FAMILY LAW

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INTRODUCTION

Once again this year, the Virginia courts and legislature have been occupied with a range of family law matters—from divorce, to custody, to support. Spousal support, in particular, has been much discussed in legislative chambers, as well as in courtrooms, and significant legislative changes will redesign how divorcing couples draft settlement agreements in the coming years. In other areas, there has been less activity and fewer results. Both the House of Delegates and the Senate of Virginia failed to move out of committee bills that would repeal "the statutory prohibitions on same-sex marriages and civil unions or other arrangements between persons of the same sex purporting to bestow the privileges and obligations of marriage."[1] Similarly stuck in committee was a bill to repeal the crime of adultery, and one to make "parenting and marriage terminology gender-neutral in the relevant law regarding adoption."[2]

I. MARRIAGE

A. *Getting Married*

Last fall, the Supreme Court of Virginia put an end to the saga of *Levick v. MacDougall*, a case that had been the source of great

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1. *SB 50 Same-Sex Marriages; Civil Unions*, VA.'S LEGIS. INFO. SYS., http://lis.virginia.gov/cgi-bin/legp604.exe?181+sum+SB50 (last visited Oct. 1, 2018); *HB 414 Same-Sex Marriages; Marriage Laws, Gender-Neutral Terms*, VA.'S LEGIS. INFO. SYS., http://lis.virginia.gov/cgi-bin/legp604.exe?ses=181&typ=bil&val=hb414 (last visited Oct. 1, 2018).

2. *HB 412 Marriage-Related Criminal Laws; Gender-Neutral Terms, Adultery Repeal, Penalty*, VA.'S LEGIS. INFO. SYS., http://lis.virginia.gov/cgi-bin/legp604.exe?181+sum+HB412 (last visited Oct. 1, 2018); *HB 413 Adoption; Gender-Neutral Terms*, VA.'S LEGIS. INFO. SYS., http://lis.virginia.gov/cgi-bin/legp604.exe?181+sum+HB413 (last visited Oct. 1, 2018).

conversation in lower courts and family law circles.[3] The facts of the case were simple. In December 2002, the couple participated in a wedding ceremony in their home in the presence of friends and family.[4] Before officiating the ceremony, the rabbi discovered that the parties had not obtained a marriage license.[5] The rabbi suggested that the couple could participate in the ceremony that day if they obtained a marriage license and submitted the marriage certificate to the rabbi as soon as possible.[6] On January 6, 2003, Deborah MacDougall ("Deborah") went to the courthouse with Richard Levick ("Richard") to obtain the license and Richard sent the license to the rabbi.[7] The rabbi, upon receipt of the license, "executed the marriage certificate and verified that the parties were married on the date of execution, not the prior date of the ceremony in their home."[8]

Ten years later, facing divorce proceedings, Richard claimed that the marriage was void ab initio because the proper licensing procedure had not been followed.[9] On this ground, Richard asserted that he could invalidate a marital agreement requiring him to pay spousal support and to distribute the marital assets.[10] Richard managed to persuade the circuit court with his reasoning and that court concluded that the marriage was void ab initio, offering Deborah little to no possibility of recovering any marital property or receiving support.[11] On appeal, the Court of Appeals of Virginia was not persuaded by the void ab initio argument, concluding that the marriage was "merely voidable."[12] This decision left Deborah with more property rights, but still with an invalid marriage and marital agreement.[13] On appeal to the Virginia Supreme Court, however, things turned out quite differently as the court decided that the marriage was indeed valid: "We disagree entirely with [Richard's] reasoning and hold that the marriage was not voidable or void ab initio."[14]

3. *See* 294 Va. 283, 805 S.E.2d 775 (2017).
4. *Id*. at 288, 805 S.E.2d at 777.
5. *Id*. at 288, 805 S.E.2d at 777.
6. *Id*. at 288, 805 S.E.2d at 777.
7. *Id*. at 288–89, 805 S.E.2d at 777.
8. *Id*. at 289, 805 S.E.2d at 777.
9. *Id*. at 290, 805 S.E.2d at 777–78.
10. *Id*. at 288, 805 S.E.2d at 776.
11. *See id*. at 288, 805 S.E.2d at 776–77.
12. *Id*. at 288, 805 S.E.2d at 776.
13. *See id*. at 290, 805 S.E.2d at 778.
14. *Id*. at 288, 805 S.E.2d at 776.

