

1994

Annual Survey of Virginia Law: Domestic Relations

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Recommended Citation

Ronald S. Evans & Deanna D. Cook, *Annual Survey of Virginia Law: Domestic Relations*, 28 U. Rich. L. Rev. 981 (1994).

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DOMESTIC RELATIONS

*Ronald S. Evans**
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I. 1994 GENERAL ASSEMBLY SESSION

A. *Family Court*

The 1993 Virginia General Assembly enacted two bills¹ to implement the Judicial Council's report to the Governor and General Assembly recommending the creation of a Family Court in Virginia.² The Family Court was to be in effect January 1, 1995, provided that the 1994 legislative session passed the necessary funding and appropriation bills. The 1994 Session did not allocate funds; however, rather than allowing the Family Court project to lapse by inaction, the legislature delayed implementation of the court until July 1, 1996.³

B. *Child Custody*

1. Child Custody Policy, Procedures and Considerations

A year-long study by the Commission on Youth, composed of

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1. Act of Apr. 7, 1993, ch. 930, 1993 Va. Acts 1464 (codified at VA. CODE ANN. § 16.1-226 (Cum. Supp. 1993)); Act of Apr. 7, 1993, ch. 929, 1993 Va. Acts 1422 (codified at VA. CODE ANN. § 16.1-230 (Cum. Supp. 1993)) (effective January 1, 1995).

2. JUDICIAL COUNCIL OF VIRGINIA, REPORT ON THE FAMILY COURT PILOT PROJECT TO THE GOVERNOR AND GENERAL ASSEMBLY OF 1993 (1993).

3. Act of Apr. 9, 1994, ch. 564, 1994 Va. Acts 789.

lay, legal, and health care members, resulted in wholesale changes to the statutes governing child custody determinations. Chapter 6.1 of Title 20, Custody and Visitation Arrangements for Minor Children,⁴ sets forth definitions, charges the court with prioritizing adjudication of custody and visitation arrangements, and establishes standards for determining the best interests of the child.

The new section 20-124.1 applies standards for use in divorce actions under Title 20, and also in custody and visitation determinations arising in the Juvenile and Domestic Relations District Courts independently of divorce.⁵ "Joint custody," "sole custody," and a "person with a legitimate interest" are defined.⁶

The legislature instructed the courts to provide "prompt adjudication" before other considerations arising in the matter.⁷ Mediation, where appropriate, "shall" be employed as an alternative means of resolving custody and visitation disputes.⁸

The best interests of the child continue to be the court's primary consideration. The court must give due regard to the primacy of the parent-child relationship. However, upon a showing by clear and convincing evidence that the best interest of the child would be served, the court may award custody or visitation to any other person with a legitimate interest.⁹

New factors to be considered in determining the best inter-

4. Act of Apr. 11, 1994, ch. 769, 1994 Va. Acts 1170 (codified at VA. CODE ANN. §§ 16.1-278.15, 20-79, 20-103, 20-107.2, 20-124.1 to -124.6 (Cum. Supp. 1994)).

5. VA. CODE ANN. § 16.1-278.15(F) (Cum. Supp. 1994).

6. Although not included in its definitions, courts presumably retain the authority to award: (1) "split custody" when each parent has physical custody of a child or children born of the parties, born of either parent and adopted by the other parent, or adopted by both parents, and (2) "shared custody" when each parent has physical custody of the child for more than 110 days per year. See VA. CODE ANN. § 20-108.2(G)(2), (G)(3) (Cum. Supp. 1994). The Assembly omitted split and shared custody from the list of definitions because these "statuses" are significant only for their impact on the application of the child support guidelines.

7. Query whether the courts must now determine custody and visitation to include support and maintenance, prior to granting exclusive use and occupancy of the marital residence, or an order excluding the offending spouse from the jointly owned or rented family dwelling upon a reasonable apprehension of bodily harm, pursuant to VA. CODE ANN. § 20-103 (Repl. Vol. 1990).

8. VA. CODE ANN. § 20-124.2 (Cum. Supp. 1994).

9. *Id. cf. Bottoms v. Bottoms*, __ Va. App. __, 444 S.E.2d 276 (1994) (enunciating that a lesbian mother was "unfit" in justifying the third-party custody.)

ests of the child address concerns often impacting children whose custody is in question. The court is now directed to give "due consideration to the child's changing developmental needs,"¹⁰ each parent's ability to "meet the emotional, intellectual and physical needs of the child,"¹¹ the parents propensity to "support the child's contact and relationship with the other parent,"¹² and the parents ability to "cooperate in matters affecting the child."¹³ Although astute and sensitive judges already consider these factors in determining the child's best interest, the fact that these considerations are now mandated may render more consistent determinations from the court on how the interests of the child may best be served.

2. Denial of Standing

The Assembly enacted legislation to exclude from the definition of "a party with a legitimate interest" anyone whose parental rights had been involuntarily terminated during the course of a legal adoption.¹⁴ Similarly, any person convicted of rape or incest is deemed not to have a legitimate interest in custody of or visitation with any child born as a result.¹⁵

C. Child Support

1. Social Services Review

Recently enacted legislation allows the Department of Social Services (DSS) to initiate a review of the amount of support ordered by any court.¹⁶ If upon review, the DSS determines that a material change in circumstances has occurred, the findings must be reported to the court that entered the order. A material change in circumstances is defined as a presumptive

10. VA. CODE ANN. § 20-124.3(1) (Cum. Supp. 1994).

11. *Id.* § 20-124.3(3).

12. *Id.* § 20-124.3(6).

13. *Id.*

14. Act of Apr. 10, 1994, ch. 719, 1994 Va. Acts 1041 (codified at VA. CODE ANN. §§ 16.1-241, 20-107.2 (Cum. Supp. 1994)).

15. *Id.*

16. Act of Apr. 11, 1994, ch. 795, 1994 Va. Acts 1237 (codified at VA. CODE ANN. §§ 20-60.3, 63.1-252.2 (Cum. Supp. 1994)).

amount deviating at least ten percent, but not less than \$25.00 per month, from the existing award. Notice is then given to both parties, and either party may then request a hearing within thirty days from receipt of the notice. Absent a request, the court must enter the modified order or schedule a hearing on the motion. Notification of the court's decision must be sent to the parties and the Department.¹⁷ The Division of Child Support Enforcement has indicated it will review only those orders handled through Aid to Dependent Children, and those assigned to it for collection. Orders will be reviewed no more than once every three years in accordance with federal standards.

