

## FAMILY LAW

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### I. INTRODUCTION

That the Court of Appeals of Virginia has reached its maturity is evident from the court's recent decisions, which rarely break significant new ground. The last two years have seen the court mainly applying established principles in new contexts, and the most interesting cases tend to be the ones whose unusual facts make them stand out. Consider, for example, *L.F. v. Breit*, in which a mother who had acknowledged the paternity of the biological father of her child argued—unsuccessfully—that because they had used in vitro fertilization the father had no parental rights.<sup>1</sup> At the other end of the spectrum are the many cases that do not even reach the merits because of some procedural failing on the part of the appealing party, such as not preserving the issue for appeal<sup>2</sup> or failing to include the issue in the opening brief.<sup>3</sup>

The General Assembly and court of appeals have attempted to dig out of the hole created by the decision in *Hoy v. Hoy* by amending Virginia Code section 20-113 to give Virginia courts the authority to enter a qualified domestic relations order (“QDRO”) or other order enforcing a support order and attaching any pension, profit-sharing, or deferred compensation plan as permitted by the Internal Revenue Code or other federal law.<sup>4</sup> But there seems to be no escape from the rule that the designation of a ben-

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1. 285 Va. 163, 186, 736 S.E.2d 711, 724 (2013), *aff'g* Breit v. Mason, 59 Va. App. 322, 718 S.E.2d 482 (2011).

2. VA. SUP. CT. R 5A:18 (Repl. Vol. 2013).

3. VA. SUP. CT. R 5A:20 (Repl. Vol. 2013).

4. Act of Feb. 28, 2012, ch. 39, 2012 Va. Acts 55 (codified as amended at VA. CODE ANN. § 20-113 (Cum. Supp. 2012)); Nkopchieu v. Minlend, 59 Va. App. 299, 312, 718 S.E.2d 470, 477 (2011); *see* Hoy v. Hoy, 29 Va. App. 115, 119, 510 S.E.2d 253, 255 (1999).

eficiary of federal life insurance prevails over all legislative efforts to require the beneficiary to convey the proceeds to the widow of the deceased.<sup>5</sup>

The court of appeals continues to issue mostly unpublished decisions, many of which seem appropriate for publication.<sup>6</sup> Sometimes an unpublished decision will address a legal issue of first impression, and even if the facts are quite unusual, it seems unduly reticent of the court not to publish the case.<sup>7</sup>

## II. JURISDICTION AND PROCEDURE

### A. *Case Law*

#### 1. Use of Affidavit in Contested Divorce Case

*Cruz v. Cruz* was the first appellate test of new Virginia Code section 20-106(A)(iii), which allows a party to submit evidence in the form of an affidavit in a case where the defendant has been served “and has failed to file a responsive pleading or to make an appearance as required by law.”<sup>8</sup> The wife filed for a divorce on grounds of separation for more than one year.<sup>9</sup> The husband was personally served with the complaint in Saudi Arabia, where he then resided, and he filed an objection to service and motion to quash process.<sup>10</sup> The motion was denied, and the husband then moved for dismissal on the grounds that the marriage was void ab initio because of bigamy.<sup>11</sup> The husband did not file a document denominated as an answer to the complaint or other responsive pleading.<sup>12</sup>

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5. *Maretta v. Hillman*, 283 Va. 34, 44–45, 722 S.E.2d 32, 36–37 (2012).

6. *See* VA. CODE ANN. § 17.1-413 (Repl. Vol. 2010).

7. *See, e.g., Gerensky-Greene v. Gerensky*, No. 1801-11-4, 2012 Va. App. LEXIS 206, at \*12 (Va. Ct. App. June 19, 2012) (unpublished decision) (recognizing that a motion to modify custody is a cause of action and may be nonsuited, but order of nonsuit is not final until court expressly so orders); *Goodwin v. Flinn*, No. 1413-11-2, 2012 Va. App. LEXIS 189, at \*15–16 (Va. Ct. App. June 5, 2012) (unpublished decision) (affirming the trial court’s decision that wife must bear monetary consequences of her refusal to sign deed so husband can refinance residence).

8. VA. CODE ANN. § 20-106 (Cum. Supp. 2012); *Cruz v. Cruz*, 62 Va. App. 31, 741 S.E.2d 71 (2013).

9. *Cruz*, 62 Va. App. at 33, 741 S.E.2d at 71.

10. *Id.*

11. *Id.*

12. *Id.* at 33–34, 741 S.E.2d at 71–72.

At the hearing on the husband's motion, the wife sought to introduce an affidavit to corroborate her testimony that the parties had been separated for more than a year.<sup>13</sup> She argued that in the absence of a responsive pleading from the husband, she was entitled to rely on Virginia Code section 20-106(A)(iii).<sup>14</sup> The trial court rejected the affidavit, holding that section 20-106(A)(iii) is inapplicable when the defendant has entered an appearance.<sup>15</sup> Without the affidavit, the wife had no corroborating evidence, so "[t]he trial court granted [the] husband's motion to strike and dismissed the case."<sup>16</sup> The Court of Appeals of Virginia affirmed.<sup>17</sup> The purpose of section 20-106(A)(iii) was to create an exception to the general rule that testimony is to be given orally in open court.<sup>18</sup>

The [statute] is most naturally read to impose two separate circumstances . . . either of which will defeat divorce by affidavit or deposition without leave of court. This reading is not only consistent with the plain language of Virginia Code section 20-106(A)(iii), it also is consistent with the overall purpose of Virginia Code section 20-106(A)(iii).<sup>19</sup>

## 2. Statute of Limitations on Support Orders

The statute of limitations on suits to enforce judgments applies to individual child support payments. In *Adcock v. Commonwealth, Department of Social Services*, the father had been ordered to pay child support in 1966, and his payment obligation continued through 1982, when the youngest child was emancipated.<sup>20</sup> The father was in arrears and never made it up.<sup>21</sup> At the mother's request, the Virginia Department of Social Services ("DSS") moved to reopen the parties' case to establish the arrearage plus interest, and to set a payment plan.<sup>22</sup> The father responded that the motion was untimely under Virginia Code sec-

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13. *Id.* at 34, 741 S.E.2d at 72.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 33, 38, 741 S.E.2d at 71, 74.

18. *Id.* at 37, 741 S.E.2d at 73–74.

19. *Id.*, 741 S.E.2d at 73.

20. 282 Va. 383, 386, 719 S.E.2d 304, 305–06 (2011), *rev'g* 56 Va. App. 334, 693 S.E.2d 757 (2010).

21. *See id.*, 719 S.E.2d at 306.

22. *Id.*

tion 8.01-251(A), which states “[n]o execution shall be issued and no action brought on a judgment . . . after 20 years from the date of such judgment.”<sup>23</sup> The court of appeals, purporting to follow *Bennett v. Commonwealth, Department of Social Services*, held that unliquidated support orders, which require payments on dates in the future, were not “judgments” within the scope of the statute.<sup>24</sup> The Supreme Court of Virginia reversed, holding that support orders require payment of money in specified amounts on dates certain.<sup>25</sup> The dates may be future dates, and the payments prospective payments at the time of the order, but each payment becomes a judgment on the due date if not paid by then.<sup>26</sup>

The opinion makes it clear that each installment of an ongoing support obligation is a judgment from the date it is due and not paid, potentially giving rise to situations in which some parts of past-due support obligations are time-barred and some are not. Although there is something to be said for treating the mother in this case like any other dilatory judgment holder, the special nature of support—and particularly child support, which no parent can waive on behalf of a child—affords a basis for distinguishing this case and enforcing the obligation.

### 3. No Interstate Transfer of Spousal Support Jurisdiction

In *O’Neil v. O’Neil*, the court of appeals discussed how the circuit court issued a final decree in 2005 ordering the husband to make monthly payments of spousal support.<sup>27</sup> The decree transferred further issues of spousal support to the Juvenile and Domestic Relations (“JDR”) court.<sup>28</sup> In 2010, the husband moved in JDR court to amend the order on spousal support.<sup>29</sup> The JDR court denied the motion, and the husband appealed to the circuit court.<sup>30</sup> The circuit court, on its own motion, transferred the case

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23. VA. CODE ANN. § 8.01-251(A) (Repl. Vol. 2007 & Cum. Supp. 2012); *Adcock*, 282 Va. at 386, 719 S.E.2d at 306.

24. *Adcock*, 282 Va. at 388, 719 S.E.2d at 307 (citing *Adcock v. Commonwealth, Dep’t of Soc. Servs.*, 56 Va. App. 334, 344, 693 S.E.2d 757, 762); see *Bennet v. Commonwealth, Dep’t of Soc. Servs.*, 15 Va. App. 135, 147, 422 S.E.2d 458, 465 (1992).

25. *Adcock*, 282 Va. at 389–90, 719 S.E.2d at 307–08.

26. *Id.*

27. 60 Va. App. 156, 157, 724 S.E.2d 247, 247–48 (2012).

28. *Id.*, 724 S.E.2d at 248.

29. *Id.*

30. *Id.*

to a court in Louisiana where both parties and their witnesses were living, but the court of appeals reversed.<sup>31</sup>

The court of appeals grounded its decision in Virginia Code section 20-88.43:2, which provides that a court that enters an order of spousal support has continuing exclusive jurisdiction to modify that order.<sup>32</sup> The circuit court had relied on section 8.01-265, Virginia's forum non conveniens law, which allows a court to dismiss an action brought by a nonresident "if the cause of action arose outside the Commonwealth and if the court determines that a more convenient forum . . . is available."<sup>33</sup> Although Virginia has not formally adopted the official comments to the Uniform Interstate Family Support Act ("UIFSA"), of which section 20-88.43:2 is a part, the court of appeals quoted from the comment as follows: "The issuing tribunal retains continuing, exclusive jurisdiction over an order of spousal support *throughout the entire existence of the support obligation*."<sup>34</sup> As between UIFSA and the more general forum non conveniens law, UIFSA prevails.