The Supreme Court of Virginia began by grounding its decision in the policy preference for upholding marriage.[15] Cutting straight to the core of the matter, the court stated:

> We begin our analysis where it will eventually end—with the first premise of Virginia law governing marriages: "The public policy of Virginia . . . has been to uphold the validity of the marriage status as for the best interest of society," . . . and thus, the presumption of the validity of a marriage ranks as "one of the strongest presumptions known to the law."[16]

As the supreme court commented, the presumption of a valid marriage is a basic and strong presumption in many states as a matter of history and public policy.[17] Citing a historical treatise on marriage and divorce, the court added: "It will be readily conceded that English and American tribunals tend, in construing the marriage acts, to uphold every marriage, if possible, notwithstanding a noncompliance with the literal forms."[18] Accordingly, based on this presumption, the court concluded that all of the husband's arguments failed.[19]

Looking at the Virginia Code itself, the court observed that "nothing in Code § 20-13 expressly indicates that the license and solemnization requirements must be performed in any particular order for the marriage to be valid."[20] In the case at hand, the court stated that the couple and the officiant all agreed on the solemnization of the marriage and were also in accordance with the plan to obtain and return the license after the ceremony.[21] By both solemnizing the marriage and agreeing to subsequently send the license to the rabbi, the couple "reasserted their mutual intent to marry."[22] The solemnization began, then, with the ceremony and

15. *Id*. at 291, 805 S.E.2d at 778.

16. *Id*. at 291, 805 S.E.2d at 778 (citations omitted) (citing Neecham v. Neecham, 183 Va. 681, 686, 33 S.E.2d at 288, 290 (1945); Eldred v. Eldred, 97 Va. 606, 625, 34 S.E. 477, 484 (1899)) .

17. *Id*. at 291, 805 S.E.2d at 778.

18. *Id*. at 291, 805 S.E.2d at 778 (citing 2 JAMES SCHOULER & ARTHUR W. BLAKEMORE, *A Treatise on the Law of Marriage, Divorce, Separation and Domestic Relations* § 1191, at 1446 (6th ed. 1921)).

19. *Id*. at 291, 805 S.E.2d at 778.

20. *Id*. at 292, 805 S.E.2d at 779. "Every marriage in this Commonwealth shall be under a license and solemnized in the manner herein provided." VA. CODE ANN. § 20-13 (Repl. Vol. 2016 & Supp. 2017). "That is a rather slow start, however, because there is no specific 'manner herein provided' anywhere in the Code of Virginia." *Levick*, 294 Va. at 292, 805 S.E.2d at 779.

21. *Id*. at 292, 805 S.E.2d at 779.

22. *Id*. at 292, 805 S.E.2d at 779.

terminated when the rabbi executed the marriage certificate.[23] This procedure, the court remarked, might have been "unconventional" but it was not "unlawful."[24] It would only have been unlawful, the supreme court added, if the legislature had expressly forbidden it.[25] This, the court stated, was not the case: "The legislature . . . has chosen not to micromanage the details of solemnization. Nor have we."[26]

Addressing the results of both the lower court decision and the dissenting opinion favoring the void ab initio theory, the supreme court remarked that such reasoning was not only erroneous, but also "particularly harsh" to the wife:

> The dissent's view . . . would treat her multi-year investment over the course of her marriage as irrelevant. She could not enforce the marital agreement, in which Levick agreed to pay her $150,000 in spousal support annually, pay for her health insurance premiums, divide equally the proceeds from the sale of the marital home, and, in the event that Levick sold his company, provide her with 35% of the proceeds. Nor would she, for that matter, have any other right to seek spousal support or to request a fair apportionment of marital property . . . .[27]

Not only did public policy dictate the presumption of a valid marriage, equity leaned toward validating the marital agreement, as well as granting Deborah property rights.[28]

B. *Prenuptial and Postnuptial Agreements*

It is a truism, taught in family law classes, that courts rarely find prenuptial agreements to be unenforceable. However, *Chapin v. Chapin* proves this wisdom wrong.[29] In *Chapin*, the Court of Appeals of Virginia held that a prenuptial agreement was unenforceable on the grounds of unconscionability.[30] The couple in question,

23. *Id*. at 292, 805 S.E.2d at 779. The marriage therefore began when the rabbi executed the marriage certificate because "he was 'completing' their solemnization agreement that began with the ceremony and ended when he received the marriage register and executed the marriage certificate." *Id*. at 292, 805 S.E.2d at 779.

