disability, and the benefit was referenced in VRS documentation as a retirement benefit with a designated retirement date.<sup>83</sup> Therefore, the trial court properly found that the disability award constituted a retirement benefit and was therefore subject to equitable distribution.<sup>84</sup>

The division of marital debts was at issue in *Kelker v. Schmidt*.<sup>85</sup> In *Kelker*, the wife sought apportionment of two debts that she owed a third party.<sup>86</sup> One debt, for \$11,000, was not evidenced by any note, and a second debt, for \$28,500, accrued over time in a piecemeal fashion.<sup>87</sup> The husband learned about the \$11,000 loan when the parties' tax returns were prepared, but testified that he was never aware of the \$28,500 loan.<sup>88</sup> The com-

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77. *Id.* at \*8.

78. *Id.* at \*9–11.

79. *Id.*

80. 33 Va. App. 393, 533 S.E.2d 643 (Ct. App. 2000).

81. *Id.* at 395, 533 S.E.2d at 644.

82. *Id.* at 397, 533 S.E.2d at 645.

83. *Id.* at 397, 533 S.E.2d at 645.

84. *Id.* at 400–01, 533 S.E.2d at 647.

85. 34 Va. App. 129, 538 S.E.2d 342 (Ct. App. 2000).

86. *Id.* at 133–34, 538 S.E.2d at 344–45.

87. *Id.* at 134, 538 S.E.2d at 345.

88. *Id.* at 134–35, 538 S.E.2d at 345.

missioner in chancery apportioned the debt between the parties.<sup>89</sup> The trial court, however, sustained the husband's exceptions to the commissioner's report and refused to apportion the debt.<sup>90</sup>

The court of appeals found that the trial court made detailed findings of the quality and quantity of the evidence about the alleged loans.<sup>91</sup> The trial court was especially concerned about the lack of documentation regarding the two loans in light of the fact that the wife had received \$100,000 during the same time period, allegedly to pay for household expenses.<sup>92</sup> Recognizing that the commissioner examined the witnesses, the appellate court found that

the commissioner in equitable distribution cases must expressly state in his or her report what he or she saw and heard concerning witness' demeanor and appearance if the decision is based, in whole or in part, upon witness demeanor and appearance. If the commissioner's report is based upon substance only, the trial judge is as competent as the commissioner to decide the facts.<sup>93</sup>

Since the Commissioner in *Kelker* did not state how he arrived at his conclusions, the trial court's decision to overrule the commissioner's report was appropriate.<sup>94</sup> The trial court properly found that the wife failed to prove, by a preponderance of the evidence, the existence of and the purpose for the alleged loans.<sup>95</sup> This case may well set a new standard of review for cases arising from a commissioner in chancery.

In *Wiese v. Wiese*,<sup>96</sup> the court of appeals found that it was error to award a lump sum equitable distribution award when there was no evidence of any marital assets of sufficient value to satisfy such an award.<sup>97</sup> The trial court ordered the husband to pay the wife \$70,000 as an equitable distribution award.<sup>98</sup> There was no evidence, however, of any marital assets that had sufficient value

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89. *Id.*

90. *Id.*

91. *Id.* at 138, 538 S.E.2d at 347.

92. *Id.* at 136, 538 S.E.2d at 346.

93. *Id.* at 140, 538 S.E.2d at 348.

94. *Id.* at 139-40, 538 S.E.2d at 347-48.

95. *Id.* at 140, 538 S.E.2d at 348.

96. No. 2512-99-1, 2000 Va. App. LEXIS 445 (Ct. App. June 20, 2000) (unpublished decision).

97. *Id.* at \*5.

98. *Id.*

to satisfy the award.<sup>99</sup> Also, there was a lack of evidence regarding the value of the marital home.<sup>100</sup> In fact, the only evidence regarding the value of that asset was the amount of debt secured by the home.<sup>101</sup> The commissioner failed to classify or value the house; consequently, the case was reversed and remanded.<sup>102</sup>

In another unpublished but potentially important decision, *Kelley v. Kelley*,<sup>103</sup> the court of appeals ruled that a husband's separate real estate could be valued separately from that same real estate after it had a newly constructed marital residence (a marital asset) built upon it.<sup>104</sup> The real estate became hybrid property consisting of the value of the raw real estate, which was separate property, and the value of the home built upon the real estate, which was marital property.<sup>105</sup> The court of appeals found nothing in Virginia Code section 20-107.3 that prohibited such a classification and valuation under this set of facts.<sup>106</sup>

An owner's ability to express an opinion of an asset's value is limited. In *Snider v. Snider*,<sup>107</sup> the appellate court found that the trial court erred in accepting the wife's stated value of her husband's business, which she provided after being prodded by her attorney to give a "best estimate."<sup>108</sup> Originally, she testified that she did not know the value of the business.<sup>109</sup> The husband testified that his business was nearly defunct and had no value.<sup>110</sup> The court of appeals found that the trial court's conclusions were "not supported by substantial, competent, and credible evidence" because the wife did not participate in the business and "had no knowledge of the financial status of the business."<sup>111</sup> *Snider* also stands for the proposition that a party is not entitled to the fair

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99. *Id.*

100. *Id.* at \*6.

101. *Id.* at \*7.

102. *Id.* at \*8.

103. No. 0896-99-2, 2000 Va. App. LEXIS 576 (Ct. App. Aug. 1, 2000) (unpublished decision).

104. *Id.* at \*7-8.

105. *Id.*

106. *Id.*

107. No. 1539-99-3, 2001 Va. App. LEXIS 19 (Ct. App. Jan. 16, 2001) (unpublished decision).

108. *Id.* at \*8-9.

109. *Id.*

110. *Id.* at \*8.

111. *Id.*

market rental value of real estate occupied by a spouse when the claimant does not have joint ownership of the occupied real estate.<sup>112</sup>

Tracing assets is one of the most difficult issues in equitable distribution cases. *Beck v. Beck*<sup>113</sup> discusses the tracing of separate assets into marital assets and the resulting formation of hybrid property.<sup>114</sup> In its discussion of hybrid property, the court of appeals first addressed the marital residence.<sup>115</sup> Because the wife could trace \$78,000 of her separate money to the purchase of the marital residence,<sup>116</sup> the court of appeals reversed the trial court's holding that the wife had made her separate contribution to the husband as a gift.<sup>117</sup>

The trial court also erred in characterizing the wife's separate contributions to joint accounts as marital property.<sup>118</sup> Although evidence indicated that both parties made investment decisions regarding the money from these accounts, the wife deposited her separate funds into the joint accounts, and the husband failed to prove that the wife intended these funds to be a gift.<sup>119</sup> However, money that the wife put into an account in her husband's name was properly determined to have been gifted to the husband while the accounts she maintained in her separate name were considered to remain separate.<sup>120</sup> *Beck* highlights the significance of the title of accounts into which separate or marital funds are placed.

#### D. Other Equitable Distribution Issues

Many property settlement agreements contain provisions regarding the effect of either spouse filing for bankruptcy. In *Fleming v. Fleming*,<sup>121</sup> the Court of Appeals of Virginia reversed and

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112. *See id.*

113. No. 1082-92-2, 2000 Va. App. LEXIS 658 (Ct. App. Dec. 19, 2000) (unpublished decision).

114. *Id.*

115. *Id.* at \*8.

116. *Id.* at \*9.

117. *Id.* at \*16.

118. *Id.* at \*16-17.

119. *Id.*

120. *Id.* at \*15-16

121. 32 Va. App. 822, 531 S.E.2d 38 (Ct. App. 2000).

remanded the trial court's remedy in response to a wife's bankruptcy.<sup>122</sup> The wife filed for bankruptcy after entering into a property settlement agreement but before the divorce decree was finalized.<sup>123</sup> Her bankruptcy discharged certain credit card debts as well as a debt owed to her in-laws.<sup>124</sup> The property settlement agreement provided, however, that if the wife ever declared bankruptcy, she had to reaffirm the debt and pay it off voluntarily, or have her wages garnished.<sup>125</sup> Both parties waived spousal support.<sup>126</sup>

The trial court found that the wife's bankruptcy filing amounted to a repudiation of the property settlement agreement and constituted a material breach of contract.<sup>127</sup> It awarded the husband a lump sum payment of spousal support and reaffirmed the balance of the terms of the separation agreement.<sup>128</sup>

The court of appeals reversed the trial court's decision, holding that it could not award the husband spousal support when he: (1) had not filed pleadings requesting such relief; and (2) had endorsed the agreement that waived all claims for spousal support.<sup>129</sup> Virginia Code section 20-09 prohibited the trial court from entering an order regarding spousal award that was contrary to the terms of the agreement.<sup>130</sup> Apparently the appropriate relief for the husband on remand would be rescission of the entire contract.

Following the old adage, "Be careful what you ask for," the trial court in *Clark v. Clark*<sup>131</sup> was reversed on appeal when it awarded the wife eighty-five percent of the marital assets.<sup>132</sup> The commissioner found that the wife provided greater care and maintenance of the parties' property during the marriage, but the record on appeal revealed that such a conclusion was not supported by the

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122. *Id.* at 826, 531 S.E.2d at 40.

123. *Id.* at 823, 531 S.E.2d at 39.

124. *Id.*

125. *Id.* at 824, 531 S.E.2d at 39.

126. *Id.* at 823, 531 S.E.2d at 39.

127. *Id.* at 824, 531 S.E.2d at 39.

128. *Id.* at 824-25, 531 S.E.2d at 39-40.

129. *Id.* at 825, 531 S.E.2d at 40.

130. *Id.* at 826, 531 S.E.2d at 40.

