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Annual Survey of Virginia Law: Domestic Relations

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DOMESTIC RELATIONS

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I. INTRODUCTION

Several significant developments in the area of domestic relations law took place in the past year. This article summarizes the key judicial decisions and legislative enactments pertaining to child support, child custody and visitation, marriage and divorce, spousal support, equitable distribution (including property classification and valuation) property settlement agreements, adoption, domestic violence, jurisdiction, and procedure that occurred from June 1, 1998 through May 15, 1999.

II. CHILD CUSTODY AND VISITATION

A. *Parent Relocation*

1. Judicial Decisions

Parent relocation remains a hot topic in Virginia. In *Parish v. Spaulding*,[1] the Supreme Court of Virginia addressed the trial court's procedure, but not the substance of the trial court's determination that the best interests of the children would be met by allowing the mother to relocate with the children from Virginia to Indiana.[2] The mother, who had sole custody of the children, ignored an injunction issued by the juvenile court ordering her not to remove the children from Virginia when she and the children moved to Indiana.[3] The circuit court held an *ore tenus* hearing on the father's

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* Associate, Mays & Valentine, L.L.P., Richmond, Virginia. B.A., 1994; J.D., 1997, University of Virginia.

1. 257 Va. 357, 513 S.E.2d 391 (1999).

2. *See id.* at 361, 513 S.E.2d at 393.

3. *See id.* at 360, 513 S.E.2d at 392. The mother made numerous attempts to obtain court permission to relocate with the children to Indiana. *See id.* at 359-60, 513 S.E.2d at 392. The circuit court and the juvenile and domestic relations district court refused to hear her requests due to lack of jurisdiction during the pendency of an appeal on the initial custody order. *See id.* Similarly, the Virginia Court of Appeals denied the mother's request to allow the trial court to adjudicate the relocation issue while the appeal was pending. *See id.* at 359, 513 S.E.2d at 392.

motion to modify custody and visitation.[4] The circuit court held that the move to Indiana was in the children's best interests because it would offer the family economic stability.[5] After the Virginia Court of Appeals affirmed this decision, the father appealed on the grounds that the trial court denied him due process by conducting the proceedings after the mother's move occurred and erred by failing to enforce the juvenile court's injunction.[6] The Supreme Court of Virginia found that the post-move hearing properly afforded the father his due process rights of notice and an opportunity to be heard.[7] The court also approved of the manner in which the trial court conducted its proceedings because the trial court based its decision "on the facts existing at the time of the move, rather than on evidence relating to the parties' changed circumstances after the move."[8] Moreover, the court held that the trial court did not err in failing to enforce the juvenile court's injunction because "[t]o require the children to return to Virginia irrespective of their best interests would have violated the requirement that courts act only in furtherance of those interests."[9] Thus, the supreme court allowed the mother to manufacture a change of circumstances by moving without the court's permission.

2. Legislative Developments

In its most recent session, the Virginia General Assembly declined to pass the Model Relocation Act that was published recently by the American Academy of Matrimonial Lawyers.[10] The Model Relocation Act sets forth, among other things, provisions concerning notice of and objections to a custodial parent's relocation with the child, and indicates that a proposed or actual relocation

4. *See id.* at 361, 513 S.E.2d at 392-93.

5. *See id.* The trial court concluded that the move was necessitated by the mother's financial difficulties and her new husband's inability to obtain employment in Virginia. *See id.* at 360-61, 513 S.E.2d at 392-93. The move would allow the family to live rent-free with the new husband's family in Indiana and to take advantage of several educational opportunities. *See id.*

6. *See id.* at 361-62, 513 S.E.2d at 393.

7. *See id.* at 362, 513 S.E.2d at 393 (distinguishing its prior holding in *Gray v. Gray*, 228 Va. 696, 698, 324 S.E.2d 677, 678 (1985), that "*before* a court permits a custodial parent to remove a child from the Commonwealth, it must determine that removal is in the child's best interest") (emphasis added).

8. *Id.* at 362, 513 S.E.2d at 393-94.

9. *Id.* at 363, 513 S.E.2d at 394 (noting that the father's remedy was to seek sanctions against the mother, not the return of the children) (citing Bottoms v. Bottoms, 249 Va. 410, 413, 457 S.E.2d 102, 104 (1995); Keel v. Keel, 225 Va. 606, 610, 303 S.E.2d 917, 920 (1983)).

10. *See* S.B. 950, Va. Gen. Assembly (Reg. Sess. 1999).

with a child constitutes a change in circumstances that may justify a modification of a custody award.[11]

B. *Grandparent Visitation*

In June 1998, the Supreme Court of Virginia in *Williams v. Williams*[12] held that grandparents are not entitled to visitation with a child over the objection of both of the child's parents.[13] The supreme court analyzed Virginia Code section 20-124.2(B), which allows persons with a legitimate interest in the child to have visitation if it is in the child's best interests,[14] and agreed with the Virginia Court of Appeals that the provision is constitutional.[15] The supreme court also did not disturb the finding of the court of appeals that parents have a fundamental right protected by the Fourteenth Amendment of the United States Constitution to raise their children, and that this right can be overcome only by a compelling state interest.[16] Thus, "'before visitation can be ordered over the objection of the child's parents, a court must find an actual harm to the child's health or welfare without such visitation.'"[17] Because there was no such allegation in this case, the supreme court (1) affirmed the decision of the Virginia Court of Appeals that denied the grandparents visitation; (2) held that a remand was unnecessary; and (3) dismissed the grandparents' petition for visitation.[18]

In May 1999, however, the Virginia Court of Appeals in *Dotson v. Hylton*[19] held that section 20-124.2 of the Virginia Code[20] only applies where both parents in an intact family object to the grandparent's visitation with the child.[21] When one of the parents objects to the visitation and one of the parents requests the visitation, courts may award visitation to the grandparent "upon a showing, by clear and convincing evidence, that the best interests of the child would

11. *See* MODEL RELOCATION ACT §§ 201-07, 301-03, 404 (American Acad. Matrimonial Law. 1997).
12. 256 Va. 19, 501 S.E.2d 417 (1998).
13. *See id.* at 22, 501 S.E.2d at 418.
14. *See* VA. CODE ANN. § 20-124.2(B) (Repl. Vol. 1995 & Cum. Supp. 1999).
15. *See Williams,* 256 Va. at 21, 501 S.E.2d at 418.
16. *See id.*
17. *Id.* at 22, 501 S.E.2d at 418 (quoting Williams v. Williams, 24 Va. App. 778, 784-85, 485 S.E.2d 651, 654 (Ct. App. 1997)).
18. *See id.*
19. 29 Va. App. 635, 513 S.E.2d 901 (Ct. App. 1999).
20. VA. CODE ANN. § 20-124.2 (Repl. Vol. 1995 & Cum. Supp. 1999).
21. *See Dotson,* 29 Va. App. at 638-39, 513 S.E.2d at 903 (distinguishing the *Williams* case).

be served."[22] Under the circumstances in *Dotson*, a grandparent does not have to demonstrate a compelling state interest, such as that withholding grandparent visitation would be detrimental to the child's welfare, before the court may apply the best interests of the child standard.[23]

C. *New Legislation*

Mediation of divorce and custody cases is becoming increasingly popular. With the enactment of new legislation, the 1999 General Assembly enlarged the permissible subjects parties may address in mediating custody cases. Effective July 1, 1999, "[w]hen mediation is used in custody and visitation matters, the goals [of mediation] may include development of a proposal addressing the child's residential schedule and care arrangements, and how disputes between the parents will be handled in the future."[24]

In addition, the Virginia General Assembly added an additional consideration in determining the best interests of a child. Courts are required to consider each parent's ability to resolve disputes regarding matters affecting the child for purposes of determining custody and visitation arrangements.[25] Before this amendment, the statute required courts to consider "the ability of each parent to cooperate in matters affecting the child."[26]

III. CHILD SUPPORT

A. *Judicial Decisions*

The Virginia Court of Appeals continued to require judges to make written findings supporting deviations from Virginia's child support guidelines and to calculate the presumptive amount of child support before deviating from those guidelines.[27] Virginia courts also

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22. *Id.* at 640, 513 S.E.2d at 903.

