University of Richmond Law Review

Volume 31 | Issue 4 Article 6

1997

Annual Survey of Virginia Law: Domestic Relations

Deanna D. Cook

Player B. Michelsen

DOMESTIC RELATIONS

*Deanna D. Cook**
*Player B. Michelsen***

I. 1997 LEGISLATION

A. *Family Court*

The General Assembly did not take any action regarding the Family Court issue in 1997. In 1996, funding for the family court was delayed until June 1, 1998, subject to state funds being "sufficient to provide adequate resources . . . for the court to carry out the purposes of [Virginia Code section 20-96] and to fulfill its mission to serve children and families of the Commonwealth."[1]

B. *Divorce*

1. Same Sex Marriages

In response to the recognition of marriages between persons of the same sex by other states, Virginia Code section 20-45.2 was amended to provide that all marriages entered into by persons of the same sex in other states or jurisdictions, as well as any contractual rights created by such marriages, "shall be void in all respects in Virginia."[2]

---

* Partner, Bremner, Janus & Cook, Richmond, Virginia. B.A., 1988, University of Richmond, Westhampton College; J.D., 1991, University of Richmond School of Law. The author wishes to thank Traci L. Flanagan for her assistance in helping prepare this article.

** Former Associate, Moreno, Colan & Butler, Richmond, Virginia. B.A., 1987, University of Massachusetts at Amherst; J.D., 1991, University of Richmond School of Law.

1. Act of April 5, 1996, ch. 616, 1996 Va. Acts 1082.
2. VA. CODE ANN. § 20-45.2 (Cum. Supp. 1997).

2. State Tax Refunds

The legislature amended the statute regarding state refunds to individual taxpayers by providing a mechanism for the reissuance of separate tax refund checks to parties who receive a final divorce decree after filing a joint income tax return.[3] Separate refund checks will be reissued to each party upon the return of the joint refund check with a certification made by one spouse that the other spouse refuses to endorse it or cannot be found. A certified copy of the final divorce decree and any agreements with respect to the division of property between the spouses must also be provided with the certification.[4] If the decree addresses how the refund is to be divided, the refund will be apportioned according to the order.[5] If the decree is silent on the issue, the refund will be divided equally between the parties.[6] The reissuance of refund payments will not affect the parties' joint tax liability on any previously filed joint returns.[7]

C. *Divorce Decrees*

All divorce decrees must now include "each party's social security number, or other control number issued by the Department of Motor Vehicles."[8]

D. *Equitable Distribution*

For the fourth consecutive year, there were no changes made or introduced to Virginia's equitable distribution statute.[9]

3. *See* VA. CODE ANN. § 58.1-499(B) (Repl. Vol. 1997).
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.*
8. VA. CODE ANN. § 20-91(B) (Cum. Supp. 1997).
9. *See id.* § 20-107.3 (Repl. Vol. 1995 & Cum. Supp. 1997).

E. *Support*

1. Spousal Support

a. Termination/Modification of Spousal Support

The legislature extended the trial court's authority to terminate or modify spousal support payable to a spouse who has been habitually cohabiting with another person in a relationship analogous to a marriage for one year or more commencing on or after July 1, 1997, unless the termination will constitute "a manifest injustice."[10] The court may not, however, decrease or terminate spousal support and maintenance if the parties have agreed otherwise in a stipulation or contract.[11] Interestingly, the burdens of proof in this statute differ. The cohabitation must be proven by clear and convincing evidence, while "manifest injustice" may be shown by a preponderance of the evidence.[12] Although the statute suggests the conditions are not met by parties cohabiting for a period of less than one year, arguably, the court should still be able to consider the effect of the cohabitation on the spouse's need.[13]

b. Rehabilitative Spousal Support

The Virginia State Bar submitted its study and recommendations on the issue of rehabilitative alimony, but the suggestions were not considered by the full House of Delegates during the 1997 session.[14] A bill granting the court authority to order periodic payments to a spouse over a specific period of time did not pass.[15] The court's authority continues to be limited to ordering spousal support in periodic payments over an indefinite period of time, in a lump sum, or both.[16]

---

10. *Id.* § 20-109(A) (Cum. Supp. 1997).
11. *See id.*
12. *See id.*
13. *See, e.g.*, Hollowell v. Hollowell, 6 Va. App. 417, 369 S.E.2d 451 (1988).
14. *See* H.J. Res. 594, Va. Gen. Assembly, (Reg. Sess. 1997) (originally passed as H.J. Res. 69, Va. Gen. Assembly, (Reg. Sess. 1996)).
15. *See* H.B. 2586, Va. Gen. Assembly, (Reg. Sess. 1997).
16. *See* VA. CODE ANN. § 20-107.1 (Repl. Vol. 1995 & Cum. Supp. 1997).

2. Child Support

a. Wage Withholding

A wage withholding order may now be entered upon the petition of an obligor.[17] When such a request is made by an obligor, notice of the withholding and the rights to contest the order are not necessary.[18]

b. License Restrictions

When a person has failed to comply with a subpoena, summons or warrant in a child support or paternity matter, restrictions may now be placed on his or her driver's license.[19] If the court issues a restricted license, the driver may not operate a commercial vehicle.[20] The court must order the surrender of the driver's license in accordance with Virginia Code section 46.2-398.[21]

Persons who apply for a license, certificate or authorization to engage in a trade or profession must include their social security number or other control number issued by the Department of Motor Vehicles on their application.[22]

If an obligor is in arrears for a period of more than ninety days or for an amount over five thousand dollars, or has failed to comply with a subpoena or warrant related to child support, the obligor's hunting, fishing, or other recreational licenses may also be restricted.[23]

A delinquent obligor attempting to have his or her license restored pursuant to an agreement for the repayment of arrearages must agree to pay the arrears in full within a period of ten years. He or she must also make at least one payment

17. *See* VA. CODE ANN. § 63.1-250.3 (Cum. Supp. 1997).
18. *See id.*
19. VA. CODE ANN. § 46.2-320(B) (Cum. Supp. 1997).
20. *See id.* § 46.2-320(c) (Cum. Supp. 1997).
21. *See id.*; *id.* § 46.2-398 (Repl. Vol. 1996).
22. *See* VA. CODE ANN. §§ 54.1-116, 63.1-263.1 (Cum. Supp. 1997).
23. *See* VA. CODE ANN. § 63.1-263.1 (Cum. Supp. 1997).

totaling five percent of the arrearage or five hundred dollars, whichever is greater.[24]

c. Federal Welfare Reform Act of 1996[25]

Pursuant to the mandates of the Federal Welfare Reform Act of 1996, Virginia has significantly enhanced its child support enforcement laws. Several provisions were added to the notice requirements in support orders. Formerly, parties were required to provide only their current address and place of employment in a support order.[26] Parties are now required to provide both a physical address and a mailing address if they are different, work and home telephone numbers, driver's license numbers and their employer's address.[27]

The General Assembly also added a new method of process service in subsequent child support matters. Where diligent efforts to locate a party are unsuccessful, the petitioner may serve written notice to the respondent's last residential address or work address as listed in the previous order.[28] If an order is entered based upon this method of service, the obligor may later challenge the order if he did not receive actual notice of the proceedings and if he can prove the entry of the prior order constitutes a manifest injustice.[29]

The Department of Social Services (DSS) now has access to criminal history records when trying to locate delinquent child support obligors or alleged putative fathers in paternity ac-

24. *See* VA. CODE ANN. § 46.2-320(D) (Cum. Supp. 1997). The previous statute only required the delinquent obligor to make one payment pursuant to an agreement in order to have their driver's license restored. *See id.* § 46.2-320 (Repl. Vol. 1996).

25. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

26. *See* VA. CODE ANN. §§ 20-60.3, 63.1-252.1 (Repl. Vol. 1995).

27. *See id.* §§ 20-60.3, 63.1-252.1 (Cum. Supp. 1997). A person may be exempt from these requirements if a protective order has been issued or the Department of Social Services has reason to believe that a party is at risk of physical or emotional harm from the other party. *See id.*

28. *See* VA. CODE ANN. §§ 20-60.6, 63.1-250.2:1 (Cum. Supp. 1997).

29. *See id.* § 20-60.6 (Cum. Supp. 1997).

tions.[30] Access is limited to demographic information on the delinquent obligor.[31]

The Division of Child Support Enforcement (DCSE) may now obtain public information on delinquent obligors from governmental agencies, financial institutions and cable television companies. The DCSE is authorized to subpoena financial records or other information relating to both the obligor and the obligee.[32] The DCSE may charge a civil penalty of up to one thousand dollars for failure to respond to a subpoena.[33]

The DSS may now enter into agreements with financial institutions to develop and operate data match systems to locate delinquent obligors.[34] Financial institutions would provide the DSS with information on delinquent obligors by matching their social security numbers or other tax identification information to existing accounts.[35] Financial institutions are immune from liability for disclosing information.[36]

The DCSE is also authorized to obtain information on compensation and settlements from the Workers' Compensation Commission.[37]

The statutes regarding paternity establishment have been strengthened in an effort to enforce an individual's obligations to provide child support.[38] A voluntary written statement acknowledging paternity is now binding and conclusive as a judgment sixty days from the signing date.[39] If a party moves for

30. *See* VA. CODE ANN. § 19.2-389(A)(27) (Cum. Supp. 1997).

31. *See id.*

32. *See* VA. CODE ANN. § 63.1-250.1(F) (Cum. Supp. 1997). The Code does not define "other information" except to say that DSCE can require the production of essential information for the establishment or enforcement of support obligations. *See id.*

33. *See id.*

34. *See id.* § 63.1-260.3 (Cum. Supp. 1997).

35. *See id.* The financial institution has a reasonable time to produce the requested information, but not less than 30 days. *See id.*

36. *See id.*

37. *See* VA. CODE ANN. § 65.2-903 (Cum. Supp. 1997).

38. *See* VA. CODE ANN. §§ 20-49.1 to -49.9 (Cum. Supp. 1997); *see also* 42 U.S.C.S. § 666 (Law. Co-op. Supp. 1997). These amendments do not apply in cases of assisted conception. The assisted conception statutes were clarified in 1997 to provide that the donor of a child conceived through assisted conception is not the parent of the child unless the donor is the husband of the gestational mother. *See* VA. CODE ANN. §§ 20-156, -158 (Cum. Supp. 1997).