24. *Id*. at 292, 805 S.E.2d at 779.

25. *Id*. at 292, 805 S.E.2d at 779.

26. *Id*. at 292, 805 S.E.2d at 779.

27. *See id*. at 301, 805 S.E.2d at 784.

28. *Id*. at 291, 301, 805 S.E.2d at 778, 784.

29. *See* No. 1541-15-4, 2017 Va. App. LEXIS 225, at *35 (Aug. 29, 2017) (unpublished decision).

30. *Id*. at *4. It was held unenforceable pursuant to Virginia Code section 20-151. *Id*.

Ekaterina Chapin ("Ekaterina") and Bryan Chapin ("Bryan"), met in 2001 through an "online agency that pairs American men with Russian women for potential marriage."[31] The two met in person on several occasions and in the fall of 2001, Ekaterina moved to Virginia on a "fiancé-visa" for the purpose of marrying Bryan.[32]

Prior to the marriage, Bryan requested that Ekaterina sign a prenuptial agreement.[33] The agreement "reserved to each party their separate property, allowed [husband] to protect his retirement savings and children's inheritances, and waived spousal support."[34] Both parties disclosed their financial information, with Bryan valuing his assets at a total of $1,795,800 and Ekaterina valuing her total worth at $500.[35] The couple's marriage lasted ten years, at which point Ekaterina moved out of their marital home and, two years later, filed for divorce.[36] Ekaterina sought equitable distribution of their marital assets and spousal support at that time, and Bryan claimed that the prenuptial agreement barred Ekaterina from receiving either equitable distribution or spousal support.[37] Ekaterina, at that point, moved to have the agreement set aside as unenforceable.[38]

In support of her request to set aside the agreement, Ekaterina testified at a pretrial hearing that she was not provided with a copy of the prenuptial agreement in Russian and that she "did not understand the legal terms of the agreement or its waiver."[39] She testified that she never reviewed the agreement with a lawyer because she could not afford one.[40] Moreover, Bryan testified that he made no offer of financial assistance to ensure that Ekaterina understood the terms of the agreement.[41] The trial court, emphasizing the disparity in assets between the parties that "shock[ed] the

31. *Id*. at *1.
32. *Id*. at *2.
33. *Id*.
34. *Id*. (alteration in original).
35. *Id*. ("Neither party disclosed any income or liabilities. In 2001, husband's liabilities totaled $545,974.76. If husband's liabilities (in addition to his total adjusted gross income of $46,131) had been factored into the total value of his assets, the total value would have been $1,295,956.44.").
36. *Id*. at *3.
37. *Id*.
38. *Id*. at *3–4.
39. *Id*. at *3.
40. *Id*. at *3–4.
41. *Id*. at *4.

conscience" and Ekaterina's "limited English vocabulary," concluded that the terms of the agreement were unconscionable.[42] Unfortunately for Ekaterina, even though she prevailed and had the prenuptial agreement invalidated, she lost on a number of other claims concerning characterization and valuation of marital property, leaving her with barely $500 as her portion of marital property.[43]

II. DIVORCE

A. *Getting Divorced*

One of the cases this year concerning divorce involved the question of bifurcation—granting the divorce without settling matters pertaining to property and support—when a husband's failing health was an issue. In *Friedman v. Smith*, Gerald Friedman ("Gerald") and Nancy Friedman ("Nancy") sought a divorce after fifty-four years of marriage.[44] Married in 1961, the couple lived together until December 2015, when Nancy left their marital home and subsequently filed for divorce on the grounds of cruelty and both actual and constructive desertion.[45] Gerald filed a cross-complaint seeking divorce on the grounds of adultery and desertion and requesting spousal support, use of the marital home, and that Nancy "be required to return all assets and company interests that she obtained fraudulently."[46] Over the next year, the parties filed

42. *Id*. at *4–5. A prenuptial agreement is found to be unenforceable pursuant to Virginia Code section 20-151 if the person against whom enforcement is sought proves:

> (1) Execution of agreement was not voluntary, or
>
> (2) The agreement was unconscionable upon execution and prior to execution, the person
>
> > a. Was not provided fair and reasonable disclosure of the property or financial obligations of the other party, and
> >
> > b. Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure involved.

