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Allocating the Fruits of a Marriage: A Look at Virginia's New Domestic Relations Statute

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COMMENTS

ALLOCATING THE FRUITS OF A MARRIAGE: A LOOK AT VIRGINIA'S NEW DOMESTIC RELATIONS STATUTE*

Divorce is on the rise. The social, emotional, and economic partnership that constitutes the foundation of the family is succumbing to both external and internal pressures, resulting in an alarming rate of divorce, an event which has significant consequences for the involved spouses and children.[1]

For many years Virginia has lagged behind the mainstream of states in recognizing marriage as a partnership and in offering a contemporary process by which the major issues in divorce proceedings can be resolved.[2]

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1. Yearly, over one million marriages end in divorce:

> Divorce has long since become a fact of American life. . . . But however common, it is never routine. Beneath the numbing statistics lie families *in extremis*, couples who, amid their pain and anger and guilt and confusion, ask courts to bridle the chaos they have unleashed. That task has always made the law uneasy; today it borders on overwhelming.

Divorce American Style, NEWSWEEK, June 10, 1983, at 42 (emphasis in original).

The emotional impact of divorce is significant, but the economic aspects of divorce may be equally, if not more, traumatic for the parties involved, as they face the reality that an economic, as well as a social unit, has dissolved. *See* Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 U.C.L.A. L. REV. 1181 (1981).

2. Prior to 1982, Virginia was one of three states following the common law approach in the distribution of property upon divorce. With the enactment of VA. CODE ANN. § 20-107.1-.3 (Cum. Supp. 1982), Virginia became an equitable distribution state.

As to allocation of property upon divorce the states fall into three broad categories: community property states, common law title states, and equitable distribution states. There are variations within each category, but generally: 1) in the eight community property states, marriage is viewed as a true economic partnership, and the community property is divided equally upon divorce; 2) in the two common law title states, allocation of property is restricted by legal title unless the spouse can establish a basis for imposing a constructive trust on the other's property; and 3) in the remaining forty states division of property upon divorce is based on equitable principles, giving the courts equitable power to distribute property either directly or indirectly through a monetary award. *See* Greene, *Comparison of the Property Aspects of the Community Property and Common-Law Marital Property Systems and Their Relative Compatibility with the Current View of the Marriage Relationship and the Rights of Women*, 13 CREIGHTON L. REV. 71 (1979). For an excellent listing and very brief summary of distribution of property in each state in the three categories, see

Virginia's past statutory basis for support, custody, and property decisions in divorce proceedings has not met the needs of the contemporary family as it dissolves and re-forms in independent, but often still interdependent units. Recognizing that change was needed, the General Assembly in its 1982 session enacted a comprehensive new statute dealing with spousal support, child custody and support, and allocation of property based on an equitable distribution concept.[3] With this new statute, Virginia has moved from a conservative approach to one more in line with the mainstream of state statutory enactments regarding divorce.[4] This move was made cautiously, reflecting Virginia's basically conservative attitude towards divorce.[5] Nevertheless, the new statute will dramatically affect divorce actions in Virginia. This comment will examine the statute, its background, development and implications for Virginia divorce actions.

I. Development of the New Statute

A. *Prior Law*

Former section 20-107 applies to divorce proceedings commenced before July 1, 1982.[6] This single section set forth the authority of the court to determine the issues of spousal support, property rights, and child custody and support based on a single general set of factors. The statute gave the court discretion to award spousal support in the form of either periodic payments or a lump sum based on consideration of the parties' property interests.[7] However, there were no provisions to guide

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Foster & Freed, *Family Law in the Fifty States: An Overview as of September 1982*, 8 Fam. L. Rep. (BNA) 4065, 4079-83 (Sept. 28, 1982).

3. Va. Code Ann. § 20-107.1-.3 (Cum. Supp. 1982).

4. *See supra* note 2.

5. Retention of fault as an absolute bar to spousal support and as a consideration in the equitable distribution of property, as well as the indirect method of property distribution by means of a monetary award instead of the ordering of a direct transfer by the court, are indicative of a conservative approach to the economic dissolution of a marriage.

6. Va. Code Ann. § 20-107 (Cum. Supp. 1981).

7. Section 20-107 provided in pertinent part:

> Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce, whether from the bond of matrimony or from bed and board, and upon decreeing that neither party is entitled to a divorce, the court may make such further decree as it shall deem expedient concerning the maintenance and support of the parties, or either of them, and the care, custody and maintenance of their minor children, and may determine with which of the parents the children or any of them shall remain, provided, that the court shall have no authority to decree support of children or support and maintenance of the spouse to continue after the death of the person ordered to pay such support and maintenance. The court may provide in its decree for visitation privileges for grandparents, stepparents or other family members. The court shall, in determining such support and maintenance for the spouse or children, consider the following:
>
> (1) The earning capacity, obligations and needs, and financial resources of the

the court in determining when a lump sum was appropriate or how property interests should be valued in arriving at a lump sum amount. Fault operated as an absolute bar to spousal support and any lump sum award.[8]

Former section 20-107 had evolved over a number of years as the result of several amendments. The basic criteria for consideration by a court in determining spousal support were inserted in 1975.[9] In 1977, two additional factors were added: the "homemaker" provisions recognizing the contributions, monetary and non-monetary, of each party to the well-being of the family and a provision recognizing "the property interests of the parties both real and personal."[10] The 1977 amendment also added the provision authorizing the court in its discretion to award a lump sum payment in addition to or in lieu of periodic spousal support payments.[11] The lump sum payment was to be "based upon consideration of the property interests of the parties except those acquired by gift or inheritance during the marriage."[12]

Although the 1975 amendment basically codified the existing law, it indicated possible General Assembly recognition of a wife's obligation to support herself.[13] The 1977 amendment reflected a nationwide trend to recognize the non-monetary contributions of a homemaker in determining spousal support. The lump sum payment provision had the greatest potential for dramatically affecting awards of spousal support;[14] however,

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parties;

(2) The education and training of the parties and the ability and opportunity of the parties to secure such education and training;

(3) The standard of living established during the marriage;

(4) The duration of the marriage;

(5) The age, physical and mental condition of the parties;

(5a) The contributions, monetary and nonmonetary, of each party to the well-being of the family;

(5b) The property interests of the parties, both real and personal;

(6) Such other factors as are necessary to consider the equities between the parties.

In addition to or in lieu of periodic payments for maintenance and support of a spouse, the court may, in its discretion, award a lump sum payment, based upon consideration of the property interests of the parties except those acquired by gift or inheritance during the marriage.

Provided, however, that no permanent support and maintenance or lump sum payment for the spouse shall be awarded by the court from a spouse if there exists in his or her favor a ground of divorce under any provision of §§ 20-91(1) through (8) or 20-95.

Id.

8. *Id.*

9. *Id.* § 20-107 (1)-(6).

10. *Id.* § 20-107 (5)(a).

11. *Id.*

12. *Id.*

13. *See* Holt, *Support v. Alimony in Virginia: It's Time to Use the Revised Statutes*, 12 U. RICH. L. REV. 139, 145-58 (1977).

14. *Id.* at 152. In 1972, the Virginia Supreme Court had allowed a lump sum award of

the potential failed due to the courts' uncertainty about application of the lump sum alternative.[15] Virginia remained one of only three states wedded to a common law scheme, despite the increasing complexity of spousal support and the need for a more equitable distribution of property.[16]

During the period from 1975 to 1980, former section 20-107 came under attack as numerous efforts were launched to make additions, deletions, or major revisions to the statute. Although unsuccessful, the consistent and strengthening challenges indicated that section 20-107 must eventually succumb to major revision. In 1975 and 1976, amendments which would authorize the courts to divide all jointly held property failed.[17] In 1977, a comprehensive revision was introduced. This revision included proposals which would: (1) authorize the courts to divide jointly held property, to divide marital property equitably,[18] and to decree provision for the family home for minor children and/or the spouse;[19] (2) establish a separate section, 20-107.1, relating specifically to custody and support of minor children and including a comprehensive list of criteria for the courts to consider;[20] and (3) confine the factors enumerated in section 20-107 to the issue of spousal support and eliminate the provision making fault a bar to such support.[21] Although these proposals failed, the challenges indicated a growing dissatisfaction with Virginia's statutory approach to spousal support and the division of property based on the elusive lump sum award. Finally in 1980, H.B. 730 was proposed; but it was continued to

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$6,000 to the wife for residential furnishings and equipment, in addition to support. Turner v. Turner, 213 Va. 42, 43-44, 189 S.E.2d 361, 363 (1972). In 1977, § 20-107 was amended to authorize the court expressly to award a lump sum based on the parties' property interests. One Virginia commentator observed that: "A court in its discretion can, however, order one lump sum payment to be made by considering the value of the property interests of the parties excluding property acquired by gift or inheritance. The amendment becomes quite significant when one considers the effect it will have." Holt, *supra* note 13, at 151.

15. According to the Joint Legislative Subcommittee:

> Much controversy arose after the 1977 amendment to § 20-107 authorized the court to 'award a lump sum payment based upon consideration of the property interests of the parties. . . .' Some authorities claimed this wording authorized the courts to, in effect, equitably apportion marital property. Others interpreted it as simply being an alternative method of awarding support which would otherwise be paid periodically. There was also a question as to what criteria were to be applied in arriving at a lump sum.

REPORT OF THE JOINT SUBCOMMITTEE STUDYING SECTION 20-107 OF THE CODE OF VIRGINIA TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA, H. DOC. No. 21, at 6 (1982) [hereinafter cited as JOINT SUBCOMMITTEE REPORT].

16. *See supra* note 2.
17. H.B. 1470, 1975 Va. Gen. Assem.
18. H.B. 1738, 1975 Va. Gen. Assem.
19. H.B. 1739, 1975 Va. Gen. Assem.
20. H.B. 1741, 1975 Va. Gen. Assem.
21. H.B. 1742, 1975 Va. Gen. Assem.

the 1981 General Assembly.[22] By refining and integrating portions of existing section 20-107 and many of the previously unsuccessful modifications and revisions, this comprehensive bill provided the starting point for discussion of the development of the ultimately successful revision of section 20-107.

B. *Legislative Development of the New Statute*

In 1981, the General Assembly called for the creation of a joint subcommittee to study section 20-107 and to examine the possibility of expanding a court's authority to determine and allocate real and personal property.[23] The obvious need to clarify certain provisions of section 20-107, particularly the provision relating to lump sum awards,[24] together with a national trend towards an equitable approach to property distribution indicated that Virginia's common law approach could not adequately resolve the complexities of spousal support and property allocation in contempoary divorce proceedings.[25]

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22. H.B. 730, 1975 Va. Gen. Assem. (offered 1980 and carried over to 1981).

23. H.J. Res. 304, 1981 Va. Gen. Assem., outlined the purposes of forming the subcommittee:

> Whereas, the problems pertaining to child support, support, and maintenance of spouses, and allocation of real and personal property in divorce proceedings have become increasingly complex; and
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> Whereas, certain amendments, particularly that of 1977 pertaining to lump sum payments, have given rise to the need for clarification; and
>
> Whereas, a study is needed to determine whether the authority of the court in such divorce proceedings should be expanded insofar as the determination of ownership and allocation of real and personal property is concerned; now, therefore, be it
>
> Resolved by the House of Delegates, the Senate concurring, that the Committees for Courts of Justice of the House of Delegates and Senate are hereby requested to establish a joint subcommittee to study the status and present state of the law concerning support and maintenance of parties as set forth in § 20-107 of Title 20 of the Code of Virginia; and, be it
>
> Resolved Further, That the joint subcommittee shall report its findings and recommendations, if any, for suggested legislation to the Governor and the 1982 General Assembly.
>
> The cost of conducting this study shall not exceed five thousand dollars.

Id. The subcommittee members included: Del. J. Samuel Glascock, Chairman; Del. Ralph L. Axselle, Jr.; Sen. Herbert H. Bateman; Del. C. Richard Cranwell; Sen. Edward M. Holland; Del. Thomas W. Moss, Jr.; Sen. William F. Parkerson, Jr.; Del. Ford C. Quillen; Del. Mary Sue Terry; Harry P. Anderson, Esq.; Donald W. Lemons, Esq.; Betty A. Thompson, Esq. JOINT SUBCOMMITTEE REPORT, *supra* note 15, at 2.