2. Health Care Insurance

An act passed in the 1994 General Assembly Session exempted the applicability of "season restrictions" from health insurance enrollments when a payroll deduction order requires the employer to enroll an employee, employee's spouse or former spouse, or the employee's dependent children in the employer's health care plan.¹⁸ These amendments to Virginia Code sections 20-79.3 and 63.1-250, in conformity with federal requirements, also prohibit disenrolling the employee's dependent children unless the court or administrative order is no longer in effect, the children are enrolled in another health care plan with no discontinuation in coverage, or the employer eliminates family coverage for all employees.¹⁹ These amendments are designed to ameliorate the devastating economic impact on non-communicating families with children incurring uncovered medical expenses.

17. VA. CODE ANN. § 63.1-252.2 (Cum. Supp. 1994). If the court deviated from statutory guidelines in the order under review, and the Department determines that a material change in circumstances has occurred, the Department *must* schedule a hearing with the court entering the order instead of notifying the parties who may or may not request a hearing. *Id.*

18. Act of Apr. 11, 1994, ch. 767, 1994 Va. Acts 1165 (codified at VA. CODE ANN. §§ 20-79.3, 63.1-210.1 (Cum. Supp. 1994)). "Season restrictions" limit the ability of an employer to alter those persons covered under his policy of insurance to certain dates.

19. *Id.*

3. Revoking Delinquent Child Support Obligor's Occupational License

A highly controversial measure allowing the court entering the child support order, or the court enforcing such order, to suspend the occupational license of a delinquent obligor passed unheralded in the 1994 Session.²⁰ Any person engaging in a business, trade, profession or occupation requiring a license from the Commonwealth pursuant to Title 22, 38.2, 46.2 or 54.1, is subject to the suspension of his or her occupational license if the delinquency is for a period of ninety days or for more than \$5,000.²¹ The obligee or the Department of Support Enforcement may petition the appropriate court for an order to suspend the delinquent obligor's license. The notice is to be sent by certified mail with proof of "actual receipt."²² The obligor has thirty days from the date of receipt of notice to either pay the delinquent funds or reach a financing agreement with the obligee or the Department. If neither occurs within thirty days, the Department of Social Services will file for the suspension of his or her occupational license.²³

The remedy of suspension is not available to the court if there is an "alternate remedy . . . likely to result in the collection of the delinquency," or if the suspension would result in "irreparable harm."²⁴ After the entry of the order, if the obligor either pays the delinquency or reaches an appropriate agreement, and acts pursuant to the agreement, the court shall order reinstatement of the license.²⁵ Although this "get tough" measure assisting in the collection of support arrearages is subject to abuse, the Act appears to provide sufficient safeguards to assure use in only the most appropriate and egregious cases.

20. Act of Apr. 11, 1994, ch. 764, 1994 Va. Acts 1160 (codified at VA. CODE ANN. §§ 20-60.3, 20-108.1, 63.1-252.1, 63.1-263.1 (Cum. Supp. 1994)).

21. VA. CODE ANN. § 63.1-263.1 (Cum. Supp. 1994).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

4. Uniform Interstate Family Support Act (UIFSA)

The most far-reaching change enacted by the 1994 Session of the Virginia General Assembly was the adoption of the Uniform Interstate Family Support Act (UIFSA)²⁶ to replace the Uniform Reciprocal Enforcement of Support Act (URESA). Although a thorough discussion of UIFSA is beyond the scope of this survey,²⁷ the Act provides for uniform long-arm jurisdiction over nonresidents. Once jurisdiction is obtained, UIFSA provides for discovery and the elicitation of testimony through the "information route" sections of the Act. It also limits the power of a tribunal, other than one having continuing and exclusive jurisdiction over the order, to modify it.²⁸

5. Criminal Violations of a Custody or Visitation Order

The General Assembly added section 18.2-49.1(B)²⁹ punishing, as a Class 4 misdemeanor,³⁰ a knowingly wrongful and intentional act constituting a clear and significant violation of a custody or visitation order. A second offense within a twelve-month period constitutes a Class 3 misdemeanor.³¹ A third conviction within twenty-four months of the first conviction is a Class 2 misdemeanor.³²

26. Act. of Apr. 10, 1994, ch. 673, 1994 Va. Acts 976 (codified at VA. CODE ANN. §§ 16.1-296, 20.88.32 to .82 (Cum. Supp. 1994)).

27. For a complete discussion and analysis, see Robert G. Spector, *The Nationalization of Family Law: An Introduction to the Manual for the Coming of Age*, 27 FAM. L.Q. 1 (1993).

28. See VA. CODE ANN. §§ 16.1-296, 20.88.32 to .82 (Cum. Supp. 1994).

29. Act of Apr. 9, 1994, ch. 575, 1994 Va. Acts 800 (codified at VA. CODE ANN. §§ 16.1-241 and 18.2-49.1 (Cum. Supp. 1994)).

30. Punishable by a fine of not more than \$250. See VA. CODE ANN. § 18.2-11(d) (Cum. Supp. 1993).

31. Punishable of a fine of not more than \$500. See VA. CODE ANN. § 18.2-11(c) (Cum. Supp. 1993).

32. Punishable by either confinement in jail for not more than six (6) months or a fine of not more than \$1,000, or both. See VA. CODE ANN. § 18.2-11(b) (Cum. Supp. 1993). Query whether this amendment renders any person who "knowingly, wrongfully and intentionally" engages in conduct constituting a "clear and significant" violation of an order, guilty of criminal, as opposed to civil, contempt. If so, all such violations must be sent to the law side of the court, and the Commonwealth attorney's office must prosecute the action, even when the remedy sought is future compliance, rather than punishment for past conduct. See *Hicks v. Feiock*, 485 U.S. 624, 633 (1988),

D. *Miscellaneous*

1. Separate Maintenance

The Legislature passed a law providing that certain provisions of Title 20 of the Virginia Code apply with equal weight to suits for divorce and for separate maintenance. Sections affected include section 20-103 authorizing *pendente lite* support, section 20-107.1 specifying the factors to be considered when awarding support and modification of an order of support, and section 20-109 defining the effect of stipulations or agreements.³³

II. JUDICIAL DECISIONS

A. *Equitable Distribution of Marital Property*

1. Classification of Property

The Virginia Court of Appeals has limited its broad expansion of the transmutation doctrine of previous years.³⁴ In the case of *Huger v. Huger*,³⁵ the court of appeals reversed a trial court's finding that the 451 shares of stock were marital property stating that when a donee presents sufficient evidence to rebut the statutory presumption of marital property, and the other party presents no evidence to the contrary, the presumption is rebutted.³⁶ The court of appeals found that the husband had sufficiently rebutted the presumption of marital property.³⁷

The husband had appealed the trial court's finding that the stock was marital property, claiming that under section 20-

cited in Kessler v. Commonwealth, ___ Va. App. ___, 441 S.E.2d 223 (1994); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911).