23. *See id.* at 640, 513 S.E.2d at 903-04.

24. S.B. 990, Va. Gen. Assembly (Reg. Sess. 1999) (enacted as Act of Mar. 27, 1999, ch. 574, 1999 Va. Acts 872) (codified as amended at VA. CODE ANN. § 20-124.2(A) (Cum. Supp. 1999)).

25. *See* VA. CODE ANN. § 20-124.3(6) (Cum. Supp. 1999).

26. *Id.* (Repl. Vol. 1995).

27. *See, e.g.*, Hackett v. Hackett, No. 2640-97-2, 1999 Va. App. LEXIS 176, at *1-2 (Va. Ct. App. Mar. 23, 1999) (unreported decision) (finding that the trial court erred in failing to calculate the presumptive amount of child support and failing to provide a written explanation in the order); Shields v. Shields, No. 1277-97-4, 1998 Va. App. LEXIS 310, at *7-8 (Va. Ct. App. June 2, 1998) (unreported decision) (finding that although the parties'

continued to require parties to present sufficient evidence of voluntary unemployment or underemployment and of available or previous higher paying jobs before imputing income to a party for purposes of calculating child support.[28] Although reluctant to deviate from the child support guidelines, Virginia courts typically will deviate from the guidelines upon a showing of "demonstrated need."[29] In *Ratcliffe v. Ratcliffe*,[30] for example, the Caroline County Circuit Court made an upward deviation from the guidelines by requiring the father to pay an additional $380 per month for one-half of the expenses of sending the parties' two children to a private Christian high school.[31] The court was convinced by the mother's argument that, where the parents had the ability to pay for the school, it was in the children's best interests to continue attending the school in which they had been placed by their parents prior to the marital separation.[32]

B. *New Shared Custody Support Guidelines*

After extensive study and debate,[33] the 1999 Session of the Virginia General Assembly amended Virginia's child support

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agreement, which the court recognized, provided grounds for a deviation, the trial court erred in failing first to calculate the presumptive amount of child support under the guidelines).

28. *See, e.g.*, Niemiec v. Virginia Dep't of Soc. Serv., 27 Va. App. 446, 450, 449 S.E.2d 576, 578-79 (Ct. App. 1998). In *Niemiec*, the Virginia Court of Appeals reversed the decision of the trial court that deviated upward from the child support guidelines by imputing income to the wife, who was working part-time but who earned more income during the marriage by working as a day care provider in the home. *See id.* at 45-52, 449 S.E.2d at 579-80. The father failed to show that day care provider positions were available to the wife and failed to present evidence enabling the trial court to determine the amount of income the wife should have been earning. *See id.* at 450, 449 S.E.2d at 579.

29. *See, e.g.*, Ratcliffe v. Ratcliffe, No. CH96-142, 1999 WL 316858, at *2 (Va. Cir. Ct. Caroline County May 5, 1999) (unreported decision); *see also* Ryan v. Ryan, No. 147391, 1999 WL 262407, at *1 (Va. Cir. Ct. Fairfax County Feb. 1, 1999) (unreported decision) (ordering that the father was entitled to a downward deviation from the guidelines where the children spent a substantial portion of time with the father, but the father did not have enough "days" with the children to warrant application of the shared custody rules).

30. No. CH96-142, 1999 WL 316858, at *1 (Va. Cir. Ct. Caroline County Feb. 1, 1999) (unreported decision).

31. *See id.* at *4.

32. *See id.*

33. In 1998, the Virginia General Assembly passed a joint resolution requiring the Virginia Bar Association Coalition Committee on Family Law Legislation to study the formula for computing the number of days of custody and the definition of a day for child support calculations. *See* H.J. Res. 141, Va. Gen. Assembly (Reg. Sess. 1998).

statute.[34] The amended statute, which became effective on July 1, 1999, adopts a formula for child support that factors in the amount of time a child spends with each parent and the income of each parent.[35] The amended statute provides that the basic amount of child support under the shared custody guidelines will be 140%, instead of 125%, of the basic amount of support from the sole custody guidelines.[36] The statute also decreases the threshold for using the shared custody guidelines from 110 to 90 visitation days per year.[37] The new statute eliminates the "cliff effect," the term often used to describe the sharp reduction in a parent's child support obligation, once the parent has the child for 110 days. Hopefully, the statute will reduce litigation by parents over a few days of visitation.

In addition, the Virginia legislature redefined a "day" for purposes of the shared custody guidelines.[38] Effective July 1, 1999, a "day" means a period of twenty-four hours; however, where the parent who has the fewer number of overnight periods during the year has an overnight period with a child, but has physical custody of the shared child for less than twenty-four hours during such overnight period, there is a presumption that each parent shall be allocated one-half of a day of custody for that period.[39]

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34. Both houses of the Virginia General Assembly passed measures to amend and reenact Virginia Code section 20-108.2. *See* S.B. 1085, Va. Gen. Assembly (Reg. Sess. 1999) (enacted as Act of Mar. 29, 1999, ch. 808, 1999 Va. Acts 1458) (codified as amended at VA. CODE ANN. § 20-108.2 (Cum. Supp. 1999)); H.B. 2407, Va. Gen. Assembly (Reg. Sess. 1999) (enacted as Act of Mar. 29, 1999, ch. 836, 1999 Va. Acts 1520) (codified as amended at VA. CODE ANN. § 20-108.2 (Cum. Supp. 1999)).

35. *See* VA. CODE ANN. § 20-108.2(G)(3)(a) (Cum. Supp. 1999).

36. *See id.* § 20-108.2(G)(3)(a)(iii) (Cum. Supp. 1999) (increasing the multiplier from 1.25 to 1.4 for determining "total shared support").

37. *See id.* § 20-108.2(G)(3)(a) (Cum. Supp. 1999). In calculating each parent's "custody share," the following is used:

> the number of days that a parent has physical custody of a shared child per year divided by the number of days in the year, the year may begin on such date as is determined in the discretion of the court, and the day may begin at such time as is determined in the discretion of the court.

Id. § 20-108.2(G)(3)(a)(ii) (Cum. Supp. 1999).

38. Previously, a "day" was defined as a continuous and uninterrupted period of 24 hours. *See* Ewing v. Ewing, 21 Va. App. 34, 37, 461 S.E.2d 417, 418 (Ct. App. 1995). The new definition of a "day" solves the problem created in *Ewing*, where the Virginia Court of Appeals created a year with less than 365 days because neither parent received credit for days where neither parent had the child for a full 24 hours. *See id.* The new definition of a "day" specifies that days will be calculated for the parent who has "the fewer days of physical custody," and the "'custody share' of the other parent shall be presumed to be the number of days in the year less the number of days calculated as the first parent's 'custody share.'" VA. CODE ANN. § 20-108.2(G)(3)(a)(ii) (Cum. Supp. 1999).

39. *See id.* § 20-108.2(G)(3)(c) (Cum. Supp. 1999).

The new statute provides that if each party has more than ninety days of visitation, child support is either the shared custody support amount or the sole custody support amount if a party "affirmatively shows that the sole custody support amount . . . is less than the shared custody support amount."[40] Thus, courts and practitioners should calculate the sole custody support and the shared custody support amounts in order to determine which amount is less.

