Family Law

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I. INTRODUCTION

Over the last several years, the General Assembly ("GA") has passed and the governor has signed some significant, but not major, pieces of legislation regarding family law. The most significant piece of legislation on the subject was passed in the 2011 legislation session,[1] resulting from a decision by the Supreme Court of Virginia that reversed twenty-five years of practice and decisions of trial courts and the court of appeals concerning title classification and allocation of debts.[2]

Developments in case law have also been modest. Aside from a brief panic in the wake of *Gilliam v. McGrady*,[3] most case law refined the finer points of family law. Practitioners, however, will be well-served to pay attention to the cases dealing with setting aside marital agreements, rights of third parties in custody and visitation, and the complex intricacies of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). In the past few years, the court of appeals provided many opinions on these particular topics.

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1. Act of Mar. 26, 2011, ch. 655, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 20-107.3(A) (Cum. Supp. 2011)).

2. *See* 279 Va. 703, 708–10, 691 S.E.2d 797, 799–801 (2010).

3. 279 Va. 703, 691 S.E.2d 797.

II. PROCEDURAL ISSUES

A. *Case Law*

1. Preserving Issues for Appeal

The court of appeals has strictly adhered to the Rules of the Supreme Court of Virginia, especially those dealing with preserving and presenting issues on appeal. Trial attorneys should always be wary to preserve their client's objections for review by the appellate courts. Supreme Court of Virginia Rules 5A:18 and 5A:20 can be especially thorny for both veteran attorneys and litigants proceeding pro se in domestic matters.[4] In the past three years, the court of appeals' opinions show that these rules remain as strong as ever, and noncompliance is almost assuredly fatal.[5]

Appealing *de novo* from the Juvenile and Domestic Relations District Court ("J&DR") is more "*de novo*" than "appellate." For example, in *Alexander v. Flowers*, the court of appeals found error by the circuit court for demanding the appealing party to produce new or different new evidence at the *de novo* hearing than that presented at the J&DR proceedings.[6]

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4. VA. SUP. CT. R. pt. 5A, 5A:18 (2011) ("No ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling. . A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to preserve the issue for appellate review."); VA. SUP. CT. R. pt. 5A, 5A:20(e) (2011) (requiring the party to provide, for each assignment of error, the standard of review and the legal argument, with citation to principals of law and authority); *see, e.g.*, Parks v. Parks, 52 Va. App. 663, 664, 666 S.E.2d 547, 548 (2008) (deeming all of the wife's questions presented on appeal as waived when Rule 5A:20(e) was not followed because no legal authority regarding the assignments of error was presented) (quoting Jay v. Commonwealth, 275 Va. 510, 520, 659 S.E.2d 311, 317 (2008)).

5. *See, e.g.*, McShane v. McShane, No. 0066-09-4, 2009 Va. App. LEXIS 280, at *1–3 (June 23, 2009) (unpublished decision) (refusing to hear arguments on appeal of spousal support ruling without specific written findings of fact to support the arguments, as required by Rule 5A:18); *see also* Coleman v. Hogan, No. 2927-08-3, 2009 Va. App. LEXIS 263, at *1–3 (June 16, 2009) (unpublished decision) (refusing to hear father's claims where he did not adhere to Rule 5A:18 when he failed to object to the J&DR court's order of dismissal at the circuit court proceeding); Mosteller v. Brooks, No. 2889-07-4, 2008 Va. App. LEXIS 565, at *2–3 (Dec. 23, 2008) (unpublished decision) (refusing to hear wife's claim of perjury and fraud by husband's attorney because those arguments were not presented to the trial court as required by Rule 5A:18). *See generally* VA. SUP. CT. R. pt. 5A, R. 5A:18 (2011).

6. 51 Va. App. 404, 413–14, 658 S.E.2d 355, 359 (2008) (holding that this demand denied the appealing party of her statutory right to a *de novo* appeal).

2. Jurisdiction

Same-sex litigation in the court of appeals is rarely about sex and more often about procedure. In *Miller v. Jenkins*, one woman attempted three times to collaterally attack custody orders from Vermont: once in the Supreme Court of Virginia, once in the Court of Appeals of Virginia, and once in the Circuit Court for the City of Winchester.[7]

Miller filed a complaint in the Circuit Court for the City of Winchester seeking declaratory and injunctive relief.[8] Jenkins demurred Miller's complaint, claiming that all issues raised by Miller were previously addressed by both the supreme court and the court of appeals.[9] The circuit court agreed and dismissed Miller's declaratory complaint with prejudice.[10] At the same time Miller was seeking declaratory relief, Jenkins filed a petition to register the Vermont custody orders.[11] Miller appealed the circuit court's dismissal of her declaratory petition, and Jenkins argued that the circuit court lacked jurisdiction.[12]

The court of appeals agreed with Jenkins that the circuit court lacked jurisdiction to hear Miller's declaratory complaint.[13] The court explained that relief under the Declaratory Judgment Act cannot lie where other remedies are available.[14] Because the relief Miller sought was to stop Jenkins from registering the Vermont orders, and because Miller filed objections opposing Jenkins from doing so, the circuit court did not have jurisdiction to hear a declaratory action.[15] The relief Miller sought was being litigated in the proceeding filed by Jenkins—the two actions were essentially the same.[16]

Jurisdiction may also impact an award of attorney's fees on appeal. For example, in *Kotara v. Kotara*, the court of appeals de-

7. 54 Va. App. 282, 285–86, 678 S.E.2d 268, 269 (2009).
8. *Id.* at 285, 678 S.E.2d at 269.
9. *Id.*
10. *Id.* at 285–86, 678 S.E.2d at 269.
11. *Id.* at 286, 678 S.E.2d at 269–70.
12. *Id.* at 286–87, 678 S.E.2d at 270.
13. *Id.* at 287, 678 S.E.2d at 270.
14. *Id.* at 289, 678 S.E.2d at 271.
15. *Id.* at 289–90, 678 S.E.2d at 271.
16. *Id.* at 289, 678 S.E.2d at 271.

termined whether an award of attorney's fees against appellant, the husband, was proper where the court ruled it lacked subject-matter jurisdiction over the husband's appeal.[17] Initially, the court determined it lacked subject-matter jurisdiction of the husband's appeal when he failed to appeal a final order or an appealable interlocutory order.[18] The court of appeals, however, explained that the determination of whether the court of appeals even has subject-matter jurisdiction *is itself* a valid ruling by the court.[19] Notwithstanding that the court could not hear the merits of his appeal, because it was a divorce case, Virginia Code section 20-99(5) allowed for attorney's fees.[20]

What happens in Paris, stays in Paris, according to the Virginia Court of Appeals. In a decision arising under Virginia's long-arm statute,[21] the court of appeals clarified that "conceive or father" means the actual act of conception.[22] In *Bergaust v. Flaherty*, after "one night in Paris," a mother from Virginia discovered she was pregnant.[23] The father was an American filmmaker living in France.[24] Upon the mother's appeal of the circuit court's decision granting the father's motion to dismiss for lack of personal jurisdiction, the court of appeals held that the baby was conceived in Paris, and notwithstanding the fact that the father acknowledged paternity, personal jurisdiction requires the conception to actually occur in Virginia.[25]

A decision from the court of appeals in February of 2011 highlighted the "fugitive disentitlement doctrine" as well as provisions of the UCCJEA.[26] In *Morrison v. Morrison*, the court of appeals

17. 55 Va. App. 705, 707, 688 S.E.2d 908, 909 (2010).

18. *Id.* (citing Kotara v. Kotara, No. 0290-9-4, 2009 Va. App. LEXIS 485, at *7 (Nov. 3, 2009) (unpublished decision)).

19. *Id.* at 710, 688 S.E.2d at 910.

20. *Id.* at 707, 710, 688 S.E.2d at 909–10; *see also* VA. CODE ANN. § 20-99(5) (Repl. Vol. 2008 & Cum. Supp. 2011).