39. *See id.* § 20-49.1(B) (Cum. Supp. 1997). This provision is inapplicable if the

genetic testing in a paternity action, the notice must be accompanied by a sworn affidavit either setting forth facts that would establish a reasonable possibility of the necessary sexual contact between the parties, or denying paternity.[40]

Pursuant to the requirements of the Federal Welfare Reform Act,[41] paternity can now be established by administrative action.[42] The Virginia DSS can establish a relationship between a father and child if a child, parent or other legal custodian of the child files a verified request at any time before the child's eighteenth birthday.[43] The DSS may summon a parent or putative father to appear before the DCSE and provide the necessary information. The DSS can then establish paternity by obtaining a written statement under oath or by ordering genetic testing.[44] The DSS is required to pay for the testing subject to reimbursement by the father if paternity is established.[45]

d. Periodic Review of Child Support Orders

At the request of a parent or the DCSE, the DSS shall initiate a review of any existing child support order every three years without requiring a showing of a change in circumstances.[46]

e. Payments to Obligees

Beginning January 1, 1998, the DCSE must distribute support payments to obligees within two business days of receipt.[47]

---

person contesting paternity establishes that the statement was signed as a result of fraud, duress or a material mistake of fact. *See id.* Pending resolution of a challenged paternity acknowledgement, each party will continue to have the same obligations toward the child except upon a showing of good cause. *See id.*

40. *See id.* § 20-49.3(A) (Cum. Supp. 1997).

41. 42 U.S.C.S. § 666(a)(5) (Law. Co-op. Supp. 1997).

42. *See* VA. CODE ANN. § 63.1-250.1:2 (Cum. Supp. 1997).

43. *See id.*

44. *See id.* Genetic testing must establish paternity by at least a 98% probability. *See id.*

45. *See id.*

46. *See id.* § 63.1-250.1(E) (Cum. Supp. 1997).

47. *See id.* § 63.1-251.2 (Cum. Supp. 1997). The DSS must have sufficient information to identify the obligee and know where the distribution should be made. *See id.*

f. Uniform Interstate Family Support Act (UIFSA)[48]

All states that have adopted or will be adopting UIFSA are required to amend their state statutes to conform to the version approved by the National Conference of Commissioners on Uniform State Laws pursuant to the Federal Welfare Reform Act.[49] "Initiating state" has been redefined as a state from which a proceeding is forwarded or in which a proceeding is filed for forwarding to a responding state.[50] The term "state" now includes the U.S. Virgin Islands.[51] In Virginia, only parties who are individuals need to file "written consent with a tribunal of this Commonwealth for a tribunal of another state to modify the order and assume continuing, exclusive jurisdiction."[52]

In cases where two or more child support orders have been issued by a tribunal of this state or another state with regard to the same obligor and child, and either the obligor or obligee resides in Virginia, a party may request a tribunal of the Commonwealth to determine which order controls.[53] That order must then be recognized under UIFSA.[54] In determining which child support order controls, the court must include written findings on how it made its determination.[55] Once the court determines which order controls, the party obtaining the order has thirty days to provide a certified copy to each tribunal that issued or registered the earlier child support order.[56] If the party who obtains the order fails to follow this procedure, they may be sanctioned.[57] If a party seeks to modify and/or enforce

48. *See* VA. CODE ANN. §§ 20-88.32-.82 (Repl. Vol. 1995).

49. 42 U.S.C.S. §§ 654(20), 666 (Law. Co-op. Supp. 1997).

50. *See* VA. CODE ANN. § 20-88.32 (Cum. Supp. 1997). The statute formerly defined "initiating state" as a "state in which a proceeding is filed for forwarding to a responding state." *See id.* § 20-88.32 (Repl. Vol. 1995).

51. *See id.* § 20-88.32 (Cum. Supp. 1997).

52. *Id.* § 20-88.39(A)(2) (Cum. Supp. 1997). This section previously stated the Commonwealth retained jurisdiction "until each individual party had filed written consent," which was meant to include agency parties. *Id.* § 20-88.39(A)(2) (Repl. Vol. 1996).

53. *See id.* § 20-88.41(C) (Cum. Supp. 1997).

54. *See id.*

55. *See id.* § 20-88.41(E) (Cum. Supp. 1997).

56. *See id.* § 20-88.41(F) (Cum. Supp. 1997).

57. *See id.*

an order from another state, they must register the order in Virginia and then file a petition specifying the grounds for modification.[58]

Under the new UIFSA statutes, Virginia courts may or may not have jurisdiction to modify or enforce existing support orders issued in other states.[59] Further, even if Virginia properly exercises jurisdiction, the court may be required to apply another state's laws.[60] All modification orders must be sent to the original issuing state.[61]

Wage withholding orders are no longer required to be sent to employers by first class mail.[62] Requirements for an employer to comply with wage withholding orders of another state have been clarified significantly.[63] Employers' processing fees, withholding amounts, and time periods for making payments must be in compliance with the law of the state of the obligor's place of employment.[64] When an employer receives multiple wage withholding orders for the same employee, satisfaction of the terms of the multiple orders and priorities for withholding must comply with the laws of the state of the obligor's principal place of employment.[65] Furthermore, employers complying with wage withholding orders in accordance with the statute are immune from civil liability.[66] If an employer willfully fails to comply with a wage withholding order issued by another state and received for enforcement, the employer is subject to the same penalties that may be imposed for non-compliance with an order issued by a Virginia court.[67] An obligor may contest the validity or enforcement of a wage withholding order issued in another state and received by an employer in the Commonwealth of Virginia by giving notice to the support enforcement

58. *See id.* § 20-88.74 (Cum. Supp. 1997).

59. *See, e.g., id.* § 20-88.77:1 (Cum. Supp. 1997). Virginia Code section 20-88.39 specifically lists the requirements for exercising jurisdiction which must be carefully reviewed by the practitioner. *See id.* § 20-88.39 (Cum. Supp. 1997).

60. *See id.* § 20-88.77:1(B) (Cum. Supp. 1997).

61. *See id.* § 20-88.77:2 (Cum. Supp. 1997).

62. *See id.* § 20-88.64 (Cum. Supp. 1997); *see also id.* § 20-88.64(A) (Repl. Vol. 1995).

63. *See id.* §§ 20-88.64:1-.64:5 (Cum. Supp. 1997).

64. *See id.* § 20-88.64:1(C) (Cum. Supp. 1997).

65. *See id.* § 20-88.64:2 (Cum. Supp. 1997).

66. *See id.* § 20-88.64:3 (Cum. Supp. 1997).

67. *See id.* § 20-88.64:4 (Cum. Supp. 1997).

agency servicing the obligee, each employer that has received the wage withholding order, and the person or agency designated to receive the payments in the order.[68] When a support or wage withholding order issued in another state is registered in a Virginia court, notice to the non-registering party no longer has to be made by first class mail or personal service.[69]

3. Custody

a. Educational Programs Relating to Parenting and Divorce

In suits for divorce, custody, or visitation, the court can enter pendente lite orders requiring parties with minor children to attend seminars regarding parenting responsibilities, options for conflict resolution, and financial responsibilities.[70]

b. Third Party Standing

The legislature has specifically eliminated the right of a person to seek custody or visitation if his or her parental rights have been terminated by court order, either voluntarily or involuntarily.[71] This prohibition also extends to other persons whose interest in the child derives from or through the person whose parental rights have been terminated.[72]

---

68. *See id.* § 20-88.64:5 (Cum. Supp. 1997).

69. *See id.* §§ 20-88.70-.71 (Cum. Supp. 1997).

70. *See id.* § 20-103(A) (Cum. Supp. 1997). No fee in excess of $50 may be charged for a program. *See id.* Previously, the court had authority only to order the parties to attend "educational seminars and other like programs." *Id.* § 20-103(A) (Repl. Vol. 1995).

71. *See id.* § 20-124.1 (Cum. Supp. 1997) (defining "person with a legitimate interest" in custody and visitation issues). The new amendment specifically overrules *Thrift v. Baldwin*, 23 Va. App. 18, 473 S.E.2d 715 (1996), where the Virginia Court of Appeals held that Virginia Code section 16.1-241 was to be construed broadly to include blood relatives of adopted children as "persons with a legitimate interest." *Thrift*, 23 Va. App. at 19-20, 473 S.E.2d at 716.

72. *See* VA. CODE ANN. § 16.1-241(A) (Cum. Supp. 1997). Formerly the statute applied only where the parental rights had been involuntarily terminated. *See id.* § 16.1-241 (Repl. Vol. 1995).

c. Non-Custodial Parents' School Participation Rights

Non-custodial parents can no longer be denied the opportunity to participate in public school or day care events for their children simply because of their status as a non-custodial parent, unless a court order has been issued stating otherwise.[73] It is the custodial parent's responsibility to provide the court order to the school or day care center.[74]

4. Domestic Violence

The General Assembly passed an act in 1996, which took effect on July 1, 1997, requiring the establishment of training standards and model policies for law-enforcement personnel in handling domestic violence.[75]

Law enforcement officers may now arrest persons *without a warrant* for domestic violence committed outside the officer's presence based upon the officer's personal observations, probable cause, the reasonable complaint of a person who observed the alleged offense, or upon the officer's investigation.[76] If the officer finds probable cause of a violation, and the totality of the circumstances shows that the alleged offender was the primary physical aggressor, the officer must arrest and take into custody the abuser.[77] Regardless of whether an arrest is made, the officer must file a written report with the police department, and a copy of the report must be provided to the alleged abuser upon request.[78] In these cases, the alleged victim must be provided with information regarding legal and community resources.[79]

An officer must petition the court for an emergency protective order pursuant to Virginia Code section 16.1-253.4 if he or she arrests an alleged abuser or there is probable cause of domestic

73. *See* VA. CODE ANN. § 22.1-279.5 (Repl. Vol. 1997).
74. *See id.*
75. *See* VA. CODE ANN. § 9-170(36) (Cum. Supp. 1997).
76. *See* VA. CODE ANN. § 19.2-81.3(A) (Cum. Supp. 1997).
77. *See id.* § 19.2-81.3(B) (Cum. Supp. 1997).
78. *See id.* § 19.2-81.3(C) (Cum. Supp. 1997).
79. *See id.*

violence.[80] The Virginia State Police and all local police and sheriff departments must establish policies and procedures for arrests in family abuse situations.[81]

In family abuse cases, venue is now proper in the jurisdiction where a protective order was issued, if at the time the proceeding was commenced the order was issued to protect the petitioner or a family member.[82] Protective orders have also been expanded to include family or household members of an abused child as parties that must observe certain conditions of behavior.[83] The court may also give the alleged abused person exclusive temporary possession and use of a jointly titled motor vehicle.[84] In pendente lite orders and suits for divorce, custody or visitation, civil courts can also enter protective orders against family or household members.[85]

Courts are permitted to enter preliminary protective orders upon evidence sufficient to establish probable cause that family abuse has recently occurred.[86] The court must hold a hearing within fifteen days of the date of the order. If the petitioner requests it, the clerk must provide him or her with a copy of the order and information regarding when the alleged abuser will be or was served.[87] The court may issue ex parte emergency orders if the petitioner asserts abuse under oath to a judge or magistrate, provided such order "expire[s] at 5:00 p.m. on the next day that the juvenile . . . court is in session or [within] seventy-two hours if the juvenile court is not in session, whichever is later."[88] A respondent's motion to dismiss an emergency ex parte protective order must be given precedence on the docket.[89] The protective orders must be reduced to writ-

80. *See id.* § 19.2-81.3(D) (Cum. Supp. 1997).