The amended statute also provides that parents should divide any extraordinary medical and dental expenses incurred by the child in accordance with their income shares, regardless of how many visitation days the child spends with each parent.[41]

After July 1, 1999, parties with court orders awarding them more than ninety days of visitation per year, as calculated under the new definition of a "day," can petition the court for a modification of child support because the amended statute most likely will be considered a change in circumstances.[42]

C. *Other Legislative Developments*

As of July 1, 1998, Virginia courts, by statute, have the discretionary authority to order a party to execute all tax forms and waivers necessary to grant the other party the tax dependency exemption for children for "any tax year or future years."[43]

In 1998, the Virginia General Assembly also enacted several measures to facilitate enforcement of child support orders. For example, Virginia Code section 63.1-250.1:3[44] established a Child Support State Case Registry for all child support orders entered or modified on or after October 1, 1998.[45] In addition, Virginia Code

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40. *Id.* § 20-108.2(G)(3)(a) (Cum. Supp. 1999). The amended statute provides that "[i]f the gross income of the payee is equal to or less than 150 percent of the federal poverty level promulgated by the U.S. Department of Health and Human Services from time to time, there shall be a presumption that the sole custody guideline calculation shall apply." *Id.* § 20-108.2 (G)(3)(d) (Cum. Supp. 1999).

41. *See id.* § 20-108.2(G)(3)(b) (Cum. Supp. 1999).

42. *See* Milligan v. Milligan, 12 Va. App. 982, 988, 407 S.E.2d 702, 705 (Ct. App. 1991) (holding that the legislative enactment of the child support guidelines and the shared custody statute constituted a material change in circumstances thereby allowing the court to review previously ordered child support awards); Slonka v. Pennline, 17 Va. App. 662, 663, 440 S.E.2d 423, 424 (Ct. App. 1995).

43. VA. CODE ANN. § 20-108.1(E) (Cum. Supp. 1999).

44. *Id.* § 63.1-250.1:3 (Cum. Supp. 1999).

45. *See id.* (providing that the Department of Social Services will maintain a registry that contains case records of services provided by the Division of Child Support Enforcement, "all support orders established or modified in the Commonwealth on or after October 1, 1998," and records regarding paternity).

section 63.1-250,[46] which relates to the Department of Social Services's efforts to collect support for dependent children, expanded the definition of "income" in determining a party's child support obligation.[47] The expanded definition broadened the types of income that may be withheld pursuant to an Income Deduction Order for collecting support.[48] After July 1, 1998, an employer must make all payments to the Division of Child Support Enforcement, instead of directly to the support recipient.[49] In fact, if an Income Deduction Order "orders payment to an entity other than to the Department of Social Services or the Department's designee . . . the order shall be void."[50] Thus, parties and practitioners should weigh the advantages and disadvantages of involving the Division of Child Support Enforcement before requesting an Income Deduction Order.

Effective July 1, 1999, a court in child support determinations may require the custodial parent to present documentation verifying expenses incurred for employment-related child care at the request of the noncustodial parent.[51]

IV. MARRIAGE AND DIVORCE

A. *Marriage*

A bill authorizing covenant marriages, which is a form of marriage where the parties must (1) obtain premarital counseling; (2) sign a declaration of intent acknowledging that marriage is a lifelong relationship; and (3) agree to obtain marital counseling when marital difficulties arise before entering into such marriage, was introduced last year.[52] The bill requires a two-year separation before the parties to such marriages may obtain a no-fault divorce.[53] The bill failed in the most recent session of the General Assembly.[54]

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46. *Id.* § 63.1-250 (Cum. Supp. 1999).
47. *See id.*
48. *See id.* § 20-79.3 (Cum. Supp. 1999).
49. *See id.* § 20-79.3(B) (Cum. Supp. 1999).
50. *Id.*
51. *See* H.B. 2658, Va. Gen. Assembly (Reg. Sess. 1999) (enacted as Act of Mar. 28, 1999, ch. 690, 1999 Va. Acts 690) (codified as amended at VA. CODE ANN. § 20-108.2 (Cum. Supp. 1999)).
52. *See* H.B. 2736, Va. Gen. Assembly (Reg. Session 1999).
53. A covenant marriage is a form of marriage where the parties agree beforehand to meet the three requirements explained in the text. It also takes longer for parties to obtain a divorce.
54. *See* H.B. 2736, Va. Gen. Assembly (Reg. Sess. 1999).

B. *Grounds for Divorce*

1. Judicial Decisions

In *Glaze v. Glaze*,[55] the Circuit Court of the City of Richmond found that a married woman cannot commit adultery by engaging in sexual relations, particularly sodomy, with another woman.[56] In order for a wife to be guilty of adultery, she must have engaged in sexual intercourse with a person of the opposite sex.[57] Accordingly, the court denied the husband's request for *pendente lite* relief because the only ground for divorce stated in his bill of complaint was that his wife committed adultery with another woman.[58]

After the plaintiff in *Glaze* amended his Bill of Complaint and alleged sodomy, the wife sought to have the case dismissed on the ground of condonation since the parties "voluntarily cohabited" after the plaintiff claimed to have discovered his wife's sodomy.[59] The Circuit Court of the City of Richmond dismissed the action because the evidence revealed that the husband condoned his wife's sodomy.[60] Although the parties did not have sexual intercourse after the husband discovered his wife's extramarital relations, the parties lived in the same house, shared meals and household chores, and held themselves out to the public as a family.[61]

In *Davis v. Davis*,[62] the Virginia Court of Appeals refused to find that a wife's occasional denial of sexual intercourse with her husband constituted constructive desertion of the marriage where the wife continued to perform her marital duties.[63] Thus, the court of appeals concluded that the trial court did not err when it granted the wife a divorce on the basis of a one-year separation.[64]

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55. 46 Va. Cir. 333 (Richmond City 1998).

56. *See id.* at 334.

57. *See id.* (citing VA. CODE ANN. § 18.2-365 (Repl. Vol. 1996), which defines adultery as voluntary sexual intercourse with any person not his or her spouse).

58. *See id.*

59. *See* Glaze v. Glaze, No. HJ-1323-4 (Richmond City Jan. 27, 1999).

60. *See id.*, slip op. at 2, 4.

61. *See id.*

62. No. 1819-97-3, 1998 Va. App. LEXIS 307, at *1 (Va. Ct. App. June 2, 1998) (unreported decision).

63. *See id.* at *5 (noting that the parties continued to have sexual relations every two or three weeks until the week prior to their separation).

64. *See id.* at *3.

2. Legislative Developments

There was no action taken in the 1999 session of the General Assembly on a bill prohibiting a no-fault divorce in cases where the parties have minor children and one party files a written objection to the initial pleading within twenty-one days of service.[65]

V. SPOUSAL SUPPORT

Legislation significantly revising Virginia's spousal support statute, Virginia Code section 20-107.1, became effective on July 1, 1998.[66] The legislation sought to balance the need for interdependence during marriage with the need for independence after marriage.[67] With the enactment of these changes, Virginia became the last state in the country to give judges the authority to grant spousal support for a period of defined duration. This defined duration award is referred to as "rehabilitative alimony."[68]

Effective July 1, 1998, judges, in their discretion, may order spousal support to "be made in periodic payments for a defined duration, or in periodic payments for an undefined duration, or in a lump sum award or in any combination thereof."[69] Under the statute, defined duration "means a period of time (i) with a specific beginning and ending date or (ii) specified in relation to the occurrence or cessation of an event or condition."[70]

Courts also may reserve the right of a party to receive spousal support in the future.[71] When courts reserve a spouse's right to

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65. *See* H.B. 1163, Va. Gen. Assembly (Reg. Sess. 1999).

66. VA. CODE ANN. § 20-107.1 (Cum. Supp. 1999).

67. REPORT OF THE FAMILY LAW SECTION OF THE VIRGINIA STATE BAR, REHABILITATIVE ALIMONY AND THE RESERVATION OF SPOUSAL SUPPORT IN DIVORCE PROCEEDINGS, H. Doc. No. 55 at 7 (1997).

