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FAMILY AND JUVENILE LAW

Lynne Marie Kohm *

I. INTRODUCTION

The sage author of last year's family law survey, Professor Robert Shepherd, noted almost prophetically "the next year promises to be far more eventful with the so-called 'Marriage Amendment' on the November 2006 ballot [T]he long-term consequences of the constitutional amendment, whether intended or unintended, are substantial."¹ Professor Shepherd could not have been more on point in predicting the gravity of the legal events of 2007 and their effects, which have not been limited to the ballot box.

Virginia, like many other states across the nation, has been involved in the conflict surrounding marriage. This strategic battle erupted in ways that have affected spousal support, parentage, custody, and cohabitation. What might these changes mean for the future of Virginia family law? While reviewing the prior year, this article also tries to capture a forward-looking analysis of Virginia family law, evaluating what type of trail those changes might have blazed for the future of domestic relations law in Virginia. In so doing, this article may even provide some insight into the law over the next four hundred years of the Commonwealth.²

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1. Robert E. Shepherd, Jr., *Annual Survey of Virginia Law: Family and Juvenile Law*, 41 U. RICH. L. REV. 151, 151 (2006).

2. In 2007, Jamestown, Virginia hosted a celebration of four hundred years of American and Virginian history. See America's 400th Anniversary, <http://www.jamestown2007.org> (last visited Sept. 16, 2007).

II. MARRIAGE

Voters amended the constitution of the Commonwealth of Virginia in 2007 to define marriage as between one man and one woman, limiting the recognition afforded to laws from other states that differ with this public policy.³ Even though some pundits viewed Virginia as a serious battleground state,⁴ the amendment, after a substantial political struggle,⁵ passed by a margin of fifty-seven to forty-three percent.⁶

To understand why the marriage issue is so important to the future of Virginians, it is helpful to get a broader picture of this hotly-debated topic, which raises so many concerns. Marriage's prerequisites are often seen as social restrictions on an individual's free choice.⁷ Precisely because it is generally state-regulated and a fundamental component of social order,⁸ marriage remains

3. VA. CONST. art. I, § 15-A.

The full text of the amendment is:

Article I, Section 15-A. Marriage.

That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.

This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.

Id. See also Proposed Constitutional Amendment, Ballot Question Number 1, http://www.sbe.state.va.us/cms/documents/2006_Constitutional_Amendments/2006ques_marriage_AP_PROVED.pdf.

4. See *2006 Elections Coverage—Part 2* (Fox television broadcast Apr. 27, 2006), available at 2006 WLNR 19339513 [hereinafter *2006 Elections Coverage*] (Brit Hume interviewing Bill Kristol).

5. See, e.g., Chris L. Jenkins, *Gearing Up to Wage War Over Marriage: Voters to Decide Fate of Same-Sex Unions*, WASH. POST, Apr. 27, 2006, at B1.

6. Virginia State Board of Elections, November 7th 2006—General Election, Official Results, http://www2.sbe.virginia.gov/web_docs/Election/results/2006/Nov/html/ (last visited Sept. 16, 2007).

7. See, e.g., Mark Strasser, *State Marriage Amendments and Overreaching: On Plain Meaning, Good Public Policy, and Constitutional Limitations*, 25 LAW & INEQ. 59, 113 (2007) (arguing state constitutional amendments unduly restrict personal liberty interests making them open to constitutional attack); Lynn D. Wardle, *Parenthood and the Limits of Adult Autonomy*, 24 ST. LOUIS U. PUB. L. REV. 169, 169 (2005) (comparing parenthood and sexuality); Sarah C. Courtman, Comment, *Sweet Land of Liberty: The Case Against the Federal Marriage Amendment*, 24 PACE L. REV. 301, 303–04 (2003) (federalizing marriage requirements restricts individual free choice).

8. See generally MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989) (discussing the

important to legislators and citizens alike. It, however, is often the object of apparent media derision.⁹

Strengthening marriage and its sustaining laws has become an important consideration of societies around the globe. Some researchers argue that the adoption of gay marriage or same-sex civil unions in European nations appears to have weakened customary marriage, an institution already eroded by easy divorce and stigma-free cohabitation.¹⁰ Others contend that there is no proof same-sex marriage erodes traditional marriage, arguing that even if marriage is declining in that part of the world, “the question remains whether that phenomenon is a lamentable development.”¹¹ In his book, *The Future of Marriage*, family researcher David Blankenhorn examined the health of marriage as an institution and the legal status of same-sex unions by studying recurring patterns in the data.¹² He noted that certain trends in values and attitudes tend to cluster with certain trends in behavior.¹³ Analyzing different international surveys,¹⁴ the correlations are significant.

changes in family law and those effects on the institution as a fundamental component of social order); JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION AND LAW IN THE WESTERN TRADITION* (1997) (discussing the social and religious foundations of marriage as a public institution of fundamental social order).

9. Thomas Sowell, *All the 'News'?*, Real Clear Politics, Feb. 6, 2007, http://www.realclearpolitics.com/articles/2007/02/all_the_news.html (last visited Sept. 16, 2007) (lamenting the disrepute of marriage by a New York Times article that twisted statistics to show a majority of women are unmarried, and thus reject marriage, as common “[n]egative depictions of marriage and family” that “play fast and loose with statistics in order to depict marriage as a relic of the past”).

10. See Stanley Kurtz, *The End of Marriage in Scandinavia*, WKLY. STANDARD, Feb. 2, 2004, at 26, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/003/660zywpj.asp>.

11. David Blankenhorn, *Defining Marriage Down . . . Is No Way to Save It*, WKLY. STANDARD, Apr. 2, 2007, at 30, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/013/451noxve.asp> (discussing WILLIAM ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE?* (2006) (replying to the research of Stanley Kurtz on Scandinavian marriage decline and its effects on families and family law in those countries)).

12. See generally DAVID BLANKENHORN, *THE FUTURE OF MARRIAGE* (2007).

13. Blankenhorn, *supra* note 11.

14. These include the “International Social Survey Programme (“ISSP”), a collaborative effort of universities in over 40 countries . . . [which] interviewed about 50,000 adults in 35 countries in 2002,” and “[t]he World Values Survey, based in Stockholm, Sweden, [which] periodically interviews nationally representative samples of the publics of some 80 countries on six continents—over 100,000 people in all.” See *id.*

A rise in unwed childbearing goes hand in hand with a weakening of the belief that people who want to have children should get married. High divorce rates are encountered where the belief in marital permanence is low. More one-parent homes are found where the belief that children need both a father and a mother is weaker. A rise in nonmarital cohabitation is linked at least partly to the belief that marriage as an institution is outmoded. The legal endorsement of gay marriage occurs where the belief prevails that marriage itself should be redefined as a private personal relationship. And all of these marriage-weakening attitudes and behaviors are linked. Around the world, the surveys show, these things go together.¹⁵

Same-sex marriage does not appear to be compatible with a marriage renaissance.¹⁶ Through the referendum process, the people of Virginia have directed that legal norms of marriage not be expanded. This solidification of the requirements for entry into marriage has legally buttressed marriage as the backbone of family law.