131. No. 0827-99-2, 2000 Va. App. LEXIS 469 (Ct. App. June 27, 2000) (unpublished decision).

132. *Id.* at \*8-9.

evidence.<sup>133</sup> The court of appeals found that it was inappropriate for the commissioner to find that the monetary contributions of the parties were almost equal and to focus on the husband's lifestyle, including his excessive expenditures on personal items, in distributing the marital assets.<sup>134</sup> Such findings did not warrant such a disproportionate equitable distribution award.<sup>135</sup>

Of particular interest is the court of appeals' further holding that the wife failed to show that the husband's personal efforts were significant or had resulted in a substantial increase in the value of the stock of his separate business.<sup>136</sup> The wife's evidence showed that the husband worked from 5:30 a.m. to 7:30 p.m. Monday through Friday and most of the day on Saturday.<sup>137</sup> The wife, however, failed to produce evidence concerning the husband's actual efforts; that is, if he increased the company's customer base or expanded the business in any way.<sup>138</sup> Additionally, the increase in stock value between their marriage date and the hearing date amounted to only five percent per year, which the trial court properly found to be a substantial increase.<sup>139</sup>

During the past year the court of appeals also addressed the issue of marital fault after the separation of the parties and before the divorce. A wife's conviction for embezzlement and subsequent incarceration was held neither to be marital fault nor to have had a negative effect upon the marital estate in *Overbey v. Overbey*.<sup>140</sup> Therefore, the court held that the equitable distribution award of forty-five percent of the husband's pension to the wife was not an abuse of discretion by the trial court.<sup>141</sup> The court did not consider either the negative monetary or the negative non-monetary contributions to the well-being of the family.<sup>142</sup>

In an unusual decision, the court of appeals held, in *Faustini v.*

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133. *Id.*

134. *See id.*

135. *See id.*

136. *Id.* at \*14.

137. *Id.*

138. *Id.*

139. *Id.*

140. *See* No. 1395-00-3, 2001 Va. App. LEXIS 178, at \*7-13 (Ct. App. Apr. 3, 2001) (unpublished decision).

141. *Id.* at \*13.

142. *Id.* The Virginia Code provides that the court may consider each party's monetary and non-monetary contributions to the well-being of the family. VA. CODE ANN. § 20-107(E)(1) (Repl. Vol. 2000 & Cum. Supp. 2001).

*Duke*,<sup>143</sup> that the trial court could properly reconsider an equitable distribution award after the wife proved the husband's intrinsic and extrinsic fraud at the time of the original equitable distribution award.<sup>144</sup> The wife presented clear and convincing evidence that the husband had perpetrated a fraud upon the trial court by failing to disclose his interest in a certain corporation.<sup>145</sup> The husband claimed that he redeemed the stock in the company for \$500 when, in fact, he transferred ownership of the stock to his partner, who was receiving dividend checks in the amount of \$5,000.<sup>146</sup> Because of the fraud, the wife was also entitled to an increase in spousal support.<sup>147</sup>

### III. CUSTODY AND VISITATION

#### A. *Case Law*

##### 1. Parental Misconduct

One of the most interesting cases regarding custody and visitation within the last year is *Hughes v. Hughes*,<sup>148</sup> a case that addressed the effect of an allegation of adultery on a custody determination.<sup>149</sup> The Hughes' legal journey began when the wife separated from her husband, claiming that various incidents of abuse by the husband had occurred in the presence of the children.<sup>150</sup> After residing for a period of time in a battered women's shelter, the wife ultimately established residency in the home of a male co-worker.<sup>151</sup> The wife denied having a sexual relationship with the co-worker but admitted to being in love with him.<sup>152</sup> The co-worker slept in his own bedroom, while the wife and her two

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143. No. 2750-99-2, 2001 Va. App. LEXIS 69 (Ct. App. Feb. 13, 2001) (unpublished decision).

144. *Id.* at \*9.

145. *Id.*

146. *Id.* at \*7. The dividends eventually totaled more than \$22,000. *Id.*

147. *Id.* at \*15-16.

148. 33 Va. App. 160, 531 S.E.2d 654 (Ct. App. 2000) [hereinafter *Hughes II*], *aff'd*, 35 Va. App. 376 (Ct. App. 2001) (en banc).

149. *See id.* at 162, 531 S.E.2d at 655.

150. *Id.* at 163, 531 S.E.2d at 656.

151. *Id.* at 164, 531 S.E.2d at 656.

152. *Id.*



sons slept in another bedroom.<sup>153</sup> Multiple juvenile court proceedings shifted custody of the Hughes' two young sons between the parents.<sup>154</sup>

In *Hughes I*,<sup>155</sup> the Court of Appeals of Virginia reversed the trial court and held that the wife's explanation for moving into her co-worker's residence along with her lack of financial resources to live elsewhere sufficiently extinguished the husband's allegations of adultery.<sup>156</sup> The appellate court held that the trial court erroneously considered the wife's testimony in separate custody proceedings when ruling on the issue of adultery, after the evidence in the divorce proceedings was presented only through depositions.<sup>157</sup> Judge Coleman dissented, finding that his colleagues had substituted their view of the facts for that of the trial court.<sup>158</sup>

In *Hughes II*, the court of appeals reversed the trial court.<sup>159</sup> The appellate court found that the trial court had erroneously ordered a change in custody from the mother to the father based upon its perception that there was a change in circumstances during the divorce proceedings.<sup>160</sup> The same trial judge that presided over the custody hearings found the wife guilty of adultery.<sup>161</sup>

The trial court previously found that a material change in circumstances occurred when it made the finding of adultery in the divorce proceedings.<sup>162</sup> The court of appeals reasoned that there were, in fact, no new facts in the most recent custody hearing

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153. *Id.*

154. *Id.* at 162, 531 S.E.2d at 655.

155. 33 Va. App. 141, 531 S.E.2d 645 (Ct. App. 2000) [hereinafter *Hughes I*].

156. *Id.* at 148, 531 S.E.2d at 648. In holding that the husband had failed to meet his burden of proving adultery by clear and convincing evidence, the husband's proof included the following factors: (1) although the wife and the co-worker denied having sexual intercourse, they did live in the same house; (2) they were not dating anyone else; (3) they each had professed love to one another; (4) they shared meals and household chores; (5) they socialized together; and (6) the co-worker testified that he was sexually attracted to the wife. *Id.* at 147-48, 531 S.E.2d at 647-48.

157. *See id.* at 154, 531 S.E.2d at 651.

158. *Id.* at 155-58, 531 S.E.2d at 651-53 (Coleman, J., concurring in part and dissenting in part).

159. *Hughes II*, 33 Va. App. at 166, 531 S.E.2d at 657.

160. *See id.*

161. *Id.*

162. *Id.* at 165, 531 S.E.2d at 657.

showing a change in circumstances since the wife's housing arrangement had remained virtually the same.<sup>163</sup> The only change in circumstances was the trial judge's ruling that sufficient facts were pled to prove adultery.<sup>164</sup> Notably, the trial court failed to make such a finding in earlier custody proceedings based upon the same facts.<sup>165</sup> Judge Coleman dissented again, noting that the appellate court substituted its factual finding for that of the trial court, and therefore, was in error.<sup>166</sup>

In *Willis v. Willis*,<sup>167</sup> the court demonstrated that the termination of all visitation rights with a natural parent is difficult to accomplish. In *Willis*, a mother sought to terminate a father's visitation rights with the parties' minor child on the grounds that the father may have sexually abused the child.<sup>168</sup> The trial court ordered supervised and limited visitation by the father.<sup>169</sup>

In the face of conflicting evidence as to why the child was having negative responses to the visitation with her father, the appellate court confirmed the trial court's decision that "the history of sexual abuse was insufficient to deny all contact between parent and child."<sup>170</sup> Furthermore, evidence indicated that the child had benefitted from visitation with the father.<sup>171</sup> The court of appeals found that the trial court had not abused its discretion in ordering such visitation.<sup>172</sup>

In determining custody and visitation rights, a court must give primary consideration to the best interests of the child.<sup>173</sup> In the case of *Cintron v. Long*,<sup>174</sup> the court of appeals reviewed a case of apparent parental alienation.<sup>175</sup> In that case, a thirteen-year-old

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163. *Id.* at 166, 531 S.E.2d at 657.

164. *Id.*

165. *Id.*

166. *Id.* at 167, 531 S.E.2d at 658 (Coleman, J., concurring in part and dissenting in part).

167. No. 2829-99-2, 2000 Va. App. LEXIS 476 (Ct. App. June 27, 2000) (unpublished decision).

168. *See id.* at \*2.

169. *See id.*

170. *Id.* at \*7.

171. *Id.*

172. *Id.*

173. *See* VA. CODE ANN. § 20-124.2(B) (Repl. Vol. 2000 & Cum. Supp. 2001).