33. Act of Apr. 9, 1994, ch. 518, 1994 Va. Acts 724 (codified at VA. CODE ANN. §§ 20-103, -107.1, -109 (Cum. Supp. 1994)).

34. *See, e.g.*, Ellington v. Ellington, 8 Va. App. 48, 378 S.E.2d 626 (1989); Lambert v. Lambert, 6 Va. App. 94, 367 S.E.2d 184 (1988).

35. 16 Va. App. 785, 433 S.E.2d 255 (1993).

36. *Id.* at 788, 433 S.E.2d at 257 (citing Stainback v. Stainback, 11 Va. App. 13, 396 S.E.2d 686 (1990)).

37. *Id.*

107.3(A)(1)(ii), the property should be classified as separate.³⁸ According to the husband, he owned 451 shares of stock, given to him by his father during the marriage.³⁹ The husband presented evidence showing that the shares were titled solely in his name and were always intended as separate property.⁴⁰ He also contended that an additional forty shares of stock received from the estate of his deceased brother, and eighty-five shares of stock received from his father prior to the marriage, were also separate property. The wife presented no contrary evidence.⁴¹

The court then had to determine whether the shares of stock received by the husband were transmuted into marital property as a result of the efforts of either party during the marriage.⁴² Where a spouse fails to separate, and instead commingles separate property with marital property, the chancellor must classify the property as marital if the increase in value was due to the efforts of either party.⁴³ In *Huger*, the court found that since the parties did not own a majority of stock, they did not have unbridled discretion over the asset.⁴⁴ Moreover, the husband and wife both drew salaries from the company which provided sufficient compensation for any work effort.⁴⁵ Therefore, the court concluded that the evidence failed to prove the transmutation of stock into marital property due to the efforts of either the husband or the wife.⁴⁶

38. VA. CODE ANN. § 20-107.3(A)(1)(ii) (Cum. Supp. 1994) (defining as separate property all property acquired during the marriage by bequest, devise, descent, survivorship or gift from a source other than the other party).

39. 16 Va. App. at 787, 433 S.E.2d at 257.

40. *Id.* at 788, 433 S.E.2d at 257.

41. *Id.* at 789, 433 S.E.2d at 258.

42. *Id.* at 788-89, 433 S.E.2d at 257-58 (citing *Pommerenke v. Pommerenke* 7 Va. App. 241, 248, 372 S.E.2d 630, 633-34 (1988)). The court of appeals noted that the stocks received by the husband prior to the marriage remained separate property, pursuant to VA. CODE ANN. § 20-107.3(A)(1)(i), unless the property becomes transmuted into marital property pursuant to VA. CODE ANN. § 20-107.3(A)(3)(a). *Id.* at 788 n.1, 433 S.E.2d at 257 n.1.

43. *Id.* at 788, 433 S.E.2d at 257 (explaining the doctrine of transmutation).

44. *Id.*

45. *Id.*

46. *Id.* at 789, 433 S.E.2d at 258.

Additionally, in the case of *Stratton v. Stratton*,⁴⁷ the court of appeals reversed the trial court's ruling that property the husband purchased from the marital business with separate funds constituted a separate asset.⁴⁸ During the marriage, the husband established and was the sole stockholder of Stratton Auto Sales, Inc., a used car business from which he received a salary as an employee.⁴⁹ The parties agreed that the business was marital property. During the marriage, the business purchased property pursuant to a land sales contract. The purchase price of \$15,000.00 was financed over ten years.⁵⁰ In February, 1989, the husband purchased the property from the marital business, using inherited separate funds.⁵¹ He paid \$6,940.00 to the business and assumed the loan on the land sales contract.⁵² The cash "buy-out" figure to the business represented the amount of equity in the property at the time of the transfer.⁵³ The court of appeals declared that the once marital property had become separate since the husband paid valuable consideration for the marital asset.⁵⁴ In other words, after the sale from the corporation to the husband, the property became his individual property acquired during the marriage by use of separate funds.⁵⁵ In the absence of fraud, the court found the transaction to be proper.⁵⁶

In *Decker v. Decker*,⁵⁷ the court of appeals affirmed a trial court's ruling, and held that no abuse of discretion occurred when the trial court allotted only twenty percent of appreciated stock as marital property, even where the husband's efforts

47. 16 Va. App. 878, 433 S.E.2d 920 (1993).

48. *Id.* at 879, 433 S.E.2d at 921.

49. *Id.* at 880, 433 S.E.2d at 921.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 881-82, 433 S.E.2d at 922.

55. *Id.* The Virginia Code further defines separate property as 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 then maintained as separate property. VA. CODE ANN. § 20-107.3(1)(iii) (Repl. Vol. 1990 & Cum. Supp. 1994).

56. 16 Va. App. at 881-82, 433 S.E.2d at 922 (citing *Clements v. Clements*, 10 Va. App. 580, 586-87, 397 S.E.2d 257, 261 (1990)).

57. 17 Va. App. 12, 435 S.E.2d 407 (1993).

resulted in the asset's substantial appreciation.⁵⁸ The court found that the record contained evidence demonstrating that all the appreciation in value could not be solely attributed to the husband's efforts, even though the husband was president and key executive of the company.⁵⁹ This proposition was based on the fact that five different executives, and not the husband alone, determined company operations.⁶⁰ Additionally, there was evidence that after Mr. Decker became president, the rate of growth and profitability of the company decreased.⁶¹ Under these circumstances, the court of appeals found no abuse of discretion in characterizing only twenty percent of the appreciation in value as marital property.⁶²

2. Consideration of Statutory Factors

In a case of first impression, the court of appeals in *Floyd v. Floyd*⁶³ held that premarital contributions having an economic impact may be considered in equitable distribution.⁶⁴ In *Floyd*, the husband and wife began living together in 1979, had a child out of wedlock in 1980, were married in 1985, and separated in 1989.⁶⁵ The husband contended that the trial court erred in making the equitable distribution award because it expressly considered the five-year pre-marital cohabitation period.⁶⁶ The court of appeals upheld the lower court's finding, and ruled that the trial court could properly consider the parties' premarital contributions, both monetary and nonmonetary, insofar as those contributions affected the value of the marital property.⁶⁷ Nothing in Virginia Code section 20-107.3 prevents

58. *Id.* at 17-18, 435 S.E.2d at 411-12.