What of the requirements for exiting marriage? Blankenhorn argues that the future of marriage also depends on recognizing that same-sex marriage is not the institution's only weakness. Rather, the institution's prospects turn on the stability of marriage in every aspect, including, particularly, the ease of divorce.¹⁷ Indeed, marriage dissolution remains an area of concern to legislators and attorneys alike, especially for those involved in the movement to stabilize and strengthen marriage. Legislative attempts regarding divorce and parental responsibility are thus equally important to an analysis of what to expect in the future for family law in Virginia.

Virginia's marriage amendment not only clearly defines marriage as between a man and a woman, but also effectively limits recognition of same-sex relationships formed in other states.¹⁸ A Virginia judge is bound by the state's constitution, even under federal full faith and credit requirements regarding another state's domestic relations law.¹⁹ This is significant because several jurisdictions have moved toward expanding legal rights of, or

15. *Id.*

16. See generally Symposium: *Moral Realism and the Renaissance of Traditional Marriage*, 17 REGENT U. L. REV. 185, 185-310 (2004-05) (containing articles detailing the concerns in attaining such a renaissance to strengthen marriage and thus family law).

17. See Blankenhorn, *supra* note 11.

18. VA. CONST. art. I, § 15-A.

19. See U.S. CONST. art. IV, § 1.

similar to, marriage. Massachusetts is the only state in the nation that recognizes same-sex marriage,²⁰ although, four states recognize a form of it in civil unions: Vermont, Connecticut, New Jersey, and New Hampshire.²¹ Civil unions, however, do not appear to be the choice of many same-sex couples.²² New Jersey, one of the most recent states to pass a civil union statute, is seeing an unexpected disinterest in couples taking advantage of the statute's marriage-like benefits.²³

By contrast, the flood of states moving away from same-sex unions by virtue of a state constitutional amendment is dramatic. Virginia joins a group of twenty-seven states that have amended their constitutions to protect marriage.²⁴ Eleven other states are set to vote on similar marriage amendments in the future.²⁵ States protecting marriage in their constitutions stand in contrast to those passing legislation to sanction same-sex relation-

20. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 1004–05 (Mass. 2003).

21. CONN. GEN. STAT. ANN. § 46b-3800 (West Supp. 2007); 2007 N.H. Laws ch. 58 (to be codified at N.H. REV. STAT. ANN. § 457-A:1); N.J. STAT. ANN. § 37-1:28 (West Supp. 2007); VT. STAT. ANN. tit. 15, § 5 (2002); see also Pam Belluck, *New Hampshire Senate Votes to Allow Same-Sex Civil Unions*, N.Y. TIMES, Apr. 27, 2007, at A20; Holly Hartman, *A Primer on Same-Sex Marriage, Civil Unions, Domestic Partnerships, and Defense of Marriage Acts*, INFOPLEASE.COM, Apr. 19, 2007, <http://www.infoplease.com/ipa/A0922609.html> (last visited Sept. 16, 2007); Christine Vestal, *Gay Marriage Ripe for Decision in 3 Courts*, STATELINE.ORG, Mar. 1, 2007, <http://www.stateline.org/live/details/Story?contentId=20695> (last visited Sept. 16, 2007).

22. See Andrea Stone, *Some Say Civil Unions Dropping Off*, USA TODAY, Apr. 20, 2007, at 3A. “[G]ay rights advocates say the honeymoon is already over for middle-ground alternatives to matrimony. Fewer gay couples are choosing to enter civil unions or register as domestic partners, says Carisa Cunningham of Boston’s Gay and Lesbian Advocates and Defenders. ‘People are waiting for marriage,’ she says.” *Id.*

23. Less than three hundred couples have applied for civil union licenses in New Jersey since they became available in 2006, which experts say represents less than one percent of the same-sex population in that state. See Tina Kelley, *Couples Not Rushing to Civil Unions in New Jersey*, N.Y. TIMES, Mar. 21, 2007, at B1. Some argue that civil unions fall short of marriage and do not offer the same benefits and status to same-sex couples as marriage. *Id.*

24. See DOMA Watch, *Marriage Amendment Summary*, <http://www.domawatch.org/amendments/amendmentssummary.html> (last visited Sept. 16, 2007). The Arizona marriage amendment failed by a slim margin, while seven other states passed marriage amendments in 2006.

25. Those eleven states are Arizona, Illinois, Indiana, Maryland, New Hampshire, New Jersey (which would effectively overturn its current law, New Jersey Statutes section 37:1-28), New Mexico, North Carolina, Oklahoma, Washington, and West Virginia. New Mexico lawmakers are considering a statutory clarification of marriage definition and recognition. See Vestal, *supra* note 21.

ships.²⁶ This seemingly creates a legal dichotomy among the states, and a gap that is likely to widen.²⁷

Results of this dichotomy are uncertain. The differentiation may cause a migration of those seeking same-sex marriage benefits to jurisdictions that offer them. That, in turn, would create an emigration from those states that have sought to stabilize marriage as only between a man and a woman. At present, there is no evidence to indicate this trend, but nonetheless, it is unlikely that such a phenomenon would cause any significant demographic changes or effects. It could, however, indicate and promote in those jurisdictions favoring same-sex relationships additional legal activism to expand sexual freedoms and benefits to a greater array of marriage-like alternatives. It could also push toward more opportunities for same-sex parenting.²⁸ This is already the case in those states that manifest legal policies benefiting same-

26. Often legislation guaranteeing marriage-like rights and benefits to same-sex relationships is directed by case law, as done in *Lewis v. Harris*, 908 A.2d 196, 224 (N.J. 2006), with N.J. STAT. ANN. § 37:1-28 and *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999), with VT. STAT. ANN. tit. 15, § 1202. New Hampshire's statute was passed directly without court intervention by the elected representatives. See Belluck, *supra* note 21. "A vote in the New Hampshire Senate on Thursday cleared the way for the state to become the fourth to allow civil unions for same-sex couples, and the first to do so without a court order or a pending lawsuit." *Id.*

27. The national ratio of marriage protection to same-sex marriage or marriage-like benefits would be 27:5. This ratio, however, does not include states that have upheld marriage judicially, which include Maryland, *Conaway v. Deane*, No. 44, slip op. at 108-09 (Md. Sept. 18, 2007), Washington, *Andersen v. King County*, 138 P.3d 963, 990 (Wash. 2006), and New York, *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006). In each instance the respective high courts upheld the state's legitimate interest in limiting marriage to a man and a woman on the rational basis or legitimate interest test; linking marriage to childrearing as the important state interest. *Conaway*, No. 44, slip op. at 108-09; *Andersen*, 138 P.3d at 990; *Hernandez*, 855 N.E.2d at 5, 10. *Conway* went a step further and also stated there is no fundamental right to marry a person of your own sex. *Conaway*, No. 44, slip op. at 96. Additionally, in another year it is likely the above ratio will reveal an even greater differentiation of 38:6 with eleven states set to vote on marriage protecting legislation, and Oregon having passed legislation effective January 1, 2008 that creates domestic partnerships for same-sex couples. See *supra* note 26 and accompanying text; *National Briefing Northwest: Oregon: Domestic Partnerships*, N.Y. TIMES, May 10, 2007, at A26.