VA. CODE ANN. § 20-151 (Repl. Vol. 2016).

43. *See Chapin*, 2017 Va. App. LEXIS 225, at *18, *11, *29. The husband's expert witness testified that only $909 in assets were marital. *Id*. at *10. The remaining assets were traceable as separate, belonging only to the husband, as they were acquired before the marriage. *Id*. at *9–10. The court agreed. *Id*. at *29.

44. 68 Va. App. 529, 534, 810 S.E.2d 912, 914 (2018).

45. *Id*. at 534, 810 S.E.2d at 914.

46. *Id*. at 535, 810 S.E.2d at 914.

numerous motions and the process was "best described as a contentious and protracted dispute between the parties."[47]

On July 13, 2017, Gerald filed a "Motion to Bifurcate Trial and for Entry of a Decree of Divorce" stating that, at the age of ninety, his "health . . . [was] such that he may not survive protracted litigation."[48] He added that Nancy's conduct seemed "calculated to purposefully and unreasonably delay this matter with the hope that [Gerald would] not survive to see his divorce finalized so that [Nancy would] benefit financially."[49] At a circuit court hearing on the matter, both parties admitted that Gerald had been recently hospitalized for tests and treatment subsequent to a stroke, and Gerald stated that he "feared his imminent death."[50] Based on this information, the circuit court granted the bifurcation, stating that "the [husband] is ninety and his health is declining and he has been receiving daily assistance since the start of this instant matter, and that there have been delays by the parties in this instant matter."[51] The circuit court granted Gerald's divorce petition on the grounds of a one-year separation pursuant to Virginia Code section 20-91(A)(9)(a) while noting: "'[T]his case is bifurcated as the Court has found that it is clearly necessary to divorce the parties and reserve certain issues' for future adjudication," including spousal support and equitable distribution.[52] Nancy appealed.[53]

On appeal, the Court of Appeals of Virginia turned to a plain reading of the relevant Virginia Code section, which stated: "[T]he court, on the motion of either party, may retain jurisdiction in the *final decree of divorce* to adjudicate the remedy provided by this section when the court determines that such action is clearly necessary . . . ."[54] The court of appeals continued by remarking that it was clearly the General Assembly's intention to grant discretion to the circuit court "to effectively finalize the issue of divorce from the

47. *Id*. at 535, 810 S.E.2d at 914.

48. *Id*. at 535, 810 S.E.2d at 914.

49. *Id*. at 535, 810 S.E.2d at 914–15.

50. *Id*. at 535, 810 S.E.2d at 915.

51. *Id*. at 542, 810 S.E.2d at 918 (alteration in original). The court also pointed out that there were issues concerning Gerald's competency and, for that reason, appointed a guardian ad litem. *Id*. at 536, 810 S.E.2d at 915.

52. *Id*. at 537, 810 S.E.2d at 915–16 (citing VA. CODE ANN. § 20-91(A)(9)(a) (Repl. Vol. 2016 & Supp. 2017)).

53. *Id*. at 537, 810 S.E.2d at 916.

54. *Id*. at 539, 810 S.E.2d at 916 (quoting VA. CODE ANN. § 20-107.3(A) (Repl. Vol. 2016 & Supp. 2017)).

bond of matrimony independent of other ancillary issues, such as equitable distribution and support, and adjudicate them separately—effectively transforming one case into two."[55] Concluding that the bifurcation was appropriate and not an abuse of the circuit court's discretion, the appellate court ended by underscoring the fact that "bifurcating a divorce proceeding in this manner is not a matter of right nor should it be a common practice, but rather an exercise of a trial court's discretion in an irregular situation . . . to achieve equity."[56] Gerald and Nancy's case, with Gerald in failing health and of advanced age, was just such a case.[57]

B. *Equitable Distribution*

In the realm of equitable distribution, one case in particular demonstrated the importance of good record keeping. *Hvozdovic v. McGuire* involved a number of issues, but at the core of the dispute was the characterization of the husband's stock.[58] John Hvozdovic ("John") and Sarah McGuire ("Sarah") were married on February 14, 1988, and they had two children.[59]