81. *See id.* § 19.2-81.4 (Cum. Supp. 1997).

82. *See* VA. CODE ANN. § 16.1-243(A)(3) (Repl. Vol. 1996).

83. *See id.* § 16.1-253(A)(1)(6) (Cum. Supp. 1997).

84. *See id.* § 16.1-253.1(A)(5) (Cum. Supp. 1997) (orders for exclusive use of jointly titled motor vehicles do not affect title or ownership.)

85. *See* VA. CODE ANN. § 20-103(B) (Cum. Supp. 1997). This section was amended in 1996 with an effective date of July 1, 1997. Prior to this amendment, the civil court's authority was limited to entry of protective orders against spouses. *See id.* § 20-103(B) (Repl. Vol. 1995 & Cum. Supp. 1997).

86. *See* VA. CODE ANN. § 16.1-253.1(A) (Cum. Supp. 1997).

87. *See id.* § 16.1-253.1(B) (Cum. Supp. 1997).

88. *Id.* § 16.1-253.4(B), (C) (Cum. Supp. 1997).

89. *See id.* § 16.1-253.4(C) (Cum. Supp. 1997).

ing on a form approved by the Supreme Court of Virginia.[90] The magistrate shall issue an emergency protective order against the abuser when he or she is arrested and brought before the magistrate.[91] Any person who is the subject of a protective order may not purchase or transport firearms while the order is in effect. A violation of this statute is a Class 1 misdemeanor and the sentence cannot be suspended.[92]

When a protective order is served, the agency serving the order must immediately place the information in the Virginia crime information network system.[93] The local police or sheriff's office must receive notice of all protective orders and any additional information required by the State Police.[94]

II. JUDICIAL DECISIONS

A. *Equitable Distribution*

There were two major cases dealing with equitable distribution decided by the Virginia Court of Appeals this year. Since each case touches upon several different aspects of equitable distribution, they will be addressed individually. These cases are also mentioned in other sections of the article.

1. *Rowe v. Rowe*[95]

a. Classification of Husband's Pre-Marital Stock

In *Rowe*, the Virginia Court of Appeals held that increases in the value of the husband's separate newspaper stock during the marriage can only be classified as marital to the extent that such increases are attributable to the husband's personal efforts

90. *See id.* § 16.1-253.4(D) (Cum. Supp. 1997).

91. *See* VA. CODE ANN. § 18.2-57.2(C) (Cum. Supp. 1997).

92. *See id.* § 18.2-308.1:4(A) (Repl. Vol. 1996).

93. *See* VA. CODE ANN. § 16.1-253.1(B) (Repl. Vol. 1996). All orders dissolving or modifying a protective order shall also be forwarded to the Virginia crime information network system. *See id.*

94. *See id.*

95. 24 Va. App. 123, 480 S.E.2d 760 (1997).

and not to those of his partner/brother or passive factors.[96] In *Rowe*, the husband presented evidence that he decreased his duties at the newspaper during the marriage, while his brother's duties substantially increased. Further, it was undisputed that the stock's increased value was largely due to the fact that the number of households in the circulation area had more than doubled during the parties' twenty-three year marriage.[97]

b. Compensation as Fair Return on Increase in Separate Property[98]

The court of appeals first addressed the issue of compensation as a fair return on the increase in separate property in the 1993 case of *Huger v. Huger*.[99] In *Huger*, the divorce suit was filed when Virginia recognized only a unitary property theory.[100] In *Rowe*, the court of appeals expanded the *Huger* ruling to apply to hybrid property as well.[101] Thus, to the extent a spouse can prove the marital estate has been adequately compensated for a spouse's effort, the trial court should consider that compensation before classifying any increase in value of a separate asset as marital.[102]

c. Classification of Marital Residence—Gifts

When the parties were married in *Rowe*, they lived in the husband's premarital residence for approximately four years.[103] During that time, the wife contributed her separate

96. *See id.* at 134, 480 S.E.2d at 765.
97. *See id.* at 133-34, 480 S.E.2d at 764-65.
98. *See id.* at 134, 480 S.E.2d at 765.
99. 16 Va. App. 785, 789, 433 S.E.2d 255, 258 (1993).
100. *See id.* at 787, 433 S.E.2d at 257; *see also* VA. CODE ANN. § 20-107.3(A)(3) (Cum. Supp. 1997). Prior to the enactment of this statute in 1990, Virginia had only two classifications of property, marital and separate. *See* VA. CODE ANN. § 20-107.3(A) (Repl. Vol. 1983 & Cum. Supp. 1989). Now there is a third classification, "part marital property and part separate property," which is commonly referred to by practitioners as "hybrid." *See* VA. CODE ANN. § 20-107.3(A)(3) (Repl. Vol. 1995 & Cum. Supp. 1997).
101. *See Rowe*, 24 Va. App. at 134-35, 480 S.E.2d at 765.
102. *See id.*
103. *See id.* at 132, 480 S.E.2d at 764.

funds and personal efforts to refurbishing this property prior to its sale.[104] The husband then sold this residence and invested the $82,000 sales proceeds into the purchase of a jointly titled marital residence.[105] Throughout the marriage, the husband contributed approximately $300,000 to improve and maintain the marital residence. The wife dedicated her personal efforts to refurbish, decorate and improve the home.[106] The trial court found that one-half of the $82,000 down payment was gifted to the wife.[107] On appeal, the husband argued that the wife failed to prove the element of intent required to make a gift. The wife argued that even if intent was not proven, it was not error to find one-half of the property was marital due to her efforts and contributions of separate funds to the property during the marriage.[108] The court of appeals reversed the trial court's decision and held that *all* of the proceeds from the sale of the husband's separate property were transmuted to marital property because the husband placed no reservations on the transfer of title permitting him to reclaim the property. There was also evidence that he told the wife that the property was also her property.[109]

d. Division of Marital Share of Retirement Benefits

In *Rowe*, the trial court found that it *could not* award the wife 25.6% of the husband's survivor benefits as the Commissioner recommended, because his retirement plan did not permit it.[110] The trial court further found that the wife would not be permitted to name an alternate beneficiary for her portion of the marital share of the husband's retirement benefits because under both state and federal law, the retirement plan did not

104. *See id.* at 136, 480 S.E.2d at 766.
105. *See id.*
106. *See id.* at 132, 480 S.E.2d at 764.
107. *See id.* at 136-37, 480 S.E.2d at 766-65.
108. *See id.* at 136-37, 480 S.E.2d at 766.
109. *See id.* at 137-38, 480 S.E.2d at 766-67. The court of appeals noted that, in accordance with *Theismann v. Theismann*, 22 Va. App. 557, 471 S.E.2d 809 (1996), the trial court is not required to make an equal distribution of this property on remand, and need only make an equitable award after proper consideration of the factors contained in Virginia Code section 20-107.3(E). *See Theismann*, 22 Va. App. at 568, 471 S.E.2d at 814; *see also* VA. CODE ANN. § 20-107.3(E) (Cum. Supp. 1997).
110. *See Rowe*, 24 Va. App. at 141, 480 S.E.2d at 768.

allow for the naming of an alternate beneficiary. While the court of appeals agreed that the trial court did not have the authority to order direct payments from the retirement plan when the plan's provisions did not permit direct payments, the court of appeals found that the trial court *did* have the authority to order the husband, rather than the plan, to pay the wife her share of the retirement benefits.[111] The court of appeals further held that the husband, rather than the plan, could be ordered to pay the wife's alternate beneficiary in the event that she predeceases him.[112] The court specifically found that Virginia Code section 20-107.3(G)(1) does not mandate that retirement payments come directly from a spouse's retirement plan.[113]

e. Post-Separation Earnings on Part Marital and Part Separate Property

After the parties separated in *Rowe*, the husband made deposits into marital accounts from distributions of the newspaper stock.[114] The trial court gave the husband credit for his post-separation deposits in the equitable distribution award. The court of appeals reversed, finding that any portion of the post-separation contributions that were generated from the marital portion of the newspaper stock dividends should be classified as marital property.[115]

2. *Frazer v. Frazer*[116]

a. Title

In *Frazer*, the Virginia Court of Appeals reiterated the long-standing statutory requirement that courts must first determine title in fashioning equitable distribution awards.[117] The trial

111. *See id.* at 142, 480 S.E.2d at 769.
112. *See id.* (citing Gamble v. Gamble, 14 Va. App. 558, 421 S.E.2d 635 (1992)).
113. *See id.*
114. *See id.* at 143, 480 S.E.2d at 769.
115. *See id.* at 145, 480 S.E.2d at 770.
116. 23 Va. App. 358, 477 S.E.2d 290 (1996).
117. *See id.* at 368, 477 S.E.2d at 295.

court had assigned values to various investment accounts of the parties and distributed them without determining who held title to these accounts.[118]

b. Retirement

Where the evidence fails to show which portion of a retirement plan was earned before the marriage and which portion was earned during the marriage, the court of appeals determined that it is error to classify such property as separate.[119] In *Frazer*, the court of appeals remanded this issue to the trial court with instructions to determine the value of the marital and separate shares of the benefits in accordance with Virginia Code section 20-107.3(G).[120] Neither *Frazer* nor the statute addresses which party has the burden of presenting this evidence, leaving the practitioner with very little guidance on this issue.[121]

c. Tax Consequences

In an unusual turn of events, the wife in *Frazer* appealed the trial court's award to her of eighty-one percent of the sales proceeds of a jointly titled real estate parcel. She argued that the court failed to consider the greater capital gains tax liability she would incur by awarding her a greater portion of the real estate.[122] The court of appeals affirmed the trial court's division of this asset, finding that the court necessarily considered this factor by awarding her a greater portion of the asset since each party was to pay their proportionate share of the tax consequences.[123]

---

118. *See id.* at 367-68, 477 S.E.2d at 294-95. There was conflicting evidence on how the accounts were titled. *See id.* at 369, 477 S.E.2d at 295.

119. *See id.* at 371, 477 S.E.2d at 296.

120. *See id.*

121. *See id.*; *see also* VA. CODE ANN. § 20-107.3(G) (Cum. Supp. 1997).

122. *See Frazer*, 23 Va. App. at 371-72, 477 S.E.2d at 296-97.

123. *See id.* at 372, 477 S.E.2d at 297.