24. *See supra* note 15.

25. The Joint Legislative Subcommittee reported that:

> Virginia is currently one of only three states in which the court is given no authority to distribute marital assets between the spouses upon their divorce. West Virginia and Mississippi share our common law approach whereby title to property determines its ownership unless the non-titled spouse can establish an interest through a constructive or resulting trust. The effect of this system is that generally a spouse can share in marital assets which are not jointly held and are not in his or her name only

The subcommittee met throughout the summer and fall of 1981, focusing its attention on three major areas of concern: "(1) spousal support; (2) child custody and support; and (3) equitable apportionment of marital property."[26] Efforts were made to maximize input from a variety of sources in order to aid the subcommittee in its deliberations.[27] Research was conducted to determine the status of the law in other jurisdictions with particular emphasis on the approaches presented by the Maryland, North Carolina, and Florida statutes.[28] The first major controversy in the subcommittee's deliberations was resolved in September, 1981, when the subcommittee agreed to recommend some method of equitable property distribution.[29] The next two major controversies centered on (1) whether the court should have authority actually to divide property or rather only to award a lump sum based on property value,[30] and (2) whether fault should be an absolute bar or only a factor in establishing the amount of periodic spousal support and in making an equitable property distribution.[31]

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through the support award. This is the case irrespective of the contributions such spouse may have made over the years to the well-being of the family and to the acquisition of the marital property.

Unfortunately, using the support award as a vehicle for property compensation is defective in a number of ways. The death of an obligor spouse absolutely terminates the support obligation as does the remarriage of the obligee spouse. Also, marital fault serves as a total bar to support for a spouse who may otherwise have made sizeable contributions to the family wealth and prosperity. All too often, the spouse upon whom a support obligation has been placed refuses to comply, necessitating burdensome enforcement suits, assuming the defaulting spouse can be located.

The historical trend in this country has been to recognize the equity inherent under the common law scheme and to provide for some form of equitable property distribution when a marriage is terminated. The fact that almost forty states (excluding eight community property states) have abandoned the commonwealth's present approach and adopted some form of divorce settlement which acknowledges the partnership status of marriage is indicative of the strength of this movement.

JOINT SUBCOMMITTEE REPORT, *supra* note 15, at 4-5.

26. *Id.* at 6.

27. Public hearings were held on June 24, July 22, September 10, October 5, and December 8, 1981. The subcommittee contacted all the circuit court judges, inviting them to share any opinions they had written interpreting former VA. CODE ANN. § 20-107 (Cum. Supp. 1981). The subcommittee and staff also contacted local, state and national bar associations. JOINT SUBCOMMITTEE REPORT, *supra* note 15, at 4.

28. *See* Minutes of the Joint Subcommittee Studying Section 20-107 of the Code of Virginia (July 22, 1981, & Sept. 10, 1981) [hereinafter cited as Minutes (July) and Minutes (Sept.)].

29. The vote to consider equitable distribution was unanimous. Minutes (Sept.), *supra* note 28, at 3.

30. "Most members favored a lump sum distribution based on property value." *Id.*

31. "In a close vote, the subcommittee felt that fault should bar periodic support. By a five to four vote, the subcommittee favored fault as a consideration as opposed to its being no consideration at all. No members felt that fault should bar property distribution." *Id.* at 4.

The 1980 bill which had been continued to the 1981 session was used as a basis for the initial drafting of H.B. 691. Redrafts of the bill incorporated conclusions reached by the subcommittee and pertinent sections of the North Carolina, Maryland, and Florida statutes.[32] In January, 1982, the subcommittee reported its findings, recommendations, and the suggested legislation to the Governor and the General Assembly.[33]

On January 29, H.B. 691 was presented to the House of Delegates and referred to the House Committee for Courts of Justice. The committee made two amendments,[34] the first changing a portion of the definition of separate property and the second inserting the last sentence of section 20-107.3(H), relating to separation agreements. The bill was reported out

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32. "Staff was requested to draft for the subcommittee's consideration a modification of House Bill No. 730 incorporating the above factors and pertinent sections of the North Carolina, Maryland and Florida statutes." *Id.* "Above factors" refers to provisions regarding the method of equitable distribution, fault as a bar to support and as a consideration in property distribution, support for children aged 18 to 21 if full time students, and factors such as insurance protection and retirement benefits.

33. JOINT SUBCOMMITTEE REPORT, *supra* note 15, at 6. The Report included an Introduction, Historical Background, Executive Summary, Findings and Considerations, and the Signatures of the Subcommittee members. Appendices included H.J.R. 304 and the recommended legislation, H.B. 691. The Findings capsuled in the Executive Summary are as follows:

> Following a thorough and comprehensive study of problems pertaining to (1) support and maintenance of spouses; (2) child support; (3) and the allocation of real and personal property in divorce proceedings, the joint subcommittee recommends in these respective areas:
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> 1. That spousal support be barred absolutely by fault; that no provision be made for temporary or rehabilitative support; and that lump sum awards are simply a varient of spousal support subject to the same factors as period support.
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> 2. That the court consider a number of relevant factors in determining child custody and the amount of child support; that there is no support obligation for children age eighteen or older; and that in custody cases the child's welfare is paramount with neither assumption nor inference of law in favor of the father or mother.
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> 3. That the court is to determine which property owned by the parties is property of the marriage (marital property); that the court is to value the marital property; that the court is empowered to grant monetary awards based on an equitable apportionment of the marital property; that the court may partition jointly titled marital property; that no power is given the court to affect the title to any property; that a monetary award may be made payable either in a lump sum or over a period of time in fixed amounts; that a lump sum may be satisfied, in whole or in part, by the conveyance of property with the court's consent; that there be no presumption in favor of an equal distribution of marital property; that the amount of the award be determined by the court after consideration of eleven stipulated factors; that fault be a consideration in determining the lump sum award, but not be a bar thereto; that spousal and child support are interrelated with the lump sum award and may be effected by such award; and that the divorce decree may affirm, ratify or incorporate a proper agreement between the parties.

JOINT SUBCOMMITTEE REPORT, *supra* note 15, at 6.

34. VA. CODE ANN. §§ 20-107.3 (A)(1)(ii), -107.3(H) (Cum. Supp. 1982).

of committee and easily passed the House. It was communicated to the Senate where it was referred twice to the Senate Committee for Courts of Justice. On the floor of the Senate, three amendments were made: (1) the wording of the pension and retirement factor in 20-107.3(E)(8) was changed,[35] (2) section 20-107.3(G), also relating to pension and retirement benefits was inserted,[36] and (3) the act was made prospective in its application.[37] The Senate passed H.B. 691 with amendments on March 12, and the Senate amendments were accepted by the House. On April 9, the Governor approved Virginia's new statute, to be effective July 1, 1982.[38]

II. The New Statute

The new statute clarifies the court's authority to resolve the issues of support and property division incident to a divorce proceeding. It clearly establishes the court's authority to distribute marital property indirectly and equitably by means of a monetary award[39] and allows the court to partition jointly held property in the final divorce decree.[40] The statute is also designed to facilitate the process of determining the major issues facing the court in a divorce proceeding—spousal support, child support and custody, and equitable property distribution by a monetary award. Although these issues are economically interrelated, the new statute provides a separate and comprehensive list of criteria to guide the court's resolution of each issue.[41]

A. *Spousal Support*

Section 20-107.1 deals specifically with spousal support.[42] Although

35. *Id.* § 20-107.3(E)(8).

36. *Id.* § 20-107.3(G).

37. 1982 Va. Acts, ch. 309, cl. 3.

38. The Senate vote was 28 to 10 in favor of H.B. 691 as amended. The House vote was 77 to 9 in favor of the Senate version. The bill initially passed the House by a vote of 85 to 11. History of H.B. 691, 1982 Virginia General Assembly (computer printout) (available from Legislative Services, Virginia General Assembly, Richmond, Va.).

39. Va. Code Ann. § 20-107.3 (Cum. Supp. 1982).

40. *Id.* § 20-107.3(C).

41. The criteria for determining spousal support and maintenance are set out in § 20-107.1(1)-(9); for determining custody and visitation of minor children in § 20-107.2(1)(a)-(f); for determining child support in § 20-107.2(2)(a)-(g); for determining the amount of the marital property distribution monetary award and method of payment in § 20-107.3(E)(1)-(11).

42. Although many states use the term alimony, in 1975 the Virginia legislature abolished the words "alimony" and "husband" from the Code and replaced them with the non-sexist terms "support and maintenance" and "spouse." Holt, *supra* note 13, at 140. *See* Foster & Freed, *supra* note 2, at 4083. Va. Code Ann. § 20-107.1 (Cum. Supp. 1982) provides:

> Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce, whether from the bond of matrimony or from bed and board, and upon decreeing that neither party is entitled to a divorce the court may make such further decree as it shall deem expedient concerning the maintenance and support of the spouses.

confined to support and maintenance, section 20-107.1 is basically a recodification of former section 20-107.[43] Fault continues to operate as an absolute bar to a needy spouse's receipt of support,[44] making Virginia one of only a small number of states which continue to bar spousal support on fault grounds.[45] Although the legislative subcommittee studying section 20-107 considered the possibility of removing fault as an absolute bar to spousal support, it ultimately concluded that "a party legally responsible for the termination of a marriage should not receive benefit from his act to the detriment of the aggrieved party."[46] A modification which would

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However, the court shall have no authority to decree maintenance and support payable by the estate of a deceased spouse. Any maintenance and support shall be subject to the limitations set forth in § 20-109, and no permanent maintenance and support shall be awarded from a spouse if there exists in such spouse's favor a ground of divorce under any provision of § 20-91 (1), (3) or (6) or § 20-95. The court, in its discretion, may decree that maintenance and support of a spouse be made in periodic payments, or in a lump sum award, or both.

The court, in determining support and maintenance for a spouse, shall consider the following:

1. The earning capacity, obligations, needs and financial resources of the parties, including but not limited to income from pension, profit sharing or retirement plans;

2. The education and training of the parties and the ability and opportunity of the parties to secure such education and training;

3. The standard of living established during the marriage;

4. The duration of the marriage;

5. The age and physical and mental condition of the parties;

6. The contributions, monetary and nonmonetary, of each party to the well-being of the family;

7. The property interests of the parties, both real and personal, tangible and intangible;

8. The provisions made with regard to the marital property under § 20-107.3; and

9. Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

43. The Joint Legislative Subcommittee reported that "[s]ection 20-107.1 of the proposed legislation . . . basically recodifies, and expands much of the subject matter in current Code § 20-107." JOINT SUBCOMMITTEE REPORT, *supra* note 15, at 6.

44. VA. CODE ANN. § 20-107.1 (Cum. Supp. 1982).

45. Jursidictions in which marital misconduct operates as an automatic bar to alimony or spousal support include: Ga.—adultery and desertion; La., N.C., P.R., S.C.—adultery; Tenn.—only where divorce granted on fault grounds; Va.—all fault grounds regardless of ground on which divorce granted. Foster & Freed, *supra* note 2, at 4085.

In Florida, as the subcommittee was aware, adultery may be only a factor in alimony determinations. FLA. STAT. ANN. § 61.08 (Cum. Supp. 1982). *See* Minutes (Sept.), *supra* note 28, at 2. In Maryland, fault is neither expressly a bar nor a consideration in the alimony determination, but one of the relevant factors considered is "the facts and circumstances leading to the estrangement of the parties and the dissolution of the marriage." MD. ANN. CODE art. 16, § 1 (Repl. Vol. 1981).

46. JOINT SUBCOMMITTEE REPORT, *supra* note 15, at 6. According to the subcommittee's report: "The subcommittee deliberated at some length as to whether fault should absolutely bar spousal support, should be only a factor to be considered in the court's determination, or should be of no consequence at all." *Id.* It also considered whether adultery alone should operate as a bar. Minutes (Sept.), *supra* note 28, at 4.

have exempted fault occurring ninety days or more after the parties separated was also rejected.[47] Although Virginia courts do not lightly find a party at fault,[48] retention of fault as an absolute bar to support will continue to encourage the economically independent spouse to seek divorce on fault grounds.