21. VA. CODE ANN. § 8.01-328.1(A)(8) (Repl. Vol. 2007 & Cum. Supp. 2011).

22. Bergaust v. Flaherty, 57 Va. App. 423, 435, 703 S.E.2d 248, 254 (2011).

23. *Id.* at 426, 703 S.E.2d at 249.

24. *Id.*

25. *Id.* at 427, 431, 435–36, 703 S.E.2d at 249–50, 252, 254.

26. *See* Morrison v. Morrison, 57 Va. App. 629, 632, 637, 642–43, 704 S.E.2d 617, 618, 620–21, 623 (2011); *see also* VA. CODE ANN. §§ 20-146.1 to -146.38 (Repl. Vol. 2008 & Cum. Supp. 2011); Sasson v. Shenhar, 276 Va. 611, 622, 667 S.E.2d 555, 560 (2008) (explaining that the fugitive disentitlement doctrine excludes a party from seeking "relief from the same judicial system whose authority he evades") (quoting Moscona v. Shenhar, 50 Va.

held that in order for the fugitive disentitlement doctrine to apply, a nexus must exist between the contemptuous behavior and the relief sought in the court applying the doctrine.[27] In *Morrison*, the court failed to find such a nexus between a mother who violated a 2003 Michigan decree and her appeal of a Virginia trial court's refusal to register that decree.[28]

The court agreed with the mother that the UCCJEA did not allow the circuit court, exercising jurisdiction, to refuse to register the order on the grounds that the mother had violated it.[29] The court cited Virginia Code section 20-146.24(A), which states that a "court of this Commonwealth *shall* recognize and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this act . . . meeting the jurisdictional standards of this act and the determination *has not been modified* in accordance with this act."[30]

The 2003 decree, however, was subsequently modified by a 2008 Michigan modification order.[31] Therefore, the circuit court achieved the correct ruling, but for the wrong reasons, and the court of appeals affirmed its decision.[32]

The court of appeals reached an unusual custody decision regarding a surrogacy agreement in *Prashad v. Copeland*.[33] In this 2009 decision, Copeland and Spivey were two male life partners who entered into a surrogacy agreement with Prashad, a married woman.[34] The child was born in Minnesota, and the fathers, Copeland and Spivey, moved with the child to North Carolina with Prashad's consent.[35]

App. 238, 240, 253, 255, 649 S.E.2d 191, 192, 198–99 (2007)).

27. *Morrison*, 57 Va. App. at 637, 704 S.E.2d at 620 (citing *Sasson*, 276 Va. at 623, 667 S.E.2d at 561).

28. *Id.* at 638–41, 704 S.E.2d at 621–22.

29. *Id.* at 644–45, 704 S.E.2d at 624.

30. *Id.* at 642, 704 S.E.2d at 6 23 (emphasis added) (citing VA. CODE ANN. § 20-146.24(A) (Repl. Vol. 2008 & Cum. Supp. 2011)).

31. *Id.* at 632–33, 704 S.E.2d at 618.

32. *Id.* at 644–45, 704 S.E.2d at 624.

33. 55 Va. App. 247, 252–54, 266, 685 S.E.2d 199, 201–03, 208 (2009).

34. *Id.* at 252, 685 S.E.2d at 201–02.

35. *Id.*, 685 S.E.2d at 201.

A year later, however, Prashad and her husband went to North Carolina with the intent of recovering the child.[36] During the custody proceedings in North Carolina, DNA tests established that Spivey was the biological father.[37] Copeland was named on the birth certificate, and in 2006, both fathers were awarded primary legal and physical custody by the North Carolina court.[38]

Prashad filed a motion in Virginia seeking emergency physical custody.[39] The J&DR ruling was affirmed by the circuit court, which registered the North Carolina custody order in its entirety.[40] The court of appeals found that because North Carolina court exercised jurisdiction under UCCJEA, the trial court of Virginia "was required to register the custody orders in their entirety or not register them at all."[41] Prashad failed to persuade the appellate court that Virginia should not recognize the North Carolina custody order, because Virginia does not legally recognize same-sex marriages.[42]

The Court of Appeals of Virginia reached several other decisions concerning the UCCJEA in 2011. In *Harrison v. Harrison*, the mother returned from Belgium to Virginia to appear at the emergency custody hearing initiated by the father, to retrieve her children from the father in Virginia, and to return them to their native country, Belgium.[43] While still in Virginia, the mother was served with the father's Virginia divorce pleadings.[44] The court of appeals found that the mother's presence in Virginia did not confer personal jurisdiction upon her, citing the immunity from service provision of Virginia Code section 20-146.8(A).[45] The court further found that no long-arm jurisdiction existed pursuant to

36. *Id.*, 685 S.E.2d at 202.
37. *Id.* at 253, 685 S.E.2d at 202.
38. *Id.* at 253–54, 685 S.E.2d at 202 (internal quotation marks omitted).
39. *Id.* at 254, 685 S.E.2d at 202.
40. *Id.*, 685 S.E.2d at 203.
41. *Id.* at 261, 685 S.E.2d at 206.
42. *Id.* at 263–65, 685 S.E.2d at 207–08.
43. 58 Va. App. 90, 95–96, 706 S.E.2d 905, 908 (2011).
44. *Id.* at 96, 706 S.E.2d at 908.
45. *Id.* at 100–01, 706 S.E.2d at 910–11 (citing VA. CODE ANN. § 20-146.8(A) (Repl. Vol. 2008)).

Virginia Code section 8.01-328.1(A)(9), as Virginia was not the mother's domicile.[46]

In a unanimous decision, the court interpreted the UCCJEA immunity provision to mean that when a party comes to Virginia to enforce a custody order, the court obtains personal jurisdiction neither upon that basis, nor upon the physical presence of the parent, for purposes of adjudicating support and property rights pursuant to the Virginia divorce action.[47]

In *Prizzia v. Prizzia*, another factually complicated decision involving the UCCJEA, the mother refused to return from a Christmas visit in Hungary with the parties' child after the father returned to Virginia.[48] The mother sued the father for divorce in Hungary and requested custody of their child.[49] The father promptly filed his own divorce and custody actions in Virginia.[50] The court of appeals reasoned that Virginia was the home state under the recent home state rule since the child lived in Virginia for some time, even though it was less than six months.[51] The court determined that Virginia had jurisdiction under the UCCJEA to make an initial custody determination.[52] However, the matter was reversed and remanded for the trial court to exercise jurisdiction over the initial custody determination and consider the evidence and factors regarding whether Virginia was an inconvenient forum.[53]

In making this decision, the court of appeals reasoned that because the trial court had jurisdiction over child custody, it also had jurisdiction to order child support.[54] Even though the parties were divorced by the Hungarian court, the court of appeals reasoned that the Virginia trial court had equity jurisdiction when

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46. *Id.* at 103–05, 706 S.E.2d at 912–13 (citing VA. CODE ANN. § 8.01-328.1(A)(9) (Repl. Vol. 2007 & Cum. Supp. 2011)).

47. *Id.* at 100, 706 S.E.2d at 910–11.

48. 58 Va. App. 137, 145, 707 S.E.2d 461, 465 (2011).

49. *Id.*

50. *Id.*

51. *Id.* at 148–50, 707 S.E.2d at 466–67 (citing VA. CODE ANN. § 20-146.18 (Repl. Vol. 2008 & Cum. Supp. 2010); *id.* § 20-146.12(a)(1) (Repl. Vol. 2008)).

52. *Id.* at 150, 707 S.E.2d at 467.

53. *Id.* at 155, 707 S.E.2d at 467–70 (citing VA. CODE ANN. § 20-146.18 (Repl. Vol. 2008 & Cum. Supp. 2011)).