Before marriage, John used part of his salary to acquire stock in his employer's company through an employee stock purchase program.[60] From 1984 to February 1988, he acquired 310 shares of his company's stock ("M/A-COM") through the program and purchased an additional 400 shares through a brokerage firm.[61] Two weeks prior to marriage, he acquired an additional 194 shares so that he held a total of 904 shares when he married.[62] After the marriage, John purchased a total of 764 additional shares in 1989 and 1990 and then, in 1991, he sold over 1600 shares of M/A-COM stock to purchase 500 shares of Qualcomm stock.[63] The Qualcomm stock eventually went into John's Ameriprise SmartTrade account

55. *Id*. at 539–40, 810 S.E.2d at 917.
56. *Id*. at 540, 810 S.E.2d at 917.
57. *Id*. at 542–43, 810 S.E.2d at 918.
58. No. 1146-17-4, 2018 Va. App. LEXIS 51, at *6 (Feb. 27, 2018) (unpublished decision).
59. *Id*. at *1–2.
60. *Id*. at *3.
61. *Id*.
62. *Id*.
63. *Id*. at *3–4.

("Ameriprise Account").[64] During the marriage, John also participated in a second employee stock purchase plan ("SAIC") and he bought stock in that company until 2011, when the company split.[65] Because of this split, John's stock was divided into shares of SAIC stock and Leidos stock.[66] Finally, John also contributed to a 401(k) through his employment, and in July 2014, he withdrew the total amount in this account, approximately $459,621, and deposited the funds in a Fidelity IRA account.[67]

The couple separated in November 2002 and reached a separation agreement in May 2003.[68] The parties agreed, for the most part, about which properties were subject to equitable distribution and their values.[69] In dispute, however, was the characterization of the Qualcomm, SAIC, and Leidos stock as well as the Fidelity IRA, all of which John claimed was separate property.[70] At trial, John testified that he purchased 500 shares of the Qualcomm stock the same day he sold the M/A-COM shares and that, prior to purchase, the M/A-COM stock was paying dividends.[71] All those dividends were deposited in the couple's joint checking account.[72] Moreover, John testified that the dividends went "to pay groceries or rent or whatever."[73] John agreed when Sarah's lawyer asked: "Whenever money was put into your joint marital account, you deemed that to be used for marital purposes, correct?"[74] John testified that he could not recall the value of the Qualcomm shares, when he started receiving dividends on those shares, or when he purchased additional shares.[75] In addition, Sarah testified that during the marriage, John asked her approval to purchase $2000 of Qualcomm stock with marital funds and she agreed to the purchase.[76] Regarding the SAIC and Leidos stock, John could not identify the value of any separate portion and, similarly, he could not

64. *Id*. at *4.
65. *Id*.
66. *Id*.
67. *Id*. at *4–5.
68. *Id*. at *2.
69. *Id*. at *5.
70. *Id*. at *17, *19, *22–23.
71. *Id*. at *9–10.
72. *Id*. at *10.
73. *Id*.
74. *Id*.
75. *Id*. at *10–11.
76. *Id*. at *11.

recall either the premarital or date-of-separation value of the 401(k) funds used to create the Fidelity IRA.[77]

The trial court issued a ruling in June 2017 and classified all the stock and IRA funds as marital mainly because John did not meet his burden of tracing separate property.[78] The court concluded that the Qualcomm stock was all marital based on John's "inability to show 'how many shares of the current Qualcomm stock was separate property' or 'to trace those from the initial funds invested.'"[79] Similarly, with the SAIC and Leidos stock, the court found that marital property and separate property had been commingled; as a result, all the stock became marital in the absence of any tracing of separate property.[80] The court also deemed the Fidelity IRA to be marital property because it was "a rollover account from a prior, marital account" and, once again, John was not able to "identify the value of any separate share."[81] John appealed this ruling, but on appeal the court affirmed the lower court ruling, reiterating that the ruling had everything to do with John's inability to produce any records to help trace his separate property: "Husband, citing a lack of recordkeeping over the lengthy time period, was unable to establish the value of the stock at the relevant intervals that might allow the trial court to determine a separate property value as distinguished from the presumptively marital whole."[82]

An interesting twist to the story was Sarah's claim that John engaged in financial waste when he withdrew funds from the Ameriprise account (holding the Qualcomm stock and no other asset) to pay for educational expenses for their son.[83] In 2016, the couple's son began a two-year master's program for student advisement.[84] John paid for the son's tuition and living expenses with funds taken from the Ameriprise account without consulting with Sarah.[85] Sarah claimed that the use of these funds to pay for the

77. *Id*. at *11–12. When John was asked the "monetary value of the separate portion" that contributed to the new SAIC stock, his answer was "zero." *Id*.