#### 4. Dispositional Order Must Be Appealed Within Ten Days

In *Blevins v. Prince William County, Department of Social Services*, the JDR court adjudicated that a child, who had been living with his grandmother, had been neglected.<sup>35</sup> In May 2010, the court entered a "dispositional order" giving legal custody to DSS.<sup>36</sup> The May order scheduled an interim review for June.<sup>37</sup> In June, the court amended its May dispositional order and granted the child's mother physical custody while DSS retained legal custody.<sup>38</sup> The June order set a foster care review hearing for November 2010.<sup>39</sup> Fifteen days after the June order the grandmother filed notice of her appeal of the foster care review and of the find-

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31. *Id.* at 156–57, 724 S.E.2d at 247–48.

32. *Id.* at 160, 724 S.E.2d at 249 (citing VA. CODE ANN. § 20-88.43.2 (Repl. Vol. 2008 & Cum. Supp. 2013)).

33. VA. CODE ANN. § 8.01-265 (Repl. Vol. 2007); see *O'Neil*, 60 Va. App. at 157, 724 S.E.2d at 248.

34. *O'Neil*, 60 Va. App. at 159, 724 S.E.2d at 249 (quoting UNIF. INTERSTATE FAMILY SUPPORT ACT § 211 cmt. at 204 (2001) (amended 2008); 9 U.L.A. 204–05 (1996)).

35. 61 Va. App. 94, 97, 733 S.E.2d 674, 676 (2012).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

ing of abuse and neglect.<sup>40</sup> On an appeal to the circuit court which was heard de novo, DSS argued that the grandmother's appeal was untimely because the May order giving DSS legal custody was a final order.<sup>41</sup> The court agreed and ruled that the grandmother could not challenge either the adjudication of neglect or the initial dispositional order.<sup>42</sup>

The court of appeals affirmed, acknowledging that ordinarily a dispositional order would not be considered "final."<sup>43</sup> A dispositional order does not "dispose[] of the whole subject" and "leaves [something] to be done," because Virginia Code section 16.1-278.2 contemplates the possibility of court review of the placement determined in the order.<sup>44</sup> But that very code section contains a provision stating that a dispositional order is "a final order from which an appeal may be taken."<sup>45</sup> The reasoning behind this provision, said the court, is to resolve issues of custody quickly in the best interests of the child.<sup>46</sup> By statute, a court conducting a dispositional hearing may rule on issues of custody.<sup>47</sup> So the May order "unquestionably was a dispositional order."<sup>48</sup> The grandmother had ten days to appeal and failed to do so. The opinion points out that just because a dispositional order of the kind involved here may call for review in the future, that does not preclude the finality of its underlying ruling—here, a change of custody from the parent or grandparent against whom an adjudication of neglect has been made.<sup>49</sup>

##### 5. Only the Circuit Court that Entered the Original Decree Can Modify It

In *Williams v. Williams*, the parties had obtained a decree of divorce from Fauquier County Circuit Court.<sup>50</sup> The decree includ-

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40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 98, 733 S.E.2d at 676.

44. *Blevins*, 61 Va. App. at 96, 98, 733 S.E.2d at 675–76; see VA. CODE ANN. § 16.1-278.2 (Repl. Vol. 2010).

45. VA. CODE ANN. § 16.1-278.2(D) (Repl. Vol. 2010).

46. *Blevins*, 61 Va. App. at 99, 733 S.E.2d at 677.

47. VA. CODE ANN. § 16.1-278.2 (Repl. Vol. 2010).

48. *Blevins*, 61 Va. App. at 100, 733 S.E.2d at 677.

49. *Id.* at 101, 733 S.E.2d at 677–78.

50. 61 Va. App. 170, 172–73, 734 S.E.2d 186, 187 (2012).

ed provisions relating to child support, which was to be paid through the Department of Child Support Enforcement (“DCSE”).<sup>51</sup> The trial court never transferred the case to Fauquier JDR court or any other court.<sup>52</sup> Some years later, after both parties had moved to Fairfax County, the mother moved in Fauquier JDR court (to which the case had never been transferred) for a transfer of the case to Fairfax County JDR Court for modification of child support.<sup>53</sup> The father then moved in Fairfax County Circuit Court for modification of child support, arguing that the circuit court was the “proper and preferred venue” for the case.<sup>54</sup> DCSE moved to intervene in the father’s case, arguing that the circuit court lacked jurisdiction.<sup>55</sup> The judge in Fairfax County Circuit Court agreed with DCSE and dismissed the case, adopting DCSE’s memorandum as her holding.<sup>56</sup>

The court of appeals affirmed.<sup>57</sup> No provision of Virginia law allows the transfer of a case from one circuit court to another.<sup>58</sup> The Fairfax Circuit Court could take no action in the case and therefore lacked jurisdiction over the subject matter. Subject matter jurisdiction, unlike territorial jurisdiction, or venue, cannot be waived or conferred by agreement of the parties.<sup>59</sup> It is true that under Virginia Code section 20-96 every circuit court in the Commonwealth has jurisdiction over cases of divorce and support, but the father was seeking a modification of child support, which is not the same thing.<sup>60</sup> Virginia Code section 20-108, which applies to modifications, states “[t]he court may, from time to time after decreeing as provided in § 20-107.2 . . . revise and alter such decree.”<sup>61</sup> By conferring this jurisdiction on “the” court and stating that the jurisdiction comes “after decreeing,” the law makes clear that the jurisdiction inheres solely in the circuit court that entered the original decree.

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51. *Id.* at 173, 734 S.E.2d at 187.

52. *Id.*

53. *Id.*

54. *Id.* at 173–74, 734 S.E.2d at 187.

55. *Id.* at 174, 734 S.E.2d at 187.

56. *Id.* at 175, 734 S.E.2d at 188.

57. *Id.* at 184, 734 S.E.2d at 183.

58. *Id.* at 181, 734 S.E.2d at 191.

59. *See id.* at 176, 734 S.E.2d at 189.

60. VA. CODE ANN. § 20-96 (Repl. Vol. 2008 & Cum. Supp. 2013); *Williams*, 61 Va. App. at 177, 734 S.E.2d at 189.

61. VA. CODE ANN. § 20-108 (Cum. Supp. 2012).

## B. *Legislative Changes*

There has been quite a bit of legislation affecting jurisdiction and procedure during the past two years, some in response to judicial decisions, some to simplify or disambiguate existing procedures.

1. One simplification is of particular interest to family law practitioners. The General Assembly has amended Virginia Code section 20-99 to provide that when (1) a suit for divorce or annulment action has been filed, (2) service has been made on the defendant in conformity with the provisions of Virginia Code section 8.01-296(1), and (3) the defendant has failed to file an answer to the suit or otherwise appear within the time permitted by law, no further notice to take depositions is required to be served on the defendant and “the court may enter any order or final decree without further notice to the defendant.”<sup>62</sup>

2. In another simplification, Virginia Code section 20-106 has been amended to permit a party in a no-fault divorce case, where the parties have a Property Settlement Agreement (“PSA”) that resolves all issues, to file an affidavit or deposition containing evidence in support of the divorce, without leave of court.<sup>63</sup> The same procedure is also available when the defendant has been personally served with the complaint and has failed to respond.<sup>64</sup> The law itself sets forth the mandatory contents of the affidavit.

3. Subsection L has been added to Virginia Code section 20-107.3. This subsection states that if it appears, upon or after entry of a final decree, that neither of the parties lives in the jurisdiction where the decree was entered, the court may transfer authority for further proceedings to the circuit court where either party resides.<sup>65</sup>

4. Virginia Code section 26-81(B)(3) has been amended and reenacted as Virginia Code section 64.2-1608 to state that unless provided otherwise, a power of attorney is terminated when a pe-

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62. Act of Mar. 6, 2012, ch. 84, 2012 Va. Acts 112, 113 (codified as amended at VA. CODE ANN. § 20-99(5) (Cum. Supp. 2012)).

63. Act of Mar. 6, 2012, ch. 72, 2012 Va. Acts 102, 102-03 (codified as amended at VA. CODE ANN. § 20-106(A) (Cum. Supp. 2012)).

64. VA. CODE ANN. § 20-106(A) (Cum. Supp. 2012).

65. Act of Mar. 7, 2012, ch. 144, 2012 Va. Acts 212, 215 (codified as amended at VA. CODE ANN. § 20-107.3 (Cum. Supp. 2012)).



tion for custody or visitation of a child of both the principal and agent is filed or, if they are married, when a suit for divorce, annulment, or separate maintenance is filed by either agent or principal.<sup>66</sup> Despite this automatic revocation, the document itself will remain unaltered. Therefore, it is important to serve written notice of cancellation on the holder, and perhaps on some persons and institutions that might be acting in reliance on the power of attorney, notwithstanding the statute.

5. Virginia Code section 16.1-241 has been amended to give JDR courts jurisdiction over protective orders in cases involving abuse of, or by, a juvenile and to allow JDR judges to prohibit contact between the abuser and allegedly abused person, as well as the allegedly abused person's family.<sup>67</sup> Several other sections were amended to conform to this change, and a clarification that the protective order can cover family members as well as the abused person was added.<sup>68</sup> These amendments should make it easier to get judicial protection and orders for exclusive use of a family residence in cases where the alleged abuser focuses abuse on a child in the home, rather than a parent. For example, the statute makes it clear that a parent wishing to protect a child who is being beaten by the other parent can get the abusive parent out of the home.