Under the new statute, the court is expressly given discretion to award spousal support in the form of either periodic payments or a lump sum award or a combination of the two.[49] The new statute should overcome any hesitancy the courts may have had in the past regarding the propriety of lump sum awards or the factors to be considered in making such awards.[50] No confusion should arise between the lump sum award for spousal support under section 20-107.1 and the monetary award for an equitable division of marital property under section 20-107.3 because the two types of award are addressed in separate sections of the statute. The lump sum payment for spousal support under section 20-107.1 is simply a variant or a different method of awarding spousal support which is to be based upon the same factors as those governing the award of periodic spousal support.[51] Because both forms of support may be used alone or in combination with each other, courts are given the flexibility needed to fashion an appropriate award in each spousal support situation.[52] How-

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47. JOINT SUBCOMMITTEE REPORT, *supra* note 15, at 6.

48. The more commonly raised fault grounds are adultery and desertion. In a series of cases, the Virginia Supreme Court has placed increasing emphasis on the requirement of clear, positive and convincing evidence to establish adultery. Dooley v. Dooley, 222 Va. 240, 278 S.E.2d 865 (1981); Painter v. Painter 215 Va. 418, 211 S.E.2d 37 (1975); Haskins v. Haskins 188 Va. 525, 50 S.E.2d 437 (1948); Colbert v. Colbert, 162 Va. 393, 174 S.E. 660 (1934). Even where the evidence is highly suspicious, the court will avoid finding adultery. Dooley v. Dooley, 222 Va. 240, 246-47, 278 S.E.2d 865, 868-69 (1981). Where desertion is the issue, a needy spouse will often have left the marital abode claiming constructive desertion. The non-needy spouse will cross claim alleging desertion. The possible outcome is that the departing spouse will be barred from receiving support and maintenance. However, the court has recognized that although the behavior of the non-needy spouse may not rise to a level sufficient for a finding of constructive desertion, the needy spouse may be justified in leaving, and not be found guilty of desertion. *See* Breschel v. Breschel, 221 Va. 208, 269 S.E.2d 363 (1980); Caps v. Caps, 216 Va. 382, 219 S.E.2d 898 (1975). Also, a spouse is not guilty of legal desertion if the departure occurs after the institution of the divorce suit or during its pendency. *See* Alls v. Alls, 216 Va. 13, 216 S.E.2d 16 (1975); Painter v. Painter, 215 Va. 418, 211 S.E.2d 37 (1975).

49. VA. CODE ANN. § 20-107.1 (Cum. Supp. 1982).

50. *See supra* note 15.

51. JOINT SUBCOMMITTEE REPORT, *supra* note 15, at 6.

52. The Joint Legislative Subcommittee noted that this would give the court "the option, in appropriate cases, to make support provisions which are not subject to the infirmities inherent in periodic payments." *Id.* at 6-7.

Different tax consequences attach depending on the variation of periodic payment or lump sum award used. The ramifications include whether the payment is tax dectible to the payor spouse and therefore included in the payee spouse's gross income. *See* I.R.C. §§ 71,215 (1976).

ever, because the lump sum award is only a variation of spousal support, fault will continue to operate as a bar to such an award.

The new statute makes no provision for rehabilitative alimony.[53] Although the legislative subcommittee considered and rejected such a provision,[54] a number of other states, including Maryland and Florida, authorize the award of rehabilitative spousal support designed to foster the needy spouse's eventual economic independence.[55]

The new statute directs the court to consider certain enumerated factors in determining spousal support.[56] With a few additions, the factors listed in section 20-107.1 are substantially equivalent to those listed in former section 20-107.[57] Thus, the case law developed under section 20-107 will remain relevant under section 20-107.1.[58] Additional considerations relevant under the new statute include: (1) income from pension, profit sharing or retirement plans;[59] (2) the improved definition of the property interests which expressly refers to both tangible and intangible property interests;[60] and (3) tax consequences.[61] A completely new factor reflects the intended relationship between the award of spousal support under section 20-107.1 and the division of marital property under section 20-107.3. In awarding spousal support, a court must consider "[t]he provisions made with regard to the marital property under § 20-107.3 . . . ."[62] Although the spousal support section of the statute precedes the section addressing property, the language in section 20-107.3 indicates that any

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53. Rehabilitative alimony is defined as "alimony payable for a short, but specific and terminable period of time, which will cease when the recipient is, in the exercise of reasonable efforts, in a position of self support." Annot., 97 A.L.R.3d 740, 742 n.2 (1980).

54. JOINT SUBCOMMITTEE REPORT, *supra* note 15, at 6.

55. *See* FLA. STAT. ANN. § 61.08(1) (West Cum. Supp. 1982); MD. ANN. CODE art. 16, § 1 (Repl. Vol. 1981).

56. VA. CODE ANN. § 20-107.1(1)-(9) (Cum. Supp. 1982). Virginia is among the approximately thirty states listing specific factors a court is to consider in determining alimony. The factors which appear in the Virginia statute, but are also included in numerous other state statutes are listed below by rank according to frequency of use: (1) financial resources, (2) duration of the marriage, (3) age and health, (4) station of life/standard of living, (7) earning capacity of each, (8) the ability of the other spouse to pay, (9) the parties' needs, (10) contribution to the marriage (including homemaker), (11) other just and equitable factors, (12) tax consequences, (15) the educational level of the parties, (18) retirement benefits, and (20) property interests of each. Note, *Property Division and Alimony Awards: A Survey of Statutory Limitations on Judicial Discretion*, 50 FORDHAM L. REV. 415, 428 n.96 (1981).

57. Section 20-107.1 is basically a recodification of the old § 20-107. JOINT SUBCOMMITTEE REPORT, *supra* note 15, at 6.

58. For relevant cases, see Note, *Overview of Virginia Supreme Court Decisions on Domestic Relations* 1979-80, 15 U. RICH. L. REV. 321 (1981).

59. VA. CODE ANN. § 20-107.1(1) (Cum. Supp. 1982).

60. *Id.* § 20-107.1(7).

61. *Id.* § 20-107.1(9). *See supra* note 52.

62. *Id.* § 20-107.1(8).

award based on a division of marital property should be made prior to any award of spousal support.[63] Such an approach could result in the reduction or elimination of support awards in cases where the award based on a division of property is sufficient to satisfy the economic needs of a spouse.

B. *Custody and Support of Minor Children*

Section 20-107.2 deals with the custody, visitation, and support of minor children.[64] It forbids the use of any presumption or inference favoring

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63. *Id.* § 20-107.3(G). The legislative subcommittee noted that "[s]upport determinations, both spousal and child, and the division of marital assets are interrelated. A monetary award based on an equitable apportionment of marital property may even obviate the need for support in many instances where economic self sufficiency and equity are thereby achieved by each party." JOINT SUBCOMMITTEE REPORT, *supra* note 15, at 7.

64. VA. CODE ANN. § 20-107.2 (Cum. Supp. 1982) provides:

> Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce, whether from the bond of matrimony or from bed and board, and upon decreeing that neither party is entitled to a divorce, the court may make such further decree as it shall deem expedient concerning the custody and support of the minor children of the parties, and concerning visitation rights of the parents and visitation privileges for grandparents, stepparents or other family members. The court shall have no authority to decree support of children payable by the estate of a deceased party.
>
> 1. The court, in determining custody and visitation of minor children, shall consider the following:
>
> a. The age and physical and mental condition of the child or children;
>
> b. The age and physical and mental condition of each parent;
>
> c. The relationship existing between each parent and each child;
>
> d. The needs of the child or children;
>
> e. The role which each parent has played, and will play in the future, in the upbringing and care of the child or children; and
>
> f. Such other factors as are necessary to consider the best interests of the child or children.
>
> In awarding the custody of the child or children to either parent, the court shall give primary consideration to the welfare of the child or children, and, as between the parents, there shall be no presumption or inference of law in favor of either.
>
> 2. The court, in determining the amount of support of the minor child or children, shall consider the following:
>
> a. The age and physical and mental condition of the child or children;
>
> b. The independent financial resources, if any, of the child or children;
>
> c. The standard of living for the family established during the marriage;
>
> d. The earning capacity, obligations and needs, and financial resources of each parent;
>
> e. The education and training of the parties and the ability and opportunity of the parties to secure such education and training;
>
> f. The contributions, monetary and nonmonetary, of each party to the well-being of the family;
>
> g. The provisions made with regard to the marital property under § 20-107.3; and
>
> h. Such other factors as are necessary to consider the equities for the parents and children.

either parent in awarding child custody[65] and confirms non-parental visitation privileges.[66] Separate sets of criteria are provided for resolving the issues of child custody and visitation rights[67] on the one hand and the amount of child support on the other.[68]

A literal interpretation of the new statute's prohibition of any presumption or inference favoring either parent apprears to deal a final death blow to the "tender years" doctrine in Virginia.[69] In awarding the custody of the child or children to either parent, the statute requires the court to "give primary consideration to the welfare of the child or children, and as between the parents, there shall be no presumption *or inference* of law."[70] The Virginia Supreme Court initially adopted the tender years doctrine as a maternal preference rule. However, the rule often effectively operated as a presumption favoring the mother. Although the rule's impact has been verbally reduced to the status of a rebuttable inference,[71] the supreme court has approved the use of the doctrine.[72] The specific statutory prohibition of any presumption or inference is a clear directive to the courts to eradicate even the inference in determining

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65. *Id.*

66. *Id.*

67. *Id.* § 20-107.2(1)(a)-(f).

68. *Id.* § 20-107(2)(a)-(g).

69. *But see* VA. CODE ANN. § 31-15 (Repl. Vol. 1979) which continues to refer only to the presumption, stating that "as between the parents there shall be no presumption of law in favor of either." *Id.* The "tender years" rule evolved under § 31-15. *See infra* note 71. Former § 20-107 contained no language referring either to presumptions or inferences. VA. CODE ANN. § 20-107 (Cum. Supp. 1981).

70. VA. CODE ANN. § 20-107.2 (Cum. Supp. 1982) (emphasis added).

71. Early Virginia courts recognized the common law rule favoring a father's right to custody of his children. *See* Latham v. Latham, 71 Va. (30 Gratt.) 307 (1878). The "tender years" doctrine later evolved notwithstanding subsequent statutory mandates that there be no presumption of law in favor of either parent. VA. CODE ANN. § 31-15 (Repl. Vol. 1979). Under this doctrine, a preference favored the mother of children of tender years so that "if she is a fit and proper person, other things being equal she should be given the custody." Mullen v. Mullen, 188 Va. 259, 270-71, 49 S.E.2d 349, 354 (1948). The court continued to apply the rule, implying that only an adjudication of maternal unfitness would preclude application of the preference. *See* Moore v. Moore, 212 Va. 153, 183 S.E.2d 172 (1971). Subsequently, focus shifted to consideration of "if other things are equal" to trigger application of the preference. *See* White v. White, 215 Va. 765, 213 S.E.2d 766 (1975). Eventually the "tender years" maxim had become "no more than a permissible and rebuttable inference. . . ." Harper v. Harper 217 Va. 477, 479, 229 S.E.2d 875, 877 (1976). For an overview of the "tender years" doctrine in Virginia, see Comment, *The Tender Years Doctrine in Virginia*, 12 U. RICH. L. REV. 593 (1978).

72. In *Harper*, the maternal preference rule was triggered where the Virginia Supreme Court found that the evidence supported a finding that other things were equal. Harper v. Harper, 217 Va. 477, 229 S.E.2d 875. More recent cases indicated that realistically such equality may rarely occur. *See* Durrette v. Durrette, 223 Va. 328, 288 S.E.2d 432 (1982). *But see* Leisge v. Leisge, 223 Va. 688, 292 S.E.2d 352 (1982), where the Virginia Supreme Court affirmed an award of custody to a mother after the trial court had reached the "conclusion that all things *were* equal." *Id.* at 689, 292 S.E.2d at 355. (emphasis added).

child custody. The prohibition thus requires the court to focus on the facts of the case relative to the factors specified in the statute, rather than starting out with a preference for one parent over the other.

