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Family Law

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FAMILY LAW

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INTRODUCTION

This Article provides a practical update on recent changes in Virginia law in the family law realm, including, but not limited to, divorce, custody and visitation, adoption, child support, and equitable distribution of assets and debts. There have been significant legislative amendments regarding the divorce process with the introduction of the Uniform Collaborative Law Act as well as the removal of the corroborating witness requirement for no-fault divorce matters. This succinct synopsis outlines legislative changes as well as significant judicial decisions within the past year.

I. MARRIAGE AND DIVORCE

A. *Legislation*

1. Celebrate Rites of Marriage

Virginia Code section 20-25 has been revised to broaden the list of those who are authorized to perform rites of marriage ceremonies.[1] Previously, other than ministers, rites could only be performed by a judge of a court of record, a judge of a district court, retired judges, as well as active, senior, or retired federal justices residing in the Commonwealth.[2] Senate Bill number 1142 added current members of the General Assembly, the Governor of

* J.D., 2017, University of Richmond School of Law; B.A., 2014, James Madison University. Thank you to Professor Allison A. Tait and Mary Burkey Owens, Esq., for their encouragement and guidance.

1. Act of Mar. 11, 2021, ch. 87, 2021 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 20-25 (Cum. Supp. 2021)).

2. § 20-25 (Repl. Vol. 2016).

Virginia, the Lieutenant Governor of Virginia, and the Attorney General of Virginia.[3]

2. Uniform Collaborative Law Act

Virginia enacted the Uniform Collaborative Law Act ("Act"), which outlines the collaborative process and its restrictions, and will be applicable to all agreements reached during the collaborative process executed on or after July 1, 2021.[4] With this enactment, Virginia followed the lead of nineteen states and the District of Columbia in standardizing this progressive form of alternative dispute resolution.[5] Divorcing parties and parents or third parties may choose to engage in a collaborative law process rather than adversarial litigation to resolve matters without court involvement.

Collaborative law aims to provide both parties with a transparent process and focuses on respectful communication. The collaborative process can assist families in resolving matters such as child support, equitable distribution, custody and visitation, and spousal support. Both spouses are represented by separate counsel who have received collaborative law training and certification[6] and are often assisted by third-party neutrals such as financial advisors, parenting specialists, and counselors that are all working together to provide an appropriate outcome for the family. The first step of the process requires both parties to endorse a written agreement of participation in the collaborative process to resolve the matter.[7] Communication that occurs during the collaborative law process is not admissible in court, is not subject to discovery, and is privileged.[8] However, this communication is not protected in certain circumstances, such as use of the information for a criminal purpose or if it is being used to prove or disprove the abuse or neglect of a child or adult.[9]

3. S.B. 1142, Va. Gen. Assembly (Spec. Sess. I 2021) (enacted as Act of Mar. 11, 2021, ch. 87, 2021 Va. Acts __, __).

4. Act of Mar. 25, 2021, ch. 346, 2021 Va. Acts __, __ (codified as amended at §§ 20-168 to -187 (Cum. Supp. 2021)).

5. Jennifer A. Bradley & Michael J. McHugh, *Ten Things Every Family Law Lawyer Needs to Know About the Uniform Collaborative Law Act*, 41 VA. FAM. L.Q. 6, 6 (2021).

6. §§ 20-170(A), 20-168 (Cum. Supp. 2021).

7. *Id.* § 20-170(A) (Cum. Supp. 2021).

8. *Id.* § 20-182 (Cum. Supp. 2021).

9. *Id.* § 20-184(A)(2)–(A)(3), (B)(2) (Cum. Supp. 2021).

The Act further outlines disqualification for attorneys representing parties throughout the collaborative process and after the termination of the collaborative process if it has been unsuccessful.[10] If a lawyer represents a party in a collaborative case, they are disqualified from representing a party from the collaborative matter in any proceeding related thereto.[11] The disqualification from representation further extends to any lawyer working in a firm associated with the attorney in the collaborative matter.[12] Therefore, it is not possible to screen out an attorney from others working within a firm for conflict purposes in collaborative matters.[13] However, there are three specific exceptions to disqualification of counsel.[14] These include requesting that a court incorporate the parties' collaborative agreement into an order or final decree of divorce, seeking for a court to enter an order that effectuates the terms of the parties' collaborative agreement, or litigation related to an emergency regarding the "health, safety, welfare, or interest of a party or a party's family or household member" if other counsel is not "immediately available."[15] The collaborative process is beneficial for many families and can lead to a positive outcome in an otherwise emotionally draining and contentious situation.