### III. PREMARITAL AND PROPERTY SETTLEMENT AGREEMENTS: "GROSS" REALLY DOES MEAN "GROSS"

In *Craig v. Craig*, the court of appeals construed a PSA to avoid double deductions from pension payments under a QDRO.<sup>69</sup> The trial court had entered a QDRO incorporating provisions of the parties' PSA, which, among other things, provided for the wife to receive a 37.5% share of the husband's gross pension from the federal government, specifically describing it as 37.5% "of the HUSBAND'S gross monthly annuity."<sup>70</sup> The QDRO used compa-

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66. Act of Mar. 1, 2012, ch. 57, 2012 Va. Acts 80, 80 (codified as amended at VA. CODE ANN. § 64.2-1608(B)(3) (Repl. Vol. 2012)).

67. Act of Apr. 5, 2012, ch. 637, 2012 Va. Acts 1339, 1341 (codified as amended at VA. CODE ANN. § 16.1-241(M) (Cum. Supp. 2012)).

68. Act of Apr. 5, 2012, ch. 637, 2012 Va. Acts 1339, 1342-43, 1347 (codified as amended at VA. CODE ANN. §§ 16.1-253.2, -253.4, 19.2-152.8, -152.11 (Cum. Supp. 2012)).

69. 59 Va. App. 527, 538, 721 S.E.2d 24, 29 (2012).

70. *Id.* at 532, 721 S.E.2d at 26.

rable terms, including the word “gross.”<sup>71</sup> A proviso in the same paragraph of the PSA stated that the cost of the wife’s survivor benefit would be deducted from the wife’s share when she received the benefits.<sup>72</sup> The QDRO, again, contained a substantially identical provision.<sup>73</sup>

When the Federal Office of Personnel Management (“OPM”) calculated the monthly amount the wife would receive, it applied its own specialized definition of “Gross Monthly Annuity” (“GMA”) as found in its regulations.<sup>74</sup> That definition provided that the cost of the survivor benefits would be subtracted from the total amount in order to calculate the GMA.<sup>75</sup> The OPM deducted the cost of the survivor benefit once in order to calculate the GMA, which meant that the wife was paying 37.5% of the survivor benefit. OPM deducted an identical amount a second time to implement the QDRO, which reduced the monthly payment by the total amount of the survivor benefit.<sup>76</sup> The result was that in the aggregate, the wife was paying 137.5% of the cost of that survivor benefit, while receiving only 37.5% of the pension (minus the two survivor-benefit deductions).

The wife sought a court order acceptable for processing and reimbursement of unpaid benefits.<sup>77</sup> The court ruled for the wife, holding that the plain intent of the parties, as evidenced by their agreement, was to use “gross” in its common usage and not in the specialized sense in the OPM regulations.<sup>78</sup> Citing *Recker v. Recker*, the court of appeals held that terms like “gross annuity” were to be given their ordinary meaning in the absence of a clear indication to the contrary.<sup>79</sup> The court determined that “gross” means “an overall total exclusive of deductions.”<sup>80</sup> Nothing indicated an intent to not use this meaning<sup>81</sup> because the QDRO was modified to “conform its terms so as to effectuate the expressed intent of

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71. *Id.*

72. *Id.*

73. *Id.* at 533, 721 S.E.2d at 27.

74. *Id.* at 534, 721 S.E.2d at 27.

75. *Id.*

76. *Id.* at 534–35, 721 S.E.2d at 27.

77. *Id.* at 534, 721 S.E.2d at 27.

78. *Id.* at 537–38, 721 S.E.2d at 29.

79. *Id.* (citing *Recker v. Recker*, 48 Va. App. 188, 629 S.E.2d 191 (2006)).

80. *Id.* at 537, 721 S.E.2d at 29 (internal quotation marks omitted).

81. *Id.* at 537–38, 721 S.E.2d at 29.

the order.”<sup>82</sup> Virginia Code section 20-107.3(K)(4) confers jurisdiction on Virginia courts to correct errors of expression in QDROs to enable them to deal with situations like the one in *Craig v. Craig*.<sup>83</sup>

#### IV. EQUITABLE DISTRIBUTION

##### A. Case Law

##### 1. Issues Concerning Size of Marital Share and Choice of Valuation Date

In *Wright v. Wright*, one of the issues was the division of one of the husband’s pensions, which had not yet vested.<sup>84</sup> The husband was a partner at Hunton & Williams.<sup>85</sup> He argued that the court should not award any of the pension to the wife because, under the terms of the particular plan, the pension was not only unvested but was also as yet unearned.<sup>86</sup> The trial court’s finding that the wife had contributed to the success of the husband’s practice, and therefore that a portion of the pension was marital property, was affirmed by the court of appeals.<sup>87</sup> However, because the trial court had determined that twenty-five percent of the pension should be awarded to the wife without actually determining what the marital share was,<sup>88</sup> the court of appeals reversed and remanded on that issue.<sup>89</sup>

The court explained that the applicable statute, Virginia Code section 20-107.3(G)(1), limits awards to the “marital share” of the pension, with a maximum award amount of fifty percent of the marital share.<sup>90</sup> The case was remanded to the trial court to determine the marital share by dividing the total years the husband had been a partner into the number of years during his partner-

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82. *Id.* at 539, 721 S.E.2d at 29.

83. VA. CODE ANN. § 20-107.3(K)(4) (Cum. Supp. 2013).

84. 61 Va. App. 432, 450, 737 S.E.2d 519, 527–28 (2013).

85. *Id.* at 440–41, 737 S.E.2d at 523.

86. *Id.* at 450–51, 737 S.E.2d at 527–28.

87. *Id.* at 453–54, 737 S.E.2d at 529.

88. *Id.* at 443, 737 S.E.2d at 524.

89. *Id.* at 454–55, 737 S.E.2d at 530.

90. VA. CODE ANN. § 20-107.3(G)(1) (Cum. Supp. 2012); *Wright*, 61 Va. App. at 450–51, 737 S.E.2d at 528; *see also* *Mosley v. Mosley*, 19 Va. App. 192, 198, 450 S.E.2d 161, 165 (1994) (discussing Virginia Code section 20-107.3(G)).

ship that occurred between marriage and separation.<sup>91</sup> The trial court must then determine what percentage of the marital share, not to exceed fifty percent, goes to the wife. This percentage is to be calculated based on the number of years the husband had been an equity partner, not based on the total number of years the husband worked at Hunton & Williams during the marriage.<sup>92</sup>

The court of appeals then addressed the issues of valuation date and marital waste. After the separation, the husband spent marital assets totaling approximately \$1,400,000 to pay his personal expenses and spousal support.<sup>93</sup> The wife argued for the use of the separation date for the valuation of marital property, because there was a lot more money in the marital accounts at the time of separation than at the time of the hearing on valuation.<sup>94</sup> But the trial court, purporting to follow Virginia Code section 20-107.3(A), used the date of the hearing, which is the default rule.<sup>95</sup> The trial court was apparently unpersuaded by this provision in the statute: “Upon motion of either party . . . the court may, for good cause shown, in order to attain the ends of justice, order that a different valuation date be used.”<sup>96</sup> The court of appeals held that the decision on the valuation date was within the sound discretion of the trial court and could be reversed only for abuse of discretion.<sup>97</sup> Citing *Clements v. Clements*, the court stated that proof of waste was required in order for an alternative valuation date to be used, and here the wife had not established marital waste.<sup>98</sup>

The wife argued that, in view of the husband’s high income, he could have made his post-separation expenditures from his separate funds, and that it would be inequitable to allow him to benefit from having used marital property to “unfairly diminish[] the parties’ marital equity.”<sup>99</sup> The court of appeals was not persuaded, and it said there are only two categories of post-separate expendi-

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91. *Wright*, 61 Va. App. at 456, 737 S.E.2d at 531.

92. *Id.*

93. *Id.* at 462, 737 S.E.2d at 533–34.

94. *Id.* at 444, 737 S.E.2d at 525.

95. *Id.* at 449, 462–63, 737 S.E.2d at 527, 533–34.

96. VA. CODE ANN. § 20-107.3(A) (Cum. Supp. 2013).

97. *Wright*, 61 Va. App. at 463, 737 S.E.2d at 534 (quoting *Thomas v. Thomas*, 40 Va. App. 639, 647, 580 S.E.2d 503, 506 (2003)).

98. *Id.* at 464–65, 737 S.E.2d at 534–35 (citing *Clements v. Clements*, 10 Va. App. 580, 586, 397 S.E.2d 257, 261 (1990)).

99. *Id.* at 465, 737 S.E.2d at 535.

tures: (1) those for proper purposes and (2) waste.<sup>100</sup> The trial court was not required as a matter of law to consider the extent of the husband's post-separation income in determining whether his expenditures were waste.<sup>101</sup> The "ends of justice" provision in the statute suggests that a trial court could choose an alternate valuation date even without a showing of marital waste, but no published opinion so far has so held.<sup>102</sup>

It appears that one result of this decision is that the wife wound up bearing half the cost of her own spousal support during the post-separation period. The legislature has done what it could to prevent such a result with a statute that allows an alternate valuation date "to attain the ends of justice," but the trial court declined the implicit invitation and the court of appeals decided that was within the trial court's discretion. This decision does leave open the possibility that a trial court in a subsequent case might be willing to address the issue, but the path of least resistance is plainly to allow a spouse to spend as much of the marital estate post-separation as he or she wishes as long as it is not utterly outrageous.