174. No. 2169-99-2, 2000 Va. App. LEXIS 487 (Ct. App. July 5, 2000) (unpublished decision).

175. *See id.* at \*2.

child refused to spend time with her father.<sup>176</sup> There was a considerable age difference, twenty-six years, between the parents, who had never married.<sup>177</sup> Multiple psychologists testified about the relationship of the child with her father, including the impact of the mother's actions on that relationship.<sup>178</sup> For example, the mother had consistently violated court orders regarding visitation.<sup>179</sup> In frustration, the trial court awarded custody to the father of the defiant child.<sup>180</sup>

The appellate court found that it was an abuse of the trial court's discretion to reverse custody when the trial court did not seem to consider the statutory factors provided in Virginia Code section 20-124.3.<sup>181</sup> The trial court rationalized the custody transfer as a response to the mother's multiple violations of the court's orders.<sup>182</sup> Since this case involved a custody determination between unmarried parents who had never lived together or jointly raised the child, it was an abuse of discretion to transfer legal custody of the child to her father "who was essentially a stranger to her."<sup>183</sup> The court of appeals did not find the mother's recalcitrance in abiding by the prior court orders to be a sufficient factor to award custody to the father.<sup>184</sup>

Interestingly, in the case of *Heretick v. Cintron*,<sup>185</sup> the same mother from *Cintron v. Long* was involved in a custody battle for another younger child by another man.<sup>186</sup> The father petitioned for a transfer of custody of the parties' five year old son.<sup>187</sup> Once again, the parents never married nor lived together.<sup>188</sup> The mother made accusations of sexual abuse against the father that

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176. *Id.* at \*3.

177. *Id.* at \*2. The father was sixty-four years old, and the mother was thirty-eight years old. *Id.*

178. *Id.* at \*3-6.

179. *Id.* at \*5.

180. *Id.* at \*10.

181. *Id.* The Virginia Code addresses the factors to be considered by the court in determining the best interest of the child for custody or visitation purposes. VA. CODE ANN. § 20-124.3 (Repl. Vol. 2000 & Cum. Supp. 2001).

182. *Cintron*, 2000 Va. App. LEXIS 487, at \*13.

183. *Id.* at \*17.

184. *Id.*

185. No. 1377-00-2, 2001 Va. App. LEXIS 172 (Ct. App. Apr. 3, 2001) (unpublished decision).

186. *See id.* at \*1.

187. *Id.*

188. *Id.* at \*2.

were investigated by social services and determined to be unfounded.<sup>189</sup> The juvenile court awarded custody to the father, found the mother guilty of civil contempt, and imposed a prison sentence, which was suspended contingent upon her compliance with the court's orders.<sup>190</sup>

The mother appealed the juvenile court order to the Chesterfield Circuit Court.<sup>191</sup> The court held a telephone conference with the parties' counsel and the guardian ad litem.<sup>192</sup> This telephone conference was neither transcribed nor produced as a written statement of facts.<sup>193</sup> Thereafter, the trial court issued a written order returning custody to the mother.<sup>194</sup> The appellate court found that the trial court had not abused its discretion in determining the best interests of the child, and its findings were not plainly wrong in returning custody to the mother.<sup>195</sup>

## 2. Relocation

Relocation cases present one of the more difficult issues addressed in change-of-custody cases. In *Stockdale v. Stockdale*,<sup>196</sup> the mother wished to relocate to New Jersey with the parties' minor children.<sup>197</sup> The burden of proof was a major issue in this case.<sup>198</sup> The appellate court agreed with the father that the trial court erred in imposing upon him the burden of proving by a preponderance of the evidence that his relationship with the children would be substantially impaired if the children moved with their mother to New Jersey.<sup>199</sup> The appellate court found, however, that this error of law was harmless because the mother proved that removing the children would be in their best interests and the fa-

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189. *Id.* at \*6.

190. *Id.*

191. *Id.* at \*10.

192. *Id.* at \*9.

193. *Id.* at \*13.

194. *Id.* at \*9-10.

195. *Id.* at \*15.

196. 33 Va. App. 179, 532 S.E.2d 332 (Ct. App. 2000).

197. *Id.* at 180, 532 S.E.2d 333.

198. *See id.* at 183, 532 S.E.2d at 334.

199. *Id.* at 185, 532 S.E.2d 335.

ther had failed to present any evidence to contradict her evidence.<sup>200</sup> In fact, the father failed to present any evidence at all.<sup>201</sup>

The Court of Appeals of Virginia also addressed the issue of relocation in *Cloutier v. Queen*<sup>202</sup> for the first time in the context of the remarriage of the relocating parent. In *Cloutier*, the trial court originally approved the mother's relocation request, allowing her to move with the children four hours away to Pennsylvania.<sup>203</sup> The trial court, however, reversed itself within twenty-one days of its original ruling and denied the mother's request for relocation.<sup>204</sup> In this order, the trial court also denied the father's motion to transfer primary residential custody to him.<sup>205</sup>

The court of appeals affirmed the trial court, finding that it would be in the children's best interests to remain in Virginia.<sup>206</sup> It was apparent from the record that both parties were good parents.<sup>207</sup> According to the record, the mother was the primary caregiver and would care for her children exclusively if allowed to move to Pennsylvania where her new husband resided with his children.<sup>208</sup> The record disclosed, however, that the parents' joint custody arrangement had worked well and that the father was involved with the children and their daily activities.<sup>209</sup> The children were doing well academically and socially and wanted to spend more time with their father.<sup>210</sup> For these reasons, the trial court properly denied the motion to relocate, despite the mother's remarriage to a non-Virginia resident.<sup>211</sup> Of significance in *Cloutier* was the court's refusal to recognize a custodial parent's remarriage as justification for relocation.

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200. *Id.* at 185, 532 S.E.2d 336.

201. *See id.* at 186, 532 S.E.2d at 336.

202. 35 Va. App. 413, 545 S.E.2d 574 (Ct. App. 2001).

203. *Id.* at 419, 545 S.E.2d at 577.

204. *Id.*

205. *Id.*

206. *Id.* at 430, 545 S.E.2d at 582.

207. *Id.* at 428-29, 545 S.E.2d at 582.

208. *See id.*

209. *Id.*

210. *Id.*

211. *See id.* at 430, 545 S.E.2d at 582.

### 3. Termination of Parental Rights

Within the last year, the court of appeals also handed down several decisions on statutes regarding the termination of parental rights.<sup>212</sup> These decisions include *Hawthorne v. Smyth County Department of Social Services*<sup>213</sup> and *Fredericksburg Department of Social Services v. Brown*.<sup>214</sup> In *Hawthorne*, the court of appeals ruled that the statute governing the termination of residual parental rights requires that two orders be issued concurrently.<sup>215</sup> The first order terminates the parental rights, and the second order gives custody of the child to a relative or a third party.<sup>216</sup>

In *Brown*, the appellate court confirmed that the juvenile court properly denied a petition to terminate parental rights because the issue raised before the juvenile court was the propriety of the entrustment agreement and not a petition to terminate parental rights.<sup>217</sup> The trial court erroneously reasoned that the termination of parental rights was an issue and that the parents required legal representation, which they did not have.<sup>218</sup> The appellate court ruled that despite the erroneous reasoning of the trial court, the lower court's decision would be affirmed because the entrustment agreement had been entered into by an aunt and not by a parent or a guardian as required by statute.<sup>219</sup>

It is certain that the issues in these custody cases will arise in the future. Relocation will continue to be a hot topic where both parents frequently are employed in an increasingly mobile American workforce. Moreover, it appears that there are more and more custody cases involving parents who have never married, lived together, or jointly raised their children. These circumstances appear to be on the rise especially among well-educated, employed and more mature adults. Each case involving these is-

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212. See VA. CODE ANN. § 16.1-283(A) (Cum. Supp. 2001).

213. 33 Va. App. 130, 531 S.E.2d 639 (Ct. App. 2000).

214. 33 Va. App. 313, 533 S.E.2d 12 (Ct. App. 2000).

215. *Hawthorne*, 33 Va. App. at 137, 531 S.E.2d at 643.

216. *Id.*

217. *Brown*, 33 Va. App. at 324, 533 S.E.2d at 17.

218. *Id.*

219. *Id.* at 323, 533 S.E.2d at 16. VA. CODE ANN. § 63.1-56 (Cum. Supp. 2001) provides that only a parent or guardian may enter into an entrustment agreement with the Department of Social Services for the care of a child under eighteen years of age. *Id.*

sues will be fact specific, but the themes of relocation and physical custody by un-partnered parents likely will be repeated.

## B. *Legislative Changes*

### 1. UCCJEA

The most sweeping and dramatic change from the General Assembly came with the adoption of the UCCJEA.<sup>220</sup> The UCCJEA replaces the Uniform Child Custody Jurisdiction Act ("UCCJA"),<sup>221</sup> which was enacted by the General Assembly in 1979.<sup>222</sup>

The basic concept of the new statute is to update current interstate custody law to conform with the federal Parental Kidnapping Prevention Act ("PKPA")<sup>223</sup> and the Violence Against Women's Act ("VAWA").<sup>224</sup> The major provisions of this new statutory scheme attempt to mirror the PKPA and the VAWA: (1) paralleling the PKPA provisions of allocation of child custody jurisdiction between states and countries;<sup>225</sup> (2) adopting the PKPA rule of absolute priority of home state jurisdiction in matters of initial jurisdiction exercise;<sup>226</sup> (3) adopting PKPA's inflexible rule on continuing jurisdiction in modification cases;<sup>227</sup> (4) clarifying that a general appearance to contest a jurisdictional issue is not the equivalent of a "general appearance;"<sup>228</sup> (5) expanding the scope of the emergency jurisdiction provisions, but clarifying the purpose of emergency jurisdiction;<sup>229</sup> and (6) providing that the UCCJEA applies to cases involving other countries.<sup>230</sup>

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220. VA. CODE ANN. §§ 20-146.1 to -146.38 (Cum. Supp. 2001).

221. *Id.* §§ 20-125 to -146 (Repl. Vol. 2000) (repealed 2001).

222. Act of Mar. 14, 1979, ch. 229, 1979 Va. Acts 294 (codified as amended at VA. CODE ANN. §§ 20-125 to -146 (Repl. Vol. 2000)).