78. *Id*. at *13–14.

79. *Id*. at *14–15.

80. *See id*. at *20–23.

81. *Id*. at *14.

82. *Id*. at *1, *18–19.

83. *Id*. at *6, *11.

84. *Id*. at *5.

85. *Id*.

son's expenses constituted waste—and the trial court agreed.[86] The circuit court stated:

> [I]t is significant that this was an adult child, and you all have been talking about marital purposes, and I would view hoping that your adult son gets a degree to be a paternal purpose as opposed to a marital purpose. There is no legal obligation, and the father took the funds without consultation with the mother, and I don't think that this is even really close, in my mind, that this is, in fact, waste, and that's the ruling I make.[87]

On appeal, the court affirmed this finding of waste, concluding that not only were the funds fully marital funds, but also that John had failed to meet his burden of proving the funds were used "for a proper purpose."[88] The use of the funds to pay for an adult child's educational expenses was not per se financial waste, the court remarked.[89] Here, however, the trial court had found that neither John nor Sarah was under a legal obligation to pay for the post-secondary education of their adult children.[90] The couple's separation agreement made no mention of these expenses and, perhaps most importantly, John had "unilaterally decided to use a marital asset to make the tuition payments."[91] Because of the facts of the situation, the trial court had not erred.[92] Ultimately, then, all of John's stock was marital property because of his failure to keep records and his expenditures on his son were determined to be waste, or the dissipation of marital assets, likely because he failed to consult with his wife.[93]

In another equitable distribution case, *Frakes v. Frakes*, the asset in question was not stock, but real estate.[94] The case turned on questions about a home that the couple owned before divorce.[95] Jane Frakes ("Jane") and Danny Frakes ("Danny") were married in August 2010 in South Dakota, and shortly after their marriage

86. *Id*. at *6, *12.
87. *Id*. at *12–13.
88. *Id*. at *28, *30.
89. *Id*. at *28–29.
90. *Id*. at *28.
91. *Id*.
92. *Id*. at *29–30.
93. *Id*. at *18–19, *28.
94. No. 1951-16-1, 2017 Va. App. LEXIS 191, at *1 (Aug. 1, 2017) (unpublished decision).
95. *Id*. at *2.

they moved to Norfolk, Virginia.[96] The marriage lasted until January 2014, at which point Jane moved out of the marital home, and the year after her departure the court granted a divorce on the grounds of her desertion.[97]

The conflict arose over a home in Michigan that Jane contended was marital property.[98] Danny had inherited the home from his mother in 2000, well before they were married.[99] However, in 2013, the couple executed a quit-claim deed that "essentially transferred title in the property to themselves."[100] Jane and Danny were listed as the grantors and the grantees.[101] At trial, Danny testified that Jane "had asked to be added to the deed to eliminate any doubt that the property would pass to her if he died."[102] He testified that he had not realized he was conveying a present interest in the property to Jane and that "he did not understand the difference between a gift and other types of transfers."[103] The court was persuaded by this testimony and concluded that Danny had intended to make an estate plan rather than an inter vivos gift.[104] Accordingly, the court determined that the home was separate property, despite the names on the deed.[105]

Jane appealed the decision, claiming that the court mischaracterized the property after improperly allowing Danny's parol evidence that he did not have donative intent.[106] The court of appeals recognized that, in general, "'property titled in the names of both parties, whether as joint tenants, tenants by the entirety or otherwise,' is classified as marital property subject to equitable distribution."[107] The court noted, however, that the Virginia Code provided an exception for "retitled separate property if it is traceable by 'a preponderance of the evidence and was not a gift.'"[108] Looking at the deed, the court focused on the fact that the document listed

96. *Id*.
97. *Id*.
98. *Id*. at *6.
99. *Id*. at *2.
100. *Id*.
101. *Id*.
102. *Id*. at *3.
103. *Id*.
104. *Id*. at *5.
105. *Id*. at *6–7.
106. *Id*. at *6.
107. *Id*. at *6–7 (quoting VA. CODE ANN. § 20-107.3(A)(2) (Repl. Vol. 2016 & Supp. 2017)).
108. *Id*. at *7 (quoting VA. CODE ANN. § 20-107.3(A)(3)(d) (Repl. Vol. 2016 & Supp. 2017)).