54. *Id.* at 157, 707 S.E.2d at 470–71 (citing VA. CODE ANN. § 16.1-241(A)(3) (Repl. Vol. 2008 & Cum. Supp. 2011)).

the divorce action was filed in Virginia by the husband, even though the trial court declined to exercise jurisdiction over the divorce in favor of Hungary.[55] The court of appeals held that "where a case is originally filed as a divorce proceeding and includes child custody and child support issues," the court may exercise "jurisdiction to award child support as an equitable concomitant to its jurisdiction over child custody."[56]

3. Miscellaneous

Bigamy is not often litigated in the court of appeals, but in 2009, the court illustrated that void marriages cannot be cured by "corrective measures."[57] In *Davidson v. Davidson,* the husband and the wife attempted to marry on August 31, 2006, before the husband concluded his divorce from his former spouse.[58] At the wife's request, and without the presence of the husband, the officiate re-signed the new certificate, falsely stating that the ceremony occurred on September 14, 2006.[59] The court upheld the wife's subsequent petition for annulment.[60]

B. *Legislative Changes*

In the past several years, only one new bill was passed that related to this topic. Service of process on foreign service officers is not an issue of general importance, but for practitioners in the Tidewater and northern Virginia areas, this area of law is important. The bill amended two existing statutes: Virginia Code section 20-97, discussing domicile and resident requirements for divorce and annulment suits; and section 8.01-328.1, Virginia's long-arm statute.[61]

Now, the court may execute personal jurisdiction over a person who has "executed an agreement in this Commonwealth which

55. *Id.* at 156–57, 707 S.E.2d at 470–71.

56. *Id.* at 157, 707 S.E.2d at 471.

57. Davidson v. Davidson, No. 2356-08-3, 2009 Va. App. LEXIS 313, at *3–4 (July 14, 2009) (unpublished decision).

58. *Id.* at *1.

59. *Id.* at *1–2.

60. *Id.* at *5–6.

61. Act of Mar. 27, 2009, ch. 582, 2009 Va. Acts 917 (codified as amended at VA. CODE ANN. §§ 8.01-328.1, 20-97 (Cum. Supp. 2009)).

obligates the person to pay spousal support or child support . . . to a person who has satisfied the residency requirements in suits for annulments or divorce for . . . *foreign service officers of the United States* pursuant to § 20-97."[62] Additionally, a foreign service officer is now considered a domiciliary for such suits if he or she: "(i) at the time the suit is commenced is, *or immediately preceding such suit was*, stationed in any territory or foreign country and (ii) was domiciled in the Commonwealth for the six month period immediately preceding his being stationed in such territory or country."[63] The legal import of this provision is that Virginia now may assert personal jurisdiction over foreign service officers.

III. PREMARITAL AND PROPERTY SETTLEMENT AGREEMENTS: CASE LAW

A. *Validity*

Mental status has obvious relevancy in a court's determination of the validity of marriage contracts. In *Bailey v. Bailey*, the court of appeals upheld the trial court's determination that a "Contract of Marriage" was not a valid property settlement agreement ("PSA") where the husband, a schizoaffective psychotic, was on a weekend furlough from a psychiatric ward when his wife presented him a "Contract of Marriage."[64] Not only did the husband believe he was "[s]igning a document to go home," but the contract also assigned all debts to the husband and assets to the wife.[65]

In *Doering v. Doering*, the court of appeals addressed the circumstances in which a trial court must incorporate a parties' PSA into the final divorce decree.[66] In *Doering*, the parties entered into a PSA in which the husband agreed to pay the wife $4000 per month in spousal support and $1200 per month in child support for their one child.[67] The PSA allowed either party to pursue mod-

62. *Id.* (codified as amended at VA. CODE ANN. § 8.01-328.1 (Cum. Supp. 2009)) (italics in original).

63. *Id.* (codified as amended at VA. CODE ANN. § 20-97 (Cum. Supp. 2009)) (italics in original).

64. 54 Va. App. 209, 211–12, 677 S.E.2d 56, 58 (2009).

65. *Id.* at 212–13, 677 S.E.2d at 58 (internal quotation marks omitted).

66. 54 Va. App. 162, 166, 676 S.E.2d 353, 355 (2009).

67. *Id.* at 167, 676 S.E.2d at 355.

ification of the spousal or child support amount, which was "modifiable upon a material change in circumstances."[68]

In August 2003, the wife filed for divorce and "requested that the PSA be incorporated into the [final] divorce decree."[69] The husband responded "that the PSA was executed under duress, fraud, and misrepresentation by [his] wife and that it was unconscionable."[70] The trial court stated that the PSA was a "lousy agreement" for the husband but otherwise denied his request to set it aside, holding the PSA valid and enforceable although "there [had] been some considerable change in circumstances [] affecting the ability of [the husband] to pay."[71]

The trial court, however, refused to incorporate the PSA, stating that the wife would be before the court "on a weekly basis" seeking court-ordered support given "there's no way under the sun [the husband] can meet the [spousal and child support payment] obligations that [the PSA] imposes on him."[72] The trial court found a material change in circumstances from the time of execution of the PSA in 2003 to the 2005 evidentiary hearing and ordered the husband to pay $330 per month in spousal support and $536 per month in child support.[73]

The court of appeals affirmed the trial court, holding that the trial court has discretion under Virginia Code section 20-109.1, which states that "[a]ny court *may* affirm, ratify and incorporate by reference" the PSA into the final decree.[74] The court of appeals found no abuse of discretion by the lower court's refusal to incorporate the agreement.[75] The court further held that the husband proved the agreement allowed for a modification and that no authority existed requiring the trial court to incorporate the PSA before ruling on a party's request for modification of the PSA.[76]

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68. *Id.* (internal quotation marks omitted).
69. *Id.*
70. *Id.*
71. *Id.* at 167–68, 676 S.E.2d at 355 (internal quotation marks omitted).
72. *Id.* at 168, 676 S.E.2d at 356 (internal quotation marks omitted).
73. *Id.* at 169, 676 S.E.2d at 356.
74. *Id.* at 169–70, 676 S.E.2d at 356 (citing VA. CODE ANN. § 20-109.1 (Repl. Vol. 2008 & Cum. Supp. 2011); Forrest v. Forrest, 3 Va. App. 236, 239, 349 S.E.2d 157, 159 (1986)).
75. *Id.* 170, 676 S.E.2d at 357.
76. *Id.* at 172, 676 S.E.2d at 358.

The most important recent opinion by the Court of Appeals of Virginia regarding the validity of marital agreements was *Sims v. Sims*, where the court of appeals reversed the trial court's failure to set aside a PSA as unconscionable.[77] Prior to *Sims*, *Galloway v. Galloway*, required a two-prong showing for unconscionability.[78] *Galloway* demanded that the party seeking to set aside a marital agreement must typically satisfy two prongs: "1) a gross disparity existed in the division of assets and 2) overreaching or oppressive influences."[79]

In *Sims*, the court lessened the burden of the second prong by explaining that overreaching may be established in either of two ways:

> When the accompanying incidents are inequitable and show [(a)] bad faith, such as concealments, misrepresentations, undue advantage, [or] oppression *on the part of the one who obtains the benefit, or* [(b)] ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like, *on the part of the other*, these circumstances, combined with [evidence of the first prong,] inadequacy of price, may easily induce a court to grant relief, defensive or affirmative.[80]

In the case at hand, the second prong was proven where the wife merely received an automobile and personal property in her possession.[81] The court held that this agreement left the wife a ward of the state, penniless and due to her disability, unable to obtain employment.[82] Therefore, the wife, as a matter of law, proved both the first prong of disparity and the second prong by showing infirmity and pecuniary necessity.[83] The agreement was held to be unconscionable.[84]

Prenuptial agreements were also the subject of appellate scrutiny. The court of appeals in *Chaplain v. Chaplain* set aside a

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77. 55 Va. App. 340, 354, 685 S.E.2d 869, 875–76 (2009).

78. 47 Va. App. 83, 92, 622 S.E.2d 267, 271 (2005) (citing Drewry v. Drewry, 8 Va. App. 460, 472–73, 383 S.E.2d 12, 18 (1989)).