3. Corroborating Witnesses in No-Fault Divorce Matters

One of the most noteworthy legislative changes involved the long-standing requirement of a witness affidavit in no-fault divorce matters. Now, no-fault divorces can proceed on only a party's testimony or affidavit. Virginia Code sections 20-99(1) and 20-106(8) were amended to remove the language mandating a corroborating witness in no-fault divorce proceedings.[16] Historically, parties were required to provide a sworn statement by an outside individual corroborating facts such as the parties' date of marriage, date of separation, and "support to the grounds for divorce stated in the complaint or counterclaim."[17] The requirement of a corroborating

10. *Id.* § 20-175 (Cum. Supp. 2021).
11. *Id.* § 20-175(A) (Cum. Supp. 2021).
12. *Id.* § 20-175(B) (Cum. Supp. 2021).
13. *Id.*
14. *Id.* § 20-175(C) (Cum Supp. 2021).
15. *Id.* § 20-175(C)1–3 (Cum Supp. 2021).
16. Act of Mar. 18, 2021, ch. 194, 2021 Va. Acts __, __ (codified as amended at § 20-99, 20-106 (Cum. Supp. 2021)).
17. § 20-106(B)(1) (Cum. Supp. 2021); Bailey v. Bailey, 62 Va. 43, 49 (1871).

witness is longstanding in Virginia history, as it first came into effect in 1849 with the intention of preventing couples from collusion and to preserve "the sanctity of the marriage relations."[18]

Corroborating witness affidavits became particularly challenging for parties to obtain during the COVID-19 pandemic, as parties to divorce matters were often working from home, social distancing, and limiting public outings. Therefore, some litigants were left without any individual with direct knowledge of the facts that must be provided by a corroborating witness.[19] Even prior to the pandemic, some divorcing couples struggled to locate the required witness simply because both parties chose to keep their separation and pending divorce behind closed doors. With the corroborating witness requirement, it was virtually impossible to avoid sharing intimate details of a divorce matter with others outside the marriage.

Prior to this legislative change, Virginia was one of the rare states with a corroborating witness requirement for no-fault divorce matters.[20] The elimination of this requirement will streamline the no-fault divorce process, which preserves time and expense for litigants and maintains privacy.

II. SUPPORT

A. *Legislation*

1. Unemployment Benefits

With over 428,000 Virginians out of work at the height of the COVID-19 pandemic,[21] unemployment income became a focal point of many child support matters, as unemployment is considered by the court in calculating a party's gross income for purposes of

18. *See Bailey*, 62 Va. at 50.

19. Lawrence D. Diehl, *Legislative Update: 2021 General Assembly Session*, 41 VA. FAM. L.Q. 3, 3 (2021).

20. *Id.*

21. Colleen Curran, *Workers in Richmond and Beyond are Switching Jobs—and Fields—for Better Work-Life-Balance and Remote Work*, RICH. TIMES DISPATCH (July 9, 2021), https://richmond.com/business/local/workers-in-richmond-and-beyond-are-switching-jobs---and-fields---for/article_313a4d16-0a13-5b61-95b5-130691f61fd5.html [https://perma.cc/6G6C-AVAD].

support.[22] Virginia Code sections 20-60.3(11) and 63.1-1916(13) were amended to require notice provisions to include information about unemployment income.[23] These notice requirements must be stated in all child support orders entered by the court and must include an obligation for child support payors to provide the name, address, and telephone number for their current employer, information regarding any change of employment status, application for unemployment benefits, or receipt of unemployment benefits.[24] This information must be provided to the Department of Social Services or the court within thirty days of the change of employment or filing for unemployment.[25]

This amendment provides the Division of Child Support Enforcement and those receiving child support payments with the necessary information to seek a modification of child support if a material change in circumstances has occurred. With this mandated report of application for unemployment benefits, child support payees are also provided with the opportunity to gain insight into circumstances surrounding the payor's unemployment if the benefit request is denied.

2. State Program of Medical Assistance

Virginia Code section 16.1-260(A) now requires that petitioners filing for child support must be informed of the eligibility requirements for medical coverage through the Family Access to Medical Insurance Security ("FAMIS") or any other government-sponsored plan through the Department of Medical Assistance Services.[26] Virginia Code section 63.2-1903 was amended to provide that if the gross income of a custodial parent is equal to or less than 200% of the federal poverty guideline, the court must notify the parties of the availability of government-sponsored medical assistance.[27] These amendments ensure that parents seeking child support are aware of all government-sponsored healthcare benefits that may be accessible for their children.

22. § 20-108.2(C) (Cum. Supp. 2020).

23. Act of Mar. 18, 2021, ch. 222, 2021 Va. Acts __, __ (codified as amended at §§ 20-60.3, 63.2-1916 (Cum. Supp. 2021)).

24. § 20-60.3(11) (Cum. Supp. 2021).

25. *Id.*

26. *Id.* § 16.1-260(A) (Cum. Supp. 2021).

27. *Id.* § 63.2-1903(A) (Cum. Supp. 2021).