## 2. QDRO Used on Father's Retirement Account to Recover Support Arrearage

The parties in *Nkopchieu v. Minlend* were only briefly married, but nevertheless had two children.<sup>103</sup> The mother was awarded \$2,000 per month in *pendente lite* child support, but the father never paid any support.<sup>104</sup> By the time the mother applied to the trial court for enforcement in early 2011, the arrearage had grown to almost \$28,000.<sup>105</sup> The father had left the country, and there was no evidence that he ever returned to the United States or intended to do so.<sup>106</sup> Thus, the mother moved for entry of a QDRO, offering a draft order to the trial court,<sup>107</sup> but the trial court did not consider the order. Instead, the court held that it

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100. *Id.* at 465–66, 737 S.E.2d at 535.

101. *Id.*

102. VA. CODE ANN. § 20-107.3(A) (Cum. Supp. 2013); *Wright*, 61 Va. App. at 466–67, 737 S.E.2d at 536.

103. 59 Va. App. 301, 301, 718 S.E.2d 472, 472 (2011).

104. *Id.* at 301–02, 718 S.E.2d at 472.

105. *Id.* at 302, 718 S.E.2d at 472.

106. *Id.*

107. *Id.*

could not enter a QDRO to enforce support.<sup>108</sup> The trial court stated that it was constrained by *Hoy v. Hoy*, in which the court of appeals held that a QDRO could not be used to enforce a support order.<sup>109</sup>

The court of appeals reversed, distinguishing *Hoy*.<sup>110</sup> In *Hoy*, the wife was seeking spousal support a full quarter-century after entry of the final decree and was attempting to attach a retirement account that had not even existed at the time of the final decree.<sup>111</sup> By contrast, the mother in *Nkopchieu* was acting on behalf of her infant children to enforce a support decree, and the applicable federal law (the Employee Retirement Income Security Act, or “ERISA”) allowed a QDRO that “relates to the provision of child support.”<sup>112</sup> The case was remanded to the trial court for consideration of the tendered QDRO, and to determine whether the tendered QDRO complied with the requirements of ERISA.<sup>113</sup>

Given that *Hoy v. Hoy* was distinguished but not overruled in this case, it is a good thing that the General Assembly enacted a provision that overruled *Hoy* and made it clear that a QDRO is available in all cases to enforce a support order, be it spousal or child support.<sup>114</sup> That provision is discussed below.

### 3. Fault Matters in Distributing Marital and Hybrid Property

The trial court in *Hamad v. Hamad* granted the husband a divorce on grounds of the wife’s adultery.<sup>115</sup> A substantial portion of the assets subject to distribution consisted of gifts from the husband’s parents, but the evidence did not enable the trial court to establish exactly what they had given him.<sup>116</sup> Thus, the court awarded the husband sixty percent and the wife forty percent.<sup>117</sup>

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108. *Id.* at 304, 718 S.E.2d at 473.

109. *Id.* at 303–04, 718 S.E.2d at 473; *see Hoy v. Hoy*, 29 Va. App. 115, 119, 510 S.E.2d 253, 255 (1999).

110. *Nkopchieu*, 59 Va. App. at 308–09, 718 S.E.2d at 475.

111. *Hoy*, 29 Va. App. at 118, 510 S.E.2d at 254.

112. 29 U.S.C. § 1056(d)(3)(B)(ii)(I) (2006); *Nkopchieu*, 59 Va. App. at 305, 307, 718 S.E.2d at 473, 475.

113. *Nkopchieu*, 59 Va. App. at 312, 718 S.E.2d at 477.

114. Act of Feb. 28, 2012, ch. 39, 2012 Va. Acts 55, 55 (codified as amended at VA. CODE ANN. § 20-113 (Cum. Supp. 2012)).

115. 61 Va. App. 593, 596–97, 739 S.E.2d 232, 234 (2013).

116. *Id.* at 602–03, 739 S.E.2d at 237.

117. *Id.* at 603, 739 S.E.2d at 237.

In explaining its ruling from the bench, the court admitted to its inability to value the gifts exactly.<sup>118</sup> The court's letter order stated that it had taken the wife's adultery and also the source of the funds into account in making the division.<sup>119</sup> The court of appeals affirmed, pointing out that distribution was a step separate from classification.<sup>120</sup> Even if the trial court lacked evidence with which to classify much of the property as other than marital, it could take into account both spousal fault and the source of the funds in making the distribution.<sup>121</sup> The trial court may have admitted to some confusion in explaining its ruling, but the ruling was still, in light of all the evidence before it, within its discretion.

### B. *Legislative Changes*

In an apparent, belated reaction to the court of appeals' decision in *Hoy v. Hoy*, and echoing the decision in *Nkopchieu v. Minlend*, Virginia Code section 20-113 has been amended to give Virginia courts the authority to enter a QDRO or other order enforcing a support order and attaching any pension, profit-sharing, or deferred compensation plan as permitted by the Internal Revenue Code or other federal law.<sup>122</sup> This applies to both child and spousal support.<sup>123</sup>

## V. SPOUSAL SUPPORT

### A. *Case Law*

#### 1. FEGLIA Designation Prefers Designated Beneficiary to Widow

In *Maretta v. Hillman*, the Supreme Court of Virginia addressed the issue of preemption.<sup>124</sup> In this case, the husband had

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118. *Id.*

119. *Id.* at 604, 739 S.E.2d at 238.

120. *Id.* at 604–05, 739 S.E.2d at 238.

121. *Id.*

122. Act of Feb. 28, 2012, ch. 39, 2012 Va. Acts 55, 55 (codified as amended at VA. CODE ANN. § 20-113 (Cum. Supp. 2012)); see *Nkopchieu v. Minlend*, 59 Va. App. 299, 312, 718 S.E.2d 470, 477 (2011); *Hoy v. Hoy*, 29 Va. App. 115, 119, 510 S.E.2d 253, 255 (1999); *supra* notes 103–14 and accompanying text.

123. Ch. 39, 210 Va. Acts at 55 (codified as amended at VA. CODE ANN. § 20-113 (Cum. Supp. 2012)).

124. 283 Va. 34, 722 S.E.2d 32 (2012).

divorced and remarried.<sup>125</sup> Before the divorce, the husband had designated his then-wife as the beneficiary of his federal life insurance policy, using the form supplied by the federal government.<sup>126</sup> The husband made no change in that designation upon his divorce or remarriage, or at any other time.<sup>127</sup> The husband then died, and the proceeds of his federal life insurance policy were disbursed to his first wife.<sup>128</sup> The husband's widow sued to require the first wife to turn the proceeds over to her.<sup>129</sup> The circuit court overruled the first wife's demurer and subsequently granted summary judgment for the widow.<sup>130</sup> The case went directly from the circuit court to the Supreme Court of Virginia, which reversed.<sup>131</sup>

The issue was federal preemption: were federal and state laws inconsistent and, if so, did federal law prevail? The federal statute involved was the Federal Employees' Group Life Insurance Act ("FEGSLIA").<sup>132</sup> Section 8705(a) of FEGSLIA provides an order of precedence for distribution of proceeds of such policies on death of the insured.<sup>133</sup> First preference is given to the beneficiary or beneficiaries designated by the insured and second preference is given to the widow or widower.<sup>134</sup> Section 8709(d)(1) explicitly states that FEGSLIA preempts any state law relating to life insurance proceeds to the extent it is inconsistent with federal law.<sup>135</sup>

The two relevant state law provisions are Virginia Code sections 20-111.1(A) and (D).<sup>136</sup> The former revokes any designation of a spouse as a life-insurance beneficiary automatically upon divorce, and it applies to all policies of life insurance.<sup>137</sup> Subsection (D) deals with cases in which federal preemption would render sub-

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125. *Id.* at 39, 722 S.E.2d at 33.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*, 722 S.E.2d at 33-34.

130. *Id.*, 722 S.E.2d at 34.

131. *Id.* at 40, 46, 722 S.E.2d at 34, 38.

132. 5 U.S.C. §§ 8701-8716 (2006 & Supp. V 2012); *Maretta*, 283 Va. at 37-39, 722 S.E.2d at 33.

133. 5 U.S.C. § 8705(a) (2006).

134. *Id.*

135. 5 U.S.C. § 8709(d)(1) (2006); *see also Maretta*, 283 Va. at 41, 722 S.E.2d at 34 (acknowledging the preemption provision in 5 U.S.C. § 8709(d)(1)).

136. VA. CODE ANN. § 20-111.1(A), (D) (Cum. Supp. 2013); *Maretta*, 283 Va. at 37-38, 722 S.E.2d at 33.

137. VA. CODE ANN. § 20-111.1(A) (Cum. Supp. 2013).



section (A) ineffective.<sup>138</sup> Subsection (D) makes the former spouse personally liable to the widow or widower for any proceeds of a federal life insurance policy distributed to the former spouse, which in effect impresses a constructive trust on the proceeds.<sup>139</sup> This provision led the circuit court to enter judgment for the widow.<sup>140</sup> Subsection (D) was also the provision that the Supreme Court of Virginia declared preempted by FEGLIA.<sup>141</sup>

Justice Kinser wrote the majority opinion, and Justice McClanahan dissented, joined by Justice Millette.<sup>142</sup> The majority relied on two decisions of the United States Supreme Court that interpreted statutes establishing life insurance for members of the armed services.<sup>143</sup> The United States Supreme Court had found that state law was preempted by federal statute.<sup>144</sup> The majority in *Maretta* found no relevant distinction between the two United States Supreme Court cases and the case before them.<sup>145</sup> They acknowledged that the majority of the state courts considering the question had ruled against preemption, but they disagreed with the reasoning of these other courts.<sup>146</sup> The dissent emphasized the distinctions between the decisions of the United States Supreme Court and the present case, arguing that Virginia should side with most other state courts on this issue.<sup>147</sup>

But what of those agreements that explicitly state that federal life insurance will be retained for the benefit of the original spouse, but then the insured spouse makes a change naming the second spouse as the beneficiary? The majority opinion responds: “The insured’s beneficiary designation takes precedence over any court order for divorce, annulment, or separation unless that order has been received by the appropriate office prior to the insured’s death.”<sup>148</sup> Thus, it is important to remember to file those

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138. *Id.* § 20-111.1(D) (Cum. Supp. 2013).