B. *Support*

1. Spousal Support/Separate Maintenance

a. Income Determination

In *Rowe v. Rowe*,[124] the Virginia Court of Appeals reversed the trial court's spousal support award to wife because the trial court failed to consider the income generating potential of her equitable distribution award.[125] The court of appeals reiterated that it is reversible error for the trial court not to consider all of the factors contained in Virginia Code section 20-107.1.[126] The husband appealed the $10,000 monthly spousal support award to his wife because the trial court affirmed the commissioner's report prior to quantifying the equitable distribution award.[127]

The court of appeals decided an issue of first impression relating to spousal support in *Frazer v. Frazer*.[128] It is now the law that voluntary contributions to a retirement plan are to be included in the payor spouse's income when determining income for calculating spousal support.[129] In reaching this determination, the court of appeals relied, in part, on Virginia Code section 20-107.1, which directs the trial court to consider the "earning capacity, obligations and financial resources of the parties, including but not limited to, all income from all pension, profit sharing or retirement plans of whatever nature."[130] The court of appeals reasoned that other jurisdictions that have addressed the issue include a spouse's voluntary contributions to retirement accounts, pension plans, or savings accounts as gross income for purposes of determining both spousal and child support.[131] The court of appeals found no reason to differen-

---

124. 24 Va. App. 123, 480 S.E.2d 760 (1997).
125. *See id.* at 139, 480 S.E.2d at 767.
126. *See id.* (citing Woolley v. Woolley, 3 Va. App. 337, 344, 349 S.E.2d 422, 426 (1986)).
127. *See id.* at 138, 480 S.E.2d at 767.
128. 23 Va. App. 358, 477 S.E.2d 290 (1996).
129. *See id.* at 378, 477 S.E.2d at 300.
130. *Id.* (quoting VA. CODE ANN. § 20-107.1(1) (Cum. Supp. 1997)).
131. *See id.*

tiate between gross income for spousal support and gross income for child support.[132] The court relied on Virginia's definition of gross income pursuant to Virginia Code section 20-108.2(C), which includes income from all sources.[133] The court held that this definition shall also apply to spousal support awards. Thus, anything that is not specifically excluded from the definition of gross income, such as voluntary contributions to retirement plans, shall be included.

The court of appeals in *Frazer* also ruled that the trial court abused its discretion in limiting the duration of wife's pendente lite support.[134] The wife demonstrated the need for spousal support, and the record reflected no rationale for the time limitation imposed. It was deemed reversible error to limit the wife's pendente lite support, and not commence her permanent support award until one month after the entry of the final divorce decree.[135]

Moreno v. Moreno[136] also presented an issue of first impression in the Virginia Court of Appeals. The *Moreno* case requires trial courts to consider income received by a payor spouse from his or her pension or retirement plan when determining spousal support. This is true regardless of whether the other spouse had previously received his or her portion of the retirement benefits pursuant to equitable distribution.[137]

---

132. *See id.*

133. *See id.* at 378, 477 S.E.2d at 299. Virginia Code section 20-108.2(C) defines gross income as:

> all income from all sources, and shall include, but not be limited to, income from salaries, wages, commissions, royalties, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits except as listed below, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, veterans' benefits, spousal support, rental income, gifts, prizes or awards.

VA. CODE ANN. § 20-108.2(C) (Cum. Supp. 1997).

134. *See* 23 Va. App. at 376, 477 S.E.2d at 298. The trial court erred in *Frazer* by limiting the pendente lite award to only three months. The final decree was entered over eight months later, and permanent spousal support was not ordered to commence until one month following entry of the decree, thus leaving wife with no support for a period of nine months. *See id.* at 375, 477 S.E.2d at 298.

135. *See id.*

136. 24 Va. App. 190, 480 S.E.2d 792 (1997).

137. *See id.* at 204, 480 S.E.2d at 799.

In *Moreno*, the parties were divorced by a final decree which incorporated their written property settlement agreement.[138] The agreement required the husband to pay spousal support and distributed as marital property the husband's pension plans.[139] The husband subsequently retired and moved the court to terminate spousal support.[140] At the time of the hearing, the wife was already receiving her share of the pension benefits directly from the husband's previous employer.[141] The husband testified that his only income was from his pension and interest earned from his savings account.[142] The wife testified that her need for spousal support was unchanged. Her income was comprised of her salary, the spousal support from the husband and her share of the husband's pension.[143] The trial court found a material change in circumstances and reduced the support from $2,600 per month to $800 per month, denying husband's motion to terminate support.[144]

On appeal, the husband argued that the language of Virginia Code sections 20-107.1 and 20-107.3(G) was inconsistent. He argued that the two statutes conflicted because one requires the court to consider all of the financial resources of a party, including pension income, and the other limits the division of a party's pension to fifty percent of the marital share of cash benefits actually received.[145] Therefore, the husband contended the trial court's failure to terminate his spousal support obligations resulted in a "double-dip" because the wife was already receiving her maximum marital share of his pension pursuant to the parties' agreement.[146]

The court of appeals disagreed with the husband. In the court's view, the Virginia General Assembly clearly intended that income from all "pensions" was to be included in a trial

---

138. *See id.* at 192, 480 S.E.2d at 793.
139. *See id.*
140. *See id.* at 193, 480 S.E.2d at 794.
141. *See id.*
142. *See Moreno*, 24 Va. App. at 193, 480 S.E.2d at 794. Subsequent to the divorce, the husband moved and became a resident of Thailand and was not legally permitted to work in Thailand. *See id.*
143. *See id.*
144. *See id.* at 194, 480 S.E.2d at 794.
145. *See id.* at 196, 480 S.E.2d at 795.
146. *See id.*

court's calculation of spousal support.[147] Moreover, even though Virginia Code section 20-107.3(G) limits a spouse's award of retirement accounts for equitable distribution, there is no statutory language precluding that property from later being considered as income for the purposes of calculating spousal support.[148] To the contrary, Virginia Code section 20-107.1 mandates the trial court to consider property received by each spouse when setting spousal support.[149] The court of appeals was also persuaded by the fact that other state legislatures have specifically directed their trial courts not to consider previously awarded pension benefits when determining spousal support.[150] Since the Virginia legislature specifically declined to exclude such a consideration, the court of appeals held that it should be included.[151]

The court of appeals also relied on the theory that spousal support and equitable distribution of property are two distinct concepts.[152] Thus, the non-pensioned spouse is not claiming rights as a co-owner in the pension, but is merely asserting that the pension income should not be ignored when reviewing the parties' relative financial positions for spousal support.[153] Based on all of the above, the court of appeals held that the trial court properly considered the husband's pension income as a source of income in awarding the wife spousal support.[154]

147. *See id.* at 199, 480 S.E.2d at 796-97 (citing VA. CODE ANN. § 20-107.1 (Repl. Vol. 1997)).

148. *See Moreno*, 24 Va. App. at 199, 480 S.E.2d at 796.

149. *See id.* at 200, 480 S.E.2d at 797.

150. *See id.*

151. *See id.*

152. *See id.* at 201, 480 S.E.2d at 798 (citing Stumbo v. Stumbo, 20 Va. App. 685, 460 S.E.2d 591 (1995) (recognizing the distinction between equitable distribution awards and spousal support awards)).

153. *See id.*

154. *See Moreno*, 24 Va. App. at 201, 480 S.E.2d at 798. The court noted that the wife's share of her pension should also be included as a resource of hers in determining her need for support. *See id.* at 204, 480 S.E.2d at 799. Further, the property settlement agreement contained no provisions excluding husband's share of the pension from his income for the purposes of recalculating his spousal support obligation. *See id.*

b. Modification of Existing Spousal Support Orders

In the case of *Head v. Head*,[155] the Virginia Court of Appeals held that the husband's child support reduction was not a material change in circumstances to justify an increase in the wife's spousal support.[156] Each party filed cross-motions in the trial court seeking modification of child and spousal support.[157] The trial court found that the only material change in circumstances since their divorce and written property settlement agreement was the 1995 legislative revision to the child support guidelines.[158] As a result, the trial court reduced the husband's child support commensurate with the revised guidelines.[159] The trial court declined to increase the wife's spousal support.[160]

The wife appealed and argued that the trial court erred by not increasing her spousal support after finding no change in her need for support. In the original proceeding, the trial court had determined the "household need" was $7,000 per month. After the husband's child support was decreased, the wife still requested $7,000 per month proportioned between child and spousal support. The court of appeals disagreed, relying on the principle that "child support and spousal support are separate and distinct obligations based on different criteria."[161] In light of this principle, the court of appeals held that a change in child support is not a circumstance "material" to a spousal support award.[162]

In *Dickson v. Dickson*,[163] involving another issue of first impression, the Virginia Court of Appeals held that when the

155. 24 Va. App. 166, 480 S.E.2d 780 (1997).

156. *See id.* at 177, 480 S.E.2d at 786.

157. *See id.* at 170, 480 S.E.2d at 782.

158. *See id.* In 1995, the legislature substantially reduced the percentage of support payable for monthly gross incomes exceeding $10,000 per month. *See* VA. CODE ANN. § 20-108.2 (Cum. Supp. 1997).

159. *See Head*, 24 Va. App. at 171, 480 S.E.2d at 783.

160. *See id.*

161. *Id.* at 177-78, 480 S.E.2d at 786 (citing Lambert v. Lambert, 10 Va. App. 623, 628-29, 395 S.E.2d 207, 210 (1990) (holding that child support is not to be considered in determining award of spousal support)).

162. *See id.*

163. 23 Va. App. 73, 474 S.E.2d 165 (1996).

husband discharged his wife's equitable distribution award and other joint debts in bankruptcy, the wife was entitled to an increase in spousal support.[164] The record on appeal revealed that the trial court placed considerable weight on all of the statutory factors, but particularly on the length of the marriage, the wife's unemployment, and the equitable distribution of the marital assets.[165] At the modification hearing, the trial judge felt that a central factor had been removed from the equation since the wife never received her equitable distribution proceeds.[166] Because the court had based its support award in large part upon the money the wife received pursuant to equitable distribution, the husband's bankruptcy constituted a material change in circumstances.[167]

The court of appeals reviewed authority from other jurisdictions and concluded that other state and federal courts had uniformly considered a discharge in bankruptcy as a sufficient material change in circumstances to trigger a support modification.[168] Although the court of appeals recognized the competing interests of giving the debtor a fresh start and the state objective in resolving domestic disputes, it sided with the majority of states.[169]

c. Periodic v. Lump Sum

Also in *Dickson*, the Virginia Court of Appeals took the opportunity to explain the distinction between periodic and lump sum spousal support.[170] The parties' final decree contained the following language:

> [H]usband shall pay wife the sum of one thousand ($1,000) dollars per month as spousal support and maintenance for twelve months beginning October 1, 1992; eight hundred ($800) dollars per month for twelve months beginning Octo-

164. *See id.* at 81, 474 S.E.2d at 169.
165. *See id.* at 82, 474 S.E.2d at 169.
166. *See id.*
167. *See id.*
168. *See id.* at 82, 474 S.E.2d at 170 (citing Siragusa v. Siragusa, 843 P.2d 807 (Nev. 1992)).
169. *See id.* at 85, 474 S.E.2d at 171.
170. *See id.* 78-79, 474 S.E.2d at 168.