223. 28 U.S.C. § 1738A (1994 & Supp. V 1999).

224. 18 U.S.C. §§ 2261-2266 (1994 & Supp. V 1999).

225. *See* VA. CODE ANN. §§ 20-146.1 to -146.38 (Cum. Supp. 2001).

226. *Id.* § 20-146.12 (Cum. Supp. 2001).

227. *Id.* § 20-146.13 (Cum. Supp. 2001).

228. *Id.* § 20-146.8 (Cum. Supp. 2001).

229. *Id.* § 20-146.15 (Cum. Supp. 2001).

230. *Id.* § 20-146.4 (Cum. Supp. 2001).

There are a number of other important provisions in this statute, but the ones cited above appear to be the most significant. These provisions are described in more detail below.

a. Jurisdiction for Initial Child Custody Proceedings

Under the old law, courts often confused jurisdictional issues in child custody cases. Now, in initial child custody proceedings, a Virginia court can exercise jurisdiction only: (1) if Virginia is the home state of the child on the date of the commencement of the proceeding; or (2) the child is absent from Virginia, if Virginia was the home state within six months of the commencement of the case and if a parent continues to live in Virginia.<sup>231</sup> Consequently, the UCCJEA eliminates the “best interests” of the child requirement under the old UCCJA.<sup>232</sup> A Virginia court may also exercise jurisdiction if: (1) the courts of the child’s home state have declined to exercise jurisdiction on the grounds that Virginia is a more appropriate forum; (2) the child and the child’s parent have a “significant connection” with Virginia other than mere physical presence; and (3) “substantial evidence” is available in Virginia.<sup>233</sup> This provision clarifies jurisdictional issues facing Virginia courts.

b. Jurisdiction for Modification and Continuing Jurisdiction

In the past, it was unclear as to when Virginia courts had jurisdiction to modify a custody determination. As stated above, Virginia may not, except in emergency jurisdiction cases, modify a child’s custody determination made by another state unless: (1) a court of that state has jurisdiction to make an initial determination; and (2) that court determines either that it no longer has continuing exclusive jurisdiction or that Virginia is a more convenient forum.<sup>234</sup> A Virginia court that makes a child custody determination but does not have continuing exclusive jurisdiction

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231. *Id.* § 20-146.12 (A)(1) (Cum. Supp. 2001).

232. *Id.* § 20-126 (Repl. Vol. 2000) (repealed 2001).

233. *Id.* § 20-146.12 (A)(2) (Cum. Supp. 2001).

234. *Id.* § 20-146.14 (Cum. Supp. 2001).



may modify the order only if it has jurisdiction to make an initial determination.<sup>235</sup>

Finally, once proper jurisdiction is exercised, Virginia has exclusive continuing jurisdiction over the matter as long as the child, the child's parent, or any person acting as a parent continues to live in Virginia.<sup>236</sup> This clearly parallels the PKPA and will help to resolve jurisdictional disputes between states. Even though exclusive continuing jurisdiction makes it clear which court has jurisdiction, a court may decline to exercise its jurisdiction.<sup>237</sup> This bright line distinction will remove much confusion about which states have modification jurisdiction.

### c. Procedural Issues

Under the UCCJEA, a litigant may now make an appearance to contest jurisdiction without being considered by the court to have made a general appearance for jurisdictional purposes.<sup>238</sup> The new statute also allows the use of depositions and testimony by telephone, audiovisual aids, or other electronic means for jurisdictional determinations.<sup>239</sup> Further, the courts must communicate on the question of jurisdiction, and the parties not only are allowed to participate in the communication, but also may present facts and arguments relating to jurisdiction.<sup>240</sup> The UCCJEA clearly forces more contact between the courts of various states and permits a greater role for litigants in jurisdictional issues.

### d. Temporary Emergency Jurisdiction

The change in temporary emergency jurisdiction provisions has received very little attention. Under the old UCCJA, emergency jurisdiction occurred only if the child was present in Virginia and had been abandoned or abused.<sup>241</sup> The UCCJEA extends the abuse provision to apply to siblings or parents of the child as

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235. *Id.* § 20-146.12 (Cum. Supp. 2001).

236. *Id.* § 20-146.13(A) (Cum. Supp. 2001).

237. *Id.* § 20-146.18(A) (Cum. Supp. 2001).

238. *Id.* § 20-146.8(A) (Cum. Supp. 2001).

239. *Id.* § 20-146.10(B) (Cum. Supp. 2001).

240. *Id.* § 20-146.9 (Cum. Supp. 2001).

241. *Id.* § 20-126(3) (Repl. Vol. 2000) (repealed 2001).

well.<sup>242</sup> However, this new statute could allow courts to assume emergency jurisdiction in cases where spouses make false claims of spousal abuse. The emergency jurisdiction provision would allow the parent to flee to another state, claim spousal abuse, and have that state's courts assume jurisdiction. This process could take months to litigate, and one parent may be deprived of an appropriate custody determination in the child's home state under this scenario. It is much more difficult to claim child abuse than to claim spousal abuse since false reporting of spousal abuse does not require the complicity of another person's testimony. There are obvious salient aspects to this revision, but the possibilities for mischief are worrisome.

On a brighter note, the UCCJEA now makes it clear that a Virginia emergency jurisdiction order continues until an order is obtained from a state having proper jurisdiction (i.e., the home state).<sup>243</sup> If no other state action is commenced, Virginia's order becomes a final determination if it so provides, and Virginia becomes the home state of the child.<sup>244</sup> It should be noted that this provision has been subject to some abuse in the past, and this abuse likely will continue in the future.

#### e. International Application

Finally, the UCCJEA provides that Virginia courts must "treat a foreign country as if it were a state of the United States for purposes of applying" the Act.<sup>245</sup> However, the UCCJEA will not be applied if the custody law of a foreign country violates fundamental principles of human rights.<sup>246</sup>

In general, the UCCJEA has many beneficial aspects and few problem areas. Certainly, it will make state and federal law more similar. Hopefully, it will allow courts to make more coherent, rational jurisdictional decisions concerning the custody of children.

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242. *Id.* § 20-146.15(A) (Cum. Supp. 2001).

243. *Id.* § 20-146.15(B) (Cum. Supp. 2001).

244. *Id.*

245. *Id.* § 20-146.4(A) (Cum. Supp. 2001).

246. *Id.* § 20-146.4(C) (Cum. Supp. 2001).

## 2. Communication of Custody Decisions to Parties

One frequent and continuing complaint voiced by litigants in custody cases is that courts fail to articulate the basis for their decisions. Many times litigants leave a courtroom only knowing that the other spouse obtained sole custody. This problem is more acute in juvenile and domestic relations courts where the volume of cases often exacerbates the lack of communication. In the past, the General Assembly has tried to remedy this problem. Now it has gone one step further by requiring that when a court makes an award of sole custody, the judge *shall* communicate the basis for the decision to the parties either orally or in writing.<sup>247</sup>

### IV. CHILD SUPPORT

#### A. Case Law

##### 1. Parental Agreements to Modify Support

The Court of Appeals of Virginia considered the effect of a parties' agreement to modify child support following the entry of a divorce decree in *Gallagher v. Gallagher*.<sup>248</sup> In *Gallagher*, the parties' 1992 divorce decree incorporated the parties' original agreement requiring the father to pay child support for the parties' two minor children.<sup>249</sup> Subsequently, in 1995 the parties reached a mediated agreement amending the original provisions regarding custody and support.<sup>250</sup> In 1999, the trial court issued a show cause order against the father for child support arrearages totaling over \$33,000.<sup>251</sup>

The trial court, which granted relief to the father, was reversed by the court of appeals sitting en banc.<sup>252</sup> The appellate court re-

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247. *Id.* § 20-124.2(B) (Repl. Vol. 2000 & Cum. Supp. 2001).

248. 35 Va. App. 470, 546 S.E.2d 222 (Ct. App. 2001) (en banc).

249. *Id.* at 473-74, 546 S.E.2d at 223-24.

250. *Id.* at 474, 546 S.E.2d at 224.

251. *Id.* Arrearages resulted from the difference in child support payments payable under the original 1992 divorce decree and those payable pursuant to the parties' 1995 mediated agreement. *Id.*

252. *Id.* at 473, 546 S.E.2d at 223.

visited the decision of *Acree v. Acree*.<sup>253</sup> The *Acree* decision recognized an exception to the general rule that child support arrearages accrue as a judgment and are not modifiable.<sup>254</sup> After *Acree*, non-conforming payments could be credited to the payor when the purpose of the child support award was achieved.<sup>255</sup>

In *Gallagher*, the court of appeals held that the *Acree* exception applies only when full custody has been transferred between the parents and the necessity of child support has ceased.<sup>256</sup> Absent such a transfer of custody, the father's proper remedy in seeking a modification of his child support obligation was to petition the court for a modification of its prior support order.<sup>257</sup> The court of appeals dismissed the "unjust enrichment" of the mother as "unfortunate," making *Acree* an iron-clad rule.<sup>258</sup>

*Riggins v. O'Brien*<sup>259</sup> confirmed the illegality of parental agreements to modify child support that is not in accordance with the presumptive guideline amount of child support.<sup>260</sup> The parties' 1991 divorce decree required the father to pay the mother child support until the children turned eighteen, married, became self-supporting or otherwise emancipated, or died.<sup>261</sup>

In 1992, when the oldest child became eighteen, the father reduced his child support obligation by one-fourth.<sup>262</sup> The mother did not object to the reduced child support payments until six years later, after having accepted the payments on a regular basis during the interim.<sup>263</sup> Also during the interim, a sixteen-year-old child moved out of the mother's home and set up a separate residence.<sup>264</sup> At that time, the father once again reduced his child

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253. 2 Va. App. 151, 342 S.E.2d 68 (Ct. App. 1986). *Acree* involved a full custodial transfer from the payee to the payor that was permanent in nature. *Id.* at 152-53, 342 S.E.2d at 68-69.