68. The General Assembly rejected proposed language in the amendment to Virginia Code section 20-107.1 that included presumptions based on the length of the marriage. In marriages of less than 5 years, the presumption would have been in favor of a defined duration award. *See* PETER N. SWISHER ET AL., VIRGINIA FAMILY LAW THEORY AND PRACTICE § 9-6.1(b), at 16 (2d ed. Supp. 1998). For marriages of 5 to 20 years, there would have been no presumption. *See id.* at 17. In marriages of more than 20 years, the presumption would have been in favor of periodic awards of undefined duration. *See id.* Legislators who opposed this language were concerned that such presumptions would result in an abused spouse staying in the marriage to qualify for a longer period of support or conversely, that spouses would leave a marriage sooner to avoid the presumptions. *See id.* § 9-6.1(b), at 17 & 21 n.9.

69. VA. CODE ANN. § 20-107.1(C) (Cum. Supp. 1999).

70. *Id.* § 20-107.1(G) (Cum. Supp. 1999).

71. *See id.* § 20-107.1(D) (Cum. Supp. 1999).

receive support, there is a rebuttable presumption "that the reservation will continue for a period equal to fifty percent of the length of time between the date of the marriage and the date of separation."[72] Once granted, the duration of a reservation cannot be modified.[73]

Under the amended statute, courts must consider thirteen factors, instead of nine, in determining the nature, amount, and duration of a spousal support award.[74] Two of the new factors to consider are: (1) "the age and physical and mental condition of the parties and any special circumstances of the family;"[75] and (2) "[t]he extent to which the age, physical or mental condition or special circumstances of any child of the parties would make it appropriate that a party not seek employment outside of the home."[76] These new factors suggest that courts may consider the needs of an elderly parent living in the home and requiring the care of one of the parties or the special medical, emotional, or educational needs of a child in determining whether a spouse should be employed.[77]

A third new factor for the court to consider is the analysis of the decisions made by the parties during their marriage "regarding employment, career, economics, education and parenting arrangements . . . and their effect on present and future earning potential."[78] This includes examination of the length of time one or both of the parties were absent from the job market.[79] This provision overrules the general requirement to impute income to a spouse who volun-

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72. *Id.* "Date of separation" is defined as "the earliest date at which the parties are physically separated and at least one party intends such separation to be permanent." *See id.* § 20-107.1(G) (Cum. Supp. 1999).

73. *See id.* § 20-107.1(D) (Cum. Supp. 1999).

74. *See id.* § 20-107.1(E) (Cum. Supp. 1999). Six of the original nine factors have been incorporated verbatim into the amended statute. *See id.* § 20-107.1(E)(2), (3), (6)-(8), (13) (Cum. Supp. 1999). Under the amended statute, earning capacity is now a separate consideration from obligations, needs, and financial resources of the parties. *See id.* § 20-107.1(E)(1), (9) (Cum. Supp. 1999). The amended statute also provides that earning capacity includes "the skills, education and training of the parties and the present employment opportunities for persons possessing such earning capacity." *Id.* § 20-107.1(E)(9) (Cum. Supp. 1999). Similarly, the amended statute expounds on the earlier version of the statute and provides that courts also may consider the "opportunity for, ability of and the time and costs involved for a party to acquire the appropriate education, training and employment . . . needed to enhance his or her earning ability." *Id.* § 20-107.1(E)(10) (Cum. Supp. 1999). Four entirely new factors were enacted in the legislation. *See id.* § 20-107.1(E)(4), (5), (11), (12) (Cum. Supp. 1999).

75. *Id.* § 20-107.1(E)(4) (Cum. Supp. 1999).

76. *Id.* § 20-107.1(E)(5) (Cum. Supp. 1999).

77. *See* SWISHER, *supra* note 68, § 9-6.1.

78. VA. CODE ANN. § 20-107.1(E)(11) (Cum. Supp. 1999).

79. *See id.*

tarily stays home with minor children.[80] Under the newly amended statute, courts still may impute income to an unemployed or underemployed spouse, but imputation is not mandatory.[81] The final new factor for the court to consider is "the extent to which either party has contributed to the attainment of education, training, career position or profession of the other party."[82]

The amended statute requires that in any contested case in circuit court, any order "granting, reserving or denying a request for spousal support" must be accompanied by written findings and conclusions of the court identifying the factors of subsection E that support the court's ruling.[83] Thus, judges are now required to explain the criteria upon which they rely in making a specific award.

Because the rehabilitative alimony statute as enacted does not contain any presumptions as to when to award defined duration spousal support, and there are not yet any published cases on this subject, the first few cases from the Virginia Court of Appeals will be instrumental in guiding courts, attorneys, and litigants. Since Virginia was the last state to enact such legislation, Virginia practitioners may find guidance in leading cases from other states that reveal developed trends on when awards of rehabilitative support are appropriate.[84]

Under Virginia Code section 20-109(B),[85] which also was amended in 1998, modifications of a defined duration award must be sought within the time period of the award.[86] The court may modify or

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80. *See* SWISHER, *supra* note 68, § 9-6.1.

81. *See* VA. CODE ANN. § 20-107.1(E)(13) (Cum. Supp. 1999).

82. *Id.* § 20-107.1(E)(12) (Cum. Supp. 1999).

83. *Id.* § 20-107.1(F) (Cum. Supp. 1999).

84. *See, e.g.*, Puls v. Puls, 645 N.E.2d 525, 529-30 (Ill. Ct. App. 1994) (holding rehabilitative alimony appropriate where specific impending future decrease in the supporting spouse's income exists); Siddens v. Siddens, 588 N.E.2d 321, 325 (Ill. Ct. App. 1992) (finding some rehabilitative alimony may be appropriate where marriage is of short duration); Neuman v. Neuman, 816 S.W.2d 283, 285 (Mo. Ct. App. 1991) (holding that rehabilitative alimony is appropriate where courts can reasonably foresee that "the financial condition of the parties will change prior to the termination of the award"); Mahoney v. Mahoney, 453 A.2d 527, 533-34 (N.J. 1982) (holding rehabilitative alimony appropriate where one spouse made past sacrifices for the marriage); Goode v. Goode, 590 N.E.2d 439, 441-42 (Ohio Ct. App. 1991) (holding rehabilitative alimony appropriate where dependent spouse's earning potential was limited because of her status as the custodial parent and the special needs of the parties' children).

85. VA. CODE ANN. § 20-109(B) (Cum. Supp. 1999).

86. *See id.* Practitioners should advise their clients that if they want to request an extension in spousal support, they must make the motion early enough to give the lawyer time to reinstate the case for a modification. *See* Deborah Elkins, *Malpractice "Trap" Arises in Rehab Alimony Statute*, VA. LAW. WKLY., Oct. 26, 1998, at A1. A letter to this effect can

terminate the amount or duration of the award "upon finding that (i) there has been a material change in the circumstances of the parties, not reasonably in the contemplation of the parties when the award was made or (ii) an event which the court anticipated would occur during the duration of the award, does not in fact occur through no fault of the party seeking the modification."[87]

The downside of this amended statute is its potential to increase the costs of the litigation, increase the use and necessity of experts to testify on some of the statutory factors, and prolong litigation, as many parties will request modifications when their support is about to terminate. More time is needed for courts, attorneys, and litigants to apply and utilize the newly amended statute before its impact can be assessed completely.

VI. EQUITABLE DISTRIBUTION

A. *Classification*

In *Martin v. Martin*,[88] the Virginia Court of Appeals, sitting en banc, held that the trial court erred in failing to determine the increase in value of the husband's separate property interest during the parties' twelve-year marriage.[89] The trial court found that the husband contributed approximately $26,634 of his separate property to the $60,100 purchase of the couple's home, which was valued at $110,000 at the dissolution of the marriage.[90] The trial court determined that the remaining funds for the purchase of the house came from marital property.[91]

The court of appeals held that "where separate property can be retraced from commingled property, the increased value in that separate property is presumed to be separate, *unless* the nonowning spouse proves that contributions of marital property or personal effort caused the increase in value."[92] In determining how to apportion the increase in value of retraced separate property, the

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avert a malpractice suit. *See* Baker McClanahan, *Lawyers Mull Strategy on New Rehab Alimony Law*, VA. LAW. WKLY., May 25, 1998, at A19.