> ber 1, 1993, and six hundred ($600) per month, for twelve months, beginning October 1, 1994; with the husband's obligation to provide spousal support to cease on September 30, 1995. . . . [171]

When the husband discharged the wife's equitable distribution award in bankruptcy, she moved to increase her spousal support.[172] The husband moved the court for a judicial determination that the spousal support was not modifiable because it was awarded as a lump sum.[173] The trial court determined that the support constituted periodic payments and was modifiable.[174] The husband appealed. The court of appeals defined a periodic payment as:

> a specified amount payable at designated intervals with the sum total uncertain; the amount of the payment can be modified by the court, if one of the parties can show a change in circumstances, or the amount of payment can be modified by agreement of the parties. The total amount of periodic support due is contingent upon future events; the right to each periodic payment becomes fixed and vested only as each payment is due.[175]

In contrast, the court of appeals defined a lump sum award as:

> an order to pay a specific amount . . . [it] is a fixed obligation to pay a sum certain when the decree is entered but the amount may be payable either in deferred installments or at once. That the payment method may allow for deferred installment payments does not change the character of the award. Thus, the right to the amount, whether payable immediately or in installments, is fixed and vested at the time of the final decree and the amount is unalterable by court order, remarriage, or death.[176]

---

171. *Id.* at 77, 474 S.E.2d at 167 (omission in original).

172. *See id.*

173. *See id.*

174. *See id.* at 78, 474 S.E.2d at 168.

175. *Id.* at 79, 474 S.E.2d at 168 (quoting Eaton v. Davis, 176 Va. 330, 342, 10 S.E.2d 893, 898 (1940)).

176. *Id.* (citing Mallery-Sayre v. Mallery, 6 Va. App. 471, 474-75, 370 S.E.2d 113, 115 (1988)).

In *Dickson*, the Virginia Court of Appeals held that the spousal support award was not a fixed obligation to pay a sum certain when the decree was entered. The award specified an amount payable at designated intervals. The amount due became vested only as each payment was due. Therefore, the court of appeals agreed with the trial court that the support was periodic and modifiable.[177]

d. Spousal Support v. Monetary Award

In *Dotson v. Dotson*,[178] the Virginia Court of Appeals distinguished a lump sum spousal support award from an equitable distribution award.[179] The court of appeals reversed the trial court's award to the wife because it did not distinguish between spousal support and property distribution.[180] The trial court awarded the wife a "lump sum" of $1.8 million. The trial court also ordered the husband to either provide the wife with health insurance or pay her $425 per month, which was the current cost of her health insurance.[181] The trial court stated in its opinion that it was not required to distinguish whether the award was intended as support or as property distribution.[182] The court of appeals reversed, explaining that there is a distinct difference between a spousal support award and a monetary award.[183] A trial court should award spousal support based on each party's current need and the ability of the payor spouse to pay from current assets.[184] Conversely, a trial court

177. *See id.* The court of appeals also relied on the fact that the trial court had not enumerated any special circumstances or compelling reasons that would have justified a lump sum award. *See id.* (citing Blank v. Blank, 10 Va. App. 1, 5-6, 389 S.E.2d 723, 725 (1990)). Special circumstances or compelling reasons would include husband's inability to pay future periodic payments or wife's immediate need for a lump sum to maintain herself or satisfy debts. *See id.*

178. 24 Va. App. 40, 480 S.E.2d 131 (1997).

179. *See id.* at 44, 480 S.E.2d at 132.

180. *See id.* at 40, 480 S.E.2d at 131.

181. *See id.*

182. *See id.* at 43-44, 480 S.E.2d at 132.

183. *See id.* (citing Brown v. Brown, 5 Va. App. 238, 246, 361 S.E.2d 364, 368 (1987)). Spousal support involves a legal duty flowing from one spouse to the other by virtue of the marital relationship. By contrast, a monetary award does not flow from any legal duty, but involves an adjustment of the equities, rights and interests of the parties in marital property. *See id.*

184. *See id.* (citing Williams v. Williams, 4 Va. App. 19, 24, 354 S.E.2d 64, 66

makes an equitable distribution award in order to recognize the marital partnership and equitably divide the marital wealth.[185] The trial court must also consider its equitable distribution award in fashioning a support award. It is improper, however, for the trial court to consider spousal support when making an equitable distribution award. Thus, the court of appeals remanded the case to the trial court to separately redetermine equitable distribution and spousal support.[186]

e. Pleadings

In *Reid v. Reid*,[187] the Virginia Court of Appeals held that the husband's Bill of Complaint did not sufficiently raise the issue of spousal support.[188] The case originated in the juvenile court where wife was awarded both child support and spousal support.[189] The husband appealed the juvenile court order to the circuit court. The circuit court affirmed the order and remanded all future support matters back to the juvenile court.[190] The husband then filed for a "no fault" divorce in the circuit court. In his Bill of Complaint, he requested "that the court decree that the [parties] be perpetually protected in their persons and property."[191] The husband did not specifically mention "spousal support" or the previous support order.[192] The wife was personally served with the complaint and a notice to take depositions, but she did not respond or appear at the scheduled hearing.[193] In accordance with the husband's prayer for relief, the trial court entered a divorce decree which revoked all previous support awards.[194] More than twenty-one days

---

(1987)).

185. *See id.* at 44, 480 S.E.2d at 133 (citing *Williams*, 4 Va. App. at 24, 354 S.E.2d at 66).

186. *See id.* (citing VA. CODE ANN. § 20-107.3(F) (Repl. Vol. 1995) (monetary award must be determined without regard to support)); VA. CODE ANN. § 20-107.1(8) (Repl. Vol. 1995) (in determining an amount of support award, a court must consider, inter alia, provisions made with regard to the distribution of marital property).

187. 24 Va. App. 146, 480 S.E.2d 771 (1997).

188. *See id.* at 150, 480 S.E.2d at 772.

189. *See id.* at 148, 480 S.E.2d at 772.

190. *See id.*

191. *Id.* at 149, 480 S.E.2d at 772.

192. *See id.*

193. *See id.*

194. *See id.*

later, the wife moved to set aside the provisions of the decree relating to spousal support.[195] Following a contested hearing on the issue, the trial court reversed its previous spousal support revocation and awarded the wife all support arrearages under the pre-existing order.[196]

The husband appealed to the court of appeals, arguing that the trial court lacked jurisdiction to amend the decree.[197] The court of appeals affirmed the trial court and found that the original decree was void. It reasoned that Virginia Code section 20-79(B) conferred jurisdiction on the trial court to award support and maintenance only at the "request" of "either party to the proceedings."[198] The trial court's exercise of this power was dependent on the husband's pleadings having raised the issue.[199] A decree entered in the absence of pleadings is void.[200] The court of appeals explained that although the husband's Bill of Complaint properly invoked the court's jurisdiction to enter the divorce, the court was precluded from exercising jurisdiction over spousal support if the husband did not specifically request that relief.[201] Accordingly, the trial court's original revocation of the prior support order was a nullity.[202]

The husband also argued that the previous spousal support order terminated by operation of law when the divorce was entered. The court of appeals found that argument was without merit. They explained that an existing spousal support order survives a subsequent divorce decree which does not address the issue.[203]

---

195. *See id.*

196. *See id.*

197. *See id.* Virginia Supreme Court Rule 1:1 states that, "[a]ll final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court . . . for twenty-one days after the date of entry, and no longer." VA. SUP. CT. R. 1:1.

198. *Reid*, 24 Va. App. at 149, 480 S.E.2d at 772.

199. *See id.* (citing Boyd v. Boyd, 2 Va. App. 16, 19, 340 S.E.2d 578, 580 (1986)).

200. *See id.* (citing Potts v. Mathieson-Alkali Works, 165 Va. 196, 207, 181 S.E.2d 521, 525 (1935)).

201. *See id.* at 150, 480 S.E.2d at 773.

202. *See id.* Because the original order terminating support was null and void, the trial court did not violate Virginia Supreme Court Rule 1:1 when it later modified the spousal support provision of the order. *See id.*

203. *See id.* at 151, 480 S.E.2d at 773 (citing Werner v. Commonwealth, 212 Va. 623, 624-25, 186 S.E.2d 76, 77-78 (1972)).

f. Separate Maintenance

In *Scott v. Scott*,[204] the Virginia Court of Appeals held that a separate maintenance award terminates at the time a divorce is granted.[205] The court of appeals explained that "separate maintenance" is the allowance "paid by one married person to the other for support if they are no longer living as husband and wife."[206] A separate maintenance award depends upon the existence of a marriage relationship.[207] When the marriage is terminated by divorce, it discharges the responsible spouse from his or her liability for separate maintenance payments awarded under a previous decree.[208] Similarly, the court's jurisdiction to award separate maintenance also terminates.

2. Child Support

a. Extraordinary Medical Expenses

In *Frazer v. Frazer*,[209] the Virginia Court of Appeals reiterated its prior decisions regarding the allocation of the payment of extraordinary medical expenses for dependent children by holding that extraordinary medical expenses not covered by insurance shall be apportioned according to a percentage equal to each party's child support obligation.[210] The court of appeals also affirmed its decision in *Carter v. Thornhill*[211] that deviating from the guidelines to require parties to pay past extraordinary medical expenses, as well as continuing expenses, is permitted under Virginia Code section 20-108.2(D).[212]

---

204. 24 Va. App. 364, 482 S.E.2d 110 (1997).
205. *See id.* at 368, 482 S.E.2d at 112.
206. *Id.* (quoting BLACK'S LAW DICTIONARY 1365 (6th ed. 1990)).
207. *See id.*
208. *See id.* at 369, 482 S.E.2d at 112.
209. 23 Va. App. 358, 477 S.E.2d 290 (1996).
210. *See id.* at 372-74, 477 S.E.2d at 297-98; *see also* Carter v. Thornhill, 19 Va. App. 501, 506, 453 S.E.2d 295, 299 (1995).
211. 19 Va. App. 501, 453 S.E.2d 295 (1995).
212. *See id.* at 503-06, 453 S.E.2d at 297-99; VA. CODE ANN. § 20-108.2(D) (Cum. Supp. 1997).

b. Income Determination

Frazer clarified a longstanding issue among practitioners as to whether spousal support should be included in the gross income of the receiving spouse for purposes of determining child support pursuant to Virginia Code section 20-108.2(C) when the issues are addressed in the same proceeding.[213] The court of appeals held that spousal support shall be deducted from the payor spouse's income and included in the payee spouse's income. The trial court must follow a three-step process in divorce proceedings.[214] The court must first determine equitable distribution, then spousal support, and then child support.[215] Additionally, although a spousal support order must pre-exist the determination of child support, the plain meaning of Virginia Code section 20-108.2(C) contemplates spousal support "between the parties to the present proceeding."[216]

The court of appeals further found that voluntary contributions to a retirement account must also be included in the gross income of a parent for purposes of calculating child support.[217]

Determining whether to impute income to a party for purposes of calculating child support continues to be highly controversial, as is evidenced by the court's decision in *Mansfield v. Taylor*.[218] The Supreme Court of Virginia first addressed the effect of a voluntary change of employment on a party's child support obligation in the case of *Antonelli v. Antonelli*.[219] In *Antonelli*, the supreme court held that voluntarily leaving a salaried position to take on a commissioned position, even if it was a bona fide and reasonable business undertaking, "was a risk that fell upon the obligor and not upon the children."[220]

---

213. *See Frazer*, 23 Va. App. at 380-81, 477 S.E.2d at 301.
214. *See id.*
215. *See id.*
216. *See id.*
217. *See id.*
218. 24 Va. App. 108, 480 S.E.2d 752 (1997).
219. 242 Va. 152, 409 S.E.2d 117 (1991). In both *Mansfield* and *Antonelli*, the parties were seeking a modification of child support based upon a job change. Thus, both parties were aware of their support obligations prior to making the change. *See Mansfield*, 24 Va. App. at 114-15, 480 S.E.2d at 755-56.
220. *Antonelli*, 242 Va. at 156, 409 S.E.2d at 119-20.