139. *See id.*; *Maretta*, 283 Va. at 41–42, 722 S.E.2d at 35.

140. *Maretta*, 283 Va. at 39, 722 S.E.2d at 34.

141. *Id.* at 46, 722 S.E.2d at 38.

142. *Id.* at 37, 46, 722 S.E.2d at 33, 38.

143. *Id.* at 42–44, 722 S.E.2d at 35–36 (citing *Ridgway v. Ridgway*, 454 U.S. 46 (1981); *Wissner v. Wissner*, 338 U.S. 655 (1950)).

144. *Id.* (citing *Ridgway v. Ridgway*, 454 U.S. 46 (1981); *Wissner v. Wissner*, 338 U.S. 655 (1950)).

145. *Id.* at 44–45, 722 S.E.2d at 36–37.

146. *Id.* at 45–46, 722 S.E.2d at 37–38.

147. *Id.* at 51–53, 722 S.E.2d at 40–42 (McClanahan, J., dissenting).

148. *Id.* at 41, 722 S.E.2d at 35 (citing 5 U.S.C. § 8705(e) (2006); 5 C.F.R. § 870.801(d)).

final orders of divorce with the benefits office where the insured is employed.

The General Assembly has attempted to patch this blown tire as best it can as explained in the subsection on legislation.

## 2. Request for Reservation of Spousal Support in Motion for Reconsideration Is Effective

The case of *Wright v. Wright*, discussed above in the section on equitable distribution, also resolves an important issue concerning spousal support.<sup>149</sup> In *Wright*, the wife included a request for spousal support in her complaint, and the trial court awarded her four years of support in its initial letter ruling.<sup>150</sup> On motion for reconsideration, the wife sought a reservation of the right to receive support beyond the four years, and in a subsequent decree the trial court granted her that reservation, but it did not specify the duration of the reservation, which by default meant that the reservation was for the presumptive length for such a reservation under Virginia Code section 20-107.1(D), that is, half the length of the marriage.<sup>151</sup> The husband argued that because the wife's complaint did not specifically request a reservation of spousal support, the trial court could not grant such a reservation and that the request in the motion for reconsideration had come too late.<sup>152</sup>

The court of appeals affirmed the trial court on this issue, following *Visicchio v. Visicchio*.<sup>153</sup> In *Visicchio*, the court of appeals held that a request for a reservation of spousal support was inherent in the request for support itself.<sup>154</sup> Virginia Code section 20-107.1(D) permits award of both support for a fixed term and a reservation of support beyond the end of the fixed term.<sup>155</sup> Having requested spousal support in her complaint, the wife was entitled to request a reservation at any time in the proceedings,

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(2012)).

149. 61 Va. App. 432, 737 S.E.2d 519 (2013).

150. *Id.* at 443–44, 737 S.E.2d at 524.

151. *Id.* at 444, 737 S.E.2d at 524–25.

152. *Id.* at 444–45, 737 S.E.2d at 525.

153. *Id.* at 447, 737 S.E.2d at 526 (citing *Visicchio v. Visicchio*, 27 Va. App. 240, 498 S.E.2d 425 (1998)).

154. *Visicchio v. Visicchio*, 27 Va. App. 240, 254, 498 S.E.2d 425, 432 (1998).

155. VA. CODE ANN. § 20-107.1(D) (Repl. Vol. 2008 & Cum. Supp. 2012).

and the prior award to her of four years of support did not bar her request for a reservation beyond the end of the four years.<sup>156</sup>

In a cross-appeal, the wife argued that the trial court had erred in awarding her only four years of support.<sup>157</sup> Although she held both an undergraduate degree in economics and an MBA, she had not worked for compensation since their children were born.<sup>158</sup> Instead, she raised the children and supported the social aspects of her husband's practice.<sup>159</sup> She testified that she was too busy with volunteer work to get a paying job.<sup>160</sup> The court of appeals held that she was capable of supporting herself, and that the trial court had not erred in allowing her no more than four years to re-train as needed and find employment.<sup>161</sup>

### 3. Major Loss of Income Is Not a "Material Change in Circumstances" for a Millionaire

The court in *Driscoll v. Hunter* confronted a case in which the husband's income dropped dramatically, but he retained substantial assets.<sup>162</sup> The parties' PSA, incorporated into the final decree, incorporated by reference an earlier agreement on *pendente lite* support, which the parties had executed in 1998.<sup>163</sup> The 1998 agreement stated that it was "without prejudice to the right of either party to request the amount of child support and/or spousal support to be determined by Court proceedings hereafter."<sup>164</sup> The 1998 agreement also stated that the support agreement was "without prejudice to the right of either party to have the child support and/or spousal support to be set in judicial proceedings without the necessity of a showing of a change in circumstances."<sup>165</sup>

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156. *Wright*, 61 Va. App. at 446–47, 737 S.E.2d at 525–26.

157. *Id.* at 441–42, 737 S.E.2d at 523.

158. *Id.* at 443, 737 S.E.2d at 524.

159. *Id.*

160. *Id.*

161. *Id.* at 468–69, 737 S.E.2d at 536–37.

162. 59 Va. App. 22, 27–28, 716 S.E.2d 477, 479 (2011).

163. *Id.* at 26–27, 716 S.E.2d at 478–79.

164. *Id.* at 26, 716 S.E.2d at 478 (internal quotation marks omitted).

165. *Id.* (internal quotation marks omitted).

In 2002, the husband, suffering from medical problems, closed his oral surgery practice.<sup>166</sup> His income dropped drastically, to the point where his expenses exceeded his income.<sup>167</sup> He eventually brought suit for a reduction in, or suspension of, spousal support.<sup>168</sup> The husband argued that the 1998 agreement, incorporated into the 2000 agreement and the final decree, excused him from having to prove a material change in circumstances.<sup>169</sup> The trial court, however, held that he had to make such a showing, and when he argued to that court that his retirement was a material change, the court held that his retirement was a change that did not affect his ability to pay the support.<sup>170</sup> The trial court therefore left the support amount where it had been.<sup>171</sup>

The court of appeals affirmed, holding that the 2000 agreement and final decree, even though they purported to incorporate the 1998 agreement by reference, had the effect of superseding the provision allowing a change in support without proof of a material change in circumstances.<sup>172</sup> The 1998 agreement, which was *pendente lite*, was intended to be of only temporary effect, and the purpose of the 2000 agreement was to establish a permanent agreement.<sup>173</sup> The permanent agreement established permanent support, supplanting the 1998 agreement, which contained the provision requiring no proof of a material change in circumstances for a change in support.<sup>174</sup>

The husband argued that his loss of income from his practice was a material change.<sup>175</sup> Because he was spending more than he was earning, the husband argued that his support should be reduced.<sup>176</sup> The court of appeals, however, held that the issue is the “ability of the supporting spouse to pay” when the trial court is asked to modify an existing support obligation.<sup>177</sup> Investment in-

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166. *Id.* at 27, 716 S.E.2d at 479.

167. *Id.*

168. *Id.*

169. *Id.* at 29, 716 S.E.2d at 479–80.

170. *Id.* at 28, 716 S.E.2d at 479.

171. *Id.*

172. *Id.* at 31–32, 716 S.E.2d at 481.

173. *Id.* at 31, 716 S.E.2d at 481.

174. *Id.* at 31–32, 716 S.E.2d at 481.

175. *Id.* at 27, 716 S.E.2d at 479.

176. *Id.*

177. *Id.* at 33, 35, 716 S.E.2d at 482–83 (quoting *Moreno v. Moreno*, 24 Va. App. 190, 195, 480 S.E.2d 792, 795 (1997)) (internal quotation marks omitted).

come and potential withdrawals of principal are the same as earned income for this purpose. The trial court did not abuse its discretion in finding the husband's loss of earnings to be not "material" as the statute requires.<sup>178</sup>

The lesson of this case is that simply proving a change in circumstances may not suffice to get a reduction of support. For a change to be "material" and affect the amount of support, it must be shown to negate the ability to continue to pay support at the same level.<sup>179</sup>

#### 4. Long-Distance Affair Is Not "Cohabitation"

The PSA in *Cranwell v. Cranwell*, incorporated into the final decree, said that spousal support would cease upon the wife's remarriage or "cohabitation . . . in a situation analogous to marriage with a person of the opposite sex for a period of one year or longer."<sup>180</sup> The wife developed a long term "romantic," i.e., sexual, relationship with a man who lived in California, but she continued to live in Virginia.<sup>181</sup> They spent nights together on a sporadic basis as travel allowed, and they talked frequently on the phone.<sup>182</sup> Each maintained a separate residence and had only a few personal items at the other's residence.<sup>183</sup> Neither had a key to the other's residence.<sup>184</sup> There was no evidence that either furnished financial support to the other.<sup>185</sup>

The court of appeals affirmed the trial court's holding that the husband had not established "cohabitation" as required by the parties' agreement.<sup>186</sup> Cohabitation "means a status in which a man and woman live together continuously, or with some permanency, mutually assuming duties and obligations normally at-

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178. *Id.* at 34–35, 716 S.E.2d at 482–83.

179. *Id.*; see also *Wright v. Wright*, No. 0275-12-2, 2012 Va. App. LEXIS 325, at \*9 (Va. Ct. App. Oct. 16, 2012) (unpublished decision) (increasing value of assets held by wife is not a material change in circumstances); *Smith v. Smith*, 2012 Va. App. LEXIS 148, at \*7 (Va. Ct. App. May 8, 2012) (unpublished decision) (stating wife not entitled to continuing support simply because husband's income has increased).