Jane and Danny together both as grantors and grantees.[109] "Thus," the court stated, "[I]t is impossible to tell from the face of the instrument whether any new interest was conveyed to wife, let alone whether such transfer was a gift."[110] Relying on Michigan law, the court concluded that "without a transfer apparent from the face of the document," there could be no clarity concerning Danny's donative intent.[111] Moreover, since the deed did not clearly show a donative transfer, the parol evidence rule did not bar Danny's testimony about his intent in retitling the property.[112] Against presumption, then, Danny retained the Michigan home as separate property.[113]

C. *Spousal Support*

1. Significant Legislative Decisions

One of the most important legislative changes this year involved spousal support and its modifiability. The legislature approved an amendment to Virginia Code section 20-109(C) stating that no request for a modification of spousal support will be denied without a hearing, unless the agreement directly states that the spousal support award is nonmodifiable.[114] That is to say, after this amendment, a spousal support agreement must affirmatively state that spousal support is nonmodifiable in order to make it nonmodifiable.[115] The new rule applies to all contracts written or executed on or after July 1, 2018.[116] Specifically, the contract must state: "The amount or duration of spousal support contained in this [Agreement] is not modifiable except as specifically set forth in this [Agreement]."[117] Without this language, spousal support will be presumptively modifiable.[118]

109. *Id*. at *8.
110. *Id*.
111. *Id*. at *8–9.
112. *Id*. at *9.
113. *Id*. at *7, *12.
114. *See* Act of Mar. 30, 2018, ch. 701, 2018 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 20-109(C) (Cum. Supp. 2018)).
115. *See id*. ch. 701, 2018 Va. Acts at __.
116. *Id*. ch. 701, 2018 Va. Acts at __.
117. *Id*. ch. 701, 2018 Va. Acts at __.
118. *See id*. ch. 701, 2018 Va. Acts at __.

In other changes to spousal support, the legislature seemed to take note of an aging population and problems surrounding spousal support and retirement. Senate Bill 540 amended Virginia Code section 20-107.1[119] and section 20-109[120] by requiring that any spousal support order, or reservation for spousal support, must state whether the court considered retirement—and, if so, what factors concerning retirement were considered. Two new subsections were added to section 20-109, one (E) stating that a payor spouse reaching the age for maximum payment of Social Security benefits (currently age sixty-seven) constitutes a material change in circumstance.[121] The mere fact that a payor spouse reaches this age does not mean there will be an automatic modification of spousal support.[122] Rather, attaining the stated age offers the opportunity for modification.[123] The other new subsection, (F), outlines what the trial court may and/or should consider when ruling on a modification for spousal support based on the payor spouse's retirement.[124] Subsection (F) states that a trial court may consider the factors set forth in section 20-107.1(E) as well as some new factors that include:

> 1. Whether retirement was contemplated by the court and specifically considered by the court when the spousal support was awarded;
> 2. Whether the retirement is mandatory or voluntary, and the terms and conditions related to such retirement;
> 3. Whether the retirement would result in a change in the income of either the payor or the payee spouse;
> 4. The age and health of the parties;
> 5. The duration and amount of spousal support already paid; and
> 6. The assets or property interest of each of the parties during the period from the date of the support order and up to the date of the hearing on modification or termination.[125]

119. Act of Mar. 30, 2018, ch. 583, 2018 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 20-107.1(F) (Cum. Supp. 2018)).

120. *Id*. ch. 583, 2018 Va. Acts at __ (codified as amended at VA. CODE ANN. § 20-109(E)–(G) (Cum. Supp. 2018)).

121. VA. CODE ANN. § 20-109(E) (Cum. Supp. 2018); *see* 42 U.S.C. § 416(*l*)(1)(A) (2012) (stating that sixty-seven is the current age of retirement).

122. *See* VA. CODE ANN. § 20-109(E) (Cum. Supp. 2018).

123. *See id*.