The court in *Mansfield* determined that the holding in *Antonelli* requires that a career change be made in good faith and without disregard for one's support obligations.[221] In *Mansfield*, the payor parent opted to pursue a new career which restricted his income to no more than $9,600 per year for a period of seven years, with the expectation that the job would pay well in the future.[222] The court found that this was unsatisfactory because the father had a current obligation to his children.[223] Thus, by ensuring he would have a very low income in his new position, he evidenced a careless disregard for his existing support obligation and income should be imputed to him.[224]

In a case of first impression, the Virginia Court of Appeals, in *Moreno v. Moreno*,[225] addressed the issue of whether a trial court is required to calculate the presumptive amount of child support prior to entering a consent decree on support. In *Moreno*, the trial court entered a final decree of divorce incorporating the parties' property settlement agreement, which provided that the father would pay a sum certain to the mother in monthly child support for the parties' two children.[226] Neither party objected to the entry of the decree and no appeal was taken.[227] Later, when a show cause order was entered against the father for his failure to pay child support, he moved to dismiss the order.[228] He argued that the child support decree was void because it made no reference to the presumptive child support guidelines and contained no written findings as to why the presumptive amount would be unjust or inappropriate, pursuant to the provisions of Virginia Code sections 20-108.1 and 20-108.2.[229] The court of appeals held that the original decree was binding because the amount of child support was never disputed or questioned at the time the order was entered.[230] The court of appeals distinguished this case from

221. *See Mansfield*, 24 Va. App. at 114, 480 S.E.2d at 755.
222. *See id.* at 114-15, 480 S.E.2d at 755.
223. *See id.* at 115, 480 S.E.2d at 756.
224. *See id.*
225. 24 Va. App. 227, 481 S.E.2d 482 (1997).
226. *See id.* at 229, 481 S.E.2d at 484.
227. *See id.*
228. *See id.* at 230, 481 S.E.2d at 484.
229. *See id.* at 230, 481 S.E.2d at 484; VA. CODE ANN. §§ 20-108.1, -108.2 (Cum. Supp. 1997).
230. *See Moreno*, 24 Va. App. at 233, 481 S.E.2d at 485.

those where the child support was in dispute at the time the divorce decree was entered or those cases where a party had specifically requested that the court calculate child support.[231]

c. Modification of Existing Child Support Orders

Head v. Head[232] addresses the fluctuation in income of an obligor as a material change in circumstances warranting a modification. In *Head*, the evidence proved that the husband's income varied because of the nature of his business.[233] The trial court found that while the husband's income fluctuated as much as thirty-two percent in a three-year period, there was only a 6.25% *reduction* in his current income, which did not constitute a material change in circumstances.[234] However, the trial court did recalculate child support because the guidelines themselves had changed since the court's previous ruling on the issue.[235] The court used the husband's prior income, as opposed to his current reduced income, for the new calculation.[236]

The husband appealed, arguing that once a material change in circumstances has been proven (i.e. guidelines modification), the court must use current income to recalculate support.[237] The court of appeals disagreed, finding that under his theory, "a party seeking a support modification could achieve, through the back door, a result barred by the front door."[238] Although it appears that *Head* is inconsistent with the Virginia Court of Appeals' decision in *Cooke v. Cooke*,[239] decided only months before, these cases are distinguishable. In *Cooke*, the court of appeals held that an amendment to the statutory guideline schedule constitutes a material change in circumstances for purposes of adjusting child support.[240] Prior to the change in

231. *See id.* at 232, 481 S.E.2d at 485; *see also* Scott v. Scott, 12 Va. App. 1245, 408 S.E.2d 579 (1991); Spagnolo v. Spagnolo, 20 Va. App. 736, 460 S.E.2d 616 (1995).
232. 24 Va. App. 166, 480 S.E.2d 780 (1997).
233. *See id.* at 175, 480 S.E.2d at 784.
234. *See id.*
235. *See id.* at 177, 480 S.E.2d at 786.
236. *See id.*
237. *See id.* at 175-177, 480 S.E.2d 785-786.
238. *Id.* at 176-177, 480 S.E.2d at 786.
239. 23 Va. App. 60, 474 S.E.2d 159 (1996).
240. *See id.* at 64, 474 S.E.2d at 161. This decision is consistent with *Slonka v.*

the guidelines themselves, the court of appeals in *Cooke* had already determined that other changes existed warranting a review of the previous award.[241] In *Head*, there were no other changes and the issue of the father's income was considered res judicata.[242]

In *Orlandi v. Orlandi*,[243] the Virginia Court of Appeals expanded the decision of the Supreme Court of Virginia in *Featherstone v. Brooks*,[244] by addressing the standard required to modify a child support order submitted with the consent of the parties.[245] The court of appeals specifically found that *Featherstone* implicitly "held that the material change of circumstances test for modification of child support should be utilized when an award is based on a consent decree."[246] The father in *Orlandi* met this burden by establishing that the child's mother had remarried, that the mother received economic benefits from her new husband, and that the mother refused to help pay some of the child's expenses after agreeing to do so in the consent decree.[247]

C. *Custody*

In the case of *Bostick v. Bostick-Bennett*,[248] the Virginia Court of Appeals set the standard for modifying an order prohibiting removal of a child from the state.[249] In *Bostick*, the trial court awarded the father sole physical custody of the parties' minor child but denied him the opportunity to relocate

---

Pennline, 17 Va. App. 662, 664-65, 440 S.E.2d 423, 425 (1994) and *Milligan v. Milligan*, 12 Va. App. 982, 988, 407 S.E.2d 702, 705 (1991).

241. *See Cooke*, 23 Va. App. at 64, 474 S.E.2d at 161.

242. *See Head*, 24 Va. App. at 177, 480 S.E.2d at 786. On appeal, the wife argued that the trial court erred by failing to deviate upward from the new guideline amount because the previous presumptive amount was evidence of the child's needs. This argument was summarily rejected by the court. *See id.*

243. 23 Va. App. 21, 473 S.E.2d 716 (1996).

244. 220 Va. 443, 258 S.E.2d 513 (1979).

245. *See Orlandi*, 23 Va. App. at 26-27, 473 S.E.2d at 719.

246. *Id.* at 26, 473 S.E.2d at 719.

247. *See id.* at 27-28, 473 S.E.2d at 719. The court of appeals specifically noted that this holding does not mean that a new spouse must support the other spouse's children, but simply that remarriage may change one parent's ability to provide support for his or her children. *See id.* at 29, 473 S.E.2d at 720.

248. 23 Va. App. 527, 478 S.E.2d 319 (1996).

249. *See id.* at 529, 478 S.E.2d at 320.

to North Carolina.[250] He was ordered to give thirty days notice of any future intention to relocate. The order further stated that the child was not to be removed from the state if an objection was noted.[251] At a subsequent hearing on relocation, the father presented evidence that he had "developed a concrete plan for his relocation to North Carolina."[252] The guardian ad litem supported the father's relocation proposal.[253] There was also evidence that the mother's circumstances had changed. She had remarried, was pregnant, and had demonstrated increased stability.[254] The trial court again denied the father's request to relocate to North Carolina.[255] The trial court felt the father had failed to prove a material change in circumstances on the issue of the child's removal.[256]

The court of appeals affirmed the trial court's decision, finding that in order to modify a decree regarding removal, the court must find "(1) a material change of circumstance since the initial decree; and (2) that relocation would be in the child's best interest."[257] The court of appeals specifically noted that while the father had developed a more concrete plan to relocate, this was not the reason that the trial court had refused to allow the removal in the first place.[258] Therefore, the more concrete plan was not determinative of the issue.[259] The trial court specifically stated that it would not allow the removal upon entry of the initial decree, because it wanted both parents to be actively involved in the child's life.[260] In denying the modification, the trial court reiterated this goal.[261]

250. *See id.* at 531, 478 S.E.2d at 321.
251. *See id.*
252. *Id.*
253. *See id.* at 532, 478 S.E.2d at 321-22.
254. *See Bostick*, 23 Va. App. at 532, 478 S.E.2d at 321.
255. *See id.* at 531, 478 S.E.2d at 322.
256. *See id.* at 532, 478 S.E.2d at 322.
257. *Id.* at 535, 478 S.E.2d at 323.
258. *See id.* at 536, 478 S.E.2d at 323.
259. *See id.*
260. *See id.* at 531, 478 S.E.2d at 321.
261. *See id.* at 533, 478 S.E.2d at 322.

D. *Procedure*

1. Evidence

In *Street v. Street*,[262] the Virginia Court of Appeals held that the Due Process Clause requires that a defendant, faced with out of court contempt charges, must be given the opportunity to present evidence in his defense, including the right to examine the opposing party, and the right to call witnesses.[263] Since inability to pay is a valid defense to a contempt charge, the trial court erred when it refused to allow the husband to call witnesses to develop this testimony.[264] The wife, relying on *Antonelli v. Antonelli*,[265] contended that the trial court did not err because the husband previously testified that he voluntarily closed his business.[266] She argued that such a voluntary change could never be a defense to contempt.[267] The court of appeals disagreed and distinguished between a support modification proceeding and a contempt proceeding.[268] Although *Antonelli* held that a reduction of income as a result of a parent's intentional act, even if done in good faith, does not warrant a support modification, this standard is not applicable to contempt charges unless the evidence shows the act was continuous.[269]

---

262. 24 Va. App. 14, 480 S.E.2d 118 (1997).
263. *See id.* at 20, 480 S.E.2d at 121.
264. *See id.*
265. 242 Va. 152, 409 S.E.2d 117 (1991).
266. *See Street*, 24 Va. App. at 21, 480 S.E.2d at 122.
267. *See id.*
268. *See id.* at 21-22, 480 S.E.2d at 122.
269. *See id.* at 22, 480 S.E.2d at 122. The court of appeals explained that contempt proceedings are controlled by the standard as set forth in *Laing v. Commonwealth*, 205 Va. 511, 137 S.E.2d 896 (1964), which states that it is true that the inability of an alleged contemner, without fault on his part, to render obedience to an order of court is a good defense to a charge of contempt. But where an alleged contemner has voluntarily and contumaciously brought on himself disability to obey an order, he cannot avail himself of a plea of inability to obey as a defense to the charge of contempt. *See id.* (quoting *Laing*, 205 Va. at 515, 127 S.E.2d at 899).