180. 59 Va. App. 155, 159, 717 S.E.2d 797, 799 (2011).

181. *Id.*

182. *Id.* at 159–60, 717 S.E.2d at 799.

183. *Id.* at 160, 717 S.E.2d at 799.

184. *Id.*

185. *Id.* at 159–60, 717 S.E.2d at 799.

186. *Id.* at 165, 717 S.E.2d at 802.

tendant with a marital relationship.”<sup>187</sup> The wife and her “boy-friend” (the court’s term) plainly were not in such a situation. Because the agreement required a showing of cohabitation and no such showing had been made, the other provisions relating to this issue were irrelevant.<sup>188</sup>

### B. *Legislative Changes*

In response to the Supreme Court of Virginia’s decision in *Maretta v. Hillman*, discussed above, a new Subsection E has been added to Virginia Code section 20-111.1, requiring the insertion of a provision in all final decrees of divorce or annulment to inform the parties that beneficiary designations for death benefits may not automatically change as a result of divorce or annulment.<sup>189</sup> New subsection E points out that insurers and other companies that will pay the death benefit should be notified if a change is intended, otherwise the former spouse may remain the beneficiary.<sup>190</sup> The statute even provides model language to use to provide notice.<sup>191</sup> It is, in the circumstances, the best the General Assembly could do, but we will have to wait and see how effective it proves in practice.

## VI. CHILD SUPPORT

### A. *Legislative Changes*

Virginia Code section 20-108.1(B)(3) has been amended by the addition of a further item as part of the imputed-income factor for the court to consider in determining whether to deviate from the presumptive child support guidelines on account of voluntary unemployment or underemployment.<sup>192</sup> The court may now consider, when determining the reasonableness of employment decisions

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187. *Id.* at 161, 717 S.E.2d at 800 (citing *Frey v. Frey*, 14 Va. App. 270, 275, 416 S.E.2d 40, 43 (1992)).

188. *Id.* at 164–65, 717 S.E.2d at 801–02.

189. Act of Apr. 4, 2012, ch. 493, 2012 Va. Acts 927, 928 (codified as amended at VA. CODE ANN. § 20-111.1(E) (Cum. Supp. 2012)); see *Maretta v. Hillman*, 283 Va. 34, 722 S.E.2d 32 (2012).

190. VA. CODE ANN. § 20-111.1(E) (Cum. Supp. 2012).

191. *Id.*

192. Act of Mar. 13, 2013, ch. 276, 2013 Va. Acts \_\_\_\_, \_\_\_\_ (codified as amended at VA. CODE ANN. § 20-108.1(B) (Cum. Supp. 2013)).

for purposes of imputing income, whether a party has attended and completed an “educational or vocational program likely to maintain or increase the party’s earning potential.”<sup>193</sup> The imputation occurs if the court determines that a party could have obtained such training but did not do so, just as has always been true of employment. In addition, new Virginia Code section 20-108.1(B)(4) adds a new factor for consideration when appropriate: the child care costs necessary to enable the custodial parent to attend “an educational or vocational program likely to maintain or increase the party’s earning potential.”<sup>194</sup>

Virginia Code sections 8.01-576.10 and 8.01-581.22 have been amended.<sup>195</sup> Prior to the amendment, these statutes required the disclosure of certain financial information used to compute child support in the mediation process.<sup>196</sup> This information would be disclosed to the opposing party and to the court, even when the parties reached no agreement.<sup>197</sup> That conflicted with the mediator’s duty of confidentiality and this legislation eliminated the conflict.

## VII. CUSTODY AND VISITATION

### A. *Case Law*

#### 1. The United States Supreme Court Rules on Appeal of International Custody Order

In a rare venture into family law, the United States Supreme Court has ruled on an issue involving the International Child Abduction Remedies Act.<sup>198</sup> In *Chafin v. Chafin*, the father was a United States citizen serving in the military.<sup>199</sup> While he was stationed in Germany, he married a British citizen and they had a child.<sup>200</sup> The mother returned to Scotland when the father was

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193. VA. CODE ANN. § 20-108.1(B)(3) (Cum. Supp. 2013).

194. *Id.* § 20-108.1(B)(4) (Cum. Supp. 2013).

195. Act of Mar. 14, 2013, ch. 383, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. §§ 8.01-576.10, -581.22 (Cum. Supp. 2013)).

196. VA. CODE ANN. §§ 8.01-576.10, -581.22 (Repl. Vol. 2007 & Cum. Supp. 2012).

197. *Id.*

198. 42 U.S.C. § 11601 (2006).

199. 568 U.S. \_\_\_, \_\_\_, 133 S. Ct. 1017, 1022 (2013).

200. *Id.*

transferred to Afghanistan, but he subsequently returned to the United States and the mother joined him there.<sup>201</sup> Soon after, the father filed for divorce and custody in Alabama.<sup>202</sup> The mother was deported but the child initially stayed with the father.<sup>203</sup> Several months later, the mother filed a petition in United States district court under the Hague Convention, seeking return of the child to Scotland.<sup>204</sup>

The district court granted the petition on the grounds that the child's country of habitual residence was Scotland.<sup>205</sup> The mother and child then promptly returned to Scotland.<sup>206</sup> The mother then filed for custody in Scottish court and was granted interim custody and a preliminary injunction prohibiting the father from removing the child from Scotland.<sup>207</sup> The husband appealed the district court's order to the United States Court of Appeals for the Eleventh Circuit, but that court, holding that the case was mooted by the child's return to Scotland, remanded it to the district court with instructions to dismiss the case.<sup>208</sup> The district court did so, and it also ordered the father to pay \$94,000 of the mother's attorneys' fees and related costs in accordance with provisions of the Hague Convention.<sup>209</sup>

The Supreme Court unanimously reversed and remanded in an opinion by Chief Justice Roberts.<sup>210</sup> A case is moot only if there is no live controversy between the parties.<sup>211</sup> The issue of the habitual residence of the child (the United States or Scotland) was a live controversy, as was the custody of the child, however unlikely it may be that the father will prevail on the merits.<sup>212</sup> The American court obtained personal jurisdiction over the mother, and that court may yet find a way to exercise that jurisdiction if it deter-

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201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at \_\_\_, 133 S. Ct. at 1022–23.

209. *Id.*

210. *Id.* at \_\_\_, 133 S. Ct. at 1021, 1028.

211. *Id.* at \_\_\_, 133 S. Ct. at 1023 (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. \_\_\_, \_\_\_, 133 S. Ct. 721, 726 (2013)).

212. *Id.* at \_\_\_, 133 S. Ct. at 1023–24.



mines that the child should be returned to the father.<sup>213</sup> The Court also pointed out that if a case became moot once a court allowed the child out of the jurisdiction where it sits, courts would be reluctant to render a decision of such finality and might well refuse to return the child even where appropriate.<sup>214</sup>

## 2. “Controlling” Decree Includes Unmodified Terms of Prior Decree

This case, *Moncrief v. Department of Child Support Enforcement ex rel. Joyner*, is not only a geography lesson, but also a perfect example of the transient nature of modern families.<sup>215</sup> The parties were divorced in New York in 1994, and the New York court awarded child support through age twenty-one.<sup>216</sup> With both parties having left New York and the child residing in North Carolina with the mother, the mother applied in 1997 for a modification of support based on a settlement between the parties.<sup>217</sup> The North Carolina court entered an order modifying support and making other changes to the New York decree but not changing the expiration of support to age twenty-one.<sup>218</sup> The North Carolina decree concluded that “[a]ll provisions of previous [o]rders not modified herein shall remain in full force and effect.”<sup>219</sup> The only previous order was the 1994 New York order.<sup>220</sup>

In 2009, the mother and child relocated to New York where the mother moved for an order of modification of the North Carolina order.<sup>221</sup> The father was then living in Virginia, and he objected, asserting Virginia was the proper jurisdiction.<sup>222</sup> The New York court determined that North Carolina had continuing exclusive jurisdiction and dismissed the case.<sup>223</sup> The wife then registered the North Carolina order in New York family court, and in March

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213. *Id.* at \_\_\_, 133 S. Ct. at 1024–25.

214. *Id.* at \_\_\_, 133 S. Ct. at 1027.

215. 60 Va. App. 721, 732 S.E.2d 714 (2012).

216. *Id.* at 724, 732 S.E.2d at 716.

217. *Id.* at 724–25, 732 S.E.2d at 716.

218. *Id.*

219. *Id.* (alterations in original).

220. *Id.* at 724, 732 S.E.2d at 716.

221. *Id.* at 725, 732 S.E.2d at 716.

222. *Id.*

223. *Id.*

2010 the New York court entered an order regarding the child's dental expenses.<sup>224</sup>

In June 2010, the North Carolina court placed the case in "inactive status" because the child had reached the age of eighteen, but two weeks later the court set aside that order because it had been entered without notice to the mother, another state was enforcing the order, and neither party resided in North Carolina.<sup>225</sup> In 2011, acting on behalf of the mother, Virginia DCSE moved for leave to register the North Carolina order in the Chesterfield County JDR court.<sup>226</sup> The father objected and moved for a determination of the "controlling order" under UIFSA.<sup>227</sup> The trial court held that the 1997 North Carolina order was the controlling order and that the North Carolina order provided for child support through age twenty-one because it had not modified the 1994 New York order, which so provided, in that respect.<sup>228</sup> The father was therefore liable for child support through age twenty-one, and the North Carolina order could be registered as a judgment.<sup>229</sup>

The court of appeals affirmed, agreeing with the trial court that the North Carolina order was controlling because it met the requirements for a controlling order set forth in UIFSA.<sup>230</sup> The original New York order, which it modified, had been properly entered at the time under New York law because both parties were then residents in New York, but under New York law, the courts of that state lost continuing jurisdiction after both parties and the child had established residency elsewhere.<sup>231</sup> In turn, the North Carolina court obtained jurisdiction when the mother and child established residency there, and under the North Carolina UIFSA, its courts had continuing jurisdiction until the order was modified by a court in another state, which had not happened.<sup>232</sup>

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224. *Id.* at 725–26, 732 S.E.2d at 716.