B. *Judicial Decisions*

In *Ridenour v. Ridenour*, the Court of Appeals of Virginia addressed deviation from the applicable child support guidelines because of a child's medical needs.[28] The parties were married for approximately thirteen years with five minor children, with one child ("B.R.") suffering from a traumatic brain injury.[29] B.R. had been working with an occupational therapist, Beatrice Bruno, for nine years prior to the trial in this matter.[30] Bruno also served as B.R.'s caregiver, as she would assist B.R. with eating, bathing, and his bedtime routine.[31] In addition to caring for B.R., Bruno aided the remaining four Ridenour children by teaching them effective communication and interaction techniques to use with B.R. and escorted them to a psychological evaluation.[32] At the time of trial, Bruno was working for the Ridenour family for thirty-five hours per week with about ten hours per week consisting of occupational therapy services for B.R.[33] The Ridenours were paying Bruno roughly $8000 per month for these services.[34] At trial, there was no dispute between the parties that B.R. required therapy services and that Bruno would continue to provide said services.[35] Further, the parties agreed the cost for Bruno's services would be apportioned with Father paying eighty percent and Mother paying twenty percent.[36]

The Loudoun County Circuit Court held that Father's eighty percent share of Bruno's services should be added to his child support obligation paid to Mother as a deviation from the guideline figure based on B.R.'s medical needs, with Father being ordered to pay $10,336 per month to Mother.[37] The circuit court reasoned that Bruno's services were more than simply therapy by stating, "she sometimes served as a caretaker for the other children. She also provided respite time for [M]other."[38] On appeal, the Court of

28. 72 Va. App. 446, 848 S.E.2d 628 (2020).
29. *Id.* at 450, 848 S.E.2d at 630.
30. *Id.* at 450, 848 S.E.2d at 630.
31. *Id.* at 451, 848 S.E.2d at 630.
32. *Id.* at 451, 848 S.E.2d at 630.
33. *Id.* at 451, 848 S.E.2d at 630.
34. *Id.* at 451, 848 S.E.2d at 631.
35. *Id.* at 451, 848 S.E.2d at 631.
36. *Id.* at 451, 848 S.E.2d at 631.
37. *Id.* at 449, 452, 848 S.E.2d at 630, 631.
38. *Id.* at 452, 848 S.E.2d at 631 (quoting the Loudoun County Circuit Court opinion).

Appeals of Virginia reviewed the case on the basis of an abuse of discretion.[39] Father appealed the decision with the argument that payment of Bruno's expenses for B.R. should be considered an unreimbursed medical expense as opposed to a deviation from the child support guidelines.[40]

The trial court's decision was affirmed.[41] Virginia law provides a framework for calculating the presumptive amount of child support in any given matter.[42] However, specific factors are listed in Virginia Code section 20-108.1 that may support a deviation from the guidelines and rebut such presumption.[43] A child's special needs "resulting from any . . . medical condition" are specifically listed as a factor for consideration by the court in support of a deviation.[44] Additionally, the Court examined Virginia Code section 20-108.2(D), which addresses payment of a child's unreimbursed medical expenses.[45] The Court clarified that section 20-108.2(D) does not restrict a court from deviation from the presumptive guideline figure, as there is no requirement pursuant to said statute that all unreimbursed medical costs be separated from the guideline calculation.[46] Therefore, the circuit court's decision was supported by adequate evidence, and there was no abuse of discretion.[47]

In a second case involving child support, the Court of Appeals of Virginia addressed a mother seeking to enforce and collect on a judgment against her ex-husband for unpaid child support.[48] In *Aufforth v. Aufforth*, Lorraine Aufforth obtained a judgment against her former husband, Allen Aufforth ("Debtor Husband"), for unpaid child support.[49] In 2012, the Fauquier County Circuit Court entered an order lengthening the enforcement period of the judgment to twenty years.[50] In 2019, Lorraine Aufforth requested that the Fredericksburg Circuit Court issue a summons to answer

39. *Id.* at 452, 848 S.E.2d at 631.
40. *Id.* at 449, 848 S.E.2d at 630.
41. *Id.* at 450, 848 S.E.2d at 630.
42. *Id* at 453, 848 S.E.2d at 632; VA. CODE ANN. § 20-108.1 (Cum Supp. 2021).
43. § 20-108.1 (Cum Supp. 2021); *Ridenour*, 72 Va. App. at 453–54, 848 S.E.2d at 632.
44. *Ridenour*, 72 Va. at 453, 848 S.E.2d at 632; § 20-108.1(B)(8) (Cum. Supp. 2021).
45. *Ridenour*, 72 Va. at 454, 848 S.E.2d at 632; § 20-108.2(D) (Cum. Supp. 2021).
46. *Ridenour*, 72 Va. at 455, 848 S.E.2d at 632; § 20-108.2(D) (Cum. Supp. 2021).
47. *Ridenour*, 72 Va. at 456, 848 S.E.2d at 633.
48. Aufforth v. Aufforth, 72 Va. App. 617, 621, 851 S.E.2d 77, 79 (2020).
49. *Id.* at 621, 851 S.E.2d at 79.
50. *Id.* at 621, 851 S.E.2d at 79.

debtor interrogatories to Joann Aufforth, her ex-husband's subsequent spouse, in reference to the child support judgment.[51] Lorraine Aufforth advised the debtor interrogatories were sought against Joann Aufforth because she was a "[b]ailee or other owner of property" and she "holds funds or assets for [Debtor Husband]."[52] Lorraine Aufforth relied upon several facts to support her request, including that Joann Aufforth had resided in Fredericksburg since 2003 and that Debtor Husband resided in a home owned by Joann Aufforth.[53]