28. Same-sex parent foster care and adoption rights are a consistent subject of the expansion of legal rights. See generally Wardle, *supra* note 7. States that have fostered benefits to same-sex partners with legal protections have opened doors for other legal rights expansion. For example, California's anti-bias laws led to a successful suit against an Arizona adoption agency that refused to consider the application of two gay men wishing to adopt. See Lisa Leff, *Judge: Gay Couple's Suit Against Adoption.com Can Move Forward*, SFGATE.COM, Apr. 10, 2007, <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2007/04/10/state/n144040D74.DTL> (last visited Sept. 16, 2007).

sex relationships.²⁹ Virginia is not among those jurisdictions. In fact, Virginia's marriage amendment indicates a state-wide policymaking tendency away from expansion of same-sex relationship benefits. Some homosexual rights activists see that movement as regrettable and regressive claiming, "It's unfortunate that while some states are moving forward and giving gay and lesbian couples some rights and recognizing their families, Virginia has chosen to move in the opposite direction."³⁰

Virginia is part of a majority of states that have chosen to strengthen marriage with constitutional legal policy while a small group of other states are expanding rights and benefits to same-sex couples through case law or legislation.³¹ Being part of the marriage amendment movement indicates that Virginia's legal landscape favors marriage over homosexual rights in marriage-like relationships.³²

Nonetheless, in the future there may be somewhat of a struggle between the legislative and judicial branches of government in light of this legal landscape. Laws effectuating policies favoring same-sex relationships and parenting are often directed by judicial authority.³³ Virginia's marriage advocates look to the Vir-

29. For example, Massachusetts recently expanded by executive order the state's original laws for same-sex marriage to register same-sex marriages of other jurisdictions. See Holly Manges Jones, *Massachusetts Governor Orders Out-of-State Same-Sex Marriages Registered*, PAPER CHASE NEWSBURST, Apr. 3, 2007, <http://jurist.law.pitt.edu/paperchase/2007/04/massachusetts-governor-orders-out-of-phi> (last visited Sept. 16, 2007).

30. Olympia Meola & Julian Walker, *N.J. Civil-Union Law Reignites Debate Here*, RICH. TIMES-DISPATCH, Feb. 20, 2007, at B2 (quoting Dyana Mason, executive director of Equality Virginia, a gay-rights group).

31. This disparity in the numbers does not appear to be a national civil war over marriage, but same-sex advocates disagree that Virginia will be in the majority in the future.

Kent Willis, executive director of the American Civil Liberties Union of Virginia, said that while state law prohibits same-sex unions, he believes that "years from now, after gays and lesbians have been fully accepted into our society, New Jersey's law will be seen as the norm, and Virginia's anti-gay marriage amendment will be compared with massive resistance."

Id.

32. The small minority of states that has been expanding and deconstructing marriage is fairly isolated, having not gained political momentum throughout the nation. See Barbara Bradley Hagerty, *Gay-Marriage Advocates Switch Tactics*, National Public Radio, Apr. 16, 2007, <http://www.npr.org/templates/story/story.php?storyId=9529479> (last visited Sept. 16, 2007). "Now, gay marriage advocates face the possibility of victory in only a handful of state courts. Even states targeted as open to gay marriage—such as New York and Washington—upheld laws defining marriage as between a man and a woman." *Id.*

33. See *supra* note 21 and accompanying text (listing examples of judicial direction of legislation). "New Jersey's Supreme Court ruled in favor of seven same-sex couples who

ginia marriage amendment as indicative of contravening that trend of dependence upon judicial authority. "The Virginia amendment 'protects Virginia from having a judge react the way the New Jersey judges did and force the legislature to create civil unions.'"³⁴ Strengthening marriage in the state's constitution has diminished concerns over judicial direction of family policy in Virginia, but the struggle between the branches of power may continue despite that fact.³⁵ Virginia courts generally have a long-standing history of judicial restraint and reliance upon the rule of law. This means the future of family law in Virginia is not likely to include any sort of dramatic judicial expansion of marriage rights for same-sex relationships.³⁶ Again, the amendment virtually guarantees that as well.

The next few years may bring skirmishes over marriage and its rights and benefits,³⁷ but for the most part, the law is settled in Virginia. Marriage, a primary protector of the future of the Commonwealth's social structure, is between one man and one woman, and its entry remains limited by the Virginia Constitution.

III. DIVORCE AND EQUITABLE DISTRIBUTION

Divorce in Virginia still requires parties to present reliable evidence to prove a cause of action.³⁸ In *Rahnema v. Rahnema*, the court of appeals upheld a trial judge's authority to find evidence

filed a lawsuit in 2002 demanding marriage rights, though the court left it to state lawmakers to determine whether they could marry or form civil unions." Meola & Walker, *supra* note 30.

34. Meola & Walker, *supra* note 30 (quoting Victoria Cobb, executive director of the Family Foundation of Virginia).

35. *See id.* ("But other groups in Virginia believe New Jersey judges got it right and pledge to continue to fight for similar legal protections here.").

36. Although this is precisely why so many lawyers, lawmakers, and judges around the Commonwealth and the nation are interested in how Virginia's courts will handle the *Miller-Jenkins* case, 49 Va. App. 88, 637 S.E.2d 330 (Ct. App. 2006). *See infra* Part III.C.

37. In his article, Professor Shepherd noted domestic violence prosecution concerns pursuant to Virginia Code section 16.1-229 and the legal effect afforded to private documents protecting arrangements between same-sex couples. *See* Shepherd, *supra* note 1, at 178. Those concerns will not change marriage as we know it in Virginia, and will likely continue to be dealt with on a fact-specific basis, according to the applicable area of law apart from family law.

38. *See, e.g.*, VA. CODE ANN. § 20-91 (Repl. Vol. 2004 & Cum. Supp. 2007) (setting forth various causes of action for divorce in Virginia).

submitted to be “inherently untrustworthy,” thus refusing to give that evidence any probative weight.³⁹ This ruling stands even though the other party did not object to grossly questionable evidence.⁴⁰

In 2007, the General Assembly passed legislation regarding the revocation of benefits received as a result of the death of an ex-spouse by divorce or annulment, and federal preemption.⁴¹ The legislation makes the former spouse who is not entitled to the benefit under section 20-111.1(A) liable for payment of those benefits to the person who would have received them if not for federal preemption.⁴² A Virginia court may, however, re-classify separate property to be divided as marital property. In *Steakley v. Steakley*, the appeals court considered a personal injury settlement marital property when the husband failed to prove that the settlement was not for non-economic loss.⁴³ In another case, the court of appeals considered the propriety of re-evaluating real estate that dramatically increased in value during the pending litigation.⁴⁴ The appellate court reversed and remanded with instructions to re-value the equitable distribution award of a Virginia Beach home, which doubled in value during the divorce litigation.⁴⁵ The court noted that the value increase in the record was sufficient to protect the matter on appeal, even if the Commissioner would hear no further evidence on the matter during the equitable distribution proceeding.⁴⁶ Finally, the effect of an equitable distribution can also protect a victimized spouse when fault is a major contributing factor on which the court may rely under Virginia Code section 20-107.3(E), so long as all applicable

39. *Rahnema v. Rahnema*, 47 Va. App. 645, 653–54, 626 S.E.2d 448, 453 (Ct. App. 2006) (involving the divorce of an Iranian couple where each partner wished to submit evidence from missing witnesses, testimony from videotapes not present during the trial, and unreliable interpretations of foreign transcripts).

40. *Id.*

41. Act of Mar. 12, 2007, ch. 306, 2007 Va. Acts 432 (to be codified as amended at VA. CODE ANN. § 20-111.1 (Cum. Supp. 2007)).