59. *Id.* at 17, 435 S.E.2d at 412.

60. *Id.*

61. *Id.*

62. *Id.* at 18, 435 S.E.2d at 412.

63. 17 Va. App. 222, 436 S.E.2d 457 (1993).

64. *Id.* at 224, 436 S.E.2d at 458.

65. *Id.*

66. *Id.*

67. *Id.* at 226, 436 S.E.2d at 459-60. The court reasoned that the marriage represented an economic partnership requiring that each party should, upon dissolution, receive a fair proportion of the property. *Id.* (citing *Roane v. Roane*, 12 Va. App. 989, 994, 407 S.E.2d 698, 701 (1991)). The court clarified that the statute would not apply if the couple never married. *Id.* (citing *Kleinfeld v. Veruki*, 7 Va. App. 183, 190, 372 S.E.2d 407, 411 (1988)).

the trial court from considering premarital contributions to the acquisition or maintenance of property.⁶⁸ However, the court cautioned that considering the period of premarital cohabitation without first determining its effect on the value of marital assets would be inappropriate.⁶⁹

3. Dissipation

In *Decker v. Decker*,⁷⁰ the court found that a husband's gift-giving to his family after the separation did not constitute "waste."⁷¹ Before the parties separated, the husband regularly gave yearly cash gifts to his family and to his wife's family for estate and tax planning purposes.⁷² After the parties separated, the husband continued to provide monetary aid, but only to his side of the family.⁷³ The wife claimed that this constituted dissipation of the marital estate. The trial court ruled, and the court of appeals upheld, that the post-separation gifts comported with the parties' overall estate planning made during the marriage, and it was not "waste" simply because the husband discontinued giving to the wife's family.⁷⁴ The court found the marital estate was actually preserved by the husband ceasing to give the wife's family assistance since the value of the estate was not thereby decreased.⁷⁵

68. 17 Va. App. at 226, 436 S.E.2d at 460. The court also relied on *Aster v. Gross*, 7 Va. App. 1, 5-6, 371 S.E.2d 833, 836 (1988), which held that "fault" in bringing about the dissolution of a marriage is not relevant to equitable distribution unless it had an economic impact on the value of the marital estate.

69. 17 Va. App. at ___, 436 S.E.2d at 460.

70. 17 Va. App. 12, 435 S.E.2d 407 (1993).

71. *Id.* at 20, 435 S.E.2d at 413.

72. *Id.*

73. *Id.*

74. *Id.* (citing *Robinette v. Robinette*, 736 S.W.2d 351 (Ky. Ct. App. 1987) asserting that while gift giving can be waste, the fact that the parties had regularly provided financial assistance to nonresident family members provided sufficient evidence to rebut that possibility.)

75. *Id.*

B. Divorce

1. Defenses

In *Hollis v. Hollis*,⁷⁶ the court of appeals found the defense of connivance, the prior consent of one spouse to the misconduct of the other, to be proven where the husband asserted that his wife urged him to date and encouraged his adulterous relationship with another woman.⁷⁷ As a defense to his wife's suit for divorce, the husband introduced a letter written by the wife stating that she wished to be free from the marriage, and wanted the husband to share his life with [the other woman].⁷⁸ The wife also sent her husband and his paramour flowers and a card stating: "My very best wishes to you both today, to your new beginning."⁷⁹ As a third piece of evidence, the husband introduced a document signed by both husband and wife which acknowledged the wife's consent to the husband moving out of the home, her knowledge that he would be moving in with another woman, and promising that she would not employ adultery as ground for divorce.⁸⁰

The trial court found that the husband's adultery resulted from his wife's connivance and procurement, and granted the husband a no-fault divorce.⁸¹ The court of appeals affirmed the lower court, stating the letters, flowers, and note supported the finding that the wife encouraged, as well as consented, to the husband's adulterous relationship.⁸²

2. Spousal Support

In the case of *Huger v. Huger*,⁸³ the court of appeals ruled that the traditional maxims of equity were not proper consider-

76. 16 Va. App. 74, 427 S.E.2d 233 (1993).

77. *Id.* at 77, 427 S.E.2d at 235.

78. *Id.* at 76, 427 S.E.2d at 234.

79. *Id.* at 76, 427 S.E.2d at 235.

80. *Id.*

81. *Id.*

82. *Id.* at 77, 427 S.E.2d at 235.

83. 16 Va. App. 785, 433 S.E.2d 255 (1993).

ations in determining spousal support.⁸⁴ In the case, the husband argued that the wife should be barred from receiving spousal support because of her "unclean hands."⁸⁵ The court of appeals interpreted Virginia Code section 20-107.1 to impose a mandatory duty upon the court to consider specific factors in determining spousal support, which does not include the doctrine of "clean hands."⁸⁶ Since the court's divorce jurisdiction is purely statutory, the "clean hands" doctrine is not a proper argument in calculating spousal support.⁸⁷

The court enumerated a standard for granting spousal support where grounds for divorce exist in the case *Barnes v. Barnes*.⁸⁸ If the denial of support would result in a "manifest injustice," the court should award support despite a party's inappropriate behavior.⁸⁹ In *Barnes*, the wife admitted to post-separation adultery, and the husband was granted a divorce on that ground.⁹⁰ However, the trial court awarded spousal support to the wife to avoid a "manifest injustice" in accordance with section 20-107.1 of the Virginia Code.⁹¹ The court explained that before making a finding of "manifest injustice," the court must consider two factors: (1) the comparative economic circumstances of the parties, and (2) the respective degrees of fault of the parties.⁹² The court declared that the respective degrees of fault during the marriage are not limited to legal grounds for divorce.⁹³ Degrees of fault can "encompass" all behavior during the marriage affecting the marital relationship, including any acts or conditions which contributed to the marriage's failure, success, or well-being.⁹⁴ In this case, the

84. *Id.* at 790, 433 S.E.2d at 259.

85. *Id.*

86. *Id.*

87. *Id.*

88. 16 Va. App. 98, 428 S.E.2d 294 (1993).

89. *Id.* at 99, 428 S.E.2d at 296.

90. *Id.*

91. *Id.* at 101, 428 S.E.2d at 297. The Code of Virginia abolished the longstanding absolute bar preventing a spouse who had a ground for divorce in his or her favor, from being required to pay permanent spousal support. However, the Code retains the provision barring payment where grounds for divorce exist for adultery, sodomy or buggery, except when a manifest injustice would result. VA. CODE ANN. § 20-107.1 (Repl. Vol. 1990).