79. *Id.* (citing Shenk v. Shenk, 39 Va. App. 161, 179 n.13, 571 S.E.2d 896, 905 n.13 (2002)).

80. *Sims*, 55 Va. App. at 349–50, 685 S.E.2d at 873 (emphasis added) (quoting Derby v. Derby, 8 Va. App. 19, 28–29, 378 S.E.2d 74, 79 (1989) (citation omitted) (internal quotation marks omitted)).

81. *Id.* at 352–54, 685 S.E.2d at 875.

82. *Id.* at 352–53, 685 S.E.2d at 875.

83. *Id.* at 353–54, 685 S.E.2d at 875.

84. *Id.* at 354, 685 S.E.2d at 875.

premarital agreement as unconscionable where the evidence showed that the wife spoke Arabic, Spanish, French, and broken English, often using a translator.[85] The testimony of the husband was that the wife could "read the English menu in a Chinese restaurant."[86] The testimony was that the wife "thought that she was signing a paper for marriage."[87]

Next, the court looked at the great disparity of value between what the wife and the husband received per the agreement.[88] The wife would basically receive nothing more than $100,000 if she and her husband remained married upon the husband's death.[89] The court further found that the husband failed to disclose all of his assets, contrary to Virginia Code section 20-151(A)(2).[90] Therefore, the trial court erred in sustaining the husband's motion to strike, and the court reversed and remanded the case.[91]

Also important in *Chaplain* was that the court was asked to determine whether the trial court's interlocutory order was properly appealable.[92] The court, relying upon *Pinkard v. Pinkard*, found that it had subject-matter jurisdiction and that the sole issue remaining was whether to enter a divorce decree based upon the terms of the agreement.[93] Therefore, this interlocutory appeal was proper because this issue decided the case.[94]

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85. 54 Va. App. 762, 771, 776, 682 S.E.2d 108, 112, 115 (2009).

86. *Id.* at 771, 682 S.E.2d at 112.

87. *Id.* (internal quotation marks omitted).

88. *Id.* at 774, 682 S.E.2d at 114.

89. *Id.*

90. *Id.* at 776, 682 S.E.2d at 115 (citing VA. CODE ANN. § 20-151(A) (Repl. Vol. 2008 & Cum. Supp. 2011)).

91. *Id.* at 777, 682 S.E.2d at 115.

92. *Id.* at 766, 682 S.E.2d at 110.

93. *Id.* at 767–70, 682 S.E.2d at 111–12.

> For an interlocutory decree to adjudicate the principles of a cause, "the decree must determine that the rules or methods by which the rights of the parties are to be finally worked out have been so far determined that it is only necessary to apply those rules or methods to the facts of the case in order to ascertain the relative rights of the parties, with regard to the subject matter of the suit."

Id. (quoting Pinkard v. Pinkard, 12 Va. App. 848, 851, 407 S.E.2d 339, 341 (1991) (citation omitted) (internal quotation marks omitted)).

94. *Id.* at 770–71, 682 S.E.2d at 112.

B. *Interpretation*

Qualified Domestic Relations Orders ("QDROs") are troublesome for both practitioners and courts. Often, a gap in time exists between the entry of a final divorce decree and the entry of the QDRO that actually splits the related accounts. The court of appeals dealt with the situation of what happens if one party takes action during this time period that frustrates or effectively denies the ability of the other party to obtain the relief ordered by the QDRO in *Lewis v. Lewis*.[95]

In *Lewis*, a PSA between the parties provided that the marital share of the husband's profit-sharing plan and pension would be divided 50/50 by a QDRO and that the wife would be awarded a separate share of the pension paid to her for the duration of her life based upon her actuarial life expectancy.[96] When the parties separated, the husband was fully vested in the pension plan.[97]

Because the parties could not agree on the language of the QDRO, the court entered a final decree without the QDRO.[98] Prior to the QDRO's entry, and unbeknownst to the wife, the husband retired.[99] In his retirement paperwork, he checked a box indicating that he wished to receive his pension "as a single life annuity."[100] He did not, therefore, request any joint or survivor annuity payments nor any payments whatsoever that would go to his wife.[101] The husband further withdrew his entire profit-sharing plan.[102] The husband then began receiving his full pension until Philip Morris decided to freeze his benefits pending the outcome of this case.[103] The wife did not receive any of her husband's pension or profit-sharing funds, either directly from the employer or from her husband.[104]

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95. 53 Va. App. 528, 673 S.E.2d 888 (2009).
96. *Id.* at 531–32, 673 S.E.2d at 889–90.
97. *Id.* at 532, 673 S.E.2d at 890.
98. *Id.* at 533, 673 S.E.2d at 890.
99. *Id.*
100. *Id.* (internal quotation marks omitted).
101. *Id.*
102. *Id.* at 534, 673 S.E.2d at 891.
103. *Id.* at 533, 673 S.E.2d at 890.
104. *Id.*

The trial court's February 27, 2008 opinion found "that the accrued unreduced benefit value of the pension plan as of June 1, 2003 was $3,719.82."[105] The trial court then awarded the wife $1,246.14 per month from the husband's pension and ordered the husband to obtain a $200,000 life insurance policy as a pension payment for her lifetime, in replacement of the wife's entitlement under the PSA.[106] The trial court further awarded the "wife her initial share of the profit-sharing account, as well as interest on those funds from the time of separation."[107]

Regarding the profit-sharing account, the husband argued that the trial court erred in granting the wife any portion of the growth that occurred after June 1, 2003, the date of separation.[108] The husband stated that the PSA precludes such an award of interest after that date.[109] "Under the parties' PSA, [the] wife was entitled to [one-half] of the marital share of [the] [h]usband's Philip Morris profit sharing account minus certain offsets."[110] The court of appeals ruled that "the interest that accrued on wife's portion of the marital share belonged to wife, just as the interest that accrued on husband's portion of the marital share belonged to husband."[111] Further, the court looked disfavorably on the husband's actions that removed the funds from the wife's control and affirmed the trial court's ruling.[112]

Regarding the life insurance, the court of appeals held that although Virginia Code section 20-107.3(K) allows a court to enter "additional orders" to effectuate a parties' agreement, such as remedy conflicts, Virginia Code section 20-107.3(G)(2) specifically and clearly prohibits a trial court from ordering a husband to obtain life insurance for the benefit of his wife.[113]

The court of appeals considered the interplay of spousal support, the obligation to pay the mortgage on the formal marital

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105. *Id.* at 535, 673 S.E.2d at 891 (internal quotation marks omitted).
106. *Id.* at 535–36, 673 S.E.2d at 891.
107. *Id.* at 536, 673 S.E.2d at 891–92.
108. *Id.* at 538–39, 673 S.E.2d at 893.
109. *Id.* at 539, 673 S.E.2d at 893.
110. *Id.* at 538–39, 673 S.E.2d at 893 (internal quotation marks omitted).
111. *Id.* at 540, 673 S.E.2d at 894.
112. *Id.* at 541, 673 S.E.2d at 894.
113. *Id.* at 543, 673 S.E.2d at 895 (citing VA. CODE ANN. § 20-107.3(G)(2), (K) (Repl. Vol. 2008)).

residence, and bankruptcy in *Stacy v. Stacy*.[114] Although both parties expressly waived spousal support in the PSA, a clause in the PSA characterized the husband's liability for the mortgage to be "in the nature of support."[115] Due to the wife's admitted post-decree cohabitation, the husband moved to terminate his responsibility to pay the mortgage, arguing it was really spousal support.[116] The wife argued that the mortgage payments were in the nature of equitable distribution and not support and, therefore, not dischargeable by the husband.[117]

The court reasoned that the provisions of a PSA are to be read as a whole and in context with each other.[118] The language tending to show these payments as support was merely to protect the wife against any future bankruptcy proceeding of the husband.[119] The court held that the "prohibition was made possible because, under bankruptcy law, an obligation found to be in the nature of support is a non-dischargeable debt."[120] Therefore, the court held that the intent of the parties was merely to protect the wife against the husband's possible future bankruptcy and not to characterize these mortgage payments as spousal support, as contemplated by Virginia Code section 20-109.[121]

IV. EQUITABLE DISTRIBUTION

A. *Case Law*

1. Classification

In the 2008 case of *Chretien v. Chretien*, the court of appeals was asked by the husband to review the trial court's decision classifying the wife's personal injury award for her injuries sustained during a motorcycle accident as the wife's separate proper-

114. 53 Va. App. 38, 41–43, 669 S.E.2d 348, 349–50 (2008) (en banc).