87. VA. CODE ANN. § 20-109(B) (Cum. Supp. 1999).

88. 27 Va. App. 745, 501 S.E.2d 450 (Ct. App. 1998) (en banc).

89. *See id.* at 748, 501 S.E.2d at 452.

90. *See id.* at 749, 501 S.E.2d at 452.

91. *See id.*

92. *Id.* at 751, 501 S.E.2d at 453.

court of appeals applied the "*Brandenburg* formula."[93] While not declaring that this formula should be the exclusive method of determining a spouse's presumptive share of the property, the court noted that this formula was "appropriate on these facts."[94] The "*Brandenburg* formula" consists of the following formulas and definitions:

> (nmc/tc) x e = nonmarital
>
> (mc/tc) x e = marital property
>
> Nonmarital contribution (nmc) is defined as the *equity* in the property at the time of the marriage, plus any amount expended after marriage by either spouse from traceable nonmarital funds in the reduction of mortgage principal, and/or the *value* of improvements made to the property from such nonmarital funds.
>
> Marital contribution (mc) is defined as the amount expended after marriage from other than nonmarital funds in the reduction of mortgage principal, plus the *value* of improvements made to the property after the marriage from other than nonmarital funds.
>
> Total contribution (tc) is defined as the sum of nonmarital and marital contributions.
>
> Equity (e) is defined as the equity in the property at the time of distribution. This may be either at the date of the decree of dissolution, or, if the property has been sold prior thereto and the proceeds may be traced, then the date of the sale shall be the time at which the equity is computed.[95]

Using this formula, the court of appeals determined that the husband's presumptive share of the hybrid property was approximately $48,748.[96] The increase in value, calculated by subtracting the initial $26,634 from $48,748, was $22,114.[97]

The court of appeals then determined that the wife failed to prove that the separate property was transmuted to marital property through the application of her "real estate acumen" in persuading the husband to purchase the property that she claimed was underpriced

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93. *Id.* at 753, 501 S.E.2d at 454. The "*Brandenburg* formula" was adopted in *Brandenburg v. Brandenburg*, 617 S.W.2d 871, 872 (Ky. Ct. App. 1981), and applied in Virginia in *Hart v. Hart*, 27 Va. App. 46, 65-66, 497 S.E.2d 496, 505 (Ct. App. 1998) (holding that the formula was an appropriate method to determine the value of the marital and separate property components of a hybrid property home).

94. *Martin*, 27 Va. App. at 753, 501 S.E.2d at 454.

95. *Hart*, 27 Va. App. at 65-66, 497 S.E.2d at 505 (quoting *Brandenberg*, 617 S.W.2d at 873).

96. *See Martin*, 27 Va. App. at 753, 501 S.E.2d at 454.

97. *See id.*

or by her "fixing up" the property by adding new carpet, paint, and wallpaper.[98] The court ruled that the wife offered no evidence supporting her claims that she had experience in real estate valuation, that the property was more valuable than the price paid, or that the husband relied on her "personal efforts" in investing in the property.[99] Even if she had possessed some "real estate acumen," the court reasoned that her suggestion to purchase the property would not be a sufficient "significant personal effort" under Virginia Code section 20-107.3(A).[100]

Furthermore, the court rejected the wife's argument that the increase in value was the result of her contributions of marital property by "fixing up" the house over the course of the marriage.[101] In order to be a contribution of marital property, there must be an "improvement, renovation, addition, or other contribution which, by its nature, imparts intrinsic value to the property and materially changes the character thereof."[102] The court found that the painting, wallpapering, and carpeting performed by the wife was merely maintenance, which preserves the value of the property, but "does not add value to the home or alter its character."[103]

In another equitable distribution case, *Moran v. Moran*,[104] the Virginia Court of Appeals ruled that the husband did not satisfy his burden of proof by demonstrating that a $30,000 renovation to a house his wife purchased prior to marriage, paid for with marital property, transformed the property to a hybrid asset.[105] The court noted that when determining if an asset is hybrid property it is important to consider whether "value was generated or added by the expenditure or significant personal effort," not solely by the amount of funds or effort expended.[106] The court of appeals held that the husband had not provided sufficient evidence to prove that the renovation added any value to the house.[107] Nevertheless, the court found that the property was in fact a hybrid asset because the couple

98. *See id.* at 754-57, 501 S.E.2d at 454-56.
99. *See id.* at 754-55, 501 S.E.2d at 454-55.
100. *Id.* at 755, 501 S.E.2d at 455.
101. *See id.* at 755-56, 501 S.E.2d at 455-56.
102. *Id.* at 756, 501 S.E.2d at 455 (citing Spindler v. Spindler, 558 N.W.2d 645, 650-51 (Wis. Ct. App. 1996)).
103. *Id.* at 757, 501 S.E.2d at 456.
104. 29 Va. App. 408, 512 S.E.2d 834 (Ct. App. 1999).
105. *See id.* at 413, 512 S.E.2d at 836.
106. *Id.* at 412, 512 S.E.2d at 836 (citing Hart v. Hart, 27 Va. App. 46, 65, 497 S.E.2d 496, 505 (Ct. App. 1998)).
107. *See id.* at 413, 512 S.E.2d at 836.

used marital funds to reduce the mortgage by approximately $6,000, thus commingling marital funds with separate property.[108]

The court of appeals also found that the trial court erred when it failed to determine the amount of passive income from the husband's premarriage investment in a pension fund.[109] Prior to the marriage, the husband invested $17,489 in his pension fund, that at the time of the dissolution of the marriage, had a value of $198,000.[110] The court of appeals ruled that the husband presented irrefutable evidence that the separate property in the pension plan earned income of at least $44,489.[111] The court accepted this figure as it was derived from a formula that was cited with approval in a prior decision by the court.[112]

Finally, the court of appeals refused to overrule the trial court's assignment to the husband of a $32,000 debt remaining on a loan secured by the pension plan.[113] The court ruled that the trial judge had not abused his discretion, as the judge had assigned to the wife a debt remaining on the marital residence of approximately $28,000.[114]

In *Holland v. Holland*,[115] the Circuit Court of Fairfax County found that the husband's social security benefit payments, which the husband moved from the parties' joint account to his separate account before the parties separated, were marital property.[116] After the court enjoined the parties from using marital assets without the

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108. *See id.* at 414, 512 S.E.2d at 836-37.

109. *See id.* at 415, 512 S.E.2d at 837.

110. *See id.* at 414-15, 512 S.E.2d at 836-37.

111. *See id.* at 415-16, 512 S.E.2d at 837.

112. *See id.* at 416, 512 S.E.2d at 837 (citing Mann v. Mann, 22 Va. App. 459, 463 n.4, 470 S.E.2d 605, 606 n.4 (Ct. App. 1996)). The *Moran* court followed the court of appeals in *Mann* by approving the method used by the Oklahoma Supreme Court in *Thielenhaus v. Thielenhaus*, 890 P.2d 925, 929-30 (Okla. 1995), to calculate the marital share of a pension plan. *See Moran*, 29 Va. App. at 416, 512 S.E.2d at 837. The *Thielenhaus* formula requires the court to:

> (1) multiply the fund's beginning balance . . . at the date of the marriage . . . (2) times the average earning of the pension account [during the marriage] and . . . (3) compound annually the interest until the date of separation . . . (4) subtract that amount from . . . the value of the fund . . . [on the date of separation] to arrive at a divisible marital asset.

Id., 29 Va. App. at 416, 512 S.E.2d at 838 (quoting *Thielenhaus*, 890 P.2d at 929-30).

113. *See Moran*, 29 Va App. at 417, 512 S.E.2d at 838.