225. *Id.* at 726, 732 S.E.2d at 717.

226. *Id.*

227. *Id.*

228. *Id.* at 727, 732 S.E.2d at 717.

229. *Id.*

230. *Id.* at 733–36, 732 S.E.2d at 720–22; *see also* VA. CODE ANN. § 20-88.66 (Repl. Vol. 2008) ("A support order . . . issued by a tribunal of another state may be registered in this Commonwealth for enforcement.").

231. N.Y. FAM. CT. ACT § 580-205 (Consol. 1999 & Cum. Supp. 2013); *Moncrief*, 60 Va. App. at 734–35, 732 S.E.2d at 721.

232. N.C. GEN. STAT. § 52C-2-205 (2012); *Moncrief*, 60 Va. App. at 735–36, 732 S.E.2d at 721–22.

As the most recent order by a court with jurisdiction, the North Carolina order was controlling.<sup>233</sup>

### B. *Legislative Changes*

Virginia Code section 20-124.3 has been amended to add a further requirement to the statute requiring a court to communicate the basis of its decision either orally or in writing to the parties, as follows: “Except in cases of consent orders for custody and visitation, this communication shall set forth the judge’s findings regarding the relevant factors set forth in this section.”<sup>234</sup> Thus, the court must not only put its findings on the record but must go factor by factor in doing so. In my experience, most judges have been doing this anyway, but the statute makes clear that it is a requirement.

## VIII. PARENTAL RIGHTS AND ADOPTION<sup>235</sup>

### A. *Case Law*

#### 1. Father of Child Conceived by In Vitro Fertilization Is Child’s Legal Parent

In *L.F. v. Breit*, father and mother had lived together unmarried for several years and tried to have a child (the traditional way), but were unable to do so.<sup>236</sup> They then successfully attempted in vitro fertilization with the mother’s egg and father’s sperm.<sup>237</sup> Before the child’s birth, the mother and father entered into an agreement on custody and visitation, and the day after the child’s birth they both signed an Acknowledgment of Paternity under oath.<sup>238</sup> They were named as mother and father on the

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233. *Moncrief*, 60 Va. App. at 736, 732 S.E.2d at 722 (citing VA. CODE ANN. § 20-88.41(B)(1) (Repl. Vol. 2008)).

234. Act of Mar. 23, 2012, ch. 358, 2012 Va. Acts 626, 626 (codified as amended at VA. CODE ANN. § 20-124.3 (Cum. Supp. 2012)).

235. The case of *Copeland v. Todd*, 282 Va. 183, 189–90, 192, 715 S.E.2d 11, 14, 16 (2011), addressing the application of the Virginia statute on forfeiture of parental rights after six months absence of contact between parent and child, and Virginia Code section 63.2-1202(H) (Repl. Vol. 2012), is the subject of a separate article and is simply noted here.

236. 285 Va. 163, 171, 736 S.E.2d 711, 715 (2013).

237. *Id.*

238. *Id.*

child's birth certificate, and the child's surname was their two names hyphenated.<sup>239</sup>

A year after the child's birth, the mother attempted to cut off all contact between father and child.<sup>240</sup> The trial court held that the father could not be recognized as a legal parent because of Virginia Code section 20-158, which, in essence, provides that the sperm donor for a baby conceived through "assisted conception" has no parental rights unless he is the husband of the mother.<sup>241</sup> The court of appeals reversed, giving precedence to Virginia Code section 20-49.1(B)(2), which states in part:

The parent and child relationship between a child and a man may be established by . . . [a] voluntary written statement of the father and mother made under oath acknowledging paternity. . . . A written statement shall have the same legal effect as a judgment . . . and shall be binding and conclusive [absent] fraud, duress, or a material mistake of fact.<sup>242</sup>

The mother then obtained review in the Supreme Court of Virginia, which affirmed the court of appeals.<sup>243</sup> The supreme court agreed with the court of appeals that the statute on acknowledgment of paternity prevailed over the statute on assisted conception.<sup>244</sup> The latter statute was intended to protect married couples against the claims of a third party, not to insulate mothers against a biological father who they themselves had acknowledged as a parent.<sup>245</sup>

The Supreme Court of Virginia also held that adopting the mother's argument would cause a violation of the Fourteenth Amendment's guarantee of due process.<sup>246</sup> In *Troxel v. Granville*, the Supreme Court of the United States held that a parent has a constitutional right to participate in decisions concerning the care, custody, and control of his or her child.<sup>247</sup> Allowing the stat-

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239. *Id.*

240. *Id.* at 171–72, 736 S.E.2d at 715.

241. VA. CODE ANN. § 20-49.1(B)(2) (Repl. Vol. 2008 & Cum. Supp. 2012); *Breit*, 285 Va. at 172, 736 S.E.2d at 716.

242. VA. CODE ANN. § 20-49.1(B)(2) (Repl. Vol. 2008 & Cum. Supp. 2012); *Breit*, 285 Va. at 172, 736 S.E.2d at 716 (quoting *Breit v. Mason*, 59 Va. App. 322, 337–38, 718 S.E.2d 482, 489 (2011)).

243. *Breit*, 285 Va. at 179–80, 736 S.E.2d at 720.

244. *Id.*, 736 S.E.2d at 719–20.

245. *Id.*, 736 S.E.2d at 720.

246. *Id.* at 181–84, 736 S.E.2d at 721–22.

247. 530 U.S. 57, 66 (2000).

ute on assisted conception to prevail over the statute on acknowledgment of paternity would violate the father's constitutionally protected liberty interest in raising his child. "[T]here is no compelling reason why a responsible, involved, unmarried, biological parent should never be allowed to establish legal parentage of his or her child born as a result of assisted conception."<sup>248</sup> In *L.F. v. Breit*, before the mother cut the father out of the child's life, the father was an active participant; the Supreme Court of Virginia seemed to say that because of the evidence of this early participation in the child's life, the father, as in the decision of the Supreme Court of the United States in *Lehr v. Robertson*, had acquired "substantial protection under the Due Process clause."<sup>249</sup>

The mother's final argument to the Supreme Court of Virginia was that acknowledgments of paternity are unenforceable because they violate a child's right to *not* have a parent.<sup>250</sup> The court made short work of this argument because "children also have a liberty interest in establishing relationships with their parents."<sup>251</sup>

## 2. Virginia Law Recognizes Cause of Action for Tortious Interference with Parental Rights

The decision in *Wyatt v. McDermott* resulted from a request from the United States District Court for the Eastern District of Virginia for answers to certified questions of law submitted to the Supreme Court of Virginia pursuant to article VI, section 1 of the Virginia Constitution and Supreme Court of Virginia Rule 5:40.<sup>252</sup> The plaintiff was the father of an infant whom the mother, without the father's knowledge or consent, arranged to have adopted.<sup>253</sup> At the instigation of a Virginia attorney (who was a named defendant in the case), whom the mother's parents had turned to

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248. *Breit*, 285 Va. at 183, 736 S.E.2d at 722.

249. 463 U.S. 248, 261 (1980); *Breit*, 285 Va. at 182–83, 736 S.E.2d at 721–22.

250. *Breit*, 285 Va. at 184, 736 S.E.2d at 723.

251. *Id.* at 185, 736 S.E.2d at 723 (citing *Commonwealth ex rel. Gray v. Johnson*, 7 Va. App. 614, 622, 376 S.E.2d 787, 791 (1989)); *see also* *Wooddell v. Lagerquist*, No. 2121-11-3, 2012 Va. App. LEXIS 374, at \*18 (Va. Ct. App. Nov. 20, 2012) (unpublished decision) (recognizing that an acknowledgment of paternity is conclusive unless obtained through fraud, duress, or mutual mistake).

252. 283 Va. 685, 689, 725 S.E.2d 555, 556 (2012); *see also* VA. CONST. art. VI, § 1; VA. SUP. CT. R. 5:40 (Repl. Vol. 2013).

253. *Wyatt*, 283 Va. at 690, 726 S.E.2d at 557.

for assistance in having the child placed for adoption, the mother kept assuring the father that she wanted to keep the child and raise it with the father as a family of three.<sup>254</sup> Meanwhile, the mother was signing papers consenting to adoption and falsely alleging on those forms that she did not know the father's whereabouts.<sup>255</sup> She also concealed the birth of the baby from the father—the child was born two weeks early—and that she had allowed the putative adoptive parents to pick up the baby in Virginia and begin adoption proceedings in Utah, where they lived.<sup>256</sup>

At the time suit was filed in the Virginia federal court, an adoption proceeding was pending in Utah and the child was living with the putative adoptive parents.<sup>257</sup> Because the child was born in Virginia, the father brought suit in Virginia federal court seeking damages for the unauthorized adoption and also a declaration under the Parental Kidnapping Prevention Act that Virginia was the proper venue for determining the validity of the adoption.<sup>258</sup> The federal court certified to the Supreme Court of Virginia the issue of whether Virginia recognized a cause of action for tortious interference with parental rights.<sup>259</sup>

The Supreme Court of Virginia, by a 4-3 vote, held that Virginia does recognize an action for tortious interference with parental rights.<sup>260</sup> The majority was forced to concede that there was no statutory basis for such a tort and that no prior decision had ever expressly recognized it.<sup>261</sup> The concessions made by the majority were the reasons why three justices dissented—if a new cause of action was to be created, it should be done by statute, not court decision.<sup>262</sup> The majority, however, based their reasoning on the protection of the parental relationship contained in the Fourteenth Amendment of the United States Constitution. The majority invoked *Chavez v. Johnson*, in which for the first time the Supreme Court of Virginia recognized the common-law tort of

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254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at 690–91, 725 S.E.2d at 557.