Joann Aufforth filed a motion to dismiss the summons on the basis that the relevant statute permitting the summons refers to possession of goods and real estate cannot be the subject of a bailment.[54] Lorraine Aufforth argued that her basis for the interrogatories was intended to address more than real estate alone and that she believed Joann Aufforth and Debtor Husband continued having ongoing "economic activity."[55] The trial court granted the motion to dismiss on the basis that Lorraine Aufforth's summons lacked sufficient facts demonstrating that Joann Aufforth was a debtor to or bailee of Debtor Husband.[56] The Court of Appeals of Virginia reviewed the matter similarly to that of a demurrer, accepting the truth of the facts alleged and those that may be inferred.[57] In affirming the trial court's decision, the court of appeals reasoned that a "reasonable, good faith belief" that Joann Aufforth could be a debtor to or bailee of Debtor Husband was an inadequate basis to request a summons for debtor interrogatories.[58] The Court noted that Virginia Code section 8.01-506(A) clearly defines those who may be summoned, and that the statute was not enacted to enable individuals to determine whether "'economic relationship[s]' exist between a third party and a judgment debtor . . . ."[59]

51. *Id.* at 621, 851 S.E.2d at 79.
52. *Id.* at 622, 851 S.E.2d at 80.
53. *Id.* at 622, 851 S.E.2d at 80.
54. *Id.* at 622, 851 S.E.2d at 80; VA. CODE ANN. § 8.01-506(A) (Repl. Vol. 2015).
55. *Aufforth*, 72 Va. App. at 622–23, 851 S.E. 2d at 80.
56. *Id.* at 623, 851 S.E.2d at 80.
57. *Id.* at 624, 851 S.E.2d at 81.
58. *Id.* at 625, 851 S.E.2d at 81.
59. *Id.* at 627, 851 S.E.2d at 82.

III. CUSTODY, VISITATION, AND ADOPTION

A. *Legislation*

1. Grandparents

Virginia Code section 20-124.2 has been revised to include new language regarding visitation rights for grandparents of minor children.[60] This amendment provides an avenue for a grandparent who is kin to a parent that is incapacitated or deceased to file a petition for visitation of a grandchild.[61] The petitioning grandparent will have the ability to present evidence demonstrating the deceased or incapacitated parent's consent to visitation between the minor child and the grandparent.[62] The consent of the biological or adoptive parent must be demonstrated by a preponderance of the evidence.[63] If a grandparent successfully meets this evidentiary standard, the court may award visitation if it would be in the child's best interest.[64] This amendment is significant, as Virginia law presumes a child should be with his or her natural parent,[65] and the Supreme Court of the United States recognized the constitutional right for parents to raise their children in the case of *Troxel v. Granville*.[66]

2. Adoption

Virginia Code section 63.2-1241 was amended to broaden the definition of those who may adopt a child.[67] Previously, this section was restricted to spouses of biological or adoptive parents, but it has now been expanded to include other persons with "a legitimate

60. Act of Mar. 18, 2021, ch. 253, 2021 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 20-124.2(B2) (Cum. Supp. 2021)).

61. § 20-124.2(B2) (Cum. Supp. 2021). The term "incapacitated" is defined in § 64.2-2000 (Cum. Supp. 2021).

62. *Id.* § 20-124.2(B2) (Cum. Supp. 2021).

63. *Id.*

64. *Id.*

65. Bailes v. Sours, 231 Va. 96, 99–100, 340 S.E.2d 824, 827 (1986) (holding that the presumption in favor of a parent is strong but can be rebutted by "clear and convincing evidence").

66. 530 U.S. 57, 65–66 (2000).

67. Act of Mar. 18, 2021, ch. 252, 2021 Va. Acts __, __ (codified as amended at § 63.2-1241(A) (Cum. Supp. 2021)).

interest."[68] Section 20-124.1 clearly defines "person with a legitimate interest" and specifically lists grandparents, step-grandparents, stepparents, former stepparents, and other family members.[69] This section further states that the "term shall be broadly construed to accommodate the best interest of the child."[70] This revision provides opportunity to adopt for foster parents as well as couples that are not legally married[71] but are raising a child together. This type of proceeding is also referred to as a "confirmatory adoption," as it solidifies an individual that is already paramount in a child's life as a legal parent.[72]

This amendment specifically assists same-sex couples raising a child together that was conceived using assisted reproductive technology.[73] While both spouses in a same-sex marriage may be listed on a child's birth certificate, this document is not determinative of legal parentage.[74] Therefore, one or both spouses are at risk of experiencing difficulty if they are not a legal parent. These challenges include, but are not limited to, the receipt of federal benefits,[75] future litigation of custody and visitation for the minor child, and inheritance rights.[76] Finally, this amendment also diminishes the government funds paid for children in the foster care system, as adoptive parents are solely responsible for costs of raising the child after completion of the adoption.[77]

B. *Judicial Decisions*

In *Lively v. Smith*, the Court refused to overturn the adoption of a minor child by his biological grandparents.[78] Mother gave birth to her son, T.S., during her marriage and later divorced from her

68. § 63.2-1241(A) (Cum. Supp. 2021).