254. *Id.* at 156-57, 342 S.E.2d at 71.

255. *Id.* at 157-58, 342 S.E.2d at 71-72.

256. *Gallagher*, 35 Va. App. at 479, 546 S.E.2d at 246.

257. *Id.* at 479, 546 S.E.2d at 226.

258. *Id.* at 478, 546 S.E.2d at 226.

259. 34 Va. App. 82, 538 S.E.2d 320 (Ct. App. 2000), *appeal granted*, No. 010501 (Va. Aug. 2, 2001).

260. *Id.* at 86, 538 S.E.2d at 322.

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.* at 87, 538 S.E.2d at 322.

support by another quarter.<sup>265</sup> In 1998, the mother filed a petition for a rule to show cause.<sup>266</sup>

The trial court found the father liable for child support arrearages exceeding \$85,000, as well as \$20,000 of prejudgment interest.<sup>267</sup> In affirming the trial court's ruling, the appellate court emphasized that court approval is required for agreements reached by parties that attempt to modify child support.<sup>268</sup> Since a reduction in support by agreement without court approval is contrary to Virginia law and public policy, any such decree is void and ineffective.<sup>269</sup> This case is currently pending before the Supreme Court of Virginia.<sup>270</sup>

Similar to *Riggins*, the holding in *Shoup v. Shoup*<sup>271</sup> also involved an interpretation of the parties' settlement agreement, which was incorporated in their divorce decree which provided that, upon a change in circumstances, the parties would follow the child support guidelines.<sup>272</sup> When the eldest child turned eighteen, childcare costs were eliminated, and the father unilaterally reduced his child support payment, consistent with the terms of the agreement, to which the mother did not object.<sup>273</sup> Subsequently, the mother filed to collect arrearages.<sup>274</sup> In holding the self-executing provision to reduce child support unenforceable, the *Shoup* court reasoned that "the prevailing and well-established principle of law requir[es] contemporaneous court approval of modification."<sup>275</sup>

*Shoup* can be distinguished from *Riggins* because the parties' agreement in *Shoup* was incorporated into the divorce decree and not drafted subsequent to the decree. According to the court of appeals, however, the automatic modification of child support upon emancipation of the child was still inappropriate.<sup>276</sup> In con-

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265. *Id.*

266. *Id.*

267. *Id.*

268. *See id.* at 90-91, 538 S.E.2d at 324.

269. *Id.* at 92, 538 S.E.2d at 325.

270. *Riggins v. O'Brien*, No. 010501, *appeal granted* (Va. Aug. 2, 2001).

271. 34 Va. App. 347, 542 S.E.2d 9 (Ct. App. 2001).

272. *Id.* at 351, 542 S.E.2d at 10.

273. *Id.* at 351, 542 S.E.2d at 11-12.

274. *Id.*

275. *Id.* at 353, 542 S.E.2d at 12.

276. *See id.* at 353-56, 542 S.E.2d at 13-14. However, it should be noted that this case

trast, the lengthy *Shoup* dissent is consistent with the view of most family law practitioners that parents should be able to have self-executing modifications of support that may be incorporated into subsequent court orders or decrees.<sup>277</sup> It is likely that this case will open the floodgate for more litigation, unless it is overruled by a statutory amendment or on appeal.

## 2. Support for Children Over Age Eighteen

The Court of Appeals of Virginia found in *Goldin v. Goldin*<sup>278</sup> that the trial court properly retained jurisdiction to reduce support regarding the youngest child of the parties.<sup>279</sup> Under Virginia Code section 20-107.2, the power to modify support continues until the child reaches the age of eighteen or graduates from high school at age nineteen.<sup>280</sup> After a child reaches that age, the court loses jurisdiction to modify support, and the provisions in the parties' settlement agreement regarding child support continue to be enforceable.<sup>281</sup> Parties may lawfully contract to provide support to the children after the age of majority.<sup>282</sup> In *Goldin*, the court of appeals held that the husband could not terminate his support obligations for the twenty-year-old child since the agreement expressly provided that he would pay child support until each child reached the age of twenty-two and graduated from college or reached age twenty-three.<sup>283</sup> Therefore, the fact that the twenty-year-old had set up her own residence, and her college status was unknown, did not relieve the father of his continued obligation to pay support pursuant to the parties' agreement.<sup>284</sup>

The issue of permanently disabled children has received scant attention from Virginia's appellate courts. The child in *Germek v. Germek*<sup>285</sup> was born with "multiple physical abnormalities."<sup>286</sup>

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has been set for rehearing en banc. *Shoup v. Shoup*, 35 Va. App. 239, 544 S.E.2d 375 (Ct. App. 2001).

277. *Shoup*, 34 Va. App. at 358-63, 542 S.E.2d at 15-18 (Benton, J., dissenting).

278. 34 Va. App. 95, 538 S.E.2d 326 (Ct. App. 2000).

279. *Id.* at 104, 538 S.E.2d at 330.

280. VA. CODE ANN. § 20-107.2 (Repl. Vol. 2000 & Cum. Supp. 2001).

281. *Goldin*, Va. App. at 106, 538 S.E.2d at 331.

282. *Id.*

283. *Id.* at 107, 538 S.E.2d at 332.

284. *Id.*

285. 34 Va. App. 1, 537 S.E.2d 596 (Ct. App. 2000).

286. *Id.* at 3, 537 S.E.2d at 598.

Shortly before the daughter's graduation from high school, the mother moved for the court to require the father to continue providing child support.<sup>287</sup>

The adult daughter in *Germek* had only one kidney, a colostomy and ostomy, and an artificial bladder.<sup>288</sup> She was, however, able to work ten hours a week as a cashier while enrolled full-time at a local community college.<sup>289</sup> She intended to transfer to a four-year college after completing two years at the community college.<sup>290</sup> Her physician testified that she could not live independently because of the risk of kidney infections and renal failure.<sup>291</sup> The daughter testified that she could live independently under ordinary circumstances, but when she was ill, she needed someone to care for her.<sup>292</sup> On this evidence, the trial court ordered the father to continue to pay child support.<sup>293</sup>

In this case of first impression, the Court of Appeals of Virginia looked at Virginia Code section 20-124.2(C).<sup>294</sup> Neither party disputed that the daughter had a physical disability, and the court of appeals assumed that her physical ailments were consistent with a permanent and severe disability as defined by statute.<sup>295</sup> Pursuant to the statutory requirements, the next issue the court addressed was whether the child could live independently and support herself.<sup>296</sup> The court of appeals concluded that the trial court did not find that the child was unable to live independently, a finding that is required by statute for continuing child support.<sup>297</sup> Rather, the trial court merely found that the child "should" not live by herself.<sup>298</sup>

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287. *Id.* at 3-4, 537 S.E.2d at 598.

288. *See id.* at 4, 537 S.E.2d at 598.

289. *See id.*

290. *Id.*

291. *See id.* at 5, 537 S.E.2d at 598.

292. *See id.* at 5, 537 S.E.2d at 598-99.

293. *Id.* at 7, 537 S.E.2d at 600.

294. *Id.* at 8-9, 537 S.E.2d at 600. The Virginia Code lists requirements that must be met in order for a court to order continuing support for children over the age of eighteen. *See* VA. CODE ANN. § 20-124.2(C) (Repl. Vol. 2000 & Cum. Supp. 2001).

295. *Germek*, 34 Va. App. at 9, 537 S.E.2d at 600. The Virginia Code addresses the required conditions governing child support for mentally or physically disabled children. *See* VA. CODE ANN. § 20-142.2(C) (Repl. Vol. 2000 & Cum. Supp. 2001).

296. *Germek*, 34 Va. App. at 9-12, 537 S.E.2d at 600-01.

297. *Id.* at 9, 537 S.E.2d at 600.

298. *Id.*

The court of appeals distinguished the facts of *Germek* from its holding in *Rinaldi v. Dumsick*,<sup>299</sup> in which the child suffered from physical and mental disabilities, including weekly seizures.<sup>300</sup> There was no evidence of either chronic illness or mental disabilities on the part of the daughter in the *Germek* case.<sup>301</sup> Accordingly, the *Germek* court vacated the trial court's award of child support.<sup>302</sup>

Another recently published decision regarding child support is *Robdau v. Commonwealth*.<sup>303</sup> In *Robdau*, the parties had three children. Two of the children were over the age of twenty-one, and the third child was nineteen, though not emancipated.<sup>304</sup> When they divorced, the parties were residents of New York, which permits child support until the age of twenty-one.<sup>305</sup> An order was entered in New York in September 1999 awarding the mother child support arrearages and requiring the father, a Virginia resident, to make payment.<sup>306</sup> The New York order was registered in Virginia pursuant to the Uniform Interstate Family Support Act (UIFSA).<sup>307</sup>

The father sought to set aside the arrearage by claiming that the circuit court in Virginia lacked subject matter jurisdiction to enforce child support arrearages accruing after his youngest child reached the age of eighteen.<sup>308</sup> The Court of Appeals of Virginia affirmed the trial court's order requiring the father to pay on arrearages that accrued after his youngest child turned eighteen, reasoning that the clear language of UIFSA provided that the law of the state issuing the court order should be enforced by Vir-

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299. 32 Va. App. 330, 528 S.E.2d 134 (Ct. App. 2000).