258. *Id.* at 691, 725 S.E.2d at 557; see 28 U.S.C. § 1738A (2006).

259. *Id.*, 725 S.E.2d at 558.

260. *Id.* at 703, 725 S.E.2d at 564.

261. *Id.* at 692, 725 S.E.2d at 558.

262. *Id.* at 704–05, 725 S.E.2d at 564–65 (McClanahan, J., dissenting).

interference with contract rights.<sup>263</sup> In *Chavez*, there had been no prior explicit recognition of such a tort, but the tort had existed at common law, so the Supreme Court of Virginia was not creating a new tort but recognizing an existing one.<sup>264</sup> For the Supreme Court of Virginia not to recognize the tort of interference with parental rights would be to leave a wrong with no remedy. The *Wyatt* opinion goes on to define the elements of the tort by incorporating standards set out in a case from West Virginia.<sup>265</sup> Finally, at the end of the majority opinion, Justice Millette articulated the public policy reasoning behind the majority opinion by stating: “[W]e hope that the threat of a civil action would help deter third parties such as attorneys and adoption agencies from engaging in the sort of actions alleged to have taken place.”<sup>266</sup>

### 3. Five-Day Hearing Requirement Is Not Jurisdictional

The parents in *Marrison v. Fairfax County Department of Family Services* neglected their children to the point where one of them died of apparent starvation.<sup>267</sup> The Department of Family Services removed the survivors pursuant to an emergency removal order on February 1, 2010, but the hearing on the abuse and neglect petitions did not occur until February 18, 2010.<sup>268</sup> The unsurprising result was that the JDR court found abuse and neglect and sustained the removal.<sup>269</sup> That decision was sustained on appeal to the circuit court.<sup>270</sup> The parents argued that the hearing came too late and that the courts therefore had no jurisdiction to remove their children, relying on Virginia Code section 16.1-251(B), which states that a hearing on emergency removal “shall be held . . . as soon as practicable, but in no event later than five business days after the removal of the child.”<sup>271</sup>

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263. *Id.* at 692–93, 725 S.E.2d at 558 (citing *Chavez v. Johnson*, 230 Va. 112, 119–20, 335 S.E.2d 97, 102 (1985)).

264. *Chavez v. Johnson*, 230 Va. 112, 119–20, 335 S.E.2d 97, 102 (1985).

265. *Wyatt*, 283 Va. at 698–99, 701, 725 S.E.2d at 562–63 (citing *Kessel v. Leavitt*, 511 S.E.2d 720, 761 n.44, 765–66 (W. Va. 1998)).

266. *Id.* at 703, 725 S.E.2d at 564.

267. 59 Va. App. 61, 64–65, 717 S.E.2d 146, 147–48 (2011).

268. *Id.*

269. *Id.* at 66, 717 S.E.2d at 148.

270. *Id.*

271. VA. CODE ANN. § 16.1-251 (Repl. Vol. 2010 & Cum. Supp. 2013); *Marrison*, 59 Va. App. at 65–66, 717 S.E.2d at 148.

The court of appeals held that the relevant timeliness was that of the JDR court, because the circuit court's jurisdiction was derivative of the JDR court's jurisdiction.<sup>272</sup> The court of appeals framed the issue as whether the statute in question imposed a jurisdictional requirement or a procedural one, concluding that it was the latter.<sup>273</sup> In Virginia, the use of "shall" in a statute is ordinarily directive, rather than jurisdictional, and unless the affected parties can show prejudice to them from the lateness of the proceeding, lateness alone is not grounds for a holding that the proceeding cannot go forward. Here, the parents had shown no prejudice, so the order of the JDR court, as affirmed in the order of the circuit court, was effective.<sup>274</sup>

### B. *Legislative Changes*

The General Assembly has enacted a law declaring the right of parents to make decisions regarding their children. It is sufficiently succinct that it can be quoted in its entirety:

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 1-240.1 as follows:

§ 1-240.1. *Rights of parents.*

*A parent has a fundamental right to make decisions concerning the upbringing, education, and care of the parent's child.*

2. That it is the expressed intent of the General Assembly that this act codify the opinion of the Supreme Court of Virginia in *L.F. v. Breit*, issued on January 10, 2013, as it relates to parental rights.<sup>275</sup>

Only the italicized portion is incorporated into the Virginia Code.<sup>276</sup>

The General Assembly enacted new Virginia Code section 16.1-283.2 to provide a procedure for the restoration of parental rights if the child is fourteen years of age or older, the parent and child both consent, the child has not achieved the permanency goal or the goal was achieved but not sustained, and the rights were terminated at least two years before the filing of the petition.<sup>277</sup>

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272. *Marrison*, 59 Va. App. at 68, 717 S.E.2d at 149.

273. *Id.* at 69, 717 S.E.2d at 150.

274. *Id.* at 68–71, 717 S.E.2d at 150–51.

275. Act of Mar. 21, 2013, ch. 678, 2013 Va. Acts \_\_\_, \_\_\_ (codified at VA. CODE ANN. § 1-240.1 (Cum. Supp. 2013)).

276. See VA. CODE ANN. § 1-240.1 (Cum. Supp. 2013).

277. Act of Mar. 21, 2013, ch. 685, 2013 Va. Acts \_\_\_, \_\_\_ (codified at VA. CODE ANN. §



The statute also provides a procedure for restoring parental rights to younger siblings even if they are younger than fourteen.<sup>278</sup> The court must hold a hearing, and the parent must prove his or her ability to care for the child by clear and convincing evidence.<sup>279</sup> If the petition is approved, the law provides for involvement by Social Services in monitoring and assisting the parent and child.<sup>280</sup> After approximately six months, a second hearing is to be held at which point the court will determine whether to make the restoration permanent and issue an appropriate order.<sup>281</sup>

Virginia Code section 63.2-1509 has been amended in several respects in apparent reaction to the Penn State child sex abuse scandal. One amendment adds the following to the classes of people required to report to authorities if they have reason to believe that a child is abused or neglected: “Any athletic coach, director or other person 18 years of age or older employed by or volunteering with a private sports organization or team” and “Administrators or employees 18 years of age or older of public or private day camps, youth centers and youth recreation programs.”<sup>282</sup> Another amendment adds the following required reporting class: “Any person employed by a public or private institution of higher education other than an attorney who is employed by a public or private institution of higher education as it relates to information gained in the course of providing legal representation to a client.”<sup>283</sup> Yet another amendment to the same section now requires reporting “as soon as possible, but not longer than 24 hours after having reason to suspect a reportable offense.”<sup>284</sup> Finally, an amendment provides that anyone who knowingly and intentionally fails to report an instance specifically of sexual abuse is guilty of a Class I misdemeanor.<sup>285</sup>

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16.1-283.2 (Cum. Supp. 2013)).

278. VA. CODE ANN. § 16.1-283.2 (Cum. Supp. 2013).

279. *Id.*

280. *Id.*

281. *Id.*

282. Act of Mar. 30, 2012, ch. 391, 2012 Va. Acts 669, 670 (codified as amended at VA. CODE ANN. § 63.2-1509 (Repl. Vol. 2012)).

283. Act of Apr. 9, 2012, ch. 698, 2012 Va. Acts 1431, 1432 (codified as amended at VA. CODE ANN. § 63.2-1509 (Repl. Vol. 2012)).

284. Act of Apr. 18, 2012, ch. 740, 2012 Va. Acts 1566, 1567 (codified as amended at VA. CODE ANN. § 63.2-1509 (Repl. Vol. 2012)).

285. Act of Apr. 9, 2012, ch. 728, 2012 Va. Acts 1518, 1519 (codified as amended at VA.

Virginia Code section 63.2-1709.3 has been added to provide a “conscience clause” for adoption agencies which states “no private child-placing agency shall be required to perform, assist, counsel, recommend, consent to, refer, or participate in any placement of a child for foster care or adoption when the proposed placement would violate the agency’s written religious or moral convictions or policies.”<sup>286</sup> Additional provisions bar any adverse administrative action or suit for damages against an agency asserting its rights under this provision.<sup>287</sup>

### IX. CONCLUSION

One lesson of recent decisions is that a party’s position can be seriously affected by matters occurring beyond the scope of litigation and even ordinary bargaining. A husband can spend more than a million dollars in marital assets after separation and persuade a court that no waste was involved. A spouse can designate a beneficiary for his or her federal life insurance and have the designation be effective even if a PSA provides otherwise. Child custody can be resolved simply by taking the child to a faraway jurisdiction so that even if there is a theoretical remedy in American courts, the likelihood of success is near zero. Practitioners may need to take immediate proactive steps, or have their client do so, starting perhaps as early as the very day the retainer is signed, lest assets or rights be lost by default.

Even so, for the most part, recent statutory enactments and court decisions in Virginia have made small but real advances toward vindication of parties’ rights and simplification of procedure. If progress has been evolutionary rather than revolutionary, things are at least going in the right direction. Let us hope that continues.

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CODE ANN. § 63.2-1509 (Supp. 2013)).

286. Act of Apr. 9, 2012, ch. 715, 2012 Va. Acts 1498, 1498 (codified at VA. CODE ANN. § 63.2-1709.3 (Repl. Vol. 2012)).

287. *Id.*