92. *Barnes*, 16 Va. App. at 102, 428 S.E.2d at 298.

93. *Id.*

94. *Id.*

court granted the wife support based on the husband's annual earnings of \$93,750, as compared to the wife's income of \$140 per month.⁹⁵ The court also found it important that the wife's adultery occurred after the separation, and after the marriage had been irretrievably lost.⁹⁶

3. Spousal Support and Property Settlement Agreements

In the case of *Radford v. Radford*,⁹⁷ the court held that spousal support in an agreement terminates upon the remarriage or death of the person to whom the support is payable, unless the agreement expressly provides for its continuation.⁹⁸ There, the husband agreed to pay his wife \$200 per month for a period of five years, and incorporated this understanding into the parties' final decree of divorce.⁹⁹ The wife remarried before the five-year period elapsed.¹⁰⁰ The court of appeals affirmed the trial court's termination of spousal support, holding that in order to be consistent with the terms of Virginia Code section 20-109, spousal support automatically terminates on the death of either party or the remarriage of the payee unless specifically stated otherwise in the parties' agreement.¹⁰¹

The court further extended the *Radford* ruling in *MacNelly v. MacNelly*.¹⁰² In *MacNelly*, the husband and wife entered into a written property settlement agreement requiring the husband to pay to the wife \$7,000 per month in support from February, 1989 until February, 1996.¹⁰³ The agreement specifically provided that if either party died before February 1, 1996, the husband's support obligation would terminate.¹⁰⁴ However, the agreement was silent as to the effect the wife's remarriage

95. *Id.* at 104, 428 S.E.2d at 299. Husband had previously supported wife's election to remain home during the marriage. *Id.*

96. *Id.* at 103, 428 S.E.2d at 298.

97. 16 Va. App. 812, 433 S.E.2d 35 (1993).

98. *Id.* at 813, 433 S.E.2d at 36 (1993). Upon the death or remarriage of the spouse receiving support, spousal support shall terminate unless otherwise provided by stipulation or contract. VA. CODE ANN. § 20-109 (Repl. Vol. 1990 & Supp. 1993).

99. *Radford*, 16 Va. App. at 813, 433 S.E.2d at 36.

100. *Id.*

101. *Id.*

102. ___ Va. App. ___, 437 S.E.2d 582 (1993).

103. *Id.* at ___, 437 S.E.2d at 582.

104. *Id.* at ___, 437 S.E.2d at 583.

would have on support.¹⁰⁵ The court of appeals reversed the trial court's ruling that support would continue beyond the wife's remarriage.¹⁰⁶ Citing *Radford*, the court held that in order to accomplish the stated objective of the statute and resolve ambiguity, the statute requires express language, either through citing the statute or expressly stating that remarriage does not terminate a support obligation.¹⁰⁷

C. Child Support

1. Tax Exemption

The court of appeals in *Floyd v. Floyd*¹⁰⁸ asserted that the custodial parent's right to claim dependent children as a tax exemption cannot be reallocated by the court.¹⁰⁹ The court held that the divorce statutes do not convey broad equitable powers on the trial court, and that the trial court cannot fashion other remedies, such as allocating the dependency exemption.¹¹⁰

2. Review of Child Support

In the case of *Hiner v. Hadeed*,¹¹¹ the court of appeals reiterated that "in any judicial or administrative proceeding for child support, the presumptively correct amount of child support shall be the amount under the guidelines."¹¹² Before the

105. See *id.* at ___, 437 S.E.2d at 583.

106. *Id.* at ___, 437 S.E.2d at 584.

107. *Id.* at 584. The court recognized that the agreement at issue differed from the agreement in *Radford*. In *Radford*, the agreement was silent not only as to the effect of remarriage, but also as to the effect of death. The agreement here contained an express provision concerning the effect of death, but the court also insisted on specific language with regard to remarriage to negate the statute. *Id.*

108. 17 Va. App. 222, 436 S.E.2d 457 (1993).

109. *Id.* at 231, 436 S.E.2d at 463 (citing I.R.C. § 152 (West Supp. 1994) which states that the custodial parent is allowed to take the exemption unless a waiver is signed); see also, *Dietz v. Dietz*, 17 Va. App. 203, 436 S.E.2d 463 (1993).

110. 17 Va. App. at 203, 436 S.E.2d at 463. Although § 20-108.1(B)(15) does not expressly provide for "transfer" of this exemption through waiver, entitlement to or reallocation of the exemption is a factor that may justify deviating from the support guidelines. *Id.*

111. 15 Va. App. at 575, 425 S.E.2d 811 (1993).

112. *Id.* at 578, 425 S.E.2d at 812.

enactment of the guidelines, a party seeking to modify support had to show that a material change in circumstance had occurred since the last hearing or award.¹¹³ In light of the adoption of the guidelines in section 20-108.2, however, the *Hiner* court ruled that a trial court could consider a modification petition without a finding of material change in circumstance, if the last award predated, and significantly varied from the presumptively correct figure calculated according to the support guidelines.¹¹⁴ The court did not "repudiate the principle that a party must otherwise prove a material change in circumstances in order to obtain a modification of support, but for this limited exception."¹¹⁵ In the *Hiner* case, the court found that the husband had already petitioned for a reduction in support after the guidelines came into effect.¹¹⁶ That decision, although erroneous, was never appealed.¹¹⁷ Therefore, the husband had to show a material change in circumstances since the last hearing in order to modify support.¹¹⁸ The husband's appeal was ultimately dismissed for failure to show a material change in circumstance. Therefore, an adjustment to the previous child support order was barred through *res judicata*.¹¹⁹

Similarly, in the case of *Slonka v. (Slonka) Pennline*,¹²⁰ the court declared that the enactment of the shared custody guidelines¹²¹ was also a sufficient and substantial change in circumstance to review past child support awards.¹²² In *Slonka*, the parties entered into a pre-guideline property settlement agreement providing for joint custody.¹²³ After the guidelines' effective date, the husband moved for a reduction in support.¹²⁴ The court denied his motion, finding that there

113. *Id.* at 579, 425 S.E.2d at 814 (citing *Featherstone v. Brooks*, 220 Va. 443, 446-47, 258 S.E.2d 513, 515 (1979)).

114. *Id.* at 581, 425 S.E.2d at 815 (citing *Milligan v. Milligan*, 12 Va. App. 987, 407 S.E.2d 704 (1991)).