300. *See id.* at 332, 528 S.E.2d at 135-36.

301. *See Germek*, 34 Va. App. at 10, 537 S.E.2d at 601.

302. *Id.* at 12, 537 S.E.2d at 602.

303. 35 Va. App. 128, 543 S.E.2d 602 (Ct. App. 2001).

304. *Id.* at 130, 543 S.E.2d at 603.

305. *See id.* The pertinent New York statute defines "child support" as "a sum to be paid pursuant to court order or decree by either or both parents or pursuant to a valid agreement between the parties for care, maintenance and education of any unemancipated child under the age of twenty-one years." N.Y. DOM. REL. LAW § 240(1-b)(b)(2) (McKinney 2000).

306. *Robdau*, 35 Va. App. at 130, 543 S.E. 2d at 603.

307. *Id.* at 130-31, 543 S.E.2d at 603. The Uniform Interstate Family Support Act, as adopted by Virginia, is found at VA. CODE ANN. §§ 20-88.32 to -88.65 (Repl. Vol. 2000 & Cum. Supp. 2001).

308. *Robdau*, 35 Va. App. at 131, 543 S.E.2d at 603-04.



ginia.<sup>309</sup> The appellate court reasoned that UIFSA intended to prevent forum shopping and to discourage parents from avoiding one state's order of child support by moving to another state that permits ending child support at a younger age.<sup>310</sup> Therefore, New York law applied.<sup>311</sup>

### 3. Procedural Issues

In *Herring v. Herring*,<sup>312</sup> the Court of Appeals of Virginia relied upon the rare "ends of justice" exception to Supreme Court of Virginia Rule 5A:18.<sup>313</sup> In this case, the appellate court reversed and remanded the trial court's calculation of child support, despite the fact that the mother did not properly preserve her appeal pursuant to appellate procedure.<sup>314</sup> Originally, the Department of Social Services entered an administrative order for child support and required the father to pay the mother.<sup>315</sup> A year later, the mother petitioned the juvenile court for an increase in support.<sup>316</sup> The juvenile court effected an increase, which the father appealed to the circuit court.<sup>317</sup> The circuit court reduced the increase after finding that half of the mother's household expenses were paid by another person with whom she lived.<sup>318</sup> The trial court, however, failed to determine the presumptive amount of child support.<sup>319</sup> The court of appeals reasoned that

although the court's support award is not necessarily erroneous, the entry of a support order which does not expressly determine the presumptive amount of support due or fully explain the basis for deviating from that amount does not provide an adequate basis for future modifications of support.<sup>320</sup>

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309. *Id.* at 133, 543 S.E.2d at 605.

310. *See id.*

311. *See id.* at 129, 133, 435 S.E.2d at 603, 605.

312. 33 Va. App. 281, 532 S.E.2d 923 (Ct. App. 2000).

313. *Id.* at 285, 532 S.E.2d at 926-27. The court explained that Rule 5A:18 of the Supreme Court of Virginia contains an "ends of justice exception" that allows the court to hear an appeal even though the appellant failed to preserve her objection for appeal. *Id.* at 285, 532 S.E.2d at 926-27

314. *Id.* at 283-84, 532 S.E.2d at 925.

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* at 285, 532 S.E.2d at 925.

319. *Id.*

320. *Id.* at 288-89, 532 S.E.2d at 927.

*Mahoney v. Mahoney*<sup>321</sup> involved an appeal of a juvenile court order finding the father in contempt for failing to pay child support, spousal support, and other bills, resulting in an outstanding obligation that exceeded \$150,000.<sup>322</sup> The father filed an appeal with the circuit court but did not post an appeal bond as required by Virginia Code section 16.1-296(H); he argued that he was not appealing the support award but was contesting the juvenile court's jurisdiction.<sup>323</sup>

In April 2000, the Court of Appeals of Virginia held that the appeal of jurisdiction was not "an appeal of a 'portion of any order or judgment establishing a support arrearage,'" and as such, Mahoney was not required to post bond.<sup>324</sup> In December 2000, however, the appellate court reversed itself on rehearing, holding that Virginia Code section 16.1-296(H) did in fact require Mahoney to post an appeal bond even though the appeal from the juvenile court did not concern the issue of support and was limited to subject matter jurisdiction.<sup>325</sup>

#### 4. Non-Traditional Family Arrangements

Another interesting decision from the Court of Appeals of Virginia was *Russell v. Russell*,<sup>326</sup> which involved support obligations of grandparents who had been awarded joint legal custody of their granddaughter.<sup>327</sup> The grandmother sought child support from the grandfather, from whom she was divorced.<sup>328</sup> Although the child was in the physical custody of her grandmother, the parents of the child retained residual parental rights, which were still in force, and their consent was required on certain major decisions concerning the child.<sup>329</sup>

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321. 32 Va. App. 139, 526 S.E.2d 780 (Ct. App. 2000), *rev'd en banc*, 34 Va. App. 63 (Ct. App. 2001).

322. *Id.* at 140-41, 526 S.E.2d at 781.

323. *Id.* The Virginia Code provides in part that "[n]o appeal bond shall be required of a party appealing from an order of a juvenile and domestic relations district court except for that portion of any order or judgment establishing a support arrearage." See VA. CODE ANN. § 16.1-296(H) (Repl. Vol. 2000 & Cum. Supp. 2001).

324. *Mahoney*, 32 Va. App. at 142, 526 S.E.2d at 781-82.

325. *Mahoney v. Mahoney*, 34 Va. App. 63, 66, 537 S.E.2d 626, 627 (Ct. App. 2000).

326. 35 Va. App. 360, 545 S.E.2d 548 (Ct. App. 2001).

327. *Id.* at 362, 545 S.E.2d at 549.

328. *See id.* at 362-63, 545 S.E.2d at 549-50.

329. *Id.* at 362, 545 S.E.2d at 549.

The court of appeals found that since the parents retained certain residual rights, they had an obligation to support the child.<sup>330</sup> The grandfather could not be ordered to pay child support pursuant to Virginia Code section 20-107.2,<sup>331</sup> and therefore, the trial court did not have authority to order the grandfather to pay child support to the grandmother.<sup>332</sup> Rather, the *Russell* court held that the sole parties with an obligation to support the child were the natural parents, and as legal custodians, pursuant to Virginia Code section 16.1-228,<sup>333</sup> the grandparents only had a duty to provide basic necessities: food, shelter, education and medical care.<sup>334</sup> Accordingly, the court of appeals reversed the decision of the trial court, and the case was remanded for determination of the natural parents' child support obligations.<sup>335</sup>

## 5. Other Calculation Issues

In *Howard v. Howard*,<sup>336</sup> the Court of Appeals of Virginia found that the trial court abused its discretion in calculating gross income for purposes of child support when it excluded from the husband's gross income rental income and certain other benefits he received from his dental corporation.<sup>337</sup> The *Howard* decision provides a good discussion of what types of business expenses should be considered when calculating parental income. For example, the court may impute income to a spouse when that spouse is deemed to be underemployed.<sup>338</sup>

In *Tatum v. Tatum*,<sup>339</sup> the court of appeals held that the trial court erred in offsetting child support payments owed by the

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330. *Id.* at 363, 545 S.E.2d at 550.

331. VA. CODE ANN. § 20-107.2 (Repl. Vol. 2000 & Cum. Supp. 2001).

332. *Russell*, 35 Va. App. at 364, 545 S.E.2d at 550.

333. VA. CODE ANN. § 16.1-228 (Repl. Vol. 1998 & Cum. Supp. 2001) (defining "[l]egal custody" as "a legal status created by court order which vests in a custodian . . . the right and duty . . . to provide [the child] with food, shelter, education and ordinary medical care.").

334. *Russell*, 35 Va. App. at 364, 545 S.E.2d at 550.

335. *Id.*

336. No. 1400-93-4, 2000 Va. App. LEXIS 518 (Ct. App. July 18, 2000) (unpublished decision).

337. *Id.* at \*4-6.

338. *Id.* at \*3-4 (citations omitted).

339. No. 0438-00-3, 2000 Va. App. LEXIS 789 (Ct. App. Dec. 5, 2000) (unpublished decision).

mother to the father against spousal support payments owed by the father to the mother.<sup>340</sup> The court of appeals reasoned that offsetting the two awards and requiring the net payment from the father to the mother amounted to an inappropriate deviation from the child support guidelines.<sup>341</sup>

The most significant decisions regarding the issue of child support are *Shoup* and *Riggins*. While *Riggins* is consistent with most practitioners' understanding of the law, *Shoup* is not. Many practitioners incorporate into their separation agreements and decrees language substantially similar to the invalidated self-executing provisions of the *Shoup* decree regarding modifications of child support. The *Shoup* rehearing, therefore, will be an important one for all family law practitioners.

## B. Legislative Changes

### 1. The Adoption of the "Colorado Method" and the Calculation of Gross Income

For over ten years, Virginia lawyers and judges have been confused as to how to apply the deviation factor for child support calculations when either the payor or payee have other children besides those involved in the current proceedings.<sup>342</sup> For many years, the Division of Child Support Enforcement ("DCSE") has used the simple and accurate Colorado Method, adopted this year by the General Assembly.<sup>343</sup> Given the volume of cases handled by the DCSE each year, it was imperative to have a consistent method that could be utilized by non-lawyers. This is what the Colorado Method permits when there are other children.<sup>344</sup>

The amendment to Virginia Code section 20-108.2 requires that, when computing gross income, the payor's gross income be

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340. See *id.* at \*7-12.