As under former section 20-107, courts are authorized to provide for non-parental visitation privileges under the new statute. In early 1980, the Virginia Supreme Court held that there was not sufficient statutory authority to grant visitation privileges to a grandmother over the objection of a custodial parent.[73] Subsequently the legislature amended both sections 16.1-241 and 20-107 to establish the court's authority to provide "for visitation privileges for grandparents, stepparents or other family members."[74] Although earlier drafts of section 20-107.2 failed to include such a provision, probably as an oversight, the legislative subcommittee incorporated a provision relating to visitation privileges of family members into the final draft. Also included was a new provision relating to "visitation rights of the parents."[75] Thus section 20-107.2 appears to distinguish between visitation *rights* of parents and the visitation *privileges* of other designated family members.[76]

In developing the new statute, the legislative subcommittee considered the possibility of expanding the court's authority to allow imposition of a support obligation on a parent for a child who was a full time student beyond the age of minority. However, no such authorization is included in section 20-107.2.[77] The rationale given for limiting the court's authority to

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73. In West v. King, 220 Va. 754, 263 S.E.2d 386 (1980), the mother argued that "at common law . . . a grandparent had no right of visitation with a grandchild, and no Virginia statute confers such a right." *Id.* at 756, 263 S.E.2d at 387. The grandmother contended that § 16.1-241 vested juvenile courts, and hence circuit courts on appeal, with jurisdiction to order such visitation. The court stated:

> As between a parent who has been awarded custody of a child, on the one hand, and on the other, third persons, including grandparents, the rights of the custodial parent are paramount; the parent has the authority to control the child and to determine with whom it visits. If these rights are to be derogated by a grant of jurisdiction purporting to permit the award of grandparental visitation privileges despite the custodial parent's objection, then the grant should be specific, reflecting the legislative intent in unambiguous language.

Id. at 756, 263 S.E.2d at 389.

74. VA. CODE ANN. § 16.1-241 (Repl. Vol. 1982); *id.* § 20-107 (Cum. Supp. 1981).

75. *Id.* § 20-107.2 (Cum. Supp. 1982).

76. Designation of parental visitation rights as opposed to non-parental visitation privileges is reminiscent of the distinction drawn by the court in *West* between the rights of the custodial parent and the grandparent's visitation privileges where the court indicated that the rights of the custodial parent are paramount. The amendments to §§ 16.1-241 and 20-107 conferring jurisdiction on the courts to decree as to non-parental visitation would permit infringement on the parental right and raise potential for conflict between visitation rights and privileges. But such conflict should be resolved based on primary consideration of the welfare of the child and the child's best interests. *See* VA. CODE ANN. §§ 16.1-227 and 20-107.2(1)(f).

77. The subcommittee actually directed the staff to draft an appropriate amendment to effect such a result. Minutes (Sept.), *supra* note 28, at 4. However, the idea was abandoned,

impose support obligations to children under eighteen[78] was that otherwise "such action would unreasonably, and perhaps unconstitutionally, subject divorced parents to a legal burden not shared by other parents. . . . [T]he obligation for educating one's children should be a moral one only, irrespective of whether or not a parent is divorced."[79] Absent such statutory authorization, any support obligation for the educational needs of children over eighteen can only be enforced through a separation agreement.[80]

New section 20-107.2 expressly mandates that in determining custody "the court shall give primary consideration to the welfare of the child or children."[81] The section also lists factors to assist the court in making this determination:

a. The age and physical and mental condition of the child or children;
b. The age and physical and mental condition of each parent;
c. The relationship existing between each parent and each parent and each child;
d. The needs of the child or children;

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and no such provision was included in the proposed bill.

78. JOINT SUBCOMMITTEE REPORT, *supra* note 15, at 7. VA. CODE ANN. § 20-107.2 (Cum. Supp. 1982), like former VA. CODE ANN. § 20-107 (Cum. Supp. 1981) is expressly limited to custody and support of *minor* children. The Virginia Supreme Court has consistently held that "once the child reaches majority the jurisdiction of the divorce court to provide for his support and maintenance terminates. . . ." Hosier v. Hosier, 221 Va. 827, 831, 273 S.E.2d 564, 566 (1981) (quoting Cutshaw v. Cutshaw, 220 Va. 638, 261 S.E.2d 52 (1979)). Only where there is an agreement providing for the support and maintenance or education for children beyond the age of majority incorporated into the divorce decree will the court enforce a duty of support to continue beyond the age of majority. *See* Gazale v. Gazale, 219 Va. 775, 250 S.E.2d 365 (1979); Eaton v. Eaton, 215 Va. 824, 213 S.E.2d 789 (1975); Paul v. Paul, 214 Va. 651, 203 S.E.2d 123 (1974).

79. JOINT COMMITTEE REPORT, *supra* note 15, at 7. *But see* In re Marriage of Urban, 293 N.W.2d 198 (Iowa 1980), where the court addressed the constitutionality of the Iowa support statute which gave the court discretion to impose a support obligation for a child between 18 and 22 regularly attending an approved school. Applying a rational basis test, the court found that "the state had a legitimate interest in promoting higher education . . . . [and that] the statute was rationally related to protecting that interest in a manner neither arbitrary nor unreasonable." *Id.* at 202.

The legislature had recognized that most parents remaining married do support their children during the college years while upon divorce "even well-intentioned parents, when deprived of the custody of their children, sometimes react by refusing to support them as they would if the family unit had been preserved." *Id.* The court determined that "the statute was designed to meet a specific and limited problem, one which the legislature could reasonably find exists only when the home is split by divorce." *Id.*

80. *See supra* note 78.

81. VA. CODE ANN. § 20-107.2 (Cum. Supp. 1982). This mandate is simply a further codification of long standing judicial recognition that "[i]n Virginia, we have established the rule that the welfare of the infant is the primary, paramount, and controlling consideration of the court . . . . All other matters are subordinate." Mullen v. Mullen, 188 Va. 259, 269, 49 S.E.2d 349, 354 (1948). This concept had its origin in Virginia in the nineteenth century. *See* Stringfellow v. Somerville, 95 Va. 701, 706, 29 S.E. 685, 687 (1898).

e. The role which each parent has played, and will play in the future in the upbringing and care of the child or children; and
f. Such other factors as are necessary to consider the best interests of the child or children[82]

These factors are, in effect, a codification of those which the courts have been utilizing in the past to determine what will serve the child's best interests.[83] The Virginia Supreme Court has repeatedly examined these same factors in holding the following considerations to be relevant to a determination of child custody: the parent's mental condition;[84] the child's emotional and physical state;[85] the moral climate of the home;[86] the location of the home (residential, rural, semi-rural);[87] proximity to schools;[88] availability of playmates;[89] accessibility to grandparents and other family members;[90] attentiveness of parent;[91] availability of babysitting;[92] provision of a separate bedroom for the child;[93] proximity to recreational facilities;[94] availability of pets;[95] possibility of the child's remaining in the former marital abode;[96] maturity/immaturity of the parent;[97] amount of parental time and involvement with the child;[98] provision of a fenced-in yard;[99] parental temperament;[100] and parental preoccupation with personal pursuits or career.[101] Such case law will continue to be relevant under section 20-107.2 because the enumerated factors generalize the considerations courts have focused on in determining child custody

82. *Id.* § 20-107.2(1)(a)-(f) (Cum. Supp. 1982).
83. JOINT SUBCOMMITTEE REPORT, *supra* note 17, at 7.
84. Leisge v. Leisge, 223 Va. 688, 292 S.E.2d 352 (1982).
85. *See* Brown v. Brown, 218 Va. 196, 237 S.E.2d 89 (1977); Burnside v. Burnside, 216 Va. 691, 222 S.E.2d 529 (1976).
86. *Brown*, 218 Va. 196, 237 S.E.2d 89.
87. *Burnside*, 216 Va. 691, 222 S.E.2d 529.
88. Durrette v. Durrette, 223 Va. 328, 288 S.E.2d 432 (1982); McCreery v. McCreery, 218 Va. 352, 237 S.E.2d 167 (1977).
89. Clark v. Clark, 217 Va. 924, 234 S.E.2d 266 (1977); Harper v. Harper, 217 Va. 477, 229 S.E.2d 875 (1976); Burnside v. Burnside, 216 Va. 691, 222 S.E.2d 529 (1976); White v. White, 215 Va. 765, 213 S.E.2d 766 (1975).
90. *Durrette*, 223 Va. 328, 288 S.E.2d 432; *Clark*, 217 Va. 924, 234 S.E.2d 266; *White*, 215 Va. 765, 213 S.E.2d 766.
91. *See* cases *supra* note 90.
92. *See* cases cited *supra* note 88. Alls v. Alls, 216 Va. 13, 216 S.E.2d 16 (1975).
93. *McCreery*, 218 Va. 352, 237 S.E.2d 167; *Harper*, 217 Va. 477, 229 S.E.2d 875; *White*, 215 Va. 765, 213 S.E.2d 766.
94. *Harper*, 217 Va. 477, 229 S.E.2d 875; *Burnside*, 216 Va. 691, 222 S.E.2d 529.
95. *White*, 215 Va. 765, 213 S.E.2d 766.
96. *Durrette*, 223 Va. 328, 288 S.E.2d 432; *Alls*, 216 Va. 13, 216 S.E.2d 16.
97. *Burnside*, 216 Va. 691, 222 S.E.2d 529.
98. *Durrette*, 223 Va. 328, S.E.2d 432 (1982); *Clark*, 217 Va. 924, 234 S.E.2d 266; *Harper*, 217 Va. 477, 229 S.E.2d 875.
99. *Clark*, 217 Va. 924, 234 S.E.2d 266; *White*, 215 Va. 765, 213 S.E.2d 766.
100. *McCreery*, 218 Va. 352, 237 S.E.2d 167.
101. *Id.*

and visitation.

In determining the amount of child support, section 20-107.2 directs the court to consider a separate list of factors:

a. The age and physical and mental condition of the child or children;
b. The independent financial resources, if any, of the child or children;
c. The standard of living for the family established during the marriage;
d. The earning capacity, obligations and needs, and financial resources of each parent;
e. The education and training of the parties and the ability and opportunity of the parties to secure such education and training;
f. The contributions, monetary and nonmonetary, of each party to the well-being of the family;
g. The provisions made with regard to the marital property under § 20-107.3; and
h. Such other factors as are necessary to consider the equities for the parents and children.[102]

These factors are similar to those contained in section 20-107.1 relating to spousal support. Again they are primarily a codification of factors the courts were utilizing under former section 20-107,[103] with the consideration of the child's independent financial resources. As the Virginia Supreme Court has noted, "[b]oth parents of a child owe that child a duty of support during minority [and] [i]n allocating this burden between parents, the law requires the court to consider, along with other factors, the 'earning capacity, obligations and needs, and financial resources of the parties.' "[104] The wording of the new section 20-107.2 assures that the court will not overlook the child's independent resources, if any, when determining child support. Also, any provision relating to marital property would be relevant to the amount of child support insofar as the marital property provision affects the parents' financial resources.[105] As in section 20-107.1, this requires the court to interrelate the various economic awards of spousal support, child support and provisions for marital property.[106]

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102. VA. CODE ANN. § 20-107.2(2)(a)-(h) (Cum. Supp. 1982).

103. *Both* parents owe their child or children a duty of support, and the court will look to a variety of factors to determine the amount. *See* Featherstone v. Brooks, 220 Va. 443, 258 S.E.2d 513 (1979) (court considered resources, expenses and needs of parties including salaries, tax refund, grocery expenses, transportation costs, children's need for orthodontic care, day care, music lessons, medical expenses, and other factors).

104. *Id.* at 447, 258 S.E.2d at 516.

105. VA. CODE ANN. § 20-107.2(2)(b) (Cum. Supp. 1982).

106. VA. CODE ANN. § 20-107.2(2)(g) (Cum. Supp. 1982).

C. *Distribution of Property*

1. Section 20-107.3 in General

Central to the revision of former section 20-107 is section 20-107.3 which authorizes the court to determine the parties' property rights upon a decree of divorce or marriage dissolution.[107] This section brings Virginia

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107. VA. CODE ANN. § 20-107.3 (Cum. Supp. 1982).