42. *Id.* This legislation might be unconstitutional in light of the Supreme Court of the United States's decision in *Egelhoff v. Egelhoff*, 532 U.S. 141, 143 (2001) (finding the federal Employee Retirement Income Security Act (“ERISA”) prevails over state law).

43. No. 2912-04-4, 2006 Va. App. LEXIS 65, at *9 (Ct. App. Feb. 21, 2006) (unpublished decision).

44. *Robbins v. Robbins*, 48 Va. App. 466, 473, 632 S.E.2d 615, 618–19 (App. Ct. 2006).

45. *Id.* at 475, 632 S.E.2d at 620.

46. *Id.* at 485–86, 632 S.E.2d at 625.

factors are considered.⁴⁷ Even if factors that contributed to the divorce had no financial impact, they can be considered in property division if those factors “detracted from the overall ‘marital partnership.’”⁴⁸

A. *Spousal Support*

The legislature established a statewide formula for *pendente lite* support this year. The formula requires courts to calculate a presumptive amount of such an award, but allows judicial discretion for deviation from the formula for good cause.⁴⁹ It permits the presumptive use of temporary spousal support guidelines only in the juvenile and domestic relations district court,⁵⁰ effectively limiting its realistic application.

B. *Cohabitation as Termination for Spousal Support*

A case that caused quite a stir in the press was *Stroud v. Stroud*.⁵¹ One headline read: “Even though same-sex couples can’t get married in Virginia, they can live together in a situation that’s comparable to marriage in the eyes of the law”⁵² Regarding cohabitation operating to terminate spousal support, *Stroud* is both instructive and important for same-sex relationships. The ruling by the court of appeals overturned a Fairfax County Circuit Court decision that denied an ex-husband’s action to terminate spousal support.⁵³ The husband provided undisputed evidence that his ex-wife resided with her girlfriend in a consensual sexual relationship for at least the past year.⁵⁴ The terms of

47. *Ranney v. Ranney*, 45 Va. App. 17, 46–47, 608 S.E.2d 485, 499–500 (Ct. App. 2005).

48. *Id.* at 47, 608 S.E.2d at 499 (citations omitted).

49. See VA. CODE ANN. § 16.1-278.17:1 (Cum. Supp. 2007). This formula applies to *pendente lite* support cases where the parties’ combined gross monthly income does not exceed \$10,000. *Id.* Courts have discretion to deviate from the presumptive amount calculated under this statewide formula, which is 30% of the payor’s income minus 50% of the payee’s income without child support, and 28% of the payor’s income minus 58% of the payee’s income with child support. *Id.*

50. See VA. CODE ANN. § 16.1-278.17 (Repl. Vol. 2003 & Cum. Supp. 2007).

51. See 49 Va. App. 359, 641 S.E.2d 142 (Ct. App. 2007).

52. Larry O’Dell, *Court: Law Recognizes Same-Sex Relationships Similar to Marriage*, DAILYPRESS.COM, Feb. 27, 2007 (on file with author).

53. *Stroud*, 49 Va. App. at 365, 641 S.E.2d at 145.

54. *Id.* at 369, 641 S.E.2d at 146–47. The defendant admitted that she and girlfriend Robyn shared a home (on average five nights per week), finances, vacations, and beds; en-

their property settlement agreement (“PSA”) stated that support payments would end upon death, the wife’s remarriage, “and/or her cohabitation with any person to whom she is not related by blood or marriage in a situation analogous to marriage for a period of thirty (30) or more continuous days”⁵⁵ The trial court ruled that same-sex cohabitation could not be “a situation analogous to marriage” under Virginia law.⁵⁶ The appellate court, however, disagreed, finding that this situation was indeed cohabitation analogous to marriage.⁵⁷ “A relationship ‘analogous to marriage’ does not mean a ‘marriage.’ Rather, ‘analogous’ is defined as ‘similar in some way,’ but not identical in form and substance.”⁵⁸

The court of appeals noted that the wife’s reliance on the code prohibiting same-sex marriages, civil unions, or domestic partnerships under Virginia law was misplaced.⁵⁹ The court’s holding did not grant legal status to the relationship as a matter of public policy, but merely ruled on the facts of the relationship as they pertained to the PSA prohibition.⁶⁰ Cohabitation “analogous to

gaged in consensual sex acts; and had exchanged rings. Robyn drove the defendant’s car and was listed as the emergency contact for the defendant’s children. Additionally, Robyn considered herself a co-parent to the defendant’s children. *Id.* at 369–70, 641 S.E.2d at 147.

55. *Id.* at 366, 641 S.E.2d at 145. The parties also argued over construction and meaning in the PSA’s language. The court ruled that “person,” as was used in the PSA, was intended to include individuals of both sexes. *Id.* at 369, 641 S.E.2d at 146. Particularly relevant (and convincing) to the court in this contract interpretation was the wife’s testimony on direct examination by her own counsel. She testified that the two women would live together for several days at a time but would separate for a weekend or so to meet the terms of the agreement. The husband testified that he remembered scratching out “male” in the original PSA draft and inserting “person” instead, which became part of the parties’ final agreement. *Id.* at 368, 641 S.E.2d at 146.

56. The record clearly shows the conundrum of the trial court regarding definitions and standards of review, relying on Virginia’s constitutional limit of marriage to a man and a woman and a 1994 attorney general’s opinion about same-sex cohabitation. *Id.* at 377, 641 S.E.2d at 151. The court cited *O’Hara v. O’Hara*, 45 Va. App. 788, 613 S.E.2d 859 (Ct. App. 2005), in deciding to apply preponderance of the evidence as the applicable standard of review for proof of cohabitation, despite the clear and convincing evidence standard required under Virginia Code section 20-109(A). *Stroud*, 49 Va. App. at 378, 641 S.E.2d at 151. *O’Hara*, like *Stroud*, involved an action to enforce a contract between the parties. *Id.* at 377–78, 641 S.E.2d at 151.

57. *Stroud*, 49 Va. App. at 378, 641 S.E.2d at 151.

58. *Id.* (citing *County of Frederick Fire & Rescue v. Dodson*, 20 Va. App. 440, 446, 457 S.E.2d 783, 786 (Ct. App. 1995)).

59. *Id.* at 379, 641 S.E.2d at 151.

60. *Id.* at 378–79, 641 S.E.2d at 151.

marriage” in *Stroud*, under the parties’ agreement, meant like a marriage, but not a marriage itself.⁶¹

Different attorneys have different perspectives about this case. Some attorneys argue *Stroud* could mean an evolution of Virginia law toward favoring rights to same-sex relationships,⁶² while others suggest the case reflects a contract law analysis that does not limit same-sex relationships.⁶³ Facts about same-sex relationships in Virginia can be judicially noted without making new public policy on marriage. The court of appeals in *Stroud* did not make any new law, but held its decision to customary standards of judicial restraint.

Prospectively, this means that Virginia lawyers can rely on courts to uphold both the public policy of marriage laws, and the spirit of laws designed to protect against abuse of spousal support.