114. *See id.*

115. No. 148131, 1999 WL 262433, at *1 (Va. Cir. Ct. Fairfax County Mar. 3, 1999) (unreported decision).

116. *See id.* at *9 (noting that Virginia's equitable distribution statute is not preempted by section 407(a) of the Social Security Act).

consent of the other and ordered the husband to pay *pendente lite* spousal support to the wife, the husband used the social security funds to meet his spousal support obligation.[117] The court held that the husband committed waste when he expended marital assets in this manner and brought the funds back into the marital estate for distribution.[118] Thus, after this decision, practitioners should be careful when advising clients to pay spousal support from marital funds.

B. *Valuation*

In *Howell v. Howell*,[119] the Richmond Circuit Court held that goodwill is an asset of a professional law practice that is subject to valuation as marital property.[120] In this case, the parties were married for thirteen years, and the husband was a partner at a large law firm in Richmond, Virginia.[121] The husband contended that the partnership contract buyout provision governed the value of his partnership interest.[122] The court found that the value of his partnership included goodwill value and required the husband to pay the wife one-half of the value of his interest in the law firm over a five-year period.[123] The wife's expert testified at the Commissioner's hearing that the husband's partnership interest "will have [intrinsic] value to the extent it allows the holder to earn more income than is realized by peers in comparable situations at other firms."[124] The Commissioner determined that "the greater weight of the evidence demonstrates that the Hunton & Williams partnership has goodwill or intangible value, and that the defendant's interest should not be valued solely by reference to the partnership agreement and the

117. *See id.* at *6.
118. *See id.* at *8-9.
119. 46 Va. Cir. 339 (Richmond City 1998).
120. *See id.* at 345-46.
121. *See id.* at 339.
122. *See id.* at 342-43.
123. *See id.* at 347.
124. *Id.* at 345. Both parties' experts agreed that the appropriate valuation method was "the capitalization of excess earnings." *Id.* at 346. The wife's expert, however, testified that the husband's partnership interest was worth $319,659, but the husband's expert testified that the value of his interest was only $86,770. *See id.* at 345. The experts disagreed "as to the appropriate peer group for purposes of determining the defendant's excess compensation above the median compensation for attorneys in his field" and "on the appropriate discount rate to be applied to the value of the defendant's share in Hunton & Williams." *Id.* at 346.

resulting repayment of his capital contribution."[125] The court determined that the Commissioner's finding that the husband's partnership interest had an intrinsic value to the parties of $319,659 was supported by "substantial and competent evidence."[126] Thus, with the use of an expert, a party may be entitled to a percentage of the value of the goodwill component of his or her spouse's interest in a professional practice, in spite of provisions to the contrary in a partnership agreement. This case is presently on appeal to the Virginia Court of Appeals.[127]

C. *Distribution*

The Virginia Court of Appeals addressed an issue of first impression in the case of *Barker v. Barker*.[128] The husband in *Barker* used approximately $50,000 of marital funds to pay spousal support payments to his former spouse.[129] In evaluating the equitable distribution factors and dividing the property, the trial court "balanced [the] husband's monetary contributions to the marriage against his use of marital funds to support his former spouse."[130] The court of appeals held that the court may exercise its discretion and consider payment of a separate debt with marital funds in determining an equitable distribution award.[131]

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125. *Id.* at 345-46; *see also* Silberblatt v. Silberblatt, No. 1793-97-3, 1998 Va. App. LEXIS 432, at *9-10 (Va. Ct. App. Aug. 11, 1998) (unreported decision) (affirming decision of the trial court that the value of husband's medical practice was worth more than the value of the equipment and receivables and should include the value of the "sweat equity"), *rev'd on other grounds*, No. 1793-97-3, 1999 LEXIS 434, at *1 (Va. Ct. App. July 13, 1999) (en banc) (unreported decision). *But see* Young v. Young, No. 15454, 1998 WL 972256, at *19-20 (Va. Cir. Ct. Fairfax County June 29, 1998) (unreported letter opinion) (finding that the value of the husband's interest in his law firm was based on adjusted book value and that there was no professional goodwill); Bundschuh v. Bundschuh, No. 2574-97-1, 1998 WL 312831, at *2-3 (Va. Ct. App. June 16, 1998) (unreported decision) (affirming trial court's findings that the husband's medical practice did not have goodwill value and that the husband's interest in the practice had a value of zero dollars).

126. *Howell*, 46 Va. Cir. at 347 (overruling husband's exception to the Commissioner's report).

127. The oral argument for this case was heard by the Virginia Court of Appeals in July. As of the date of this article, the Court of Appeals had not ruled on the case.

128. 27 Va. App. 519, 536-42, 500 S.E.2d 240, 248-51 (Ct. App. 1998) (noting, however, that the principles behind the decision are "well-established" in Virginia given Virginia Code section 20-107.3 and the cases applying it).

129. *See id.* at 535-36, 500 S.E.2d at 248.

130. *Id.* at 536, 500 S.E.2d at 248.

131. *See id.* (affirming the decision of the trial court).

VII. PROPERTY SETTLEMENT AGREEMENTS

Virginia courts continue to favor strict construction of property settlement agreements by consistently refusing to add provisions to the agreements that the parties did not expressly include[132] or to make new contracts for the parties.[133] For example, courts have refused to add provisions to property settlement agreements allowing spousal support to continue after the cohabitation of the recipient spouse with another person in a relationship analogous to marriage.[134] In light of Virginia Code section 20-109, for spousal support to survive cohabitation, "there must be an express provision to that effect, not one presumed by inference."[135]

Similarly, in *Douglas v. Hammett*,[136] the Virginia Court of Appeals found that the husband was bound by the contractual obligations he undertook in the parties' property settlement agreement.[137] In

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132. For example, in *Jarvinen v. Votaw*, No. 1763-98-4, 1999 Va. App. LEXIS 156, at *1 (Va. Ct. App. Mar. 9, 1999) (unreported decision), the Virginia Court of Appeals held that the trial court erred when it ruled that the wife's remarriage prior to age 55 did not terminate her share of her ex-husband's Foreign Service pension benefits. *See id.* at *2-3. The court of appeals found that the trial court's ruling did not comport with the relevant federal statute. *See id.* at *3. Neither the parties' agreement nor the final decree waived the provisions in the statute. *See id.* The court concluded that the trial judge could not add a waiver provision to the agreement to which the parties never agreed. *See id.*; *see also* McCombs v. McCombs, No. 0341-98-1, 1999 Va. App. LEXIS 66, at *3-5 (Va. Ct. App. Feb. 2, 1999) (unreported decision) (finding that because the language in the parties' stipulation agreement was unambiguous and clearly called for the wife to receive one-half of the aggregate value of the husband's retirement accounts as valued on a certain date, the trial court erred when it awarded the wife earnings that accrued on her share of the accounts after the specified valuation date).

133. *See, e.g.*, DeVore v. DeVore, No. 0552-98-2, 1999 Va. App. LEXIS 74, at *8 (Va. Ct. App. Feb. 2, 1999) (unreported decision) (holding that to read the parties' property settlement agreement in the manner suggested by the wife would effectively make a new contract for the parties and indicating that the trial court should have terminated, not suspended, the ex-husband's spousal support obligation); Michael v. Michael, No. 16944 (Va. Cir. Ct. Rockingham County Mar. 29, 1999) (holding that the court was without jurisdiction to modify or alter the spousal support provision in the parties' property settlement agreement even though the husband claimed that he was unable to pay the past due and future support after he was involved in an automobile accident, had been unable to work, and had accumulated substantial medical bills).

134. *See* Biddle v. Biddle, 46 Va. Cir. 433, 434 (Stafford County 1998). In this case, the wife unsuccessfully argued that the parties' property settlement agreement distinguished her primary spousal support, which was to continue as long as she did not remarry or cohabit with someone as man and wife, from the retirement income spousal support, which was to continue as long as the wife did not remarry. *See id.*

135. *Id.* The absence of such a provision "mandates the conclusion that spousal support terminates upon remarriage by operation of [Virginia Code sections 20-109 and 20-109.1]." Langley v. Johnson, 27 Va. App. 365, 373, 499 S.E.2d 15, 19 (Ct. App. 1998).