2. Jurisdiction

In *Fahey v. Fahey*,[270] the Virginia Court of Appeals reversed the trial court's decision to modify a Qualified Domestic Relations Order (QDRO) more than twenty-one days after it was entered.[271] In *Fahey*, the husband appealed an order amending an existing QDRO distributing his Keogh plan.[272] After a rehearing en banc, the court of appeals panel concurred in the decision to reverse the amended QDRO.[273]

The parties were divorced by final decree which reserved jurisdiction over equitable distribution.[274] Thereafter, the parties executed a property settlement agreement which was incorporated into a consent order.[275] The QDRO in question allotted "one-half of the accrued value of the [Keogh] Plan as of [the date of the separation agreement]."[276] One year later, the administrator of the retirement plan divided the assets in-kind rather than in accordance with the separation agreement.[277] The husband objected to an in-kind division due to the substantial increase in the account value since the valuation date.[278] The wife argued that the administrator had acted properly and moved the court to enter an amended QDRO assigning her "'one-half of the shares of the plan as of [the agreement date], together with any appreciation or depreciation that had accrued since that time until the time of distribution.'"[279] The initial QDRO was never appealed and was final prior to the disputed amendment.[280]

The court of appeals acknowledged that a trial court has the jurisdiction to "[m]odify any order . . . intended to effect or divide any pension, profit-sharing, or deferred compensation

---

270. 24 Va. App. 254, 481 S.E.2d 496 (1997).
271. *See id.* at 257, 481 S.E.2d at 497.
272. *See id.* at 255, 481 S.E.2d at 496.
273. *See id.*
274. *See id.*
275. *See id.* at 255-56, 481 S.E.2d at 496.
276. *Id.* at 256, 481 S.E.2d at 497 (quoting the QDRO).
277. *See id.*
278. *See id.*
279. *Id.* (quoting the amended QDRO).
280. *See id.* (citing Rook v. Rook, 233 Va. 92, 94-95, 353 S.E.2d 756, 758 (1987)).

plan or retirement benefits . . . to revise or conform its terms so as to effectuate the expressed intent of the order."[281] However, the modification must be "consistent with the substantive provisions of the original decree."[282] The court of appeals explained that an amendment cannot adjust terms to take into account a party's change in circumstances.[283] The court of appeals stated that the manifest intent of the original QDRO was to allot the wife one-half of the account value on the agreement date.[284] Even though this calculation method later disfavored the wife because of the increased account value, the court lacked authority to substantively modify the order.[285]

In *Romine v. Romine*,[286] the Virginia Court of Appeals held that even though a circuit court had previously remanded future spousal support issues to the juvenile court, its subsequent exercise of jurisdiction over these matters divested the juvenile court of jurisdiction.[287]

In *Romine*, the circuit court awarded the wife $900 per month in spousal support.[288] The final decree then transferred future jurisdiction over spousal support to the juvenile court.[289] The husband subsequently lost his job and filed a petition in the circuit court to reduce the support.[290] The parties agreed to abate the support payments. The circuit court entered a Consent Order abating the spousal support which did not transfer the matter back to the juvenile court.[291] Several months later, when the husband became employed, upon the wife's petition, the juvenile court reinstated spousal support.[292] The husband appealed the juvenile court order. The juvenile court set a $5,000 bond with surety, which the husband failed

281. *Id.* at 256-57, 481 S.E.2d at 497 (citing VA. CODE ANN. § 20-107.3(K)(4) (Repl. Vol. 1995)).
282. *Id.* (quoting Caudle v. Caudle, 18 Va. App. 795, 798, 447 S.E.2d 247, 249 (1994)).
283. *See id.* (citing *Caudle*, 18 Va. App. at 798, 447 S.E.2d at 249).
284. *See id.*
285. *See id.*
286. 22 Va. App. 760, 473 S.E.2d 99 (1996).
287. *See id.* at 763-66, 473 S.E.2d at 101-02.
288. *See id.* at 762, 473 S.E.2d at 100.
289. *See id.*
290. *See id.*
291. *See id.*
292. *See id.*

to post.[293] The husband petitioned the circuit court to permit his appeal without posting the bond. The circuit court denied the husband's request, ruling that only the juvenile court had jurisdiction over the bond.[294] Implicit in the circuit court's ruling was a finding that the juvenile court had jurisdiction to reinstate the spousal support.[295]

The husband appealed to the court of appeals. He argued that the circuit court's subsequent exercise of jurisdiction abating the support divested the juvenile court of further jurisdiction.[296] The court of appeals held that when a circuit court transfers matters to a juvenile court, it creates concurrent jurisdiction in each court.[297] However, a juvenile court does not retain jurisdiction pursuant to a transfer if the circuit court again exercises jurisdiction in the case.[298] The court of appeals explained that the juvenile court's jurisdiction exists only as a result of the circuit court's action.[299] If a circuit court decides to resume jurisdiction, it conclusively determines that the matter will be litigated in a court of record.[300] It follows that the circuit court intends to preclude the juvenile court from acting further on that issue.[301] Accordingly, when the circuit court assumed jurisdiction over the support matter subsequent to its transfer pursuant to Virginia Code section 20-79(C), its action divested the juvenile court of jurisdiction.[302] Thus, because the juvenile court lacked jurisdiction to reinstate spousal support after the circuit court abated it, the circuit court order was reversed and the juvenile court order vacated.[303]

---

293. *See id.*
294. *See id.*
295. *See id.*
296. *See id.* at 763, 473 S.E.2d at 100.
297. *See id.* at 763, 473 S.E.2d at 101 (citing Crabtree v. Crabtree, 17 Va. App. 81, 86, 435 S.E.2d 883, 887 (1993)). The circuit court retains its continuing jurisdiction to modify custody and support matters pursuant to Virginia Code sections 20-108 and -109.
298. *See id.* at 764, 473 S.E.2d at 101.
299. *See id.*
300. *See id.* at 765-66, 473 S.E.2d at 102.
301. *See id.* (citing *Crabtree*, 17 Va. App. at 87, 435 S.E.2d at 887).
302. *See id.*; *see also* VA. CODE ANN. § 20-79(C) (Repl. Vol. & Cum. Supp. 1997).
303. *See Romine*, 22 Va. App. at 765-66, 473 S.E.2d at 102.

In *Commonwealth v. Richter*,[304] the Virginia Court of Appeals had one of the first opportunities to interpret the Uniform Interstate Family Support Act (UIFSA).[305] UIFSA adopts the concept of continuing exclusive jurisdiction to establish and modify support.[306] Under UIFSA, once a court or administrative agency with jurisdiction enters a support decree, it is the only body entitled to modify the decree as long as it retains continuing exclusive jurisdiction under the Act. Another state, while required by UIFSA to enforce the existing decree, has no power under the Act to modify the original decree.[307]

In *Richter*, the trial court, believing it lacked jurisdiction, declined to enforce its original support order which it had entered twenty years earlier.[308] After entry of the original order, both parties left Virginia.[309] The husband moved to South Carolina and the wife moved to California.[310] Years later, the wife filed a wage withholding request through the California Child Support Agency in South Carolina.[311] The South Carolina court ruled that it had jurisdiction over the husband, but denied the wage withholding request because the husband disputed the arrearage.[312] The South Carolina court took no further action.[313]

The wife then moved the California Child Support Agency to recover the support arrearages in Virginia.[314] The Virginia circuit court ruled it had no jurisdiction to enforce the order, believing that South Carolina had usurped jurisdiction.[315] The Virginia Court of Appeals reversed and explained that the Virginia court could exercise personal jurisdiction over a non-resi-

---

304. 23 Va. App. 186, 475 S.E.2d 817 (1996).

305. VA. CODE ANN. §§ 20-88.32-.82 (Repl. Vol. 1995 & Cum. Supp. 1997). The UIFSA replaced the Revised Uniform Reciprocal Enforcement of Support Act (RURESA) and is intended to provide a means to establish and enforce child support and spousal support obligations across state lines.

306. *See Richter*, 23 Va. App. at 190, 475 S.E.2d at 819 (citation omitted).

307. *See id.* (citation omitted).

308. *See id.* at 188, 475 S.E.2d at 818.

309. *See id.*

310. *See id.*

311. *See id.*

312. *See id.* at 189, 475 S.E.2d at 819.

313. *See id.*

314. *See id.*

315. *See id.*

dent individual when, among other things, the individual resided with the child in the Commonwealth or when the exercise of personal jurisdiction was authorized under the Virginia Long Arm Statute.[316] Under UIFSA, Virginia had continuing exclusive jurisdiction over support as long as the Commonwealth remained the residence of the obligor, the individual obligee, or the child.[317] However, the statute does not state, either by express terms or by implication, that Virginia loses all jurisdiction if none of the parties are continuing residents.[318] The court of appeals reversed and held that Virginia continued to have the right to enforce its own decree even if all of the parties were no longer residents.[319]

The Virginia Court of Appeals has held that a circuit court has no jurisdiction to terminate parental rights. In *Church v. Church*,[320] the circuit court determined that the father had abandoned the parties' child. The circuit court believed it was in the child's best interest to terminate the father's residual parental rights, and did so in the final decree pursuant to former Virginia Code section 16.1-279(A)(1).[321] The divorce decree also eliminated the father's obligation to pay child support and not-

316. *See id.* at 192, 475 S.E.2d at 820; VA. CODE ANN. §§ 8.01-328.1 (Repl. Vol. 1992 & Cum. Supp. 1997), 20-88.35(3), 20-88.35(6) (Repl. Vol. 1995 & Cum. Supp. 1997). The Virginia Long Arm statute provides jurisdiction over an individual who has been ordered to pay spousal support or child support pursuant to an order entered by any court of competent jurisdiction in this Commonwealth having in personam jurisdiction over such person. *See* VA. CODE ANN. § 8.01-328.1(A)(8)(i) (Repl. Vol. 1992 & Cum. Supp. 1997).