C. Custody

The 2007 Virginia legislature did not enact any significant legislation on custody, but there was plenty of controversy in the matters litigated in a case of great national interest: *Miller-Jenkins v. Miller-Jenkins*.⁶⁴ The importance of this ongoing case involving Virginia, Vermont, and federal law is not easily underestimated. This case is critical, given the interest in protecting children, in understanding the civil rights of gays and lesbians, and in affording due respect to a state’s domestic relations statutes. As the general public sees it, “[a] judge will soon decide whether a woman with no biological or adoptive ties to Isabella can legally be declared her mother.”⁶⁵

61. *Id.* at 365, 641 S.E.2d at 145.

62. American University Adjunct Professor and attorney David Spratt suggested that recognition of same-sex cohabitation is important to other Virginia law definitions, such as adultery covering homosexual acts. See O’Dell, *supra* note 52.

63. Both Carl Tobias, Professor at the University of Richmond, and Chris Freund, Virginia Family Foundation, took the position that *Stroud* is about a contract between two people and its application in same-sex relationships. *Id.*

64. See 49 Va. App. 88, 637 S.E.2d 330 (Ct. App 2006).

65. Chuck Colson, *Legal Fictions*, TOWNHALL.COM, Feb. 27, 2007, http://www.townhall.com/columnists/ChuckColson/2007/02/27/legal_fictions (last visited Sept. 16, 2007) (claiming heterosexual couples have tacitly led the way to include a third parent with artificial insemination reproductive techniques, even though having two mothers or two fathers is a biological impossibility).

What happened in *Miller-Jenkins*? Lisa Miller and Janet Jenkins met and began a lesbian relationship in Virginia.⁶⁶ After traveling to Vermont to enter into a civil union, Janet and Lisa returned to Virginia. They agreed that Lisa would have a child by artificial insemination, and Isabella was born in Virginia.⁶⁷ Thereafter, the three moved to Vermont until the relationship soured, and Lisa returned to Virginia with Isabella where they both now reside.⁶⁸ Janet remained a resident of Vermont, where Lisa initially petitioned for dissolution of the civil union between the parties.⁶⁹ Actions were filed in both jurisdictions, and the courts of both states have ruled on the matter.⁷⁰

Vermont's highest court ruled that Lisa, the genetic and gestational mother, was in contempt of court regarding Janet's visitation rights, as set forth under Vermont's civil union statute.⁷¹ Lisa was found in contempt for refusing to honor the Vermont order in her reliance on Virginia's parentage ruling.⁷² The Court of Appeals of Virginia ruled in December of 2006 that the Vermont ruling stands.⁷³

We hold that the trial court erred in failing to recognize that the PKPA prevented its exercise of jurisdiction Accordingly, we vacate the orders of the trial court and remand this matter to the trial court with instruction to extend full faith and credit to the custody and visitation orders of the Vermont court.⁷⁴

The rulings in *Miller-Jenkins*—the dissolution of the couple's civil union, the convergence of the custody dispute (or under the Virginia trial court's ruling, the parentage dispute), and Virginia's full faith and credit obligation to maintain jurisdiction in Vermont⁷⁵—have both limited and expanded the rights of gays

66. A fair and comprehensive overview of the facts of the case was published in the Washington Post. April Witt, *About Isabella*, WASH. POST, Feb. 4, 2007, at W14.

67. See Adam Liptak, *Custody After Civil Union Puts 2 Rulings in Conflict*, N.Y. TIMES, Sept. 8, 2005, at A18.

68. See Witt, *supra* note 66.

69. See Liptak, *supra* note 67.

70. See *id.*

71. See *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 974 (Vt. 2006).

72. *Id.* at 973. The contempt fine totaled nearly \$10,000. See Witt, *supra* note 66.

73. *Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. 88, 98, 637 S.E.2d 330, 335.

74. *Id.* at 103, 637 S.E.2d at 337–38.

75. 28 U.S.C. § 1738A (2000).

and lesbians. The child's best interests are caught somewhere in between.

Vermont's custody and visitation orders are based in its state civil union statute,⁷⁶ which the Virginia litigant, Lisa, contends leaves this case further open to both state and federal appeals. The Supreme Court of Virginia will consider her arguments on appeal from the appellate court ruling.⁷⁷ The Supreme Court of the United States, however, has denied her for writ of certiorari.⁷⁸

This case continues to merit observation for many reasons. It is important not only to those concerned about custody rulings, but also to any attorney who is planning how to litigate in Virginia any aspect of a relationship dissolution from a jurisdiction that recognizes an alternative to marriage. Courts will likely not look favorably on litigants who forum shop in these matters. The case is also important to future rulings on the parental rights of partners who are not biologically related to the child.

D. Visitation

The Virginia Courts of Appeals held in *Surles v. Mayer* that a mother's boyfriend has standing to assert visitation.⁷⁹ The court of appeals ruled that under Virginia Code section 20-124.1 he was a "person with a legitimate interest" in his girlfriend's son because he acted like the child's father.⁸⁰ The boyfriend, however, still had to prove the child would suffer actual harm if the visitation was not ordered.⁸¹

This case is alarming to attorneys who understand the dangers of granting visitation to third-party litigants. Yet, on the other hand, when an adult has established a substantial relationship with a child, it is in the best interests of that child that the rela-

76. VT. STAT. ANN. tit. 15, § 5 (2002).

77. *Miller-Jenkins*, 49 Va. App. 88, 637 S.E.2d 330, appeal docketed, No. 070933 (Va. Sept. 12, 2007).

78. *Miller-Jenkins*, 912 A.2d 951, cert. denied, 127 S. Ct. 2130 (U.S. Apr. 30, 2007) (No. 06-110).

79. 48 Va. App. 146, 161-62, 628 S.E.2d 563, 570 (Ct. App. 2006). The boyfriend had a daughter with the woman, but the woman's son, who was the subject of the visitation, had a different father. *Id.* at 156, 628 S.E.2d at 567-68.

80. *Id.* at 161-62, 628 S.E.2d at 570.

81. The boyfriend failed to establish harm to the child if visitation was denied; thus, his petition was dismissed. *Id.* at 161-62, 179, 628 S.E.2d at 570, 579.

tionship continues. In this situation, the court will grant visitation based on those best interests.⁸²

IV. ADOPTION AND TERMINATION OF PARENTAL RIGHTS

The statutory nature of adoption lends itself to various pieces of legislation every year, and 2007 was no exception. Most of these changes were technical in nature but are nonetheless important.

Laws were passed requiring comprehensive adoption records⁸³ and making adoption easier, in general, for a birth parent who voluntarily consents to the adoption of his or her children.⁸⁴ In further support of adoption, the General Assembly commissioned a study by the Department of Taxation to examine financial incentives to support adoption already used in other states.⁸⁵

Adoption continues to be an important focus of providing for the best interests of children in Virginia. The legislature has instituted these changes to continue the movement to ease adoption in Virginia—"to make navigating through the adoption process easier and facilitate use of the process by all involved."⁸⁶ Attorneys can expect courts to adhere to the Virginia Code, thereby protecting rights of birth parents as required, while pressing forward for the best interests of children in need of a family.

Parents who have previously consented to the termination of their parental rights must revoke their entrustment agreement in writing.⁸⁷ Written revocation is required even if the entrustment agreement is revocable at any time prior to adoption.⁸⁸ In *Butler v. Culpepper County Department of Social Services*, the court held that a mother's attempted revocation was ineffective because she

82. See *id.* at 164–66, 628 S.E.2d at 571–72.

83. VA. CODE ANN. § 63.2-1208 (Repl. Vol. 2007).

84. VA. CODE ANN. § 63.2-901.1 (Repl. Vol. 2007); see also *id.* §§ 63.2-903, -1201, -1202, -1212, -1213, -1222, -1223, -1226, -1229, -1233, -1241 (Repl. Vol. 2007) (consisting of numerous provisions affording greater ease in release of parental rights).