136. 28 Va. App. 517, 507 S.E.2d 98 (Ct. App. 1998).

137. *See id.* at 526, 507 S.E.2d at 102.

Douglas, the parties' agreement specified that the husband was responsible for paying "the expenses of a college education for the child."[138] The parties' son had a full athletic scholarship that covered his college tuition, books, housing, and meals, and his mother sent him a monthly allowance for living expenses and other incidentals not covered by his scholarship.[139] After the son graduated, the mother sought reimbursement for the money she sent to the son while he was in school, including the price of the computer she purchased for the son.[140] The trial court followed the "plain meaning" of the parties' agreement and ordered that the father reimburse the mother for the son's "college-related" expenses in the amount of $10,123, which represented $150 per month for nine months a year over four years and for the cost of the computer.[141]

White v. White[142] is another example of Virginia courts strictly construing separation agreements. In that case, the Supreme Court of Virginia held that where a valid divorce agreement required the husband to make monthly payments on the $30,000 mortgage on the marital home, the husband is not further obligated to make monthly spousal payments equal to the remaining mortgage balance when the wife subsequently sells the home, using the proceeds from the sale to pay off the mortgage.[143] The court adhered to the plain meaning of the agreement, examining the intent of the parties, and found that the agreement required the husband to pay solely the mortgage, with no provision for spousal support payments to Mrs. White.[144] Thus, the husband's obligation to make payments existed only so long as the mortgage existed.[145]

The United States District Court for the Eastern District of Virginia ruled in *Lincoln National Life Insurance Co. v. Johnson*[146] that the court must adhere to the plain meaning of a couple's property settlement agreement regarding the beneficiaries of a life insurance policy.[147] In the agreement, the husband, who subse-

138. *Id.* at 520, 507 S.E.2d at 99 (noting that the parties' agreement was incorporated into the final decree of divorce).

139. *See id.* at 520-21, 507 S.E.2d at 99-100.

140. *See id.* at 521, 507 S.E.2d at 100.

141. *See id.* at 522-24, 507 S.E.2d at 100-02 (following precedent that indicated that "college expenses" includes reasonable living expenses).

142. 257 Va. 139, 509 S.E.2d 323 (1999).

143. *See id.* at 145, 509 S.E.2d at 326.

144. *See id.*

145. *See id.*

146. 38 F. Supp. 2d 440 (E.D. Va. 1999).

147. *See id.* at 447.

quently remarried and adopted his second wife's child, agreed to designate his children with his first wife as beneficiaries to his life insurance policy, but never did so prior to his death.[148] The court found that the husband was bound by the decree, and ruled that the children of the first marriage were the proper beneficiaries.[149] The court concluded that the contractual obligations of the agreement superceded any expectancy interest of the second wife and adopted daughter.[150]

VIII. ADOPTION

Beginning on July 1, 1999, a birth father's consent to adoption is not necessary where the birth father was convicted of carnal knowledge of a child between 13 and 15 years of age and the child to be adopted was conceived as a result of the violation.[151] The amended statute also bars the person convicted from having a legitimate interest in the custody and visitation of a child conceived as a result of the violation.[152] Formerly, consent of the birth father was waived only if the birth father was convicted of rape, adultery, or fornication with his daughter, mother, or grandmother and the child was conceived as a result of such acts.[153]

IX. DOMESTIC VIOLENCE

Last year, the Virginia legislature passed a law allowing law-enforcement officers to file emergency protective order petitions on behalf of parties who are mentally or physically incapable of filing such petitions.[154] In 1999, the Virginia General Assembly continued to strengthen efforts to combat domestic violence. Several new laws, effective July 1, 1999, provide additional protection to abuse victims and additional measures to punish the offenders.

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148. *See id.* at 445.

149. *See id.* at 448-49.

150. *See id.* at 451-52.

151. *See* S.B. 907, Va. Gen. Assembly (Reg. Sess. 1999) (enacted as Act of May 7, 1999, ch. 1028, 1999 Va. Acts 2718) (codified as amended at VA. CODE ANN. §§ 16.1-241, 20-124.1, 63.1-204, 63.1-220.2, 63.1-220.3, 63.1-225 (Cum. Supp. 1999)) (setting forth that "an entrustment agreement for the termination of all parental rights and responsibilities with respect to the child shall be valid notwithstanding that it is not signed by the birth father when such father has been convicted of a violation" of Virginia Code sections 18.2-61(A), 18.2-63, or 18.2-366(B)).

152. *See id.* (defining who is a person with a legitimate interest in a child).

153. *See* VA. CODE ANN. §63.1-220.2 (Repl. Vol. 1995 & Cum. Supp. 1998).

154. *See id.* § 16.1-253.4 (Cum. Supp. 1998).

One of the new laws broadens the type of acts that can be considered as family abuse for the purposes of determining custody of minor children[155] and the issuance of protective orders in cases of family abuse.[156] The definition of "family abuse" for these purposes now includes any "act involving violence, force or threat including any forceful detention, which results in physical injury or places one in reasonable apprehension of serious bodily injury and which is committed by a person against such person's family or household member."[157] The former definition of family abuse included only acts of violence, not acts involving force or threat.[158]

The Virginia General Assembly also revised the definition of "family or household member" for purposes of protective orders in cases of family abuse and protection under the family assault statute to include "the person's parents, stepparents, children, stepchildren, brothers, sisters, grandparents and grandchildren regardless of whether such persons reside in the same home with the person."[159] Virginia Code sections 16.1-228,[160] 16.1-241,[161] 18.2-57.2 [162] and 19.2-81.3[163] formerly protected only those who resided in the same home with the abuser.

Effective July 1, 1999, when issuing emergency protective orders in cases involving stalking, judges and magistrates may impose conditions that they deem necessary to prevent contact of any kind, not merely further acts of stalking or communication, by the respondent with the person seeking the protective order.[164]

In addition, localities now have the authority to establish family violence fatality review teams to examine fatal family violence incidents and create a mass of information to help prevent future family violence.[165] The chief medical examiner is to provide "a model

155. *See id.* § 20-124.3(8) (Cum. Supp. 1999).

156. *See id.* §§ 16.1-279.1 (Repl. Vol. 1999) (protective orders in cases of family abuse), 16.1-253.4 (Repl. Vol. 1999) (emergency protective orders), 16.1-253.1 (Repl. Vol. 1999) (preliminary protective orders).

157. *Id.* § 16.1-228 (Repl. Vol. 1999).

158. *See id.* (Repl. Vol. 1996) (defining family abuse as "any act of violence, including any forceful detention, which results in physical injury or places one in reasonable apprehension of serious bodily injury and which is committed by a person against such person's family or household member").

159. *Id.* § 16.1-228 (Repl. Vol. 1999).

160. *Id.*

161. *Id.* § 16.1-241 (Repl. Vol. 1999).

162. *Id.* § 18.2-57.2(D) (Cum. Supp. 1998).

163. *Id.* § 19.2-81.3(F) (Cum. Supp. 1998).

164. *See id.* § 192-152.8(B)(1)-(3) (Cum. Supp. 1999).

165. *See id.* § 32.1-283.2(A) (Cum. Supp. 1999).

protocol for the development and implementation of local family violence fatality review teams" and act as "a clearinghouse" for the information gathered.[166]

These new laws enacted in 1999, along with the continued efforts of the review teams and commission, will strengthen Virginia's legal measures against family violence.