115. *Id.* at 579-80, 425 S.E.2d at 814.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. ___ Va. App. ___, 440 S.E.2d 423 (Va. App. 1994).

121. VA. CODE ANN. § 20-108.2(G)(3) (Cum. Supp. 1994) (effective July 1, 1992).

122. ___ Va. App. at ___, 440 S.E.2d at 423.

123. ___ Va. ___ at, 440 S.E.2d at 423.

124. ___ Va. App. ___ at, 440 S.E.2d at 423.

had been no material change in circumstances since the parties' original agreement.¹²⁵ The court of appeals reversed the lower court's determination, holding that because the 1992 amendment to the Code created a new category for shared custody arrangements, the trial court erred in requiring a showing, other than the guideline amendment, which demonstrated a significant disparity from the parties' agreed support amount.¹²⁶

3. Imputed Income

The court of appeals showed its willingness to impute income to non-working mothers in two cases over the past year. In *Hamel v. Hamel*,¹²⁷ the court imputed income to a mother who voluntarily quit her employment.¹²⁸ The wife had a job earning approximately \$17,000 per year.¹²⁹ Although she had voluntarily quit her job and earned no income at the time of the hearing,¹³⁰ the trial court refused to impute income to her.¹³¹ The court of appeals, however, reversed.¹³²

Also, in the case of *Brody v. Brody*,¹³³ the father appealed the denial of an award of child support where the mother had voluntarily quit her job to stay home and care for a new child from a subsequent marriage.¹³⁴ In *Brody*, the Court considered the sufficiency of evidence needed to impute income to a parent who is allegedly voluntarily unemployed, and set forth the following guidelines: (1) when a parent leaves his or her employment, the burden is on that parent to show that the decision was not voluntary, (2) the unilateral decision to stay at home and care for a child is not sufficient, standing alone, to establish that unemployment is involuntary if child care services are available and the cost of such services may be determined, and

125. __ Va. App. __ at, 440 S.E.2d at 425.

126. __ Va. App. at __, 440 S.E.2d at 425.

127. __ Va. App. __, 441 S.E.2d 221 (1994).

128. *Id.* at __, 441 S.E.2d at 221-22.

129. *Id.* at __, 441 S.E.2d at 222.

130. *Id.* at __, 441 S.E.2d at 222.

131. *Id.* at __, 441 S.E.2d at 222.

132. *Id.* at __, 441 S.E.2d at 223.

133. 16 Va. App. 647, 432 S.E.2d 20 (1993).

134. *Id.*

(3) imputed income may be based on employment recently and voluntarily terminated.¹³⁵

The mother in *Brody* had previously earned \$54,000 per year.¹³⁶ She stopped working in order to stay at home and care for a child from her new marriage expected in December of that year.¹³⁷ The wife's new husband was transferred to Germany, and the wife planned to follow him.¹³⁸ The court of appeals held that the father only had to present evidence sufficient to enable the trial judge to project the amount of imputed income and that figure could be based on her previous employment and earnings.¹³⁹

In *Whitaker v. Colbert*,¹⁴⁰ the court of appeals upheld the trial court's refusal to treat a father's personal injury settlement as income in calculating child support.¹⁴¹ The trial court held that the personal injury settlement was not "income" within the scope of Virginia Code section 20-108.2(C), as that section applies to income, not capital recoupment.¹⁴² The court found that although the father's unapportioned personal injury claim included an income element of lost earnings, the award also included capital elements of compensation for medical expenses, loss of earning capacity, disability, injury and pain and suffering, and it would be speculative to attribute a portion of the settlement to lost wages.¹⁴³ Therefore, the court found that the evidence did not prove that the settlement generated income to Colbert.¹⁴⁴

The court did, however, impute Social Security benefits as income to the father. The children received the benefits as a result of their father's disability. The court determined that the benefit received by the children should be considered income derived from the father, and should be included in the computa-

135. *Id.* at 650-51, 432 S.E.2d at 22.

136. *Id.* at 649, 432 S.E.2d at 21.

137. *Id.*

138. *Id.*

139. *Id.* at 651, 432 S.E.2d at 22.

140. ___ Va. App. ___, 442 S.E.2d 429 (Va. App. 1994).

141. *Id.*

142. *Id.* at ___, 442 S.E.2d at 431.

143. *Id.* at ___, 442 S.E.2d at 431.

144. *Id.* at ___, 442 S.E.2d at 431.

tion of his ongoing support obligation as a credit against that obligation.¹⁴⁵

The court found the Social Security benefits received by the children were "entitlements" earned by the father through his earlier employment, and may be considered as a substitute for his lost ability to provide for the children.¹⁴⁶ The father, the court declared is entitled to a credit for that alternative payment of ongoing support.¹⁴⁷ This was not a retroactive modification of support, the court found, but rather a source of funds, indirectly attributable to a parent, to be used to satisfy that parent's court ordered obligation.¹⁴⁸

4. Child Support and Property Settlement Agreements

In the case of *Kelly v. Kelly*,¹⁴⁹ the parties executed a property settlement agreement that was affirmed, ratified and incorporated by reference into their final decree of divorce.¹⁵⁰ The husband relinquished all equity in the jointly owned marital residence to the wife, in exchange for never paying child support. The wife agreed to hold him harmless from any child support payment should she ever successfully petition for child support. When the wife subsequently petitioned and was awarded child support by the trial court, the husband sought to enforce the agreement's reimbursement provision. The trial court held that the reimbursement provision was void as contrary to public policy.¹⁵¹ The court of appeals reversed, holding that where a trial court affirms, ratifies, and incorporates by reference an agreement into its decree, it shall be deemed for all purposes to be a term of the decree.¹⁵² After twenty-one

145. __ Va. App. at __, 442 S.E.2d at 432. The court cited other jurisdictions that have followed the same approach.

146. *Id.* at 431.

147. *See also*, Commonwealth *ex. rel.* Comptroller of Virginia v. Skeens, __ Va. App. __, 442 S.E.2d 432 (1994) (holding that the trial court has the sound discretion to credit Social Security benefits paid to children toward arrears in certain circumstances).

148. *Id.* at __, 442 S.E.2d at 433.

149. 17 Va. App. 93, 435 S.E.2d 421 (1993).

150. *Id.* at 94, 435 S.E.2d at 422.

151. *Id.* at 95, 435 S.E.2d at 423.