85. See S.J. 377, Va. Gen. Assembly (Reg. Sess. 2007).

86. Shepherd, *supra* note 1, at 162.

87. VA. CODE ANN. § 63.2-1223 (Repl. Vol. 2007).

88. *Id.*

did not deliver a written revocation of the agreement to the agency in accordance with section 63.2-1223.⁸⁹

Despite the court's decision in *Butler*, the court of appeals recently denied some of the Department of Social Services' ("DSS") petitions to terminate parental rights.⁹⁰ For example, in *Richmond Department of Social Services v. Crawley*, the court affirmed the trial judge's refusal to terminate one mother's parental rights.⁹¹ DSS asserted that the mother would never be able to provide for her children.⁹² They presented evidence that the mother lost her job, was separated from her husband, had been hospitalized, and spent time in jail for forging checks.⁹³ Nevertheless, the judge based his decision on the mother's continuing daily relationship with the children and viewed the total evidence in a light most favorable to the parent.⁹⁴

Based on the holding in *Crawley*, it seems that the courts and DSS alike try to keep the best interests of children in mind. As demonstrated in *Crawley*, the courts and DSS often disagree on what actions are in the best interest of the child. Yet, both the courts and DSS agree that it is in the child's best interest to provide him or her with a family. In Virginia, this generally includes a mother and a father who are married, although this is not a requirement of Virginia law. The focus of adoption law in Virginia is on the child and his or her best interests, rather than concerns for adult adoptive rights.

V. PROTECTION OF CHILDREN

The courts were proactive in their protection of children. For example, in *McDonald v. Commonwealth*, the Supreme Court of Virginia affirmed the court of appeals decision which upheld the constitutionality of section 18.2-361(A), Virginia's criminal statute against sodomy.⁹⁵ This code section holds that although con-

89. 48 Va. App. 537, 546, 633 S.E.2d 196, 200 (Ct. App. 2006).

90. See *Richmond Dep't of Soc. Servs. v. Crawley*, 47 Va. App. 572, 574, 625 S.E.2d 670, 671 (Ct. App. 2006).

91. *Id.*

92. *Id.* at 578, 625 S.E.2d at 673.

93. *Id.* at 575-78, 625 S.E.2d at 671-73.

94. *Id.* at 583-84, 625 S.E.2d at 675-76 (finding that a failed marriage, poor health, and poverty were not reasons for a parent to lose her children).

95. 274 Va. 249, 260, 645 S.E.2d 918, 924 (2007).

sensual sex between an adult and a child between the age of fifteen and seventeen is a misdemeanor,⁹⁶ a felony conviction can apply to sixteen and seventeen year-olds.⁹⁷ The court noted that in *Lawrence v. Texas*,⁹⁸ the Supreme Court of the United States “was explicit in its declaration of the scope of its opinion: ‘the present case does not involve minors.’”⁹⁹

The Virginia General Assembly also enacted several statutes for the protection of children. The General Assembly enacted House Bill 2504 to protect children from potential abuse.¹⁰⁰ The bill requires prospective foster and adoptive parents to undergo background checks.¹⁰¹ Senate Bill 1332 expands the scope of funds available to children who require mental health services.¹⁰² There was also additional legislation designed to protect children such as: Senate Bill 1203, which authorizes the Attorney General to study the feasibility of treatment options for sexually violent predators;¹⁰³ House Bill 2980, which allows for the seizure of child pornography equipment;¹⁰⁴ House Bill 2344, which prohibits convicted sex offenders from being on school property;¹⁰⁵ House Bill 3085, which “[e]xpands the scope of the rape shield statute to include prosecution for taking indecent liberties with [a child]” under the age of fourteen;¹⁰⁶ and House Bill 1625, which requires a public official to forfeit his or her office upon conviction of a sex crime that requires registration on the Sex Offender and Crimes Against Minors Registry.¹⁰⁷ Finally, several bills were passed to

96. VA. CODE ANN. § 18.2-371 (Cum. Supp. 2007).

97. *Id.* § 18.2-361 (Cum. Supp. 2007) (sodomy, regardless of age, is a felony); see also *McDonald*, 274 Va. at 258–60, 645 S.E.2d at 923–24.

98. 539 U.S. 558 (2003).

99. *McDonald*, 274 Va. at 260, 645 S.E.2d at 924 (quoting *Lawrence*, 539 U.S. at 578).

100. H.B. 2504, Va. Gen. Assembly (Reg. Sess. 2007) (enacted as Act of Apr. 4, 2007, ch. 871, 2007 Va. Acts 2353).

101. *Id.*

102. S.B. 1332, Va. Gen. Assembly (Reg. Sess. 2007) (enacted as Act of Mar. 26, 2007, ch. 840, 2007 Va. Acts 1465). This bill requires reenactment, however, by the 2008 Regular Session of the General Assembly.

103. S.B. 1203, Va. Gen. Assembly (Reg. Sess. 2007). This bill was vetoed by the Governor on April 10, 2007.

104. H.B. 2980, Va. Gen. Assembly (Reg. Sess. 2007) (enacted as Act of Mar. 8, 2007, ch. 134, 2007 Va. Acts 198).

105. H.B. 2344, Va. Gen. Assembly (Reg. Sess. 2007) (enacted as Act of Mar. 12, 2007, ch. 284, 2007 Va. Acts 400).

106. H.B. 3058, Va. Gen. Assembly (Reg. Sess. 2007) (enacted as Act of Apr. 4, 2007, ch. 890, 2007 Va. Acts 2424).

107. H.B. 1625, Va. Gen. Assembly (Reg. Sess. 2007) (enacted as Act of Mar. 9, 2007,

strengthen sex offender registry laws.¹⁰⁸ Attorney General Robert McDonnell has also been proactive in combating sexually violent predators.

Of great interest to the national popular media and parents in Virginia was House Bill 2319, known as "Abraham's Law."¹⁰⁹ The law was proposed in response to the difficulty sixteen-year-old cancer patient Abraham Cherrix and his parents experienced in attempting to choose an alternative cancer treatment.¹¹⁰ Abraham had one round of chemotherapy, but it was ineffective and physically harmful, causing his parents to seek alternative treatments.¹¹¹ After the Cherrixes refused a second round of chemotherapy, however, the doctors at Children's Hospital of the King's Daughters notified the Accomack County Department of Social Services ("ACDSS"), and the ACDSS took the Cherrixes to court for medical neglect.¹¹² A juvenile and domestic relations district court ordered Abraham to report to the hospital for chemotherapy treatment and found the Cherrixes medically neglectful.¹¹³ ACDSS and the Cherrixes eventually reached a consent decree that allowed the Cherrixes to maintain their custody of Abraham and permitted the family to seek the medical treatment of their choice.¹¹⁴ Shortly thereafter, legislators responded by proposing and passing Abraham's Law, which protects decisions by parents or guardians to refuse particular medical treatment for a minor child.¹¹⁵ The law requires the decision to refuse medical treat-

ch. 175, 2007 Va. Acts 256).