69. *Id.* § 20-124.1 (Repl. Vol. 2016).

70. *Id.*

71. *See* § 20-31.1 (Repl. Vol. 2016).

72. Benjamin L. Jerner & Leora Cohen Schiff, *Defining Parental Rights in Pennsylvania in the 21st Century*, 91 PA. B. ASS'N Q. 133, 140 (2020).

73. *See* Catherine P. Sakimura, *Beyond the Myth of Affluence: The Intersection of LGBTQ Family Law and Poverty*, 33 J. AM. ACAD. MATRIMONIAL LAWS. 137, 140–41 (2020) (discussing the use of assisted reproduction for LGBTQ parents).

74. *See* § 32.1-257(D) (Cum. Supp. 2020); § 64.2-103 (Repl. Vol. 2017).

75. 20 C.F.R. § 404.350 (2020).

76. *See* VA. CODE ANN. § 64.2-102(3) (Repl. Vol. 2017).

77. Lawrence D. Diehl, *Legislative Update: 2021 General Assembly Session*, 41 VA. FAM. L.Q. 5 (2021).

78. 72 Va. App. 429, 848 S.E.2d 620 (2020).

abusive husband.[79] In 2009, Mother was sentenced to incarceration for a period of four years because of multiple felony convictions.[80] Mother requested that her parents ("the Smiths") take custody of her son, and the Smiths were granted full legal and physical custody of their grandson by the Juvenile and Domestic Relations District ("JDR") Court.[81] In 2011, the Smiths petitioned the Tazewell County Circuit Court to formally adopt T.S.[82] Mother, while still incarcerated, executed a form consenting to the adoption by her parents.[83] Along with her signed consent, Mother sent counsel for the Smiths a letter thanking her for handling the matter.[84] Recognizing the biological mother's consent to the proceeding, the circuit court entered the final order of adoption on August 16, 2011.[85]

In 2014, the Smiths separated, and Ms. Smith was granted primary physical custody of her grandson.[86] Mother then petitioned the court seeking custody of T.S. due to her parents' divorce proceedings.[87] Mother's petition was denied, and the JDR Court ruled that she did not have standing to seek custody of the minor child, as a final order of adoption had been entered which terminated her parental rights.[88] In 2018, Mother filed suit to set aside her parents' adoption of her biological son and alleged that her consent was obtained fraudulently.[89] Mother argued that her consent was not valid as she was incarcerated at the time it was executed, making her a person under a disability pursuant to Virginia Code section 8.01-9.[90] In addition, Mother argued that this lack of due process made the application of Virginia Code section 63.2-1216 unconstitutional.[91] As no guardian ad litem was appointed for Mother during the adoption proceeding, she argued that she did not fully understand the effect of her consent to the adoption.[92]

79. *Id.* at 433, 848 S.E.2d at 621–22.
80. *Id.* at 433, 848 S.E.2d at 622.
81. *Id.* at 433, 848 S.E.2d at 622.
82. *Id.* at 433, 848 S.E.2d at 622.
83. *Id.* at 433, 848 S.E.2d at 622.
84. *Id.* at 433–34, 848 S.E.2d at 622.
85. *Id.* at 434, 848 S.E.2d at 622.
86. *Id.* at 434, 848 S.E.2d at 622.
87. *Id.* at 434, 848 S.E.2d at 622.
88. *Id.* at 435, 848 S.E.2d at 622–23.
89. *Id.* at 435, 848 S.E.2d at 623.
90. *Id.* at 435, 848 S.E.2d at 623.
91. *Id.* at 435, 848 S.E.2d at 623.
92. *Id.* at 435, 848 S.E.2d at 623.

Mother testified she believed her parents were caring for her son, and her signing of the consent form was simply a temporary arrangement until she was released from incarceration and able to care for T.S.[93]

The Tazewell County Circuit Court acknowledged that Mother was a person with a disability at the time of her consent, and she should have been appointed a guardian ad litem, which was a violation of due process and equal protection.[94] However, the circuit court further held that this violation did not mandate overturning the adoption.[95] The circuit court reasoned that this adoption was not procured by fraud, that Mother was fully aware of the adoption proceeding, and she did not attempt to overturn the adoption until approximately six years after her release from incarceration.[96] The Court of Appeals of Virginia reviewed the constitutional argument using a de novo standard and affirmed the trial court's decision.[97] The Court recognized that a parent's right to raise her child is "perhaps the oldest of the fundamental liberty interests recognized by [the] Court."[98] Nonetheless, the State also has a compelling interest in maintaining a permanence in family dynamics for children.[99] The Court noted that the language in Virginia Code section 63.2-1216 that protects a final order of adoption from attack after six months' time was to provide permanent stability for the adopted child and avoid repeated litigation.[100] The evidence presented to the circuit court indicated Mother understood the nature of the adoption proceedings and the consent she provided.[101] The Court found no basis for challenging the adoption of her minor child by her biological parents.[102]

93. *Id.* at 436, 848 S.E.2d at 623.
94. *Id.* at 437, 848 S.E.2d at 623–24.
95. *Id.* at 437, 848 S.E.2d at 624.
96. *Id.* at 437–38, 848 S.E.2d at 624.
97. *Id.* at 440, 446, 848 S.E.2d at 625, 628.
98. *Id.* at 441, 848 S.E.2d at 626 (citing L.F. v. Breit, 285 Va. 163, 182, 736 S.E.2d 711, 721 (2013)).
99. *Id.* at 442, 848 S.E.2d at 626.
100. *Id.* at 440, 848 S.E.2d at 625.
101. *Id.* at 444–45, 848 S.E.2d at 627.
102. *Id.* at 446, 848 S.E.2d at 628.

IV. EQUITABLE DISTRIBUTION

A. *Legislation*

There were no legislative updates on the subject of equitable distribution.

B. *Judicial Decisions*

In *Wood v. Martin*, the Supreme Court of Virginia addressed enforcement of an equitable distribution provision of the parties' property settlement agreement ("Agreement") that was subsequently incorporated into their final decree of divorce.[103] The provision in question required Husband to maintain an American General Life Insurance Company ("AGLIC") life insurance policy with his Wife as 50% beneficiary so long as he owed her a duty of spousal support, or until his youngest child graduated from college or reached age twenty-three, whichever occurred last.[104] The Agreement also stated that if either party died and did not comply with this life insurance provision, the death benefits payable under the policy would become a judgment against that noncomplying party's estate.[105] Husband violated the Court's order by removing his Wife as a 50% beneficiary of his life insurance policy and instead listing his subsequent spouse (45%), siblings (one at 40% and one at 5%) and a friend (10%) as beneficiaries (collectively the "new beneficiaries").[106] After changing the beneficiary designation, Husband took his own life and left a note explaining his ex-wife was intentionally not listed as a beneficiary.[107] Wife then filed suit to recover the death benefits owed to her under the parties' Agreement.[108]

Wife requested a declaratory judgment establishing her $750,000 interest in the life insurance policy (representing her 50% share) and brought a breach of contract action against Husband's estate, AGLIC, Access National Bank, and the trustees of

103. 299 Va. 238, 242, 848 S.E.2d 809, 810 (2020).
104. *Id.* at 242, 848 S.E.2d at 810.
105. *Id.* at 242, 848 S.E.2d at 811.
106. *Id.* at 243, 848 S.E.2d at 811.
107. *Id.* at 243, 848 S.E.2d at 811.
108. *Id.* at 243, 848 S.E.2d at 811.

Husband's living trust.[109] A consent order was entered requiring AGLIC to pay $74,062.50 to Access National Bank, to deposit the disputed $750,000 with the court, and to pay the remainder to the new beneficiaries listed on Husband's policy at the time of his death.[110] The Circuit Court of Fairfax County awarded the $750,000 to Wife.[111] On appeal, the new beneficiaries asserted that Wife was barred from receiving the policy proceeds as she was creditor pursuant to Virginia Code section 38.2-3122(B), and the Agreement notes that Wife's only remedy is a breach of contract action against Husband's estate.[112]

The Supreme Court of Virginia affirmed the circuit court's decision by classifying Wife's claim to the policy proceeds as an equitable assignment.[113] The Court reasoned that "'a contract to assign or a contract to transfer proceeds may create a right in the promisee very similar to that of an assignee' which '[may] be enforced against third parties.'"[114] The Court also disagreed with the assertion that Wife's claim was barred due to the language in the Agreement limiting Wife's recovery to a breach of contract action.[115] The Court held that the language "shall become a charge against the decedent's estate" from the agreement did not state this was an exclusive remedy.[116] Therefore, the Court affirmed the circuit court's decision and awarded Wife the 50% share of the life insurance proceeds.[117]

The Court of Appeals of Virginia examined an issue of equitable distribution classification in the case of *Price v. Peek*.[118] Husband and Wife resolved their divorce matter pursuant to a property settlement agreement which was incorporated into their final decree of divorce.[119] Pursuant to the agreement, Husband was solely responsible for the payment of all marital debt, and he agreed to hold

109. *Id.* at 243, 848 S.E.2d at 811.
110. *Id.* at 243–44, 848 S.E.2d at 811.
111. *Id.* at 244, 848 S.E.2d at 811.
112. *Id.* at 244, 848 S.E.2d at 811–12.
113. *Id.* at 246, 848 S.E.2d at 812.
114. *Id.* at 247, 848 S.E.2d at 813 (citing RESTATEMENT (SECOND) OF CONTS. § 330 cmt. c, illus. 6 (AM. L. INST. 1981)).
115. *Id.* at 251, 848 S.E.2d at 815.
116. *Id.* at 251–52, 848 S.E.2d at 815–16.
117. *Id.* at 252, 848 S.E.2d at 816.
118. 72 Va. App. 640, 851 S.E.2d 749.
119. *Id.* at 644, 851 S.E.2d at 750–51.

Wife harmless from any liability associated with said debt.[120] One marital debt was a joint loan from the Farm Credit Bureau of the Virginias ("Farm Credit Loan") that was collateralized by Wife's real estate, which was her separate property.[121] Husband later failed to make the necessary payments on the Farm Credit Loan and Wife agreed to refinance the loan to salvage her separate property being used as collateral.[122] As part of the refinance, the parties cosigned a second loan with First Bank & Trust ("First Bank & Trust Loan") and paid off the remaining balance on the Farm Credit Loan.[123] Husband testified that he believed Wife had agreed to be financially responsible for one-half of the First Bank & Trust Loan by cosigning.[124] Contrarily, Wife testified that she believed the First Bank & Trust Loan would be Husband's sole responsibility.[125]

Wife made a payment of $3000 toward the First Bank & Trust Loan but all further payments were made by Husband.[126] Ultimately, Husband became delinquent on the First Bank & Trust Loan and filed suit requesting a declaratory judgment against Wife to require her to pay one-half of the loan.[127] The Scott County Circuit Court ruled against Husband by finding the First Bank & Trust Loan was simply a replacement for the Farm Credit Loan, and the debt remained Husband's responsibility.[128] Husband appealed.

The Court of Appeals of Virginia analyzed Husband's argument that his obligation for payment of the Farm Credit Loan was satisfied by the novation of the First Bank & Trust Loan but was unpersuaded.[129] While one loan was replaced by a second loan that was cosigned by Wife, a true novation cannot occur without both parties intending to do so.[130] Wife expressed that her intention was not to assume any portion of the First Bank & Trust Loan, and she did not consent to Husband being relieved of sole responsibility of

120. *Id.* at 644, 851 S.E.2d at 750–51.
121. *Id.* at 644, 851 S.E.2d at 751.
122. *Id.* at 644, 851 S.E.2d at 751.
123. *Id.* at 644, 851 S.E.2d at 751.
124. *Id.* at 644, 851 S.E.2d at 751.
125. *Id.* at 644, 851 S.E.2d at 751.
126. *Id.* at 644–45, 851 S.E.2d at 751.
127. *Id.* at 644–45, 851 S.E.2d at 751.
128. *Id.* at 645, 851 S.E.2d at 751.
129. *Id.* at 645, 650, 851 S.E.2d at 751, 754.
130. *Id.* at 648–49, 851 S.E.2d at 753.

the marital debt.[131] Thus, Husband's responsibility for repayment of the marital debt as outlined in the parties' Agreement remained, regardless of the new form of the loan.[132]

V. PROCEDURE

A. *Service of Process*

The case of *Koons v. Crane* was particularly interesting, as the Court of Appeals of Virginia evaluated the applicability of Virginia's long-arm statute in show cause matters against a nonresident defendant.[133] Husband and Wife were divorced in April 2016 after executing a property settlement agreement that resolved all issues pending before the court.[134] The agreement required Husband to pay for Wife's insurance premiums and specific unreimbursed medical expenses in addition to his obligation of spousal support to Wife.[135] Husband was further ordered to pay the monthly mortgages on the parties' two condominiums until the properties were sold with an equal division of the net sale proceeds.[136] The agreement specified that either party's failure to make his or her required payments associated with the condominiums would be paid from said party's share of the net proceeds and given to the other party.[137] Both parties were ordered to inform the other of their residential address so long as any of the obligations under the agreement remained outstanding.[138]

Two years later, Wife filed a motion for show cause against Husband for his noncompliance with the terms of the final decree of divorce and a motion to modify spousal support.[139] At the time the final decree was entered, Husband resided at an address in Woodland, Washington.[140] The Fairfax County Circuit Court issued a show cause rule against Husband and scheduled the matter for a

131. *Id.* at 649, 851 S.E.2d at 753.
132. *Id.* at 649–50, 851 S.E.2d at 753.
133. 72 Va. App. 720, 853 S.E.2d 524 (2021).
134. *Id.* at 725, 853 S.E.2d at 527.
135. *Id.* at 725, 853 S.E.2d at 527.
136. *Id.* at 725, 853 S.E.2d at 527.
137. *Id.* at 725, 853 S.E.2d at 527.
138. *Id.* at 726, 853 S.E.2d at 527.
139. *Id.* at 726, 853 S.E.2d at 527.
140. *See id.* at 726–28, 853 S.E.2d at 527–28.

hearing, which Husband failed to attend.[141] Wife provided documentation that Husband had been served via substituted service on another household resident, his mother-in-law, at the Washington address he provided in the divorce matter.[142] Wife explained to the Court that Husband e-mailed her in 2017 and provided an updated address that listed a post office box in Saudi Arabia.[143] Wife testified that she had no updated residential address for Husband and that her counsel attempted to send the show cause rule to Husband via the Saudi Arabia post office box but was unsuccessful.[144] In addition, Wife e-mailed the show cause rule to Husband in October 2018 at the e-mail address he was using as of March 2018.[145] Wife's counsel then had the amended show cause rule served on Husband at the Washington address using substituted service on his mother-in-law.[146] The circuit court ruled that Husband had been appropriately served with the show cause rule and heard evidence in the matter.[147] The circuit court found Husband in contempt for his violation of the divorce decree and continued the case to a new date for the presentation of further evidence.[148]

Prior to the additional hearing date, Husband's counsel made a special appearance and sought to dismiss the show cause rule based on inadequate service of process.[149] Husband argued that substituted service at the Washington address was invalid, as it was not his "usual place of abode," referencing Virginia Code section 8.01-296(2)(a).[150] Husband presented evidence that he moved from the Washington residence when he became employed in Saudi Arabia and had only returned to that address once in 2017 and once in 2018.[151] The circuit court again held that Husband had been properly served with the show cause rule, harping on Husband's failure to comply with the obligation to notify Wife or the

141. *Id.* at 726, 853 S.E.2d at 527.
142. *Id.* at 726, 853 S.E.2d at 527–28.
143. *Id.* at 726–27, 853 S.E.2d at 528.
144. *Id.* at 726–27, 853 S.E.2d at 528.
145. *Id.* at 727, 853 S.E.2d at 528.
146. *Id.* at 727, 853 S.E.2d at 528.
147. *Id.* at 727–28, 853 S.E.2d at 528.
148. *Id.* at 728, 853 S.E.2d at 528.
149. *Id.* at 728–29, 853 S.E.2d at 529.
150. *Id.* at 729, 853 S.E.2d at 529 (quoting VA. CODE ANN. § 8.01-296(2)(a) (Repl. Vol. 2015)).
151. *Id.* at 729, 853 S.E.2d at 529.

court of his residential address pursuant to the parties' final decree of divorce.[152]

Husband appealed on the basis that he was not adequately served with the show cause rule and even if service was upheld, substituted service is not sufficient for a finding of contempt.[153] Husband argued that the Washington address where substituted service was effectuated was not his "usual place of abode" as noted in Virginia Code section 8.01-296.[154] The Court disagreed with Husband's argument, as the evidence presented did not demonstrate Husband had abandoned the Washington residence.[155] Specifically, Husband did not provide Wife or the Court with a notice that his address had changed, he provided Wife with a post office box in Saudi Arabia, as opposed to a residential address, and Husband had returned to the Washington residence on at least two occasions.[156] Husband then asserted that he had not been properly served as the relevant statute states the rule must be "served on the person" and the rule was not hand-delivered in this matter.[157] The Court clarified that this language simply refers to in personam jurisdiction, which can be accomplished through substituted service pursuant to Virginia Code section 8.01-296(2).[158]

Husband further argued that personal service was required for a finding of contempt pursuant to *Estate of Hackler v. Hackler*.[159] The Court distinguished the present case from *Hackler*, as that matter contained a contempt finding against a deceased spouse with the use of estate funds to purge the contempt.[160] In contrast, the current case contains a contempt finding against a living spouse that was not present in court, because he evaded personal service of the show cause.[161] The Court held that substituted service on a nonresident was appropriate pursuant to Virginia's long-arm statute.[162]

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152. *Id.* at 729, 853 S.E.2d at 529.
153. *Id.* at 731–32, 853 S.E.2d at 530.
154. *Id.* at 734, 853 S.E.2d at 532 (quoting § 8.01-296(2)(a) (Repl. Vol. 2015)).
155. *Id.* at 735, 853 S.E.2d at 532.
156. *Id.* at 735, 853 S.E.2d at 532.
157. *Id.* at 732–33, 853 S.E.2d at 531.
158. *Id.*at 732–33, 853 S.E.2d at 531.
159. *Id.* at 735, 853 S.E.2d at 532; *see* 44 Va. App. 51, 71, 602 S.E.2d 426, 436 (2004).
160. *Koons*, 72 Va. App. at 735–36, 853 S.E.2d at 532.
161. *Id.* at 736, 853 S.E.2d at 532.
162. *Id.* at 734, 853 S.E.2d at 531; VA. CODE ANN. § 8.01-328.1 (Cum. Supp. 2021).

CONCLUSION

In conclusion, Virginia courts and Legislature have continued to analyze and clarify the challenging and developing issues encapsulated within family law matters. Recent legislative changes demonstrate a progressive approach to family law matters with the removal of corroborating witnesses in no-fault divorce matters, enactment of the Uniform Collaborative Law Act, and the expansion of an adoption statute to include persons with "a legitimate interest."[163] In addition, the addressed issues that surfaced as a result of the COVID-19 pandemic by including a new requirement for child support payors to provide information about the receipt of or application for unemployment benefits.

163. § 63.2-1241(A) (Cum. Supp. 2021).