It is important to note that § 20-107.3 allows the court to decree as to the parties' property in a final divorce or annulment, but not in a bed and board decree. This section provides:

> A. Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce from the bond of matrimony, the court, upon motion of either party, shall determine the legal title as between the parties, and the ownership and value of all real and personal property of the parties and shall consider which of such property is separate property and which is marital property.
>
> 1. Separate property is (i) all property, real and personal, acquired by either party before the marriage; (ii) all property acquired during the marriage by bequest, devise, descent, survivorship or gift from a source other than the other party; and (iii) all property acquired during the marriage in exchange for or from the proceeds of sale of separate property, provided that such property acquired during the marriage is maintained as separate property. Income received from, and the increase in value of, separate property during the marriage is separate property.
>
> 2. Marital property is (i) all property titled in the names of both parties, whether as joint tenants, tenants by the entirety or otherwise, and (ii) all other property acquired by each party during the marriage which is not separate property as defined above. All property acquired by either spouse during the marriage is presumed to be marital property in the absence of satisfactory evidence that it is separate property.
>
> B. For the purposes of this section only, both parties shall be deemed to have rights and interests in the marital property; however, such interests and rights shall not attach to the legal title of such property and are only to be used as a consideration in determining a monetary award, if any, as provided in this section.
>
> C. The court shall have no authority to order the conveyance of separate property or marital property not titled in the names of both parties; however, in the final decree of divorce the court may partition marital property which is titled in the names of both parties.
>
> D. Based upon the equities and the rights and interests of each party in the marital property, the court may grant a monetary award, payable either in a lump sum or over a period of time in fixed amounts, to either party. The party against whom a monetary award is made may satisfy the award, in whole or in part, by conveyance of property, subject to the approval of the court.
>
> Any marital property, which has been considered or ordered transferred in granting the monetary award under this section, shall not thereafter be the subject of a suit between the same parties to transfer title or possession of such property.
>
> E. The amount of the award and the method of payment shall be determined by the court after consideration of the following factors:
>
> 1. The contributions, monetary and nonmonetary, of each party to the well-being of the family;
>
> 2. The contributions, monetary and nonmonetary, of each party in the acquisition and care and maintenance of such marital property of the parties;
>
> 3. The duration of the marriage;
>
> 4. The ages and physical and mental condition of the parties;
>
> 5. The circumstances and factors which contributed to the dissolution of the mar-

"into the mainstream of a 'broad reform movement in this country to vest substantially greater discretion in the courts to reach equitable results than that which existed under the common law title system.' "[108] The thrust of the section is "to recognize marriage as a partnership."[109]

Section 20-107.3, however, is not a pure equitable distribution statute. Like the Maryland statute, it is a hybrid of the modern and common law approaches in that the court is not authorized *directly* to distribute non-jointly held marital property.[110] Rather, the court may only use marital property as a basis for making a monetary award on equitable considerations.[111] Although the aim is an equitable distribution of marital property, this aim must be accomplished indirectly through a monetary award. Section 20-107.3 only authorizes the court to partition jointly held prop-

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riage, specifically including any ground for divorce under the provisions of § 20-91(1), (3) or (6) of § 20-95;

6. How and when specific items of such marital propety were acquired;

7. The debts and liabilities of each spouse, the basis for such debts and liabilities, and the property which may serve as security for such debts and liabilities;

8. The present value of pension or retirement benefits, whether vested or nonvested;

9. The liquid or nonliquid character of all marital property;

10. The tax consequences to each party; and

11. Such other factors as the court deems necessary or appropriate to consider in order to arrive at a fair and equitable monetary award.

F. The court shall determine the amount of any such monetary award without regard to maintenance and support awarded for either party or support for the minor children of both parties and shall, after or at the time of such determination and upon motion of either party, consider whether an order for support and maintenance of a spouse or children shall be entered or, if previously entered, whether such order shall be modified or vacated.

G. No part of any monetary award based upon the value of pension or retirement benefits, whether vested or nonvested, shall become effective until the party against whom such award is made actually begins to receive such benefits. No such award shall exceed fifty percent of the cash benefits actually received by the party against whom such award is made.

H. Nothing in this section shall be construed to prevent the affirmation, ratification and incorporation in a decree of an agreement between the parties pursuant to §§ 20-109 and 20-109.1. Agreements, otherwise valid as contracts, entered into between spouses prior to the marriage shall be recognized and enforceable.

Id.

108. JOINT SUBCOMMITTEE REPORT, *supra* note 15, at 7 (1982) (quoting Auerbach & Jenner, *Historical and Practice Notes* to ILL. ANN. STAT. ch. 40, § 503 (Smith-Hurd 1980).

109. JOINT SUBCOMMITTEE REPORT, *supra* note 15, at 7.

110. *See* Note, *Property Disposition Upon Divorce In Maryland: An Analysis of the New Statute*, 8 U. BALT. L. REV. 377, 391 (1979).

111. *See* MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-05 (Repl. Vol. 1980 & Cum. Supp. 1982).

Maryland and Virginia use a monetary award as the vehicle for equitably distributing marital property. A few states such as New York and North Carolina allow the court to make a monetary award as an alternative to the direct distribution of the property. *See* N.C. GEN. STAT. § 50-20(e) (Cum. Supp. 1981); N.Y. DOM. REL. LAW § 236B.1(b) (Consol. 1981).

erty in the final decree.[112] Section 20-107.3, however, permits the parties to make a whole or partial conveyance of property to satisfy the monetary award, subject to the approval of the court.[113] Because the court may *encourage* and *approve* a transfer of property to satisfy the monetary award, the net result could be similar to a direct property distribution.

Section 20-107.3 establishes a three-step process by which the court, in its discretion, is to make a monetary award for the equitable distribution of marital property. First, the court must determine which property owned by the parties is marital rather than separate property. Second, the court must determine the value of the marital property. Third, the court must consider eleven factors in determining the amount of the monetary award necessary to allocate equitably the marital property.[114] Determination of the legal title, ownership and value of the parties' property is mandatory upon motion of either party, whereas the grant and amount of a monetary award lies solely within the court's discretion.[115]

2. Identification and Valuation of Property

a. Types of Property

The court initially must identify the legal title, rights, and interests of the parties in their properties and determine whether these properties are to be classified as marital or separate.[116] Section 20-107.3 generally covers "all property."[117] It does not specify which properties are classified as separate or marital. Certain types of property can be excluded from the marital classification either by statute or judicial decision.[118] However,

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112. VA. CODE ANN. § 20-107.3(C) (Cum. Supp. 1982). By inserting this provision the subcommittee hoped to avoid separate suits for partition. JOINT SUBCOMMITTEE REPORT, *supra* note 15, at 8.

113. VA. CODE ANN. § 20-107.3(D) (Cum. Supp. 1982).

114. JOINT SUBCOMMITTEE REPORT, *supra* note 15, at 7. *See infra* text accompanying note 184.

115. *Compare* VA. CODE ANN. § 20-107.3(A) (Cum. Supp. 1982) ("[T]he court, upon motion of either party, *shall* determine legal title . . . and the ownership and value. . . .") (emphasis added) *with* VA. CODE ANN. § 20-107.3(D) (Cum. Supp. 1982) ("[T]he court *may* grant a monetary award. . . .") (emphasis added).

116. VA. CODE ANN. § 20-107.3(A) (Cum. Supp. 1982).

Although the court is to determine the rights and interests of the respective parties in the marital property, such determination does not affect legal title, but is considered by the court only in determining the monetary award, if any, to be given under § 20-107.3. *Id.* § 20-107.3(B).

117. The phrase "all property" is used throughout the separate and marital property definitional sections. However, § 20-107.3(A)(1)(i) refers to "all property, real and personal." An immediate question arises as to why the Senate, when it amended § 20-107.1(7) to include "tangible and intangible" property, did not do the same in § 20-107.3. The omission may not be critical, however, since "property" is preceded by the word "all" throughout § 20-107.3.

118. *See* N.C. GEN. STAT. § 50-20(b)(2) (Cum. Supp. 1982) ("All professional licenses and

because the Virginia statute lists no specific exclusions, Virginia courts may be persuaded by authority from other states in deciding what is marital property. Types of property deemed "marital" by other courts range from ordinary forms of property interests such as parcels of real estate, personal property and stock, to more unusual forms of property interests such as retirement, pension and profit-sharing plans, shares of closely-held corporations, partnership interests, business and professional assets including goodwill, professional licenses and degrees, trust interests, cash value of life insurance policies, contingent fee contracts, and personal injury awards.

Spousal claims to an interest in the other spouse's retirement or pension benefits have been designated "[t]he most timely issue regarding the economics of support."[119] Pension and retirement benefits may be among the most valuable assets accumulated by either marriage partner.[120] Although the definitional section does not expressly classify these benefits as marital property, their importance is recognized by their express inclusion as a factor to be considered in determining the monetary award.[121]

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business licenses which would terminate on transfer shall be considered separate property, vested pension or retirement rights and the expectation of nonvested pension or retirement rights shall be considered separate property.").

119. I. BAXTER, MARITAL PROPERTY § 11:2 (Cum. Supp. 1981). Early cases determined that a right to retirement pay was merely an expectancy rather than a property interest and, therefore, not subject to division upon divorce. *See* French v. French, 17 Cal. 2d 775, 112 P.2d 235 (1941), *overruled in In re* Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). But 35 years later in the leading case in this area, the court held that an unmatured interest in a retirement pension was in fact property and, therefore, available for distribution. *In re* Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). State courts with the statutory authority to distribute joint and separate property upon termination of a marriage have almost unanimously divided these benefits between the spouses. Deering v. Deering, 292 Md. 115, 437 A.2d 883 (1981). For an excellent listing and brief review of the most recent cases on spousal rights in retirement and pension benefits in both community property and equitable distribution states, see Foster & Freed, *supra* note 2, at 4094-99. *See also* Bass, *Update: Division at Divorce of ERISA, Pensions and other Benefit Plans*, 6 Fam. L. Rep. (BNA) 4001 (November 27, 1979).

120. In Deering v. Deering, 292 Md. 115, 437 A.2d 883 (1981), the court stated:

> [I]t is significant that over the past several years, pension benefits have become an increasingly important part of an employee's compensation package which he or she brings to a marriage unit. Moreover, in a situation where economic circumstances prevent a husband and wife from saving or investing a portion of the wage earner's income, the pension right swells in importance as retirement or vesting approaches, and may well represent the most valuable asset accumulated by either of the marriage partners.

Id. at 119, 437 A.2d at 887.

121. VA. CODE ANN. § 20-107.3(E) (Cum. Supp. 1982).

A few states expressly include pension and retirement benefits in their distribution scheme. *See, e.g.*, IDAHO CODE § 32-712(b)(7) (Cum. Supp. 1982). In other states, courts have determined that pensions and retirement benefits are either available for, or a consideration in, distribution. Basically the courts perceive these benefits as "an economic resource acquired with the fruits of the wage earner spouse's labor which would otherwise have been

Pension and profit-sharing plans stimulated two Senate floor amendments to H.B. 691.[122] Although the joint legislative committee that drafted the statute was aware of the North Carolina statute's express designation of pension and retirement rights as separate property,[123] it did not exclude these benefits from the marital property classification in the Virginia statute. Hence it is plausible to conclude that pension and retirement benefits may be classified as marital property in Virginia.

In *McCarty v. McCarty*,[124] the United States Supreme Court held that certain federal military retirement benefits were excluded from distribution as marital property and that the federal law creating these benefits preempted state law regarding the division of marital property.[125] This ruling, applicable to the division of property in community property states, subsequently was extended to include equitable distribution states.[126] Some courts, concerned with the potential inequities in excluding these valuable benefits from material property, have attempted to circumvent *McCarty* by distinguishing the actual division of federal retirement benefits from the consideration of these benefits as a factor in fixing the amount of spousal support or property division.[127] However, the issue

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utilized by the parties during the marriage to purchase other deferred income assets." *Deering*, 292 Md. at 120, 437 A.2d at 888.

122. *See supra* notes 35-36 and accompanying text.

123. *See supra* note 118.

124. 101 S. Ct. 2728 (1981). The Court relied on its earlier decision in Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), where it held that retirement benefits under the Railroad Retirement Act were unavailable for distribution. In *Hisquierdo*, the Court found a conflict between state and federal law and determined that application of state law would damage significant federal interests. Federal law thus preempted state law under the supremacy clause. In *McCarty*, the Court called the military retirement benefits personal entitlements and stated that division of these benefits potentially could threaten federal interests and frustrate the two major congressional goals for the military retirement system—"to provide for the retired service member and to meet the personnel management needs of the active military forces." 101 S. Ct. at 2741.

125. *McCarty*, 101 S. Ct. 2728. *See supra* note 124.