152. *Id.* at 96, 435 S.E.2d at 423.

days, the judgment of a trial court may not be modified unless it is void.¹⁵³ Since the validity of the agreement was not challenged before the divorce decree was entered, or within twenty-one days thereafter, the trial court lost jurisdiction of the case except for the limited purpose of revising child custody and support.¹⁵⁴ The Supreme Court of Virginia reversed the Court of Appeals decision and affirmed the trial courts ruling that the provision which substantially altered the childrens right to receive support was void because it was violative of clear established law.¹⁵⁵ The court further ruled that because the judgment was void. It could be attached and vacated in any court at any time, directly or collaterally.¹⁵⁶

D. Paternity

In the case of *Dunbar v. Hogan*,¹⁵⁷ the court of appeals found that a sworn declaration of paternity, although having the same legal effect as a judgment entered pursuant to Virginia Code section 20-49.8,¹⁵⁸ is not res judicata on the issue of paternity, nor does it collaterally estop a party from adjudicating the issue where no previous judicial determination of paternity has been made.¹⁵⁹ In *Dunbar*, the father signed a sworn declaration stating he was the father of a child born out of wedlock to Ms. Hogan. Three months later, the mother filed a petition in the juvenile court seeking child support. Dunbar then requested, and the court ordered, paternity tests. The test results excluded Dunbar as the biological father of the child.¹⁶⁰ Dunbar defended Hogan's support petition on the ground that the mother obtained his declaration of paternity by

153. *Id.* A judgment may not be modified after 21 days unless it is void because of extrinsic or collateral fraud, or entered by a court that did not have jurisdiction over the subject matter or the parties. VA. SUP. CT. R. 1:1 (Repl. Vol. 1994).

154. 17 Va. App. at 96, 435 S.E.2d at 424.

155. *Kelley v. Kelley*, No. 931522, 1994 WL503255 (Va. Sept. 16, 1994).

156. *Id.* at *3.

157. 16 Va. App. 653, 432 S.E.2d 16 (1993).

158. Code § 20-49.8 allows a judgment or order establishing parentage to include provisions for support, custody, etc. VA. CODE ANN. § 20-49.8 (Repl. Vol. 1990).

159. 16 Va. App. at 659, 432 S.E.2d at 19, 20.

160. *Id.* at 655-56, 432 S.E.2d at 1.

fraud, and on the ground that he was not the child's biological father.¹⁶¹

The trial court ruled that the declaration of paternity was not obtained by fraud, and held that the provisions of former code section 20-49.1 estopped Dunbar from disclaiming that he was the child's father, and from disproving his paternity with evidence of HLA test results.¹⁶² The trial judge ruled that by giving the declaration of paternity the "same legal effect as a judgment" entered pursuant to code section 20-49.8, as required by section 20-49.1(B), the issue of paternity had already been decided, and the father was estopped from relitigating the issue.¹⁶³ The court of appeals reversed the judgment, finding that the issue of paternity had never been judicially determined.¹⁶⁴

According to the court of appeals an affidavit of paternity, having the same legal effect as a judgment entered pursuant to section 20-49.8, for purposes of determining or enforcing support, custody, visitation or guardianship, supports adjudication of those issues without litigating paternity.¹⁶⁵

The sworn statement or a ninety-eight percent test result, however, does not have the same legal effect as a judgment for all purposes. While a sworn statement or test result may "have the same legal effect" as a judgment of paternity for purposes of support, custody and visitation, the fact of paternity carries certain rights, such as inheritance, which section 20-49.8 does not address.¹⁶⁶ The statute does not preclude a father from raising paternity absent a prior adjudication.¹⁶⁷

E. Contempt of Court

The court of appeals in *Kessler v. Commonwealth*,¹⁶⁸ reversed the trial court's denial of Kessler's request for a jury

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 658, 432 S.E.2d at 19.

165. *Id.* at 659, 432 S.E.2d at 19.

166. See VA. CODE ANN. § 20-49.8 (Repl. Vol. 1990 & Cum. Supp. 1994).

167. *Id.*

168. — Va. App. —, 441 S.E.2d 223 (1994).

trial on a contempt charge.¹⁶⁹ On appeal from the Juvenile and Domestic Relations District Court, the Botetourt County Circuit Court found that Kessler, in arrears for over \$18,000, had a long-standing history of willful failure to pay child support. The court sentenced Kessler to serve eleven months in jail, and did not permit him to purge the contempt charge by paying the support arrearage.¹⁷⁰

The circuit court first determined, contrary to the trial court's rulings, that Kessler was being tried for criminal as opposed to civil contempt because the Order sentenced him to jail without any provision to enable him to purge himself of the charge.¹⁷¹ Citing *Baugh v. Commonwealth*,¹⁷² the court declared that the authority of the courts to punish for criminal contempt in the absence of a jury was limited to "petty contempt," having a penalty "not exceeding six months."¹⁷³ Since Kessler was sentenced to a term in excess of six months in jail, the right to a trial by jury attached, and the case was subsequently reversed and remanded.¹⁷⁴

F. *Jurisdiction After Virginia Code Section 20-79(c) Referral*

In *Crabtree v. Crabtree*,¹⁷⁵ a panel of the court of appeals was called to determine whether a circuit court, in transferring matters pertaining to child support and custody to a juvenile and domestic relations district court divested itself of jurisdiction to reinstate the matters and hear those issues.¹⁷⁶ The court noted that section 16.1-244 vests circuit courts and juvenile and domestic relations district courts with concurrent jurisdiction over "custody, guardianship, visitation or support of children when such [an issue] is incidental to a determination

169. *Id.* at __, 441 S.E.2d at 223.

170. *Id.* at __, 441 S.E.2d at 224.

171. *Id.* at __, 441 S.E.2d at 224.

172. 14 Va. App. 368, 417 S.E.2d 891 (1992).

173. *Id.* at 374, 417 S.E.2d at 895.

174. __ Va. App. at __, 441 S.E.2d at 225. It will be interesting to see how courts implement this rule. Must the court make a ruling on what punishment will be imposed prior to hearing evidence relating to the contempt citation? How will the court know, since the jury presumably will do the sentencing?

175. 17 Va. App. 81, 435 S.E.2d 883 (1993).