108. H.B. 2776, Va. Gen. Assembly (Reg. Sess. 2007) (enacted as Act of Apr. 4, 2007, ch. 878, 2007 Va. Acts 2387) (prohibiting sex offender treatment services in residential areas); H.B. 2749, Va. Gen. Assembly (Reg. Sess. 2007) (enacted as Act of Mar. 23, 2007, ch. 759, 2007 Va. Acts 1153) (requiring sex offenders to list an electronic address); H.B. 1923, Va. Gen. Assembly (Reg. Sess. 2007) (enacted as Act of Mar. 23, 2007, ch. 744, 2007 Va. Acts 1135) (requiring registry with Sex Offender and Crimes Against Minors Registry even if not guilty by reason of insanity); S.B. 1065, Va. Gen. Assembly (Reg. Sess. 2007) (enacted as Act of Mar. 21, 2007, ch. 718, 2007 Va. Acts 1097).

109. S.B. 905, Va. Gen. Assembly (Reg. Sess. 2007) (enacted as Act of Mar. 20, 2007, ch. 597, 2007 Va. Acts 810); H.B. 2319, Va. Gen. Assembly (Reg. Sess. 2007) (enacted as Act of Mar. 19, 2007, ch. 479, 2007 Va. Acts 649).

110. See Elizabeth Simpson, *Kaine Signs 'Abraham's Law' Bill on Choice to Refuse Treatment*, VIRGINIAN-PILOT, Mar. 22, 2007.

111. *Id.*

112. *Id.*

113. Shawn Bishop, *Court Lets Teen Forgo Chemotherapy*, RICH. TIMES-DISPATCH, Aug. 17, 2006, at A1.

114. Sonja Barisic, *Court Deal Allows Teen with Hodgkins to Avoid Chemo*, CHI. TRIB., Aug. 17, 2006, at 5.

115. VA. CODE ANN. § 63.2-100 (Repl. Vol. 2007).

ment to be made in good faith and in the child's best interests, and the child must be fourteen or older.¹¹⁶ This law should give parents and their teenage children greater authority in their own medical decision-making processes, and prevent unwanted intervention from government agencies such as Child Protective Services and DSS. Abraham's Law, therefore, protects children and their parents by recognizing that those decisions made by children of suitable age and maturity with their parents should be respected.

Furthermore, Virginia joined a very small group of states that require the human papillomavirus ("HPV") vaccine.¹¹⁷ Much controversy was waged over this bill, particularly by parents and others who understand the behavioral nature of the sexually transmitted disease HPV. The concerns centered around a lack of track record for the vaccine and the generally growing public perception that mandatory vaccines for minors override parental authority.¹¹⁸ Pharmaceutical companies that benefit from the mandatory vaccine recognize that it will prevent only four of the nearly one hundred strains of HPV that are known to cause cervical cancer.¹¹⁹ Because of these concerns, the Governor included in the bill an enhanced opt-out provision.¹²⁰ Despite this provision, those that are concerned with the bill and those that support the bill alike are concerned with the vaccine's lack of a successful track record and its unknown long-term side effects.¹²¹

VI. DOMESTIC VIOLENCE

The General Assembly passed several bills intending to protect families from domestic violence. Specifically, this includes bills that: create a presumption in favor of issuing an emergency pro-

116. *Id.*

117. VA. CODE ANN § 32.1-46 (Cum. Supp. 2007).

118. See Arthur Allen, *The HPV Debate Needs an Injection of Reality*, WASH. POST, Apr. 8, 2007, at B3 (detailing both the benefits and detriments of the mandated vaccine).

119. See Elizabeth Simpson, *Virginia Considers Requiring Girls to Get HPV Vaccine*, VIRGINIAN PILOT, Jan. 18, 2007, at A1.

120. Nancy Young, *Governor to Sign Vaccine Bill*, VIRGINIAN PILOT, Mar. 2, 2007, at B1. "Virginia acted this year to require the immunizations but made it fairly easy for parents to opt out." Allen, *supra* note 118.

121. See Allen, *supra* note 118 (stating "there's no guarantee that the HPV immunization won't provoke a rare side effect . . . [and] it lacks credibility").

tective order where an assault warrant already exists;¹²² promote more stringent punishment for a second violation of a protective order;¹²³ extend protective orders;¹²⁴ and provide for greater ease in obtaining an emergency protective order.¹²⁵ Legislation was also passed to include instruction regarding dating violence in the family life education curriculum.¹²⁶ Unfortunately, domestic violence persists as an enigma because the law continues to posture and fund policy that addresses danger, but often tends to reveal the limits of the legislation in curbing social problems.

VII. ADDITIONAL NOTABLE LEGISLATION

In 2007, Virginia legislators seemed to search for ways to strengthen and stabilize marriage through family law and procedure. Many of these efforts, though not passed into law, indicate a legislative outlook seeking to strengthen marriage in a culture of divorce and marital instability. Bills that were not voted into law include extending the waiting period for a marriage license¹²⁷ and allowing parties to agree to “stricter standards upon . . . either party . . . seek[ing] a divorce on no-fault grounds.”¹²⁸ These bills are clear attempts to encourage greater selectivity in marriage and more difficulty in divorce by party choice and consent.

Legislative proposals also sought to afford more stability to marriage where children are involved. Attempts failed to require consideration of marital fault in child custody decisions¹²⁹ as well as in equitable distribution,¹³⁰ and to create a presumption for

122. H.B. 1738, Va. Gen. Assembly (Reg. Sess. 2007) (enacted as Act of Mar. 15, 2007, ch. 396, 2007 Va. Acts 564). This bill demands the issuance of an emergency protective order contemporaneously with the issuance of a warrant for domestic assault. *Id.* It also creates a rebuttable presumption of further family abuse when there is already a warrant, or one has been issued, for domestic assault. *Id.*

123. H.B. 1982, Va. Gen. Assembly (Reg. Sess. 2007) (enacted as Act of Mar. 23, 2007, ch. 745, 2007 Va. Acts 1135) (mandating a minimum of sixty days incarceration).

124. H.B. 2576, Va. Gen. Assembly (Reg. Sess. 2007) (enacted as Act of Mar. 9, 2007, ch. 205, 2007 Va. Acts 289).

125. H.B. 2646, Va. Gen. Assembly (Reg. Sess. 2007) (enacted as Act of Mar. 20, 2007, ch. 661, 2007 Va. Acts 1009).

126. H.B. 1916, Va. Gen. Assembly (Reg. Sess. 2007) (enacted as Act of Feb. 19, 2007, ch. 32, 2007 Va. Acts 33).

127. H.B. 2445, Va. Gen. Assembly (Reg. Sess. 2007).

128. H.B. 1660, Va. Gen. Assembly (Reg. Sess. 2007).

129. H.B. 1662, Va. Gen. Assembly (Reg. Sess. 2007).

130. H.B. 1664, Va. Gen. Assembly (Reg. Sess. 2007).

sole custody for the “innocent parent” when the other party has previously assaulted a family member.¹³¹ Attempts failed to limit no-fault divorce for parties with minor children when one or more party objects to the divorce¹³² and to require a custody implementation plan.¹³³ Additionally, attempts failed to require a parenting plan to be developed in visitation actions.¹³⁴ These bills rested on the rationale of strengthening families. “The argued policy supporting [these bills] . . . is that parents should give strong consideration to divorce and should maintain marriages where there are minor children.”¹³⁵

Similar to the interest in making families and marriages stronger is a concern for keeping noncustodial parents in contact with their children. This issue can be addressed by supplementing actual visitation using telephones, email, video conferencing, or other electronic communication technologies. A virtual visitation, however, has languished in the Senate’s Committee for Courts of Justice.¹³⁶ An attempt to afford immediate divorce for family abuse (violation of a protective order or a conviction for assault and battery) failed,¹³⁷ as did a bill requiring dispute resolution in custody, visitation, and child support cases.¹³⁸

There was strong support for a failed proposal to repeal Virginia Code section 20-124.3:1,¹³⁹ which prohibits the admission of parents’ mental health care records in custody and visitation cases.¹⁴⁰ The importance of mental health records and patient

131. H.B. 2728, Va. Gen. Assembly (Reg. Sess. 2007). Current law requires only that a court consider any history of family abuse in determining the best interests of a child.

132. H.B. 2798, Va. Gen. Assembly (Reg. Sess. 2007).

133. S.B. 947, Va. Gen. Assembly (Reg. Sess. 2007).

134. H.B. 2056, Va. Gen. Assembly (Reg. Sess. 2007).

135. Lawrence D. Diehl, *Legislative Update: 2007 General Assembly*, Virginia CLE 23rd Annual Advanced Family Law Seminar, at 3 (on file with author). Despite opposition to H.B. 2798, Diehl notes the importance of Virginia’s representatives seeking to strengthen marriage for the sake of children, while objecting to the profound scope of such a proposal. *Id.*

136. S.B. 1036, Va. Gen. Assembly (Reg. Sess. 2007). This bill would have allowed courts to order virtual visitation through the use of electronic communication equipment (which would supplement, not replace, actual visitation). It also provided that virtual visitation not be a factor in child support or relocation. *Id.* Legislation attempting to ease child support burdens on incarcerated obligors also failed. See H.B. 3163, Va. Gen. Assembly (Reg. Sess. 2007); S.B. 937, Va. Gen. Assembly (Reg. Sess. 2007).

137. H.B. 2862, Va. Gen. Assembly (Reg. Sess. 2007).

138. S.B. 919, Va. Gen. Assembly (Reg. Sess. 2007).

139. S.B. 737, Va. Gen. Assembly (Reg. Sess. 2007).

140. VA. CODE ANN. § 20-124.3:1 (Repl. Vol. 2004 & Cum. Supp. 2007) (relating to the

privacy can collide with a child's best interests when a parent's behavior might affect the child. In light of the heightened level of interest in mental health concerns, this bill was among the most significant and controversial of the session.¹⁴¹

Attempts to afford additional remedies for the enforcement of child support¹⁴² and to establish a presumption favoring joint legal and physical custody as in the best interests of a child failed again.¹⁴³ The study for stem cell research has been extended and continued for another year, particularly for purposes of monitoring the Virginia Cord Blood Bank Initiative.¹⁴⁴ Virginia also continues to support military families with the Virginia Military Family Relief Fund, providing financial assistance for active duty military until 180 days after their release from active duty.¹⁴⁵

VIII. A PROSPECTIVE LOOK AT FAMILY LAW IN VIRGINIA

Virginia has proven it is not a battleground state on same-sex marriage and is now aligned with a nation-wide movement to constitutionally define marriage.¹⁴⁶ Some experts predicted that if a "marriage amendment would finally lose, [Virginia] would be the state it lost in."¹⁴⁷ The consequence of the amendment on Virginia's family laws is to concrete effectively marriage between a man and a woman as the foundation for families in laws that protect them. The issues raised as a result provide excellent fodder for the newly established National Center for Family Law at the

admissibility of mental health records and testimony of a therapist or mental health provider in custody cases and prohibiting such a provider from testifying against or for a parent in any such proceeding). This statute was relied upon by the Court of Appeals of Virginia in *Schwartz v. Schwartz*, 46 Va. App. 145, 616 S.E.2d 59 (Ct. App. 2005), where the Fairfax County Circuit Court was found to be in error for admitting therapist testimony without parental consent. *Id.* at 148, 616 S.E.2d at 61; *see also* Shepherd, *supra* note 1, at 161-62.

141. In October 2006, Chief Justice Leroy Hassell, Sr. asked the legislature to reconsider Virginia's Mental Health Laws, a move the majority of Virginians appear to support. *See* Tom Jackman, *Commission Targets How State Treats Mentally Ill*, WASH. POST, Oct. 11, 2006, at B2. In all likelihood, the concern and scrutiny over Virginia's mental health laws will only increase after the April 2007 Virginia Tech Massacre.

142. H.B. 2658, Va. Gen. Assembly (Reg. Session 2007).

143. H.B. 2957, Va. Gen. Assembly (Reg. Session 2007).

144. H.J. Res. 584, Va. Gen. Assembly (Reg. Sess. 2007).

145. VA. CODE ANN. § 44-102.2 (Cum. Supp. 2007).

146. VA. CONST. art. I, § 15-A.

147. *See* 2006 Elections Coverage, *supra* note 4.

University of Richmond School of Law to sort through and study.¹⁴⁸

Recent sociological research has revealed that family experimentation has not succeeded, as a recent study of people of Generation X¹⁴⁹ age and younger makes a case for the success of traditional views of marriage and childbirth.¹⁵⁰ By a large majority, study participants preferred experiencing education, marriage, and parenting in that order, while only a small minority felt families require no such order.¹⁵¹ The study revealed that closing the “marriage gap” is an effective way to minimize family poverty because keeping marriage and children inexorably linked provides a stable environment—both socially and economically—particularly when marriage follows the completion of education.¹⁵² Research like this, combined with the movement of state constitutional amendments protecting marriage, illustrates that lawmakers and policymakers take their lead from a confluence of events to protect families and children with pro-marriage policies. Both legislative and judicial changes in the law of domestic relations that occurred in 2006–2007 reflect public policy seeking to strengthen and stabilize marriage and families.

Domestic relations law and policymaking in Virginia will likely continue this trend toward family stability. The long-term consequences of these laws and the constitutional amendment protecting marriage will continue to be substantial¹⁵³ and appear to be quite intended.

148. For more information on the Center, see National Center for Family Law at the University of Richmond School of Law, <http://www.ncfl-ur.org> (last visited Sept. 16, 2007). Mr. Edward Barnes (a prominent Richmond family law attorney and member of the American Academy of Matrimonial Lawyers) and Professor Robert Shepherd have put together a formidable group of attorneys in establishing the Center.

149. Generation X refers to people born between 1961 and 1981. R. Randall Kelso, *Narcissism, Generation X, The Corporate Elite, and the Religious Right Within the Modern Republican Party: A Set of “Friendly” Observations for President Bush*, 24 CARDOZO L. REV. 1971, 1982 (2003).

150. See Cheryl Wetzstein, *The Life-Script Schism*, WASH. TIMES, Feb. 22, 2007, at A2.

151. *Id.*

152. “Generation X and its younger brothers and sisters looked into the unmarried abyss and decided they didn’t want to go there,” said Manhattan Institute scholar Kay S. Hymowitz. *Id.*

153. See Shepherd, *supra* note 1, at 151.