341. See *id.* at \*19-20.

342. See, e.g., *Summers v. Summers*, 1993 Va. App. LEXIS 230 (Ct. App. June 29, 1993).

343. See H.B. 2290, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Apr. 9, 2001, ch. 809, 2001 Va. Acts 1112) (codified as amended at VA. CODE ANN. §§ 20-108.1, -108.2 (Cum. Supp. 2001)).

344. For a lengthy analysis of this statute, practitioners should review Richard J. Byrd, *The Colorado Method in Virginia*, FAM. L. NEWS, Spring 2001.

adjusted by deducting the amount of child support paid for children who are not subject to the current proceeding where there is either a written agreement or a court or administrative order.<sup>345</sup> Such child support payments actually must be made in order for the payor's gross income to qualify for the adjustment.<sup>346</sup> The amendment also alters this section by requiring that the payor's gross income be deducted by the amount set out in the statutory guidelines for any children in the payor's current household.<sup>347</sup> These deductions will result in less child support for the child or children in the current proceeding. However, the General Assembly erected a limitation on this reduction by providing that the adjustment to gross income will not create or reduce a support obligation by an amount that seriously impairs the custodial parent's ability to maintain minimal adequate housing and provide other basic necessities for the child.<sup>348</sup>

These amendments raise other important considerations. The statute now makes "other children" a part of the presumptive calculation, not a deviation factor as they were before.<sup>349</sup> Further, the responsibility for other children is not an independent material change of circumstances in modification proceedings.<sup>350</sup> Instead, the obligation can only be considered where the initial child support award is being established or where modification includes another change of circumstances not related to the "other children."<sup>351</sup> This provision reflects the legislative intent to avoid having this particular amendment create a massive filing of motions to modify child support.

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345. See VA. CODE ANN. § 20-108.2(C) (Cum. Supp. 2001).

346. *Id.*

347. Compare *id.* § 20-108.2 (Cum. Supp. 2001), with *id.* § 20-108.2 (Repl. Vol. 2000).

348. *Id.* § 20-108.2 (Cum. Supp. 2001).

349. See *id.*

350. See *id.*

351. *Id.*

## V. SPOUSAL SUPPORT

## A. Case Law

## 1. Cohabitation

Practicing lawyers in Virginia eagerly anticipated the rehearing of *Rubio v. Rubio*.<sup>352</sup> The original appellate decision was rendered in August 2000,<sup>353</sup> and a petition for rehearing was granted later that month.<sup>354</sup> The decision on the rehearing was made on July 24, 2001, vacating the original appellate decision, reversing the trial court, and remanding the case for a further proceeding.<sup>355</sup>

Statutory law has been changed to correct the perceived error by the court of appeals in *Rubio*.<sup>356</sup> The statute at issue, Virginia Code section 20-109(A), provides for the modification of spousal support upon clear and convincing evidence that the payee spouse has been habitually cohabiting with another person in a relationship analogous to marriage for one year, commencing on or after July 1, 1997.<sup>357</sup>

Mr. and Mrs. Rubio were divorced in 1994.<sup>358</sup> In 1999, Mr. Rubio sought to terminate spousal support on the grounds that Mrs. Rubio was cohabiting with another man.<sup>359</sup> Mrs. Rubio confirmed that she had been cohabiting in such a relationship since 1997.<sup>360</sup> The trial court found that it had authority under Virginia Code section 20-109(A) to modify the award of spousal support.<sup>361</sup> Instead of terminating support on the basis of Mrs. Rubio's co-

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352. 33 Va. App. 74, 531 S.E.2d 612 (Ct. App. 2000), *reh'g granted en banc*, 33 Va. App. 440, 534 S.E.2d 536 (Ct. App. 2000), *rev'd*, 36 Va. App. 248, 549 S.E.2d 610 (Ct. App. 2001).

353. *Rubio*, 33 Va. App. 74, 531 S.E.2d 612 (Ct. App. 2000).

354. *Rubio v. Rubio*, 33 Va. App. 440, 534 S.E.2d 336 (Ct. App. 2000).

355. *Rubio v. Rubio*, 36 Va. App. 248, 549 S.E.2d 610 (Ct. App. 2001).

356. *See infra* discussion Part V.B.1.

357. VA. CODE ANN. § 20-109(A) (Cum. Supp. 2000).

358. *Rubio*, 33 Va. App. at 75, 531 S.E.2d at 613.

359. *Id.*

360. *Id.*

361. *Id.*

habitation, the trial court reduced the payments from \$600 per month to \$200 per month, and Mrs. Rubio appealed.<sup>362</sup>

In a concise opinion, the court of appeals agreed with Mrs. Rubio that the Virginia Code provision regarding cohabitation could not be retroactively applied to orders entered before July 1, 1998.<sup>363</sup> The appellate court reasoned that the General Assembly rewrote Virginia Code section 20-109(A) to provide for cohabitation as a change of circumstances.<sup>364</sup> In 1998, the General Assembly made further amendments to the statute but also "reenacted" that Code provision.<sup>365</sup> The court reasoned that by reenacting the statute, the General Assembly established the Act "anew."<sup>366</sup> Therefore, the entire Act regarding modification was only applicable to suits filed on or after July 1, 1998,<sup>367</sup> which is not the interpretation most practitioners have adopted. The general interpretation of this code revision was effectively acknowledged in the July 2001, rehearing opinion, which vacated the appellate decision.<sup>368</sup>

## 2. Sources of Income and Imputation

The court in *Joynes v. Payne*<sup>369</sup> considered the issue of imputing income to a spouse requesting an award of spousal support.<sup>370</sup> In *Joynes*, both parties were lawyers.<sup>371</sup> The wife worked part-time up to a year before the parties separated, and two years after the birth of their second child.<sup>372</sup> At that time, she was making \$80,000 per year.<sup>373</sup> The husband presented evidence of the wife's potential earning capacity should she return to full-time employ-

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362. *See id.* at 75-76, 531 S.E.2d at 613.

363. *See id.* at 76, 531 S.E.2d at 613.

364. *See id.*

365. H.B. 517, Va. Gen. Assembly (Reg. Sess. 1998) (enacted as Act of Apr. 15, 1998, ch. 604, 1998 Va. Acts 1410) (codified as amended at VA. CODE ANN. §§ 20-107.1, -109 (Repl. Vol. 2000)).

366. *Rubio*, 33 Va. App. at 76-77, 531 S.E.2d at 613.

367. *Id.* at 77, 531 S.E.2d at 614.

368. *See Rubio*, 36 Va. App. 248, 549 S.E.2d 610.

369. 35 Va. App. 386, 545 S.E.2d 561 (Ct. App. 2001).

370. *See id.* at 402, 545 S.E.2d at 569.

371. *See id.* at 395-96, 545 S.E.2d at 565-66.

372. *Id.* at 395, 545 S.E.2d at 566.

373. *Id.* at 403, 545 S.E.2d at 569.

ment, which was estimated at approximately \$170,000 per year.<sup>374</sup>

On appeal, the court of appeals affirmed the commissioner's decision to impute the part-time income to the wife based on her actual past earnings capacity and to reject the husband's expert witness' testimony regarding her potential earning capacity.<sup>375</sup> The court of appeals also affirmed the commissioner's decision to award the wife spousal support for an undefined duration.<sup>376</sup> The husband requested that the trial court specify a date upon which the spousal support award would terminate.<sup>377</sup> The court of appeals, however, found that Virginia Code section 20-107.1 does not require the court to identify a date of termination; rather, it specifically allows the court to award spousal support for an undefined period.<sup>378</sup>

The *Joynes* court also determined that the commissioner erred in imputing the same amount of income to the wife for purposes of determining child support.<sup>379</sup> The implication of this opinion is that perhaps the commissioner *should* have considered, for child support purposes, the amount of income the wife could have earned had she been employed full-time, even though the parties had agreed during the marriage that she remain employed on a part-time basis.<sup>380</sup>

*Beck v. Beck*<sup>381</sup> is one of a handful of recent unpublished decisions addressing spousal support for an employable, but unemployed, spouse. In *Beck*, the Court of Appeals of Virginia found that the trial court's failure to award the wife spousal support was error and not supported by the evidence.<sup>382</sup> The court found that even though the wife had a master's degree in business administration, she had not worked but instead remained at home to raise the parties' three young children.<sup>383</sup> Moreover, the record

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374. *Id.*

375. *Id.* at 404-05, 545 S.E.2d at 570.

376. *Id.* at 406, 545 S.E.2d at 571.

377. *See id.*

378. *Id.*

379. *Id.* at 408, 545 S.E.2d at 572.

380. *See id.*

381. No. 1082-99-2, 2000 WL 1339534 (Va. Ct. App. Sept. 19, 2000) (unpublished decision).

382. *Id.* at \*8.

383. *Id.*



failed to indicate that the wife had income sufficient to meet her needs.<sup>384</sup>

## B. Legislative Changes—The Death of *Rubio v. Rubio*

The Virginia General Assembly remedied the apparent unintended consequences of *Rubio v. Rubio*.<sup>385</sup> If left alone, this ruling not only would have limited the applicability of cohabitation as a termination event, but would have meant that spousal support ordered prior to July 1, 1998, would not be subject to modification.<sup>386</sup> This oversight required immediate action by the General Assembly.

The General Assembly, therefore, amended Virginia Code section 20-109(A) by adding the following language: "The provisions of this subsection shall apply to all orders and decrees for spousal support, regardless of the date of the suit for initial setting of support, the date of entry of any such order or decree, or the date of any petition for modification of support."<sup>387</sup> With this revision, support orders entered prior to July 1, 1998, will be subject to modification.<sup>388</sup> The General Assembly further amended Virginia Code section 20-109(B) by clarifying that the limitations on suits involving defined duration support shall apply only to cases initially filed on or after July 1, 1998.<sup>389</sup> Accordingly, the *Rubio* problem appears to be resolved.