176. *Id.* at 81, 435 S.E.2d at 883.

of causes pending in such courts.”¹⁷⁷ The court cited section 20-121.1 of the Virginia Code which authorizes a circuit court to reinstate a matter previously stricken from the docket, and noted that section 20-108 bestows on circuit courts, after the entry of a final decree, jurisdiction to modify its decree as to matters affecting custody, support and visitation of minor children.¹⁷⁸

Upon examination of the language in section 20-79(c), the court noted that the language of the statute does not “divest” the circuit court of its “jurisdiction” to consider matters over which it had concurrent jurisdiction.¹⁷⁹ The court concluded that section 20-79(C) does not place a limitation on the circuit court’s jurisdiction, but rather is designed to expand the tools available to the circuit court to enforce its orders with regard to certain issues.¹⁸⁰ Accordingly, the circuit court had continuing jurisdiction, even after the transfer of certain matters to the juvenile and domestic relations district court, and retained the power “in its discretion” to reinstate the case on the docket, and adjudicate those issues.¹⁸¹ Since the circuit court, under the current statutory scheme, would hear de novo appeals from the juvenile and domestic relations district court, an effective argument can be made that it serves judicial economy to simply reinstate the matter on the circuit court’s docket, and have a hearing, an appeal from which would not result in trying the matter anew.

G. *Effect of Appeal*

Not only has the advent of the court of appeals provided practitioners with a formidable body of case law, but also the appeal as of right from final orders in domestic relations matters creates numerous possible issues to be presented. Three

177. *Id.* at 85, 435 S.E.2d at 886.

178. *Id.*

179. *Id.* at 86, 435 S.E.2d at 887.

180. *Id.* at 86-87, 435 S.E.2d at 887.

181. *Id.* at 87, 435 S.E.2d at 887.

such cases, *Wagner v. Wagner*,¹⁸² *Decker v. Decker*,¹⁸³ and *Reid v. Reid*,¹⁸⁴ illustrate this point.

The *Wagner* court held that upon remand from a previous appeal, the trial court did not err in taking additional evidence to ascertain the current value of all marital assets.¹⁸⁵ Citing *Gaynor v. Hird*,¹⁸⁶ the court affirmed that the reason for revaluation on remand was the same as in the original hearing, so as "to obtain the most accurate valuation and equitable distribution."¹⁸⁷

The court of appeals in *Decker* held that the trial court was without jurisdiction to modify its *pendente lite* spousal support award while the final decree of divorce was on appeal, absent obtaining leave of the court of appeals to seek a modification.¹⁸⁸

The issue of a trial court's authority to order restitution from a spouse who received spousal support payments pursuant to a court order when the order was reversed on appeal, was determined in *Reid v. Reid*.¹⁸⁹ In holding that the court of appeals' reliance on *Flemings v. Riddick's Executor*¹⁹⁰ was misplaced, the Supreme Court cited sections 20-109 and 20-112, which authorize a court to increase, decrease or terminate an award. The court concluded that the General Assembly modified the inherent power described in *Flemings* to order restitution and that the court now retained no such authority.¹⁹¹

182. 16 Va. App. 529, 431 S.E.2d 77 (1993).

183. ___ Va. App. ___, 440 S.E.2d 411 (1994).

184. 245 Va. 409, 429 S.E.2d 208 (1993).

185. 16 Va. App. at 529, 431 S.E.2d at 77.

186. 11 Va. App. 588, 400 S.E.2d 788 (1991).

187. 16 Va. App. at 529, 431 S.E.2d at 78 (1993).

188. ___ Va. App. at ___, 440 S.E.2d at 412. The Court in *dictum* indicated that "only under compelling circumstances would this Court likely grant such leave." *Id.*

189. 245 Va. 409, 429 S.E.2d 208, (1993).

190. 46 Va. (5 Gratt.) 272 (1848).

191. 245 Va. at 414-15, 429 S.E.2d at 210-11. This ruling seems to be a bit harsh, especially in light of a party not being entitled to suspension of a judgment for spousal support pending appeal, and the court of appeals ruling in *Decker v. Decker*, only under compelling circumstances may the trial court leave to modify its order pending appeal. See VA. CODE ANN. § 8.01-676.1(D) (Repl. Vol. 1992); ___ Va. App. ___, 440 S.E.2d 411 (1994).

H. Bankruptcy

The interplay among the laws of bankruptcy and matters of equitable distribution, property settlement agreements and support was recently decided in the cases of *In re McKoy*,¹⁹² *Douglas v. Douglas*,¹⁹³ and *In re Robb*.¹⁹⁴ In *McKoy*, the court disapproved the show cause application for violation of the automatic stay against Linda McKoy, and granted her motion for relief from stay.¹⁹⁵ The debtor, McKoy's former husband, had failed to make a payment of \$4,165.00 for her interest in their marital real property, although he had recorded the deed, tendered to him in escrow before making the required payment.¹⁹⁶

In *Douglas*, the court of appeals upheld the judgment of the trial court in finding the appellant in contempt for failure to comply with the terms of his divorce decree. The decree ratified, affirmed and incorporated a provision where the appellant agreed to indemnify the wife, and hold her harmless from paying a certain bank debt.¹⁹⁷ The court held that although he listed the bank as a creditor he failed to list his wife as a creditor, or to inform the bankruptcy court of the terms of the divorce decree agreement with regard to the debt.¹⁹⁸

In *Robb*, the Fourth Circuit affirmed the judgment of the United States District Court for the District of Maryland, by deeming a periodic support payment of \$3,000 nondischargeable in bankruptcy.¹⁹⁹ The appellant sought to disclose the payment in bankruptcy by characterizing the \$3,000 payment as non-support assistance to the wife's child from a former marriage whom he never adopted. The wife asserted that the \$3,000 monthly payments were spousal support, and therefore were not dischargeable pursuant to 11 U.S.C. § 523(A)(5).²⁰⁰

192. 161 B.R. 941 (Bankr. E.D. Va. 1993).

193. 437 S.E.2d 244 (Va. App. 1993).

194. 23 F.3d 895 (4th Cir. 1994).

195. *McKoy*, 161 B.R. at 943.

196. 161 B.R. at 942.

197. ___ Va. App. at ___, 437 S.E.2d at 246.

198. *Id.*

199. 23 F.3d at 895.

200. *Id.* at 897.

The *Robb* court, citing the husband's claim of the \$3,000 monthly payment as alimony on his income tax returns, applied the doctrine of "quasi-estoppel," and declined to allow the husband to argue that the payments constituted something other than alimony.²⁰¹ Even absent the doctrine of quasi-estoppel, they were deemed exempted from discharge because the payments bore no relation to the needs of the wife's daughter from a previous marriage, and that the parties clearly and mutually intended the \$3,000 monthly payments to qualify as alimony.²⁰²

201. *Id.* at 898.

202. *Id.* at 899.