X. JURISDICTION AND COURTS

A. *Judicial Decisions*

In *Calfee v. Calfee*,[167] the Virginia Court of Appeals ruled that upon remand of a child support case by the circuit court to the juvenile and domestic relations district court, the circuit court is divested of jurisdiction, including concurrent jurisdiction over the matter, and the case is properly before the juvenile court.[168] In *Calfee*, the husband appealed an order of the circuit court finding him in contempt for failure to comply with the court's child support order and modifying the court's previous order.[169] After the wife attempted to reinstate the matter on the circuit court's docket, the husband asserted that the circuit court lacked jurisdiction, and that the juvenile court had exclusive jurisdiction over these matters because the circuit court previously remanded the case to the juvenile court after finding that "the purpose of this matter [was] accomplished."[170] The court of appeals held that once the circuit court resolved the appeal and remanded the matter to the juvenile court, it expressly surrendered jurisdiction to the original statutory authority of the juvenile court pursuant to Virginia Code section 16.1-297.[171] The court of appeals held that "upon remand of a judgment rendered on appeal, the former jurisdiction of the [juvenile] court over the proceedings is restored . . . subject to the potential

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166. *Id.* This statute was a recommendation of the Commission on Family Violence Prevention. Senate Joint Resolution 396, authorizes the commission to

> (i) develop recommendations related to custody and visitation matters when family violence is present; (ii) develop and provide training to judicial personnel related to family violence; (iii) develop recommendations for a mechanism to assure coordination across state agencies related to training and community services that address, prevent, and treat family violence; and (iv) assist state agencies in implementing the 1999 recommendations of the Commission.

S.J. Res. 396, Va. Gen. Assembly (Reg. Sess. 1999).

167. 29 Va. App. 88, 509 S.E.2d 552 (Ct. App. 1999).

168. *See id.* at 94, 509 S.E.2d at 555.

169. *See id.* at 91, 509 S.E.2d at 552-53.

170. *Id.* at 92, 509 S.E.2d at 554.

171. *See id.* (citing VA. CODE ANN. § 16.1-297 (Repl. Vol. 1999)).

exercise of jurisdiction by the circuit court in accordance with [Virginia] Code §§ 16.1-241,[172] 16.1-244[173] and 16.1-296,"[174] none of which applied in this case.[175] Thus, the court of appeals held that the circuit court surrendered jurisdiction over the child support matter to the juvenile court pursuant to Virginia Code section 16.1-297.[176]

In *Oxenham v. J.S.M.*,[177] the Supreme Court of Virginia concluded that a juvenile court judge had the jurisdiction and authority to appoint counsel to represent a child charged with assault and battery on his mother.[178] The child's father objected to the court- appointed counsel because he wanted to choose counsel for his son.[179] The father obtained a writ of prohibition against Judge Oxenham in the circuit court.[180] The supreme court held that Judge Oxenham had jurisdiction to hear the assault and battery case and to appoint

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172. The relevant portions of Virginia Code section 16.1-241(A)(3) provide that, unless otherwise provided, the juvenile and domestic relations district courts have "exclusive original jurisdiction" over all cases involving the support of a child when the support is a subject of controversy or requires determination. However, this jurisdiction is "concurrent with and not exclusive of courts having equity jurisdiction, except as provided in [Virginia Code] § 16.1-244." VA. CODE ANN. § 16.1-241(A)(3) (Repl. Vol. 1999).

173. Virginia Code section 16.1-244(A) provides that circuit courts, concurrently with the juvenile and domestic relations district courts, may "determine the . . . support of children when . . . incidental to the determination of causes pending in such [circuit] courts." The statute divests the juvenile courts of jurisdiction where a divorce suit has been filed in circuit court, "in which the . . . support of children of the parties is raised by the pleadings and a hearing is set by the . . . court . . . on such issue for a date . . . within twenty-one days of the filing." *Id.* § 16.1-244 (Repl. Vol. 1999).

174. On an appeal of a child support order from the juvenile court, "proceedings in the circuit court shall conform to the equity practice where evidence is heard ore tenus." *Id.* § 16.1-296(F) (Repl. Vol. 1999).

175. *Calfee*, 29 Va. App. at 94, 509 S.E.2d at 555. The court also explored the distinctions between Virginia Code section 16.1-136 regarding an appeal of a juvenile court ruling and Virginia Code section 16.1-244(A) regarding the divestiture of juvenile court jurisdiction once a divorce action has been filed in the circuit court. *See id.*

176. *See id.* Virginia Code section 16.1-297 provides that "[u]pon the rendition of final judgment upon an appeal from the [juvenile] court, the circuit court shall cause a copy of its judgment to be filed with the [juvenile] court within twenty-one days of entry of its order, which shall thereupon become the judgment of the [juvenile] court." In addition,

> the circuit court may remand [the proceedings] to the jurisdiction of the [juvenile] court . . . under the terms of its order or judgment, and thereafter such . . . shall be and remain under the jurisdiction of the [juvenile] court in the same manner as if such court had rendered the judgment in the first instances.

VA. CODE ANN. § 16.1-297 (Repl. Vol. 1999).

177. 256 Va. 180, 501 S.E.2d 765 (1998).

178. *See id.* at 184, 501 S.E.2d at 767.

179. *See id.* at 182, 501 S.E.2d at 767.

180. *See id.*

counsel for the child; therefore, the circuit court erred in issuing the writ of prohibition.[181]

B. *Legislation*

The 1998 Virginia General Assembly carried over a bill[182] that sought to replace Virginia's statutory provisions adopting the Uniform Child Custody Jurisdiction Act ("UCCJA")[183] with the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA").[184] The UCCJEA addressed jurisdictional issues and added measures to facilitate the enforcement of custody and visitation orders issued in other states.[185]

In addition, in the 1999 session, the Virginia General Assembly repealed statutory provisions enacted in 1989 that established experimental family courts.[186]

XI. PROCEDURE

In *Smiley v. Erickson*,[187] the Virginia Court of Appeals held that the trial court erred when it denied the appellee's Motion to Require Additional Security in a case where the father posted an appeal bond of $500 to appeal his case from the juvenile court to the circuit court and his child support arrearage was $18,975.[188] The court of appeals found this bond to be "grossly inadequate."[189]

The Fairfax County Circuit Court in *Martin v. McGee* [190] held that in a juvenile court child support proceeding, posted service is only valid where process was also mailed to the defendant pursuant to

181. *See id.* at 184, 501 S.E.2d at 767.
182. *See* S.B. 413, Va. Gen. Assembly (Reg. Sess. 1998).
183. VA. CODE ANN. §§ 20-125 to -146 (Repl. Vol. 1995 & Cum. Supp. 1999).
184. *See* S.B. 1087, Va. Gen. Assembly (Reg. Sess. 1999).
185. *See id.*
186. S.B. 1178, Va. Gen. Assembly (Reg. Sess. 1999) (enacted as Act of March 17, 1999, ch. 161, 1999 Va. Acts 190) (repealing VA. CODE ANN. §§ 16.1-296.1, 20-96.1, and 20-96.2).
187. 29 Va. App. 426, 512 S.E.2d 842 (1999).
188. *See id.* at 431-32, 512 S.E.2d at 844-45 (reversing and remanding the case to the circuit court and stating that the juvenile court abused its discretion when it informed Erickson that the court had set his appeal bond at $500).
189. *See id.* at 431, 512 S.E.2d at 845.
190. 46 Va. Cir. 87 (Fairfax County 1998).

Virginia Code section 8.01-296(2)(b).[191] Accordingly, the juvenile court's child support order was void where the Division of Child Support Enforcement failed to satisfy the mailing requirement of that section.[192]

XII. CONCLUSION

In the past year, Virginia courts have handed down numerous decisions in the area of domestic relations law that will impact litigants and attorneys. In addition, in its 1998 and 1999 sessions, the Virginia General Assembly significantly refined and modified Virginia's domestic relations laws. To date, however, Virginia courts have not addressed or analyzed these recent legislative enactments. Practitioners should watch for new cases offering guidance on the application and interpretation of recent judicial decisions and amended statutory provisions.

191. *See id.* at 92.
192. *See id.* (dismissing the Rule to Show Cause against the respondent).