124. *See id*. § 20-109(F) (Cum. Supp. 2018).

125. *Id*. Factor six is significant, as it requires the court to consider the assets or property interests of each party from the date of the initial hearing to the date of the modification hearing. *Id*. § 20-109(F)(6) (Cum. Supp. 2018). This factor reverses *Driscoll v. Hunter*, a 2011 Virginia case, which held that only the payor spouse's assets could be considered by the court in support modification upon retirement. 59 Va. App. 22, 716 S.E.2d 477 (2011). Therefore, it is important to note that the court now must consider the assets or property interests

Upon retirement, then, payors will now have new opportunities to request modification based on changes in income brought about by retirement.[126] Alternately, for older individuals receiving spousal support, this brings a new possibility that the support they are receiving could be reduced when they might need it the most.

2. Significant Judicial Decisions

In addition to the legislative time and attention paid to the issue of spousal support, court dockets were also replete with spousal support cases. Notable cases included all aspects of support from the awarding to the modification.

a. Awarding Spousal Support

One issue with respect to awarding spousal support involved the question of proving ability to pay and the burden placed on the person seeking support. In *Collard v. Collins*, the couple was married for almost thirteen years before separating in 2012.[127] When the wife, Patricia Collins ("Patricia"), filed her complaint for divorce, she requested and was awarded *pendente lite* support.[128] Her husband, Reginald Collard ("Reginald"), was obligated to pay her "rent, electric bill, DirecTV bill, car loan payment, and car insurance payment."[129] The *pendente lite* order "expressly stated that these payments were not intended to be construed as spousal support payments" and "that its terms had 'no presumptive effect.'"[130]

At trial, Patricia represented herself and presented her evidence by "submitting a folder of documents to the circuit court."[131] The documents included her written testimony, as well as information about her monthly income and expenses.[132] More importantly, she did not include anything that established her husband's income or

of each party, not just the payor spouse. *See* VA. CODE ANN. § 20-109(F)(6) (Cum. Supp. 2018).

126. VA. CODE ANN. § 20-109(F)(3) (Cum. Supp. 2018).

127. No. 0406-17-4, 2017 Va. App. LEXIS 281, at *2 (Nov. 14, 2017) (unpublished decision).

128. *Id*.

129. *Id*.

130. *Id.* at *2–3.

131. *Id.* at *3.

132. *Id.*

ability to pay any spousal support.[133] The circuit court noted that the parties had presented "limited" evidence with respect to their financial situations and that neither one had actually established Reginald's ability to pay.[134] The court did, however, note that he had been paying the *pendente lite* support as ordered.[135] On this basis, the court ultimately ordered Reginald to pay $2625 per month in spousal support, a decision that he appealed, claiming that Patricia had failed to establish that he had the ability to pay this amount.[136]

On appeal, the Court of Appeals of Virginia began by reiterating that: "A party seeking spousal support bears the burden of proving all facts necessary for an award."[137] From there, the court stated that Patricia had clearly failed to "present any evidence establishing [Reginald's] income or his ability to pay [the] spousal support" award at issue.[138] Moreover, the court stated, the *pendente lite* award was incorrectly used by the circuit court as a measure of Reginald's ability to pay spousal support.[139] The court noted that "[n]umerous circumstances could have changed between the entry of the *pendente lite* order and the final spousal support decision, and [Reginald's] ability to pay may have changed drastically."[140] The appellate court concluded that the circuit court had abused its discretion and therefore reversed the decision.[141] Patricia was denied her spousal support and, it is possible to speculate, was penalized for her failure or inability to procure legal counsel who could have instructed her as to what evidence to present to the court.[142]

A second case about the amount of a spousal support award also involved a long-term marriage and a great asymmetry of incomes. In *Gordon v. Gordon*, the couple married in 1985 and was together

133. *Id.*
134. *Id.* at *4.
135. *Id.*
136. *Id.* at *5.
137. *Id.* (quoting Robbins v. Robbins, 48 Va. App. 466, 484, 632 S.E.2d 615, 624 (2006)).
138. *Id.* at *6. All of the evidence that Patricia presented focused on her own financial needs, and the evidence presented by Reginald did not address his financial circumstances or ability to pay spousal support. *Id.* at *3–4. Although the evidence established that Reginald's owned a construction business, Patricia did not provide any