126. Hill v. Hill, 291 Md. 615, 436 A.2d 67 (1981). "In our view the rationale in McCarty is equally applicable to a division of property in an equitable distribution state. . . . [U]nder the Supremacy Clause, upon the dissolution of a marriage, federal law precludes a Maryland court from dividing military non disability retired pay as marital property. . . ." *Id.* at 70. *See also* Cose v. Cose, 592 P.2d 1230 (Alaska 1979), *cert. denied*, 453 U.S. 922 (1981); Russell v. Russell, 605 S.W.2d 33 (Ky. Ct. App. 1980), *cert. denied*, 435 U.S. 922 (1981). Subsequent to *McCarty*, the Supreme Court held that military retirement pay was divisible in the equitable distribution state of Montana. *In re* Miller, ___ Mont. ___, 609 P.2d 1185 (1980), *vacated and remanded*, 453 U.S. 918 (1981).

127. *See In re* Meyer, 103 Ill. App. 3d 44, 430 N.E.2d 610 (1981) (court may not award any portion of military pension but may consider the pension in arriving at property and maintenance dipositions); Sadler v. Sadler, ___ Ind. App. ___, 428 N.E.2d 1305 (1981) (military retirement benefits barred from distribution, but court may consider such assets in deciding the manner in which other property is distributed); Russell v. Russell, 605 S.W.2d 33 (Ky. Ct. App. 1980), *cert. denied*, 435 U.S. 922 (1981) (military retirement pay is excluded from division of marital property but may be considered in determining maintenance

appears to have been resolved by the Military Spouse Protection Act which was signed into law by the President on September 9, 1982.[128] This legislation permits courts to apply state law to determine whether military retirement benefit can be considered marital property and therefore, subjected to equitable distribution in divorce actions. Under the federal statute, distribution of military benefits to a former spouse is limited to fifty percent of the disposable benefits.[129] Section 20-107.3 of the Virginia statute permits the court to consider these benefits and appears consistent with the federal Act's fifty percent limitation.

Other potentially significant assets are personal injury awards, and courts vary as to their classification. In *Nixon v. Nixon*,[130] a state court held that an out-of-state court settlement of a lawsuit filed by the husband against a drug company for damages to his eyes and loss of professional income was marital property subject to distribution. Reflecting a contrary view, another state court in *Amato v. Amato*[131] held that a personal injury claim or a loss of consortium claim represented "personal property of the injured spouse [which was] not distributable"[132] as marital property. Likewise, in *Izatt v. Izatt*[133] a Utah state court classified a settlement the wife received for injuries in a malpractice suit as the wife's sole and separate property.

Although the claims and settlements in the *Amato* and *Izatt* cases were classified as separate property, neither court's analysis stopped with this determination. In *Amato*, the court went on to hold that losses [as a result of the spouse's injury], such as past wages and medical expenses which had diminished the marital estate are distributable when recovered."[134] In *Izatt*, the wife was required to pay one-half of a debt due to the husband's parents despite the fact that a personal injury settlement would be the source of funds to pay the debt.[135] Although the settlement was separate property, the court stated that "the fact that she possesses that asset is one of the total circumstances the court could consider in making what [it] regards as a just and practical allocation of the property and finances of the parties."[136] Regardless of whether a Virginia court would classify a personal injury award as marital or separate property, the equitable nature of the statute necessitates that such a valuable asset

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and support).

128. Foster & Freed, *supra* note 2, at 4099.

129. *See Military Spouse Protection Act Reverses McCarty v. McCarty*, 8 FAM. L. REP. (BNA) 2640-41 (Aug. 31, 1982).

130. 525 S.W.2d 835, 839 (Mo. Ct. App. 1975).

131. 180 N.J. Sup. 210, 434 A.2d 639 (1981).

132. *Id.* at ___, 434 A.2d at 643-44.

133. 627 P.2d 49 (Utah 1981).

134. 180 N.J. Sup. at ___, 434 A.2d at 644.

135. 627 P.2d at 51.

136. *Id.*

be considered in the equitable allocation process. It may well fall into the catchall provision authorizing the court to consider "other factors . . . the court deems necessary or appropriate to consider in order to arrive at a fair and equitable monetary award."[137]

The recognition of one spouse's contribution to the other spouse's present and potential career is "[o]ne of the skirmishes in the running battle for economic justice upon divorce."[138] The considerable variation in the courts' classification of professional and business licenses and degrees reflects the uncertainty as to the value to be placed upon one spouse's contribution to the other's career and career potential. Some of these career-type interests specifically may be excluded from marital property treatment by statute, as in the North Carolina marital property distribution scheme.[139] However, in most states, the classification decision has been left to the courts. Because the Virginia statute is silent on the classification of career-type interests, their status will have to be established by judicial decision.

Although courts in other states generally have held that a professional degree or license is not property subject to distribution,[140] they have not always denied a remedy to the spouse who provided support while the other acquired an education. Some courts have recognized that the potential for increased future earning capacity is either a distributable marital asset or a relevant factor to be considered in determining the property distribution. In *In re Horstmann*,[141] a state court refused to hold that the husband's law degree and certificate of admission to practice law was a marital asset. Instead the court held that "[i]t is the potential for increase in future earning capacity made possible by the law degree and certificate of admission conferred upon the husband with the aid of his wife's efforts

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137. VA. CODE ANN. § 20-107.3(E)(11) (Cum. Supp. 1982).

138. Foster & Freed, *supra* note 2, at 4069.

139. *See supra* note 118.

140. *See* Foster & Freed, *supra* note 2, at 4069-74. An often-quoted statement of the court in *In re* Graham, 194 Colo. 429, 574 P.2d 75 (1978) reflects the thinking of numerous courts:

> An educational degree, such as an M.B.A. is simply not encompassed even by the broad views of the concept of "property." It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term.

574 P.2d at 77. For an overview of the divisibility of professional degrees, see generally Note, *Family Law: Ought a Professional Degree be Divisible as Property Upon Divorce?*, 22 WM. & MARY L. REV. 517 (1981).

141. 263 N.W.2d 885 (Iowa 1978).

which constitutes the asset for distribution by the court."[142] Other courts which refuse to include potential earning capacity as marital property have recognized that "potential earning capacity is doubtless a factor to be considered . . . in determining what distribution [would] be equitable."[143] Finally, some courts have reimbursed the spouse who provided support for direct contributions he or she made to the educational pursuit of the other.[144] One court, expressing its rationale for this type of decision, said that a gross inequity would otherwise result if the spouse were "left by the roadside before the fruit of that education could be harvested."[145] A few courts, however, have refused to consider the future income of each party on the ground that such a consideration is too speculative.[146]

b. Classification as Separate or Marital Property

Once the court has determined that a particular type of property is capable of being classified as marital property, it then must determine whether the specific property involved is, in fact, marital or separate property based on the facts of the case. As the joint legislative subcommittee studying section 20-107 recognized, making this factual determination could lead to complex tracing problems.[147] The Virginia statutory provisions relating to marital and separate property are similar to North Carolina's recently enacted statutory provisions.[148] They also resemble Illinois's older statutory provisions[149] which already have a developed body

142. *Id.* at 891.

143. Stern v. Stern, 66 N.J. 376, 331 A.2d 277 (1975).

144. *See, e.g.*, Moss v. Moss, 80 Mich. App. 643, 264 N.W.2d 97 (1978).

145. 80 Mich. App. at ___, 264 N.W.2d at 98.

146. *In re* Goldstein, ___ Ill. App. ___, 423 N.E.2d 1201 (1981).

147. "The subcommittee was aware that the determination of which property is separate and which is marital will, in some instances, lead to complex tracing problems. However, the members felt the inherent fairness of the proposed system far outweighs any burden such problems might impose." JOINT SUBCOMMITTEE REPORT, *supra* note 15, at 8. Separate property is defined in § 20-107.3(A)(1), and marital property is defined in § 20-107.3(A)(2).

148. *See* N.C. GEN. STAT. § 50-20(b)(1)-(2) (Cum. Supp. 1981).

149. The Illinois statute provides as follows:

> (a) For purposes of this Act, "marital property" means all property acquired by either spouse subsequent to the marriage, except the following, which is known as "non-marital property":
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> (1) property acquired by gift, bequest, devise or descent;
>
> (2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise or descent;
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> (3) property acquired by a spouse after a judgment of legal separation;
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> (4) property excluded by valid agreement of the parties;
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> (5) the increase in value of property acquired before the marriage; and (6) property acquired before the marriage.
>
> (b) All property acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage is presumed to be marital property, regardless of whether title is held individually or by the

of case law addressing complex tracing problems.

The Illinois courts have held that a clear legislative preference for the classification of property as marital property is indicated by the interplay of the definitional provisions with the marital property presumption provision.[150] The Illinois courts also have held that although the purpose of the equitable distribution section is to eliminate disparities between marital partners, exceptions defining non-marital property "manifest the legislative purpose to preserve the character of non-marital property in those situations where the actions of the parties have not created ambiguity."[151] By focusing on the parties' treatment of the property as indicative of their intent to keep the property separate or to make it marital, the Illinois courts have avoided some of the complexities of tracing.

The Virginia statute establishes a presumption that all property acquired during the marriage is marital property.[152] This presumption may be rebutted by "satisfactory evidence that it is separate."[153] Rebutting the same presumption under the Illinois statute requires a showing that the property fits into one of the statute's definitions of non-marital property.[154] The Illinois courts have added the further requirement that the property had, in the past, been maintained as separate property.[155] The Virginia statute includes a similar requirement,[156] but as the statute is worded, this requirement apparently only applies to "all property acquired during the marriage in exchange for or from the proceeds of sale of separate property. . . ."[157]

Classification problems may arise under the Virginia statute where non-marital property acquired before marriage is treated as marital property during marriage. Where title to separate property is transferred during the marriage to the other spouse or is transformed into a joint tenancy, the property then could be considered marital property, since such a transfer indicates an intent to treat it as such.[158] Where there are addi-

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spouses in some form of co-ownership such joint tenancy, tenancy in common, tenancy by the entirety, or community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (a) of this Section.

ILL. ANN. STAT. ch. 40, § 503 (Smith-Hurd 1980).

150. *In re* Smith, 86 Ill. 2d 518, ___, 427 N.E.2d 1239, 1244 (1981).

151. *Id.* at 524, 427 N.E.2d at 1245.

152. VA. CODE ANN. § 20-107.3(A)(2) (Cum. Supp. 1982).

153. *Id.*

154. *In re* Smith, 86 Ill. 2d at 524, 427 N.E.2d at 1245.

155. *See id.* at 523-25, 427 N.E.2d at 1245-47.

156. VA. CODE ANN. § 20-107.3(A)(1)(iii) (Cum. Supp. 1982).

157. *Id. See infra* note 168.

158. *In re* Smith, 86 Ill. 2d 518, ___, 427 N.E.2d 1239, 1244 (1981) (stock certificates in name of both spouses is marital property). *See also In re* Rogers, 85 Ill. 2d 217, 422 N.E.2d 635 (1981) (jointly held marital home as marital property); *In re* Emken, 86 Ill. 2d 164, 427 N.E.2d 125 (1981) (joint bank account is marital property).

tions, improvements, or contributions to the separate property from either marital income, commingled marital assets, or the other spouse's separate assets, a court could interpret such actions as indicating an intent to transform the separate property into marital property.[159] Although section 20-107.3 defines separate property to include "income received from and the increase in value of separate property during the marriage,"[160] complications will arise where the income received from separate property has been commingled with marital assets or where the value increase is not due solely to economic factors.[161] Some courts have held that such commingling or contribution transforms separate into marital property.[162] Other courts have held that although the property retains its non-marital status, the non-owning spouse's contributions are to be considered in making an equitable distribution of marital property.[163]

Property acquired during the marriage also may pose classification problems depending on the facts of the case. Section 20-107.3 is unclear on the relationship between the marital property presumption and the provisions classifying certain property acquired during the marriage as separate. The Illinois statute defines marital property and establishes the presumption that all property acquired during marriage is marital.[164] Non-marital property is defined by listing exceptions to the general

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159. *In re* Smith, 86 Ill. 2d at 522, 427 N.E.2d at 1244. *See In re* Jones, 104 Ill. App. 3d 490, 432 N.E.2d 113 (1981). In *Jones*, a stock trust established prior to the marriage was classified as non-marital property since the husband reinvested most of the income generated by the trust. Neither the trust assets nor the trust income were commingled with marital property, and the appreciation in the stock trust's value was not due solely to economic factors. Nevertheless, the husband's inherited stock in his father's business was classified as marital property because the business had been commingled completely with the husband and wife's business after the father's death. Such treatment, though, merely establishes a rebuttable presumption that the property is marital property. In another Illinois case, the husband owned stock that he had acquired before the marriage, but he used marital assets to reduce the debt he had incurred in purchasing the stock. The court said this created a rebuttable presumption that he intended the stock to be treated as a marital asset. Since both parties repeatedly testified that the stock was intended to be separate, the presumption was rebutted. *In re* Parr, 103 Ill. App. 3d 199, 204, 430 N.E.2d 656, 661 (1981).