115. *Id.* at 47, 669 S.E.2d at 352 (internal quotation marks omitted).

116. *Id.* at 42, 669 S.E.2d at 349–50.

117. *Id.*, 669 S.E.2d at 350.

118. *Id.* at 48, 669 S.E.2d at 353 (citing Quadros & Assocs., P.C. v. City of Hampton, 268 Va. 50, 54–55, 547 S.E.2d 90, 93 (2004) (citations omitted)).

119. *Id.*

120. *Id.* (internal quotation marks omitted); *see also* 11 U.S.C. § 523(a)(5) (2010).

121. *Id.* at 48–49, 669 S.E.2d at 353; *see also* VA. CODE ANN. § 20-109 (Repl. Vol. 2008 & Cum. Supp. 2011).

ty.[122] Due to the husband's negligence, the wife was injured on a motorcycle and received approximately $150,000.[123] The burden of proof provided the fundamental issue.[124]

Virginia Code section 20-107.3(H) defines "marital share" as "that part of the total personal injury or workers' compensation recovery attributable to *lost wages or medical expenses*."[125] The husband argued that proceeds are subject to the presumption that all property acquired during a marriage is presumed to be marital property.[126]

The trial court held that the personal injury recovery is presumptively separate property.[127] The trial court found that the "husband failed to overcome that presumption or to show that he substantially increased the value of the recovery through his personal efforts."[128] Further, "the court found that, even if the personal injury recovery is presumed to be marital property, [the] wife overcame that presumption and proved that the proceeds are separate."[129] The trial court also issued an alternative holding, stating that in light of the factors of Virginia Code section 20-107.3(E), the court awards all the proceeds to the wife because of the husband's negligence and found that it would not be equitable to award any of the proceeds to the husband as he "caused the tort that led to the serious injuries suffered by [the wife]."[130]

On appeal, the court of appeals agreed with the husband that the circuit court erred in its classification.[131] Relying upon the language of Virginia Code section 20-107.3(H), the court held that the personal injury award is presumptively marital, and thus, the

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122. 53 Va. App. 200, 202–04, 670 S.E.2d 45, 46–47 (2008).

123. *See id.* at 205, 670 S.E.2d at 48 (citing Von Raab v. Von Raab, 26 Va. App. 239, 248, 494 S.E.2d 156, 160 (1997)).

124. *Id.* at 202–03, 670 S.E.2d at 46–47.

125. VA. CODE ANN. § 20-107.3(H) (Repl. Vol. 2008 & Cum. Supp. 2011) (emphasis added).

126. *Chretien*, 53 Va. App. at 203, 670 S.E.2d at 47 (citing *Von Raab*, 26 Va. App. at 248, 494 S.E.2d at 160)).

127. *Id.*

128. *Id.*

129. *Id.* at 203–04, 670 S.E.2d at 47.

130. *Id.* at 204, 670 S.E.2d at 47 (internal quotation marks omitted) (citing VA. CODE ANN. § 20-107.3(E) (Repl. Vol. 2008 & Cum. Supp. 2011)).

131. *Id.*

"wife bore the burden of proving that some or all of the personal injury recovery was separate property."[132]

Although the court of appeals agreed that the trial court erred in its classification, the court found that the error was harmless.[133] Relying upon the fact that the trial court stated that it would have awarded the entire amount of the award to the wife in any event, pursuant to Virginia Code section 20-107.3(E), the court held that so long as that basis was proper, the error was harmless because the trial court would have reached the same result even if it had classified the award correctly.[134]

An argument dealt with by all equitable distribution practitioners and courts is whether to apply the *Brandenburg*[135] or the *Keeling*[136] formulas. The court of appeals took a "split the baby" approach in *Rinaldi v. Rinaldi*.[137] In *Rinaldi*, the court weighed in on the propriety of the circuit court applying the *Brandenburg* formula to one piece of real property and the *Keeling* formula to a different piece of property.[138] Virginia Code section 20-107.3(E) demands that the trial court achieve an equitable result, but as long as the trial court considers the required factors, the court is free to choose which method is appropriate for the particular asset provided that the result is not patently inequitable.[139]

Practitioners should take notice that classification of assets occurs at the time of acquisition, notwithstanding the possibility of subsequent transmutation. In *Duva v. Duva*, the husband pur-

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132. *Id.* at 205, 670 S.E.2d at 48 (citing *Von Raab*, 26 Va. App. at 246, 494 S.E.2d at 160); *see also* VA. CODE ANN. § 20-107.3(H) (Repl. Vol. 2008 & Cum. Supp. 2011).

133. *Id.* at 208, 670 S.E.2d at 49.

134. *Id.* at 207, 670 S.E.2d at 49 (citing VA. CODE ANN. § 20-107.3(E) (Repl. Vol. 2008 & Cum. Supp. 2011)).

135. Brandenburg v. Brandenburg, 617 S.W.2d 871, 872 (Ky. Ct. App. 1981). In *Brandenburg*, the Kentucky Court of Appeals approved a formula that apportioned the marital and non-marital components of hybrid property in "the same percentages as their respective contributions to the total equity in the property." *Id.* (quoting Newman v. Newman, 597 S.W.2d 137, 138 (Ky. 1980) (internal quotation marks omitted)).

136. Keeling v. Keeling, 47 Va. App. 484, 490–94, 624 S.E.2d 687, 689–91 (2006). The *Keeling* formula is more equitable when the parties use marital funds to hold a property or pay down a marital debt, notwithstanding separate contributions to the down payment. *Id.* at 493–94, 624 S.E.2d at 691 (citing *von Raab*, 26 Va. App. at 249, 494 S.E.2d at 161).

137. 53 Va. App. 61, 70, 679 S.E.2d 359, 363 (2008).

138. *Id.* at 72, 699 S.E.2d at 364.

139. VA. CODE ANN. § 20-107.3(E) (Repl. Vol. 2008 & Cum. Supp. 2011); *Rinaldi*, 53 Va. App. at 70–72, 679 S.E.2d at 364.

chased a property five months prior to marriage and then the parties used almost exclusively marital funds to continue to pay for and manage the property.[140] The trial court erroneously explained in an opinion letter that "[t]he simple fact the property was acquired before marriage does not overcome the [c]ourt's finding that the bulk of the mortgage was paid with marital funds. Separate property may become marital property by the act of comingling which is what was found to occur in this case."[141]

The court of appeals found error with the trial court in that "the trial court did not consider marital funds losing its classification as marital property when comingled with the receiving property."[142] The court found error in that the trial court should have classified the property as separate *initially*, where the husband acquired it before the marriage.[143] The burden would then shift to the wife to show transmutation.[144]

2. Valuation

Retirement funds are to be valued at the time of the evidentiary hearing. In *Cusack v. Cusack*, the court of appeals found error with the trial court in allowing the wife to receive 50% of the marital share of the husband's military retirement benefits commencing on the *date of his retirement*.[145] The court of appeals reversed the trial court's ruling, finding that "[g]eneral principles for the valuation and division of property in equitable distribution proceedings also apply to the valuation and division of retirement benefits, including the principle that '[t]he court shall determine the value of any such property *as of the date of the evidentiary hearing on the valuation issue.*'"[146]

140. 55 Va. App. 286, 292, 685 S.E.2d 842, 845 (2009).