317. *See Richter*, 23 Va. App. at 192, 475 S.E.2d at 820.

318. *See* VA. CODE ANN. § 8.01-328.1 (Repl. Vol. 1992 & Cum. Supp. 1997).

319. The intent of the statute is to facilitate the enforcement of support orders by making other states equally available to an obligee. *See Richter*, 23 Va. App. at 192, 475 S.E.2d at 820.

320. 24 Va. App. 502, 483 S.E. 498 (1997).

321. *See id.* at 504, 483 S.E.2d at 499. Virginia Code section 16.1-279(A), in effect at the time of the final decree, is for all purposes material to this appeal identical to Virginia Code section 16.1-278.2, which provides in pertinent part:

> If a child is found to be . . . abandoned by his parent . . . the juvenile court or the circuit court may make . . . [an] order of disposition to protect the welfare of the child . . . [t]erminat[ing] the rights of the parent pursuant to § 16.1-283.

VA. CODE ANN. § 16.1-278.2 (Cum. Supp. 1997); *see also* VA. CODE ANN. § 16.1-279(A) (Repl. Vol. 1996).

ed the mother's agreement to forego any claim for delinquent child support.[322]

Several years later, the mother filed a petition for child support.[323] The mother acknowledged that the previous decree terminated the father's obligation to pay support, but argued that the child's best interest required a support order.[324] The father moved to dismiss the petition, arguing that the previous decree barred the requested relief and that the time for seeking relief had expired.[325] The trial court granted father's motion, ruling that it had properly terminated father's parental rights pursuant to Virginia Code sections 16.1-241(A)(5) and 16.1-244.[326] The mother failed to timely appeal the decree.[327] Therefore, in order to have the decree set aside, the mother had to establish that the decree was void.[328]

The court of appeals held the original decree was void,[329] explaining that a circuit court's authority to terminate parental rights and support obligations is limited.[330] The court of appeals found that the trial court erroneously assumed jurisdiction by relying on Title 16.1 of the Virginia Code.[331] Title 16.1, titled "Courts not of Record," addresses only juvenile court powers.[332] Section 16.1-241 of the Virginia Code does not confer original jurisdiction on the circuit courts where none otherwise exists.[333] The court of appeals explained that even though section 16.1-241(A)(5) of the Virginia Code mentions concurrent jurisdiction with the circuit court, it does not constitute a grant of jurisdiction to the circuit courts.[334] "It simply affirms that, where jurisdiction is granted to the circuit

322. *See Church*, 24 Va. App. at 504, 483 S.E.2d at 499.
323. *See id.*
324. *See id.*
325. *See id.* at 504-05, 483 S.E.2d at 499.
326. *See id.* at 505, 483 S.E.2d at 499-500.
327. *See id.* at 505, 482 S.E.2d at 500.
328. *See id.* (citing Rook v. Rook, 233 Va. App. 92, 95, 353 S.E.2d 756, 758 (1987)).
329. *See id.* at 508, 483 S.E.2d at 501.
330. *See id.* at 505-06, 483 S.E.2d at 500 (citations omitted).
331. *See id.* at 506, 483 S.E.2d at 500.
332. *See id.*
333. *See id.*; VA. CODE ANN. § 16.1-241 (Cum. Supp. 1997).
334. *See Church*, 24 Va. App. at 507, 483 S.E.2d at 501 (footnote omitted).

courts, . . . [it] is not exclusive."[335] If jurisdiction does not exist, it cannot be concurrent with another court's jurisdiction.[336] Further, the circuit court has no original jurisdiction to terminate parental rights. The circuit court's jurisdictional powers are conferred by section 17-123 of the Virginia Code.[337] That section grants the circuit courts "original and general jurisdiction of all cases in chancery and civil cases at law and jurisdiction of all other matters . . . made cognizable therein by law."[338] The circuit court's jurisdiction in matters relating to minor children is further made cognizable in Titles 20, 63.1 and 31 of the Virginia Code, none of which relate to termination of parental rights.[339] Therefore, the circuit court's original order was void.[340]

Moreover, the court of appeals found the trial court's decision terminating the father's child support obligation was in part based on the parties' agreement.[341] The court of appeals has previously established that such agreements are "void as against public policy and unenforceable as a matter of law."[342]

A trial court's refusal to dismiss a show cause order is not an appealable decree. In *Moreno v. Moreno*,[343] a show cause order was entered against the husband for his failure to pay child support. The husband moved to dismiss the show cause order.[344] The trial court denied the husband's motion and reduced its finding to an order, which the husband did not appeal. More than thirty days later, the trial court found the husband in contempt.[345] The husband did appeal the contempt order. The wife argued that the husband's appeal was untimely because he should have appealed the previous order denying his

335. *Id.*
336. *See id.*
337. *See id.*
338. *Id.* (citation omitted).
339. *See id.*
340. *See id.* at 508, 483 S.E.2d at 501.
341. *See id.*
342. *Id.* (citing Kelley v. Kelley, 248 Va. 295, 298-99, 449 S.E.2d 55, 56-57 (1994) (stating that parties' agreements to terminate child support are void as against public policy)).
343. 24 Va. App. 227, 481 S.E.2d 482 (1997).
344. *See id.* at 230, 481 S.E.2d at 484.
345. *See id.*

motion to dismiss the show cause order.[346] The court of appeals held that the original order was not an appealable order because it did not dispose of the whole subject.[347]

The court of appeals has original jurisdiction over circuit court final decrees in domestic relations matters that arise under Title 16.1 or 20 of the Virginia Code. Original jurisdiction also arises over an interlocutory decree or an order involving the granting, dissolving, or denying of an injunction or an order that adjudicates "the principles of a cause."[348]

The court of appeals defined a final decree as one "which disposes of the whole subject matter and gives all the relief that is contemplated, and leaves nothing to be done by the court."[349] In this instance, the trial court still had to proceed with the actual show cause hearing so the order was not final.[350] Accordingly, unless the husband's motion constituted an "interlocutory decree that adjudicated the principles of the cause" the court would not have had jurisdiction to consider an appeal of the first order.[351] The court of appeals defined an "interlocutory decree which adjudicated the principles of a cause" as a decree in which

> the rules or methods by which the rights of the parties are to be finally worked out have been so far determined that it is only necessary to apply those rules or methods to the facts of the case in order to ascertain the relative rights of the parties, with regard to the subject matter of the suit.[352]

When the trial court denied the husband's motion to dismiss the show cause petition, it did not determine whether husband had cause for failing to pay his child support. Nor had the court determined what terms it would impose for such a failure. Therefore, it was not an order that adjudicated the principles of

---

346. *See id.*

347. *See id.* at 231, 481 S.E.2d at 484.

348. *See id.* (citing VA. CODE ANN. §§ 17-116.05(3)(f)-.05(4) (Repl. Vol. 1996)).

349. *Id.* (citing Erikson v. Erikson, 19 Va. App. 389, 390, 451 S.E.2d 711, 712 (1994)).

350. *See id.*

351. *Id.*

352. *Id.* (citing Pinkard v. Pinkard, 12 Va. App. 848, 851, 407 S.E.2d 339, 341 (1991)).

the cause, and the husband's appeal of the later contempt order was timely.[353]

E. *Property Settlement Agreements*

In *Allocca v. Allocca*,[354] the Virginia Court of Appeals discussed the effect of a bankruptcy filing on a property settlement agreement. In *Allocca*, the parties were divorced by final decree that affirmed, ratified and incorporated by reference a property settlement agreement from a previous separation.[355] The wife later moved to set aside the agreement, arguing that her husband had, among other things, repudiated the agreement by obtaining a discharge in bankruptcy.[356]

During their previous separation, the husband and wife executed the agreement in question and sold their residence. They distributed the sales proceeds in accordance with their agreement.[357] They had performed all of their obligations under the previous agreement, and nothing further remained to be done.[358] Husband and wife then reconciled. They purchased a new residence and signed a deed of trust note.[359] When they separated again, the husband made the monthly payments.[360] Several days after the wife filed for divorce, the husband filed for bankruptcy.[361] The husband listed his wife on the bankruptcy schedules as a co-debtor on the deed of trust note.[362] The bankruptcy court discharged the husband of his obligations while the divorce action was pending.[363] The trial court then entered the divorce decree and incorporated their initial agreement into the final decree, which the wife appealed.[364]

---

353. *See id.*
354. 23 Va. App. 571, 478 S.E.2d 702 (1996).
355. *See id.* at 573, 478 S.E.2d at 703.
356. *See id.*
357. *See id.* at 574, 478 S.E.2d at 703.
358. *See id.*
359. *See id.*
360. *See id.*
361. *See id.*
362. *See id.*
363. *See id.*
364. *See id.*

The wife argued that the husband's discharge in bankruptcy constituted a repudiation of the agreement which gave her the right to rescind the agreement.[365] The court of appeals found that the husband had not discharged his obligations under the agreement. He only discharged in bankruptcy his obligation on the deed of trust note for which he and his wife were jointly and severally liable.[366] The previous agreement had not required the husband to pay the deed of trust note, because it was executed more than a year after the agreement was signed. When the husband filed for bankruptcy, he had already fully performed his obligations under the agreement. Therefore, his bankruptcy was not a repudiation of their agreement entitling the wife to rescind the agreement.[367]

F. *Attorney's Fees*

In *O'Loughlin v. O'Loughlin*,[368] the Virginia Court of Appeals held that a trial court does not have jurisdiction to award attorney's fees for an appeal unless the court of appeals specifically remands on that issue.[369] In *O'Loughlin*, on the original appeal, the trial court's ruling was affirmed.[370] The court of appeals issued a mandate providing an itemized statement of costs payable to the appellee.[371] The wife then petitioned the trial court for attorney's fees that she incurred on the appeal which the trial court granted. The husband appealed the attorney's fee award and the court of appeals held that the trial court lacked jurisdiction to make the award. The court went on

365. *See id.* The wife relied on *Carter v. Carter*, 18 Va. App. 787, 447 S.E.2d 522 (1994), where husband filed for bankruptcy after he separated from wife. *See id.* at 788, 447 S.E.2d at 523. He listed wife as a creditor and identified his obligation to wife under the parties' property settlement agreement. The court of appeals found that case distinguishable from the present case because, in *Carter*, the parties' agreement contained a specific provision that called for recision in the event of a breach. *See Allocca*, 23 Va. App. at 575, 478 S.E.2d at 704.

366. *See id.*

367. *See id.*

368. 23 Va. App. 690, 479 S.E.2d 98 (1996).

369. *See id.* at 694, 479 S.E.2d at 100.

370. *See id.*

371. *See id.* at 692-93, 479 S.E.2d at 99.

to string cite cases going as far back as 1936 where the issue of attorney's fees was specifically remanded to the trial court.[372]

372. *See id.* at 694, 479 S.E.2d at 100.