160. VA. CODE ANN. § 20-107.3(A)(1) (Cum. Supp. 1982).

161. Where appreciation or increase in value is not due to an addition of marital funds or other marital contribution, but is due only to economic factors, the property retains its separate or non-marital classification. Economic factors may include increases due to inflation, or appreciation due to stock splits and dividends. *See In re* Smith, 86 Ill. 2d at 525, 427 N.E.2d at 1246, where the court held that stock splits and stock dividends should be treated as economic appreciation, since neither increase a shareholder's ownership rights in a corporation. *See also In re* Jones, 104 Ill. App. 3d 490, 427 N.E.2d 113.

162. *See supra* note 159.

163. *See In re* Parr, where the court, though determining husband's stock to be non-marital property, stated that "the use of marital assets for the reduction of the debt on the non-marital stock is to be considered when dividing the marital property." 103 Ill. App. 3d 199, 204, 430 N.E.2d 656, 661 (1981).

164. ILL. ANN. STAT. ch. 40, § 503 (Smith-Hurd 1980). *See supra* note 149.

rule.[165] Section 20-107.3, in setting out a separate definition of separate property, initially appears to require an independent determination of whether specific property is separate. A closer reading, however, reveals that the marital property presumption can aid in characterizing specific property. All property acquired during marriage initially may be presumed to be marital. This presumption may then be rebutted by presenting "satisfactory evidence"[166] that the property is separate within the definition set forth in section 20-107.3. Thus, the burden would be on the party attempting to establish a separate classification for property acquired during marriage.[167] Property acquired during marriage by bequest, devise, descent, survivorship, or gift will also create problems in ambiguous situations where there has been subsequent commingling with marital or separate property of the other spouse.[168]

The valuation process is potentially the most extensive and expensive part of the divorce proceeding as parties battle over small items such as lamps or mailboxes,[169] and as experts battle over the proper method of valuing major assets such as pension and profit sharing plans, partnership goodwill, and shares of a closely-held corporation.[170] Infinite detail is not

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165. *Id. See supra* note 149.

166. VA. CODE ANN. § 20-107.3(A)(2) (Cum. Supp. 1982).

167. In *In re* Parr, the Illinois court interpreted the statute to permit

> a spouse who has acquired propety before the marriage to hold this property separate from the marriage partnerhsip, as non-marital . . . [but] the contribution of marital assets to a non-marital asset creates a rebuttable presumption that the contribution was intended to change the character of the property to marital. . . . While the property may retain its non-marital character, despite a contribution of marital funds, the contribution does affect the burden of proof. The party asserting that the property is non-marital has the burden of proving by convincing evidence that the property was not intended to become an asset of the marital partnership.

103 Ill. App. 3d at ___, 430 N.E.2d at 660-61.

168. Subsequent commingling may indicate an intent to transform the property into marital property. *See In re* Smith, 86 Ill. 2d 518, 427 N.E.2d 1239 (1981) (holding inherited stock transformed to marital property).

The Illinois courts require that any separate property have been maintained as separate property. *See supra* note 159. The Virginia statute apparently does not make such a requirement of separate property, because it was acquired "during the marriage by bequest, devise, descent, survivorship or gift from a source other than the other party. . . ." VA. CODE ANN. § 20-107.3(A)(1)(iii) (Cum. Supp. 1982). Realistically, if such property is not maintained as separate property but is commingled with other marital assets, it may appear that the intent was to transform the property into marital property.

169. One court described the extended litigation over the parties' property to be

> a devastating example of the futility of litigation of this type which is begun and conducted in a mutual spirit of hatred and revenge. The record is a maze of factual contradictions by both parties. The parties could agree only on the value of the marital residence. Virtually each and every other asset was the subject of bitter charges and countercharges.

In re Greenberg, 102 Ill. App. 3d 938, 943, 429 N.E.2d 1334, 1339 (1981).

170. It is beyond the scope of this article to discuss the variety of valuation methods available and being utilized. *See generally* Biederman, *Putting a Value on: Art and*

required. As one court noted, "it is not necessary that every pot, pan, broom and hoe handle be separately listed and valued."[171] Nonetheless, reaching a just distribution requires that a value be assigned to property interests.[172] Where little valuation evidence is presented, a just distribution may be unrealistic, particularly where the property requires expert evaluation. As one court noted, where the necessary evidence is lacking, the spouses may be forced to suffer the consequences of an inequitable distribution.[173]

Section 20-107.3 requires the court to "value all real and personal property of the parties"[174] but does not specify any guidelines for valuation. The only other reference to valuation is with respect to pension and profit sharing plans.[175] The valuation of pension and retirement benefits under section 20-107.3 involves a two-step process. First, the court is expressly required to establish the present value of any pension or retirement benefits.[176] This present value may be considered in fixing both the amount of the monetary award and the method of payment. Second, to the extent that the monetary award is based on the value of pension or retirement benefits, the statute appears to recommend a percentage of benefits approach.[177]

Courts have recognized that the "percentage of benefits" approach offers a simple and efficient method of valuing and distributing pension and retirement benefits. For example, in *Bloomer v. Bloomer*,[178] the Wisconsin Supreme Court outlined three possible valuation approaches: (1) an approach based on the amount of contributions made by the employee spouse up to the commencement of the divorce action; (2) an approach based on the discounted present value of benefits to vest under a plan; and (3) an approach aimed at awarding the non-employee spouse a fixed

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Antiques, 2 FAM. ADVOC. 19 (1979); Grosman, *Identification and Valuation of Assets Subject to Equitable Distribution*, 56 N.D.L. REV. 201 (1980); Kennedy & Thomas, *Putting a Value on: Education and Professional Goodwill*, 2 FAM. ADVOC. 3 (1979); Munson, *Putting a Value on: Insurance Policies*, 2 FAM. ADVOC. 10 (1979); Perroci & Walsh, *Putting a Value on: Closely Held Corporations*, 2 FAM. ADVOC. 32 (1979); Projector, *Putting a Value on: A Pension Plan*, 2 FAM. ADVOC. 37 (1979); Annot., 74 A.L.R. 3d 621 (1981).

171. Marks v. Marks, 618 S.W.2d 249, 251 (Mo. Ct. App. 1981).

172. *In re* Mitchell, 103 Ill. App. 3d 242, 246, 430 N.E.2d 716, 720 (1981).

173. *In re* Messerle, 57 Or. App. 15, 643 P.2d 1286 (1982).

> The parties chose to try this case without the benefit of any expert witness, even though the principle bone of contention was the valuation of a one-quarter interest in a successful going concern worth at least $2½ million [and] as a result, the trial judge was left practically to his own devices, substantially unaided.

Id. at 19, 643 P.2d at 1290.

174. VA. CODE ANN. § 20-107.3(A) (Cum. Supp. 1982).

175. *Id.* §§ 20-107.3(E)(8), -107.3(G).

176. *Id.* § 20-107.3(E)(8).

177. *Id.* § 20-107.3(G).

178. 84 Wis. 124, 267 N.W.2d 235 (1978).

percentage of the future payments the employee spouse expects to receive, payable if and when the benefits actually are paid to the employee spouse.[179] In *Deering v. Deering*,[180] the Maryland Supreme Court adopted an elastic approach to the valuation and allocation of pension and retirement benefits, stating that "any of . . . [*Bloomer's*] articulated approaches may represent the proper one for the [Maryland] trial courts . . . to date."[181] However, the court noted the advantage of using only the fixed percentage method because "it is unnecessary to determine the value of the pension fund at all . . . and the court need do no more than determine the appropriate percentage to which the non-employee spouse is entitled."[182] Unfortunately, section 20-107.3, by requiring that a present value be assigned to pension and retirement benefits if any part of the monetary award is to be based on such benefits, apparently prevents the use of only the fixed percentage approach as a means of avoiding the difficulties involved in valuing pension and retirement benefits.

3. Amount of the Award and Method of Payment

Under section 20-107.3, "equitable" does not necessarily mean "equal." Neither an equal distribution nor a fifty-fifty presumption is required or proper. The Joint Legislative Subcommittee which drafted the new section considered, but voted against, any equality presumption. Rather the court is to fix the amount and method of payment based on eleven factors set forth in section 20-107.3.[183] These factors include:

> 1. The contributions, monetary and nonmonetary, of each party to the well-being of the family;
>
> 2. The contribution, monetary and nonmonetary, of each party in the acquisition and care and maintenance of such marital property of the parties;
>
> 3. The duration of the marriage;
>
> 4. The ages and physical and mental condition of the parties;
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> 5. The circumstances and factors which contributed to the dissolution of the marriage, specifically including any ground for divorce under the provi-

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179. *Id.* at ___, 267 N.W.2d at 241.

180. 292 Md. 115, 437 A.2d 883 (1981).

181. *Id.* at 123, 437 A.2d at 892.

182. *Id.* at ___, 437 A.2d at 891-92.

183. The subcommittee voted against any presumption in favor of an equal distribution of marital property. Instead the court is to decide the amount of the award (and the method of payment) after consideration of eleven factors deemed relevant to this determination. . . . A catch-all provision is included to give the court reasonable discretion to look at any other circumstances it feels are appropriate in a given case.

JOINT SUBCOMMITTEE REPORT, *supra* note 15, at 8.

The first, third, and fourth factors were present in the old statute and also are considerations in the new § 20-107.1. The second and tenth factors, plus the catch-all provision are new, but also are present in § 20-107.1. The remaining factors are new and unique to § 20-107.3. *See supra* note 7.

sions of § 20-91 (1), (3) or (6) or § 20-95;

6. How and when specific items of such marital property were acquired;

7. The debts and liabilities of each spouse, the basis for such debts and liabilities, and the property which may serve as security for such debts and liabilities;

8. The present value of pension or retirement benefits, whether vested or nonvested;

9. The liquid or nonliquid character of all marital property;

10. The tax consequences to each party; and

11. Such other factors as the court deems necessary or appropriate to consider in order to arrive at a fair and equitable monetary award.[184]

Nearly half the state statutes enumerate factors to be considered by the court in making a property division.[185] As one commentator has noted:

> A listing of factors gives invaluable guidance to the fact finder and the practioner by providing a convenient checklist of items that the state feels are of importance in making an equitable division of the property. Without such a list there can be no predictability from case to case as to what will be considered in the division.[186]

The eleventh, or catchall provision, will give courts the flexibility necessary to resolve unusual situations.[187]

What constitutes equitable distribution appears to depend heavily on the facts and circumstances of each case.[188] Equitable distribution, not mathematical precision, is required.[189] The factors enumerated in section 20-107.3 will allow the court flexibility needed to fashion an appropriate award based on the facts of the case.

Although courts must examine all the factors, the weight to be attached to each factor is largely discretionary. The "homemaker" provision in many state statutes continues to carry great weight, especially as the duration of the marriage inceases.[190] Some courts consider the homemaker's contributions to be as significant as the economic contributions of the

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184. VA. CODE ANN. § 20-107(E) (Cum. Supp. 1982).

185. Note, *Property Division and Alimony Awards: A Survey of Statutory Limitations on Judicial Discretion*, 50 FORDHAM L. REV. 415, 438-39 (1981).

186. *Id.* at 441.

187. *See supra* note 184.

188. "[E]ach case must be looked at individually with an eye to its unique circumstances." *In re* Laster, ___ Mont. ___, 643 P.2d 597 (1982) (quoting *In re* Aanenson, ___ Mont. ___, 598 P.2d 1120, 1123 (1979).

189. *See* Theeke v. Theeke, 105 Ill. App. 3d 119, 433 N.E.2d 1311 (1981).