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384. *Id.*

385. 33 Va. App. 74, 531 S.E.2d 612 (Ct. App. 2000), *reh'g granted en banc*, 33 Va. App. 440, 534 S.E.2d 536 (Ct. App. 2000), *rev'd*, 35 Va. App. 248, 549 S.E.2d 610 (Ct. App. 2001). For a further discussion of *Rubio*, see *supra* part V.A.

386. See *Rubio*, 33 Va. App. at 76, 531 S.E.2d at 613.

387. H.B. 2215, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 27, 2001, ch. 725, 2001 Va. Acts 984) (codified as amended at VA. CODE ANN. § 20-109 (Cum. Supp. 2001)).

388. See VA. CODE ANN. § 20-109 (Cum. Supp. 2001).

389. See Va. H.B. 2215.

## VI. OTHER IMPORTANT LEGISLATIVE CHANGES IN FAMILY LAW

### A. *Relief from Determination of Paternity*

Historically, there have been decisions from the Court of Appeals of Virginia that have inequitably imposed a child support obligation on a person when that person was not the biological father of the child. Recognizing this fundamental unfairness, the General Assembly attempted to grant relief to individuals who have had a court determine that they must pay child support by adding a new provision to the paternity statute.<sup>390</sup> This amendment allows an individual to petition a court to set aside a final judgment, a court order obligation of child support, or a legal determination of paternity if a “scientifically reliable genetic test,” performed in accordance with the procedures established in the statute, establishes that the individual is not the father of the child.<sup>391</sup> The court may order any appropriate relief, including prospectively setting aside an obligation to pay child support.<sup>392</sup> Relief from paternity will not be granted “if the individual named as father (i) acknowledged paternity knowing he was not the father, (ii) adopted the child or, (iii) knew that the child was conceived through artificial insemination.”<sup>393</sup>

It appears that the legislature does not want to allow men who knowingly made a decision to accept paternity but thereafter changed their minds to be relieved of a child support obligation; rather, the General Assembly sought to protect innocent men burdened with improper child support orders.

### B. *Attorney’s Lien For Fees And Action For Divorce and Annulment*

For years, family lawyers have been “stiffed” by disgruntled or impecunious clients after spending many billable hours in divorce cases involving property division, custody, visitation and support.

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390. H.B. 2376, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Apr. 9, 2001, ch. 814, 2001 Va. Acts 1122) (codified at VA. CODE ANN. § 20-49.10 (Cum. Supp. 2001)).

391. VA. CODE ANN. § 20-49.10 (Cum. Supp. 2001).

392. *Id.*

393. *Id.*

Clients either refuse to pay, leave the jurisdiction, or file bankruptcy. Even the Virginia State Bar has not been helpful; it promulgated a legal opinion stating that a family lawyer is not entitled to a deed of trust on the marital residence since it was the subject matter of the proceeding.<sup>394</sup>

However, thanks to Betty Thompson of Arlington, Virginia, and the General Assembly, family lawyers now have a new weapon in their arsenal of fee collecting methods. For the first time, attorneys in divorce and annulment cases in Virginia will be able to have an attorney's lien for fees.<sup>395</sup> This statute grants a lien for legal services, and the attorney will have a lien on the cause of action as security for his fees for any services rendered in relation to such cause of action.<sup>396</sup> The attorney's lien may not be exercised until the divorce judgment is final, however, and the court may exclude spousal and child support from the lien.<sup>397</sup>

Nevertheless, a word of caution should be noted. Clients in these situations are typically the ones who are most willing to file bar complaints for alleged unethical conduct. A practitioner should ensure that every procedural requirement has been satisfied and that there is no deviation from the statute. If not, one might find himself the subject of a disciplinary action.

Due to the above changes, the authors recommend that language concerning the statutory attorney's fee lien be noted in bold print in standard retainer agreements. Whether this statutory lien will be retroactive to cases accepted prior to July 1, 2001, (the effective date of revised Virginia Code section 54.1-3932)<sup>398</sup> is not clear from the statute, so in light of this uncertainty, caution may be the best approach.

### C. *Privacy of Electronically Filed Court Records*

Virginia has commenced pilot projects for electronically filed pleadings or documents. The age of the internet is both a blessing and a curse. The blessing, of course, is that it enables individuals

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394. See Va. St. Bar Comm. on Legal Ethics, Legal Ethics Op. 1653 (1995).

395. VA. CODE ANN. § 54.1-3932 (Cum. Supp. 2001).

396. *Id.* § 54.1-3932(A) (Cum. Supp. 2001).

397. *Id.* § 54.1-3932(B) (Cum. Supp. 2001).

398. See *id.* § 54.1-3932 (Cum. Supp. 2001).

or organizations to obtain and disseminate information much more rapidly than before. On the negative side, however, it also makes such information available to those who do not need access to it or who may use the information in an improper or destructive fashion.

The General Assembly responded to this dilemma by rejecting the suggestions of family law bar groups to make an exception to the experimental electronic filing provisions if the case involved divorce or annulment.<sup>399</sup> Such restrictions were vigorously opposed by the various news media and their phalanx of well-paid lawyers. The General Assembly solved the problem by directing the Supreme Court of Virginia to promulgate rules to restrict *remote* electronic access to records in the pilot projects to judges, court personnel, any persons assisting such persons, counsel of record, and parties appearing *pro se*.<sup>400</sup> This bill will expire on July 1, 2002.<sup>401</sup>

#### D. *Health Insurance: Prohibiting Discrimination Against Domestic Violence Victims*

A recent amendment to Title 38 prohibits life and health insurers from discriminating against victims of domestic violence.<sup>402</sup> This provision does *not* prohibit an insurer or insurance professional from asking about a medical condition even if the medical information requested is related to a medical condition that such person knows resulted from domestic violence.<sup>403</sup> Therefore, it appears that the insurance companies are allowed to ask about abuse but are not permitted to act upon any of this information.

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399. The Virginia Bar Association Coalition on Family Law Legislation submitted such a provision in 2001.

400. H.B. 2043, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 14, 2001, ch. 220, 2001 Va. Acts 185).

401. *Id.*

402. H.B. 1661, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 8, 2001, ch. 34, 2001 Va. Acts 27) (codified as amended at VA. CODE ANN. § 38.2-508 (Cum. Supp. 2001)). Domestic violence is defined as "the occurrence of one or more of the following acts by a current or former family member, household member as defined in § 16.1-228, person against whom the victim obtained a protective order or caretaker . . . ." VA. CODE ANN. § 38.2-508(7) (Cum. Supp. 2001).

403. *Id.* § 38.2-508(7) (Cum. Supp. 2001).

### E. *Preliminary Protective Orders in Cases of Family Abuse and Stalking*

Prior to the amendment of Title 16, a hearing on a protective order in cases of family abuse and stalking had to be held within fifteen days of the issuance of the preliminary protective order.<sup>404</sup> The amendment, however, states that upon the motion of respondent, and for good cause shown, the court may continue the hearing, and the preliminary order shall remain in effect until such hearing.<sup>405</sup> This provision gives more discretion to the respondent as to when the hearing will be held, and it also provides such person with a greater opportunity to obtain counsel and prepare for the hearing. Although the statute is quite unusual, this seems to be an amendment that gives some benefits to the alleged abuser.

### F. *Protective Orders from Other States: Firearms*

Whereas the previously discussed statutory provisions gave some protection to an alleged abuser, another bill expanded the scope and penalties for one who has had a protective order entered against him.<sup>406</sup> This amendment makes it a Class I misdemeanor for an individual to purchase or transport a firearm while a protective order is in effect, even if the order is from another state, so long as the statute of the other state is substantially similar to the Virginia statute.<sup>407</sup>

## VII. CONCLUSION

The past year resulted in a rare family law decision from the United States Supreme Court that makes it clear that beneficiary changes to insurance policies and retirement plans must be confirmed soon after entry of a divorce decree. Additionally, decisions regarding equitable distribution were plentiful. The most impor-

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404. *Id.* § 19.2-152.9 (Repl. Vol. 2000).

405. *Id.* § 16.1-251 (Repl. Vol. 2000 & Cum. Supp. 2001); *id.* § 19.2-152.9 (Repl. Vol. 2000).

406. S.B. 1353, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 19, 2001, ch. 357, 2001 Va. Acts 330) (codified as amended at VA. CODE ANN. § 18.2-308.1:4 (Cum. Supp. 2001)).

407. *See* VA. CODE ANN. § 18.2-308.1:4 (Cum. Supp. 2001).

tant decisions in Virginia over the past year concern the preemption of federal law regarding beneficiary designations. A common theme among many appellate decisions was the valuation of stocks and the appropriateness of revaluation upon remand.

Moreover, practitioners are advised to reconsider the self-executing language incorporated in property settlement agreements regarding modification of child support. Clients should be advised that their only protection to secure modification of support is a new court order approving the modification. Practitioners also should remain on alert for the latest appeals to be reported next year in the contentious *Rowe* decision and related cases.

Finally, although this was not a momentous legislative session for family law practitioners, the passage of the UCCJEA and the adoption of the Colorado Method for child support cases are of great practical significance to family lawyers. Certainly this session will not be viewed as one of the landmark sessions for family law, but there are times when striking down bad bills is much better than passing good ones. Perhaps some of the bills that did not pass this year are as important as the ones that were passed.

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