141. *Id.* (internal quotation marks omitted) (citing VA. CODE ANN. §20-107.3(A)(3)(d) (Repl. Vol. 2008 & Cum. Supp. 2011)).

142. *Id.* at 294, 685 S.E.2d at 846.

143. *See id.* at 299, 685 S.E.2d at 849.

144. *Id.* at 294, 685 S.E.2d at 846.

145. 53 Va. App. 315, 318–19, 323, 671 S.E.2d 420, 422, 424 (2009).

146. *Id.* at 320, 671 S.E.2d at 423 (emphasis in original) (quoting VA. CODE ANN. § 20-107.3 (Cum. Supp. 2011)).

B. *Legislative Changes*

The only important revision to our statute came as a result of *Gilliam v. McGrady*.[147] The Supreme Court of Virginia interpreted the language of Virginia Code section 20-107.3(A) strictly concerning the classification of debts.[148] Prior practice across the commonwealth in all courts was that if a debt was incurred during the marriage, it was presumed to be marital property, even if incurred in the name of one party.[149]

This prior presumption made the life of practitioners and trial judges much easier in all respects, including during settlement and trial. However, the Supreme Court of Virginia examined the statute and could find no such presumption as opposed to the property provisions of this same statute.[150] Consequently, the court held that debts in the name of one spouse were presumed to be separate, and joint debts were presumed to be marital.[151]

After this decision, settling and trying cases immediately became more difficult, time-consuming, and costly, and everyone yearned for the good old days. The Virginia Coalition on Family Law Legislation took up the challenge and appointed a subcommittee to remedy this problem by drafting corrective legislation.[152] The new bill was drafted and found little opposition in the GA.[153] The new statute, which took effect July 1, 2011, essentially returned to the traditional way that practitioners and trial courts dealt with debt.[154]

Simply stated, a debt is now classified as separate or marital in Virginia Code sections 20-107.3(A)(4) and (5).[155] Separate debts are: (i) acquired before the marriage; (ii) incurred after the last date of separation; or (iii) any debt classified as part separate as

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147. 279 Va. 703, 691 S.E. 2d 797 (2010).

148. *Id.* at 708–10, 691 S.E.2d at 799–800 (citing VA. CODE ANN. § 20-107.3(A) (Repl. Vol. 2008 & Cum. Supp. 2011)).

149. *See id.*

150. *Id.* at 708–09, 691 S.E.2d at 799–800.

151. *Id.* at 710, 691 S.E.2d at 800.

152. *See* Alan Cooper, *Family Law Group's Bills Are Advancing*, VA. LAW. WKLY., Feb. 21, 2011, at 3.

153. *See* H. JOURNAL, House of Delegates of Va., Reg. Sess. ___ (2011), *available at* http://lis.virginia.gov/cgi-bin/legp604.exe?111+sum+hb1569.

154. Act of Mar. 26, 2011, ch. 655, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 20-107.3 (Cum. Supp. 2011)).

155. *Id.*

per (A)(5).[156] However, if a party can demonstrate by a preponderance of the evidence that it was for a "marital purpose," the court *may* classify the debt as marital.[157] It will be interesting to see how this discretionary issue is interpreted in practice.

As for marital debt, it is now defined as debt incurred in joint names during the marriage or debt incurred in either spouses name during the marriage; however, to the extent a party can show that a debt was incurred, or the proceeds were secured by incurring the debt were used, in whole or in part, for a non-marital purpose, the court *may* designate it as separate or hybrid.[158] This discretion is once again provided to the court.[159] Finally, as with property, the court can only apportion jointly owed marital debt to a party.[160]

The most intriguing aspect of this new statute is whether the courts will apply it to cases filed before July 1, 2011. The generally accepted, but unpopular view, is that it will be applied only prospectively. All practitioners are encouraged to set forth to trial courts the most persuasive arguments and theories for its application retroactively.

V. CHILD SUPPORT: LEGISLATIVE CHANGES

Most legislative child support amendments involve procedural or remedial issues. Few relate to the actual amount of support awarded by a court or calculated by practitioners. For examples of such technical changes, the GA recently enacted two amendments. First, Virginia Code section 20-60.3 was amended to add new "notice" provisions to add to the already burdensome list.[161] It is now wise to either develop a computerized form or to review the statute when preparing any order or decree where support is included. Second, the general garnishment statute[162] was amended to favor child support obligations over other creditors.[163] A par-

156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. Act of Mar. 30, 2009, ch. 706, 2009 Va. Acts 1500, 1500–01 (codified as amended at VA. CODE ANN. § 20-60.3 (Cum. Supp. 2009)).
162. VA. CODE ANN. § 8.01-512.4 (Repl. Vol. 2007).
163. Act of Mar. 27, 2009, ch. 332, 2009 Va. Acts 552, 553–54 (codified as amended at

ent who supports a dependent child who lives with them may exempt an additional $34, $52, and $66 per week for one, two, or three or more children, respectively.[164] This exemption does not apply to a household whose gross income (including support) exceeds $1750 per month.[165]

Of a more substantive nature, the GA recently enacted three new statutes. Health insurance and medical costs remain a critical and often confusing issue. In 2009, the GA revised Virginia Code sections 20-60.3 and 63.2–1900, establishing a new term "cash medical support", i.e., cash payments for medical expenses.[166] This term merely means the proportional payment by the parties for unreimbursed medical expenses pursuant to Virginia Code section 20-108.2.[167] These terms must be included in all orders of support.[168] In 2010, however, the definition of "cash medical support" was amended to rescind the right of the Virginia Department of Social Services to order a 2.5% cash medical support payment from noncustodial parents if the child received Medicaid or Family Access to Medical Insurance Security Plan.[169]

Finally, the criminal non-support statute, Virginia Code section 20-61, was addressed in the 2010 session. This statute was frequently used, until thirty years ago when it was basically ignored by family lawyers and the staff of the juvenile court system. Because of the criminal burden of proof problems, it was almost abandoned by most courts and litigants. The 2010 amendment provided that a person is subject to criminal prosecution for desertion and non-support of a spouse or a child who are not receiving federal or state aid to a permanently and totally disabled person.[170] It is still rarely used because of the burden of proof problems.

VA. CODE ANN. § 8.01-512.4 (Cum. Supp. 2009); codified at *id.* § 34-4.2 (Cum. Supp. 2009)).

164. Ch. 332, 2009 Va. Acts at 554.

165. *Id.*

166. Act of Mar. 30, 2009, ch. 713, 2009 Va. Acts 1508, 1511, 1519 (codified as amended at VA. CODE ANN. §§ 20-60.3, 63.2-1900 (Cum. Supp. 2009)).

167. Ch. 713, 2009 Va. Acts at 1519.

168. *Id.* at 1511.

169. Act of Apr. 7, 2010, ch. 243, 2010 Va. Acts 335, 341 (codified as amended at VA. CODE ANN. § 63.2-1900 (Cum. Supp. 2010)).

170. Act of Apr. 11, 2010, ch. 619, 2010 Va. Acts 1108, 1108–09 (codified as amended at VA. CODE ANN. § 20-61 (Cum. Supp. 2010)).

VI. SPOUSAL SUPPORT AND MAINTENANCE

A. *Case Law*

1. Determination

A decision from the court of appeals rendered in 2009 actually assists practitioners in determining the weight that the standard of living factor should be given in a spousal support determination.[171] In *Robinson v. Robinson*, the wife was awarded $5,000 per month in spousal support.[172] The husband originally appealed this decision, claiming that the trial court had failed to make written findings regarding the statutory factors found in Virginia Code section 20-107.1(E).[173] In the first appeal, the court of appeals agreed with the husband and reversed and remanded the award to the trial court.[174] Upon remand, the trial court added an "Addendum to Final Decree" in which the details regarding the factors were documented.[175] The award of spousal support remained the same.[176]

Once again, the husband appealed the trial court's decision, claiming that the spousal support award surpassed the wife's proven needs, and exceeded the standard of living the parties maintained while married to one another.[177] The husband did not contest the total sum of the wife's monthly need but argued that she could subsidize her need with income from her assets.[178]

On the second appeal, the court of appeals ruled that the husband incorrectly assumed that spousal support is aimed at keeping a wife at the *same* standard of living that was enjoyed during the marriage.[179] The court of appeals stated that the standard of living is not meant to "cap or limit" the amount that can be awarded.[180] The trial court must consider all of the statutory fac-

171. Robinson v. Robinson, 54 Va. App. 87, 95–97, 675 S.E.2d 873, 877–78 (2009).
172. *Id.* at 92, 675 S.E.2d at 876.
173. *Id.* (citing VA. CODE ANN. § 20-107.1(E) (Repl. Vol. 2008 & Cum. Supp. 2011)).
174. *Id.*
175. *Id.* (internal quotation marks omitted).
176. *Id.*
177. *Id.* at 95, 675 S.E.2d at 877.
178. *Id.*
179. *Id.*
180. *Id.* at 95–96, 675 S.E.2d at 877.

tors, not just the single issue of the standard of living.[181] The other factors the trial court considered in the *Robinson* decision included the fact that the marriage was thirty-seven years long, the fact that the wife had made significant non-monetary contributions, and the fact that the wife had been out of the workforce for thirty-four years and was, at that time, fifty-nine years old.[182]

2. Modification

In *Brown v. Brown*, the court of appeals addressed when a spousal support order may be modified.[183] In *Brown*, the husband appealed the trial court's dismissal of his petition to terminate spousal support based upon a material change in circumstances.[184] After entry of the divorce decree awarding the wife spousal support, the husband sought to retire from his job and filed a motion to terminate his obligation due to that material change in circumstances.[185]

The circuit court granted the wife's motion and dismissed the husband's petition, finding that the parties' consent decree had a binding legal effect on them and could not be modified at the unilateral request of the husband.[186] The wife previously filed a show cause motion alleging an arrearage in spousal support, which the consent decree subsequently resolved.[187]

The issue presented to the court of appeals was whether the consent decree, which resolved the show cause issue, constituted an agreement to modify spousal support and thus made it subject to the limitations of Virginia Code section 20-109(C) as ruled in *Newman v. Newman*.[188] The court of appeals distinguished the ruling in *Newman*, which involved a consent order that was created in the context of a motion to modify spousal support, not in

181. *See id.* at 96, 675 S.E.2d at 877; VA. CODE ANN. § 20-107.1(E)(2), (13) (Repl. Vol. 2008 & Cum. Supp. 2011).

182. *Robinson*, 54 Va. App. at 96–97, 675 S.E.2d at 878.

183. 53 Va. App. 723, 724–25, 674 S.E.2d 597, 598 (2009).

184. *Id.* at 726, 674 S.E.2d at 598.

185. *Id.*

186. *Id.*

187. *Id.* at 725–26, 674 S.E.2d at 598.

188. *Id.* at 727–28, 674 S.E.2d at 599 (quoting Newman v. Newman, 42 Va. App. 557, 568–69, 593 S.E.2d 533, 539 (2004) (en banc)); *see* VA. CODE ANN. § 20-109(C) (Repl. Vol. 2008 & Cum. Supp. 2011).

the context of a show cause petition.[189] The court of appeals reasoned that in *Newman* the order concerned the amount of spousal support payable to the wife by the husband, not the manner in which the husband would pay back a spousal support arrearage.[190] The court of appeals held that the contempt order before it did not state that it resolved all issues between the parties and was not endorsed in such a fashion as to indicate an overall resolution, but rather was endorsed as seen and agreed upon.[191] Therefore, the language of the consent order at issue in *Brown* concerned only the resolution of the show cause petition, and the husband could petition for a termination of support based upon the divorce decree.[192]

Another case regarding the termination of spousal support is *Stroud v. Stroud* (*Stroud II*), where the court refused to equate a lesbian relationship to a marriage.[193] *Stroud* involved two appeals, and an unusual set of circumstances. In the original appeal, known as *Stroud I*, the husband argued that his wife's spousal support should be terminated, because she was cohabiting in a relationship analogous to marriage, but the relationship was with another woman.[194] The trial court ruled as a matter of law that same-sex persons in Virginia cannot cohabit in a relationship analogous to marriage and found that the husband had failed to meet his burden of proof of cohabitation.[195] The decision of the trial court was reversed, and the matter remanded.[196]

In the subsequent appeal in *Stroud II*, the husband once again was requesting an award of attorney's fees, arguing that since the appellate court in essence had ruled in his favor, the wife should be obligated to pay his attorney's fees and costs.[197] The court of appeals, however, reasoned that the termination event in the parties' separation agreement was not self-executing but required a

189. *Compare Brown*, 53 Va. App. at 729, 674 S.E.2d at 600 (involving an order created in the context of a show cause petition), *with Newman*, 42 Va. App. at 560, 593 S.E.2d at 535 (involving an order created in the context of a motion to modify spousal support).

190. *Brown*, 53 Va. App. at 729–30, 674 S.E.2d at 600.

191. *Id.* at 730, 674 S.E.2d at 600.

192. *Id.* at 731, 674 S.E.2d at 601.

193. 54 Va. App. 231, 233–34, 239, 675 S.E.2d 627, 630, 633 (2009).

194. 49 Va. App. 359, 365–66, 641 S.E.2d 142, 145 (2007).

195. *Id.* at 375, 377, 641 S.E.2d at 150.

196. *Id.* at 379, 377, 641 S.E.2d at 151.

197. *Stroud II*, 54 Va. App. at 232–33, 677 S.E.2d at 629–30.

determination and proceeding before the trial court could determine if the husband met the burden of proof.[198] Since that issue first had to be decided by the trial court and was not a self-executing provision, i.e., termination of spousal support at a certain age or date, it was not an abuse of discretion for the trial court to deny an award of attorney's fees to the husband under the facts of that case.[199]

B. *Legislative Changes*

Recent legislation in this area of family law tackled only two issues: (1) *pendente lite* payments for certain debts in circuit courts, and (2) vocational evaluations in both circuit and J&DR courts. Although spousal support is frequently addressed by the court of appeals, the GA infrequently delved into this area, since the revision relative to rehabilitative spousal support occurred over ten years ago.[200]

For the first time, the 2010 amendment to Virginia Code section 20-108.1(H) statutorily permitted parties in both the circuit and J&DR courts to enter an order, upon showing good cause, to submit to a vocational evaluation by a vocational expert employed by the moving party.[201] This new statute also permits the expert to attend depositions.[202] Under the amendment, the order may contain: the name and address of the expert; the scope of the evaluation; and the time for filing the report with the court, and copies to the parties.[203]

The court also has the authority to award costs and fees for the evaluation and the services of the expert.[204] Prior to this provision, the practice was inconsistent across the state as to whether the court had the jurisdiction to order such an evaluation. Most practitioners voluntarily agree to this type of evaluation, except for

198. *Id.* at 238–39, 677 S.E.2d at 632.

199. *Id.*, 677 S.E.2d at 632–33.

200. *See* Melissa J. Roberts, *Domestic Relations*, 33 U. RICH. L. REV. 939, 948 (1999) (citing VA. CODE ANN. § 20-107.1 (Cum. Supp. 1999)).

201. Act of Mar. 29, 2010, ch. 176, 2010 Va. Acts 237, 239 (codified as amended at VA. CODE ANN. § 20-108.1(H) (Cum. Supp. 2011)).

202. *Id.*

203. *Id.*

204. *Id.*

the more contentious areas of practice or more contentious individual practitioners. With this amendment, the debate is now behind us.

A dispute existed across the state as to whether circuit courts, pursuant to Virginia Code section 20-103, had the authority to order the payment of specific debts. The dispute generally involved the payment of the mortgage on the marital residence. In 2011, the GA settled this dispute when it modified Virginia Code section 20-103(A)(i)(b) to authorize a court to order "that a party pay secured or unsecured debts incurred jointly or by either party."[205] Many courts were already exercising this jurisdiction, but others felt a statutory mandate was needed. Now, this issue is resolved.

VII. CUSTODY

A. *Case Law*

1. Modification of Visitation

In *Duva v. Duva,* the court of appeals held that a change in circumstances must be significant in order to alter visitation.[206] The trial court awarded primary physical custody to the mother with supervised visits to the father with the parties' children.[207] The agreement of the parties was reached in front of the trial court but never incorporated into the form of an order.[208] Subsequent to this ruling in 2006, in 2008, the father petitioned the court for a modification of visitation.[209] The father argued that since the mother had failed, pursuant to their earlier agreement, to take the children to their therapy sessions, a change in visitation was warranted.[210] The court of appeals, however, disagreed.[211]

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205. Act of Mar. 26, 2011, ch. 687, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 20-103(A)(i)(b) (Cum. Supp. 2011)).

206. *See* 55 Va. App. 286, 291, 303, 685 S.E.2d 842, 845, 851 (2009).

207. *Id.* at 289, 685 S.E.2d at 844.

208. *Id.*

209. *Id.* at 290, 685 S.E.2d at 844.

210. *Id.*

211. *Id.* at 291, 685 S.E.2d at 845.

The court of appeals found that the father failed to make the necessary connection between the children's missed therapy sessions and the necessity of a change in the visitation schedule, much less demonstrated that the missed therapy constituted a material change in circumstance.[212] The court of appeals affirmed the trial court's decision to not modify the visitation under the facts of the case.[213]

2. Third-Party Visitation

In *Florio v. Clark*, the Supreme Court of Virginia addressed three issues: (1) the appropriate standard to use in a third-party case where the unfitness of a parent is at issue; (2) the effect of a guardian *ad litem*'s recommendations; and (3) the importance of the child's preference.[214] In *Florio*, a biological father's unsuccessful attempts to win custody of his son encompassed essentially a five-year period of litigation.[215]

The child, at age five, lived with his maternal aunt and uncle, upon the death of the biological mother.[216] Thereafter, the father repeatedly attempted to gain custody of his son and was awarded temporary custody for five months pending the next hearing date in front of the juvenile court.[217] The juvenile court ultimately awarded custody to the aunt and uncle.[218]

This case went to the Supreme Court of Virginia which emphasized that the best interests of the child must be considered, and the presumption of custody being awarded to a natural parent may be rebutted by establishing certain factors by clear and convincing evidence: parental unfitness; a previous order of divestiture; voluntary relinquishment; abandonment; and special facts and circumstances constituting an extraordinary reason to take the child from his biological parent.[219] The court held that once

212. *Id.*
213. *Id.*
214. 277 Va. 566, 571–72, 674 S.E.2d 845, 847–48 (2009).
215. *Id.* at 569–70, 674 S.E.2d at 846.
216. *Id.* at 569, 674 S.E.2d at 846.
217. *Id.*
218. *Id.*
219. *Id.* at 571, 674 S.E.2d at 847 (quoting Bailes v. Sours, 231 Va. 96, 100, 340 S.E.2d 824, 827 (1986) (citations omitted)).

the presumption is successfully rebutted, the natural parent then must show that awarding him/her custody of his/her child would be in the child's best interests.[220]

The child had only lived with his father for five months throughout his entire life.[221] The father had little to do with the child in his first five years of life and never paid child support.[222] In addition, the father had a long misdemeanor record including multiple convictions for being drunk in public and DUIs.[223] The child was one with special needs.[224]

The aunt and uncle, however, were a part of the child's life since he was six months old and were well-suited to care for their nephew, since both were college-educated, both served in the United States Air Force, and both were able to provide the child with health insurance.[225]

The court affirmed the judgment of the court of appeals, ruling that continuing to award custody to the aunt and uncle would serve the best interests of the child.[226] This affirmation of the decision of the lower court occurred despite the fact that the child, who was then ten years old, expressed his desire to live with his father, and the guardian *ad litem* found that the father reformed himself and was no longer unfit.[227]

3. Relocation/Notice

Relocation is always a hot and difficult topic. In *Judd v. Judd*, the mother sought to relocate to Wisconsin with the parties' two young children over the father's objection.[228] The mother failed to give advance written notice of the specific street address where she planned to relocate, as the existing *pendente lite* order required.[229] However, she filed a complaint asserting that she would

220. *Id.*
221. *Id.* at 569, 674 S.E.2d at 846.
222. *Id.* at 571, 674 S.E.2d at 847.
223. *Id.*
224. *Id.* at 572, 674 S.E.2d at 847.
225. *Id.* at 569, 572, 674 S.E.2d at 846–48.
226. *Id.* at 573, 674 S.E.2d at 848.
227. *Id.* at 572, 674 S.E.2d at 848.
228. 53 Va. App. 578, 581–82, 673 S.E.2d 913, 914 (2009).
229. *Id.* at 585, 673 S.E.2d at 916.

be moving to Wisconsin.[230] The father objected on the ground that the mother did not give him adequate notice of her intention to relocate to Wisconsin, violating the thirty day notice requirement of the *pendente lite* order.[231]

The court of appeals affirmed the trial court, holding that the father was provided adequate notice of the mother's intention to relocate.[232] The court of appeals also found that a violation of Virginia Code section 20-124.5, which requires notice, does not prevent the parties from litigating relocation.[233] The mother met her burden of proof that the relocation would not impair the children's relationship with their father.[234] It was only in the very recent history that the father became more involved in the children's care and education.[235]

B. *Legislative Changes*

The most significant statutory amendments in the last several years relate to deployed military personnel's visitation rights.[236] The intent of the amendment seems to be to assure the family of these deployed military personnel with continued access to the their children.[237] Even though this amendment extends visitation rights to family members of deployed personnel, the statute also included appropriate safeguards.[238] Therefore, the GA recognized opportunities for mischief and harm to the children. These safeguards include the following: (1) the court must find that it is in the child's best interest before delegation of such visitation rights; (2) the delegation or the deploying member's visitation can be in whole or in part; (3) the child must have close and substantial relationship with the family member; (4) the order delegating visitation rights to the family member does not create a separate right

230. *Id.* at 586, 673 S.E.2d at 916.

231. *Id.* at 583, 673 S.E.2d at 915.

232. *Id.* at 585–86, 673 S.E.2d at 916.

233. *Id.* at 586, 673 S.E.2d at 916–17 (citing VA. CODE ANN. § 20-124.5 (Repl. Vol. 2008 & Cum. Supp. 2011)).

234. *Id.* at 589–90, 673 S.E.2d at 918.

235. *Id.* at 590, 673 S.E.2d at 918.

236. *See* Act of Mar. 22, 2011, ch. 351, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. § 20-124.8 (Cum. Supp. 2011)).

237. *See id.*

238. *See id.*

to visitation in such family member; (5) the deploying parent or the non-deploying parent upon a showing of a change of circumstances may file a motion to rescind the order; (6) the order terminates automatically upon the return of the deploying parent; and (7) finally, the court may conduct a telephonic or electronic order and video hearing.[239] If utilized appropriately, this new statute should be beneficial to a child's long-term relationship with extended family members.

VIII. CONCLUSION

Although not many, these past few years have provided some very significant developments in Virginia family law. Practitioners should take special note of case law interpreting the UCCJEA as well as the developments in the law relating to marital agreements. For those practitioners whose practice significantly involves military families, the advancements in the Virginia Military Parents Equal Protection Act warrant attention. Finally, the changes to the law relating to support and equitable distribution are the most important to those practicing in the divorce and support areas.

239. Ch. 351, 2011 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 20-124.8 to -124.9 (Cum. Supp. 2011)).