190. The "homemaker" provisions recognize the nonmonetary contributions of a spouse to the family's well-being. See VA. CODE ANN. § 20-107.3 (E)(1) (Cum. Supp. 1982). For example, a court may look very sympathetically upon a wife who "during the couple's 34 year marriage, [a]s a farmer's wife . . . did the gardening, canning and packaging of the meat; this in addition to raising 14 children and managing the household." *In re* Reed, 100 Ill. App. 3d 873, ___, 427 N.E.2d 282, 283 (1981).

income-producing spouse.[191] Where a spouse has made long-term contributions both as a wage-earner and as a homemaker, the courts tend to award a significant property distribution.[192] Other factors, such as a spouse's physical and mental health, age, or unemployability may also influence the court.[193] Factors not specifically listed in section 20-107.3 but which have been found to be relevant either legislatively or judicially in other states include the employment and vocational capabilities of a spouse and the other spouse's dissipation of assets.[194] Though not expressly included in section 20-107.3, such factors may be considered under the catchall provision.

Probably the most controversial factor listed in section 20-107.3 is the provision requiring consideration of "[t]he circumstances and factors which contributed to the dissolution of the marriage specifically including any ground for divorce. . . ."[195] The court may consider the conduct of both parties and is not limited to conduct constituting a fault ground for divorce.

Although the national trend is to minimize the importance of marital misconduct in equitable property distribution, fault remains a factor to be considered in many states.[196]It may be included expressly by statute, as in Virginia, or may be read into a statute by the court under a "catchall" provision.[197] In either case, the critical issue is what weight the court

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191. *In re* Reed, 100 Ill. App. 3d 873, 427 N.E.2d 282.

192. *See* Temple v. Temple, ___ Ind. App. ___, 435 N.E.2d 259 (1982) (59% to wife, 41% to husband); LaGarde v. LaGarde, 437 A.2d 872 (Me. 1981) (50/50 division); Theeke v. Theeke, 105 Ill. App. 3d 119, 433 N.E.2d 1311 (1981) (60% to wife, 40% to husband on proceeds of marital home and 50% to each on husband's profit sharing plan).

193. In Gottschalk v. Gottschalk, 107 Mich. App. 716, 309 N.W.2d 711 (1981), the court gave particular weight to the fact that the 56 year old wife, possessing few or no saleable employment skills was suffering from severe depression which doctors predicted would continue in the future. In Lupo v. Lupo, ___ Mont. ___, 642 P.2d 1056 (1982), the court appeared particularly concerned about the wife's health problems and employability limitations.

194. *See* Foster & Freed, *supra* note 2, at 4083.

195. VA. CODE ANN. § 20-107.3(E)(5) (Cum. Supp. 1982).

The Joint Subcommittee studying § 20-107 deliberated at length as to the role fault should play in the equitable distribution section of the new statute. They ultimately concluded:

> [T]o allow fault to serve as an absolute bar to the monetary award would defeat the equitable purpose of this section. However, to avoid unreasonable results in situations involving fault, the circumstances contributing to the dissolution of the marriage, specifically including any ground for divorce, have been included among the factors for consideration by the court.

JOINT SUBCOMMITTEE REPORT, *supra* note 15, at 8.

196. Foster & Freed, *supra* note 2, at 4078.

197. For example, the New York courts have read in marital fault to be considered along with "any other factor which the court shall expressly find to be just and proper." Giannola v. Giannola, 441 N.Y.S.2d 341, 342 (1981).

should assign this factor.[198] In *Royal v. Royal*,[199] a Missouri appellate court stated that "[w]hile marital misconduct . . . may justify a disparate division of property . . . misconduct is not a basis for punishing one spouse . . . or for awarding inadequate marital property to an offending spouse."[200] The New York court in *Giannola v. Giannola*[201] stressed that although marital fault may be a factor to be considered, it should not preclude an equitable distribution, since "each party to the marriage is entitled to take with him that which he contributed to the marriage."[202] In *Peters v. Peters*,[203] a Georgia court recognized that even though adultery precluded a spouse from receiving spousal support, an equitable property division was still permissible under equitable maxims.[204] Courts recognize further that marital misconduct is only one of numerous factors to be considered.[205] Where the conduct is extremely burdensome to the marital relationship, it may carry greater weight with the court and significantly affect the award.[206] Often, however, there is objectionable conduct by both parties which effectively cancels out any significant impact marital misconduct would otherwise have had on the property distribution.[207]

Because section 20-107.3 is broad in allowing the consideration of fault in making a property distribution,[208] parties will be encouraged to present all details leading to the marriage's failure. However, because the monetary award is to be "based upon the equities and the rights and interests of each party in the marital property,"[209] the fault factor should not be

198. *See Giannola*, 441 N.Y.S.2d at 342.

199. 617 S.W.2d 615 (Mo. Ct. App. 1981).

200. *Id.* at 618.

201. 441 N.Y.S.2d 341 (1981).

202. 441 N.Y.S.2d at 343.

203. 248 Ga. 442, 283 S.E.2d 454 (1981).

204. *Id.* at ___, 283 S.E.2d at 455.

205. *See In re* Powers, 527 S.W.2d 949 (Mo. Ct. App. 1975).

206. *See In re* Pehle, 622 S.W.2d 711 (Mo. Ct. App. 1981) (wife's flagrant adulterous behavior not only resulted in a child custody award to the father but a 70/30 division of property, the bulk going to the husband).

207. *See, e.g.*, Royal v. Royal, 617 S.W.2d 615 (Mo. Ct. App. 1981).

208. It is similar in this respect to the Maryland statute which lists one of the nine factors to be considered in granting a monetary award as "[t]he facts and circumstances leading to the estrangement of the parties and the dissolution of the marriage." MD. ANN. CODE art. 16, § 1 (Repl. Vol. 1981). One Maryland court, recognizing that marital misconduct (adultery) could be examined at the courts discretion, noted that such conduct was a factor "to be considered not only in making an award of alimony but also in making a monetary award." Ohm v. Ohm, 49 Md. 392, ___, 431 A.2d 1371, 1381 (1981). One commentator has indicated, however, that this factor in the Maryland statute is unclear, that the term estrangement is ambiguous, that there is insufficient indication as to how the factor was to be applied, and that a statutory definition is in order "especially in view of the modern trend not to consider fault in dividing property." Note, *Legislation, Property Disposition Upon Divorce in Maryland: An Analysis of the New Statute*, 8 U. BALT. L. REV. 377, 405 (1979).

209. VA. CODE ANN. § 20-107.3(D) (Cum. Supp. 1982).

given disproportionate weight. If this factor is given disproportionate weight, the equitable purpose of the statute would be defeated.

The factors listed in section 20-107.3 will aid the court in determining the appropriate method for payment of the monetary award. To achieve the goal of "maximizing judicial flexibility and minimizing any burden placed on either party under section 20-107.3,"[210] several payment alternatives are permitted. The monetary award may be in the form of a lump sum or periodic payments.[211] In addition, the award may be satisfied in whole or in part by a court-approved conveyance of property.[212]

Several of the factors listed for court consideration particular are relevant to the method of payment selected. These include tax consequences,[213] the liquidity or nonliquidity of the marital property,[214] and the debts and liabilities of each party.[215] The tax consequences of the method selected will vary and should be carefully considered in order to apportion most equitably the resulting tax burdens.[216] For example, the owner spouse may receive income in the form of capital gains where appreciated property is transferred to the other spouse. The timing of installments or periodic payments will affect whether such payments are tax deductible for the payor spouse and includable as income to the payee spouse.

A distribution under a statute such as section 20-107.3 is vulnerable to discharge in bankruptcy.[217] Although spousal and child support obligations are specifically excepted from discharge in bankruptcy, property settlement obligations are not.[218] Hence, the debt created by the monetary award or the duty to transfer property to satisfy such an award would be a debt dischargeable in bankruptcy.

Section 20-107.3 directs the court to determine the amount of the property-based monetary award without regard to spousal or child support awards.[219] The Joint Legislative Subcommittee stated that "[s]upport determinations, both spousal and child, and the division of marital assets are interrelated. A monetary award based on an equitable apportionment of the marital property may even obviate the need for support in many

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210. JOINT SUBCOMMITTEE REPORT, *supra* note 15, at 8.
211. VA. CODE ANN. § 20-107.3(D) (Cum. Supp. 1982).
212. *Id.*
213. *Id.* § 20-107.3(E)(10).
214. *Id.* § 20-107.3(E)(9).
215. *Id.* § 20-107.3(E)(7).
216. *See generally* Note, *Tax Effects of Equitable Distributions Property Transfers*, 35 TAX LAW 199 (1981); Annot., 51 A.L.R. 3d 461 (1981).
217. *See* 11 U.S.C. § 523(a)(5)(1981); Note, *Legislation Property Disposition upon Divorce in Maryland: An Analysis of the New Statute*, 8 U. BALT. L. REV. 377, 408 (1979).
218. *See* 11 U.S.C. § 523(a)(5) (1981).
219. VA. CODE ANN. § 20-107.3(F) (Cum. Supp. 1982).

instances where economic self-sufficiency and equity are thereby achieved by each party."[220] Section 20-107.1, by expressly requiring courts to consider "[t]he provisions made with regard to the marital property under § 20-107.3,"[221] serves to ensure that the various economic awards will be interrelated and that the potential impact of the property distribution award will not be ignored in determining the need for spousal and child support.

III. CONCLUSION

New sections 20-107.1 through 20-107.3 represent a significant improvement over former section 20-107. The legislature's implied preference for property distribution reflects the more modern perception of marriage as a partnership. Structurally, the three new sections will promote clarity by requiring separate consideration of unique and comprehensive criteria in awarding spousal support and maintenance, child custody and support, and property distribution. At the same time, these sections recognize the interrelationship between these awards. The structural changes should lead to increased predictability and uniformity in divorce actions.

While the new sections bring needed modernization to Virginia's divorce law, they still contain conservative elements. Spousal support remains shackled to the conservative view that fault should operate as a complete bar to spousal support. A more contemporary approach would make fault, at most, only a factor rather than a bar to an award of spousal suppport.

The new sections give the court greater flexibility in structuring awards of spousal and child support, child custody, and property. Full flexibility needed to fashion an equitable award, however, is lacking because of the hybrid approach taken to the equitable distribution of property. Restrictions on the court's power to distribute non-jointly held marital property and to fashion a monetary award reflects legislative skepticism about authorizing courts to reallocate such property equitably. Indirect allocation through a monetary award may lead to reduced awards and less equitable results.

Section 20-107.3 relating to property distribution adds the complexities of tracing and valuing properties to divorce proceedings, which in turn will increase the incidence and expense of litigation where a variety of experts is necessary to make a complete and accurate property valuation. One commentator, calling the new sections a "Divorce Lawyers Relief Act,"[222] has predicted that divorce litigation will become more expensive

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220. JOINT SUBCOMMITTEE REPORT, *supra* note 15, at 7.

221. *See* VA. CODE ANN. §§ 20-107.1(8),-107.2(2)(G) (Cum. Supp. 1982).

222. Address by Lawrence D. Gaughan, Eighth Annual Recent Developments in the Law Seminar presented by the Committee on Continuing Legal Education of the Virginia Law

and time consuming. A related byproduct could be the increased use of commissioners.[223] Moreover, separation agreements could become an even more attractive alternative to litigation as parties are encouraged to address the realities of their dissolving partnership and to structure their future economic relationship in an environment of negotiation and compromise.[224]

Compared to the approach taken in other states, Virginia's approach remains conservative. Nevertheless, the new sections represent both a change within Virginia and a mandate by the Virginia legislature to the courts to view the marital relationship as an economic partnership which must be handled objectively and equitably upon dissolution.

Torrence M. Hinnant

Foundation (June 17, 1982).

223. *See* VA. CODE ANN. § 8.01-607 (Cum. Supp. 1982).

224. Recent legislative encouragement of the use of separation agreements to facilitate divorce is indicated by the 1982 amendment to § 20-91 to include the following: "In any case where the parties have entered into a separation agreement and there are no minor children, a divoce may be decreed on application if and when the husband and wife have lived separately and apart without cohabitation and without interruption for *six months*." VA. CODE ANN. § 20-91(9)(a) (Cum. Supp. 1982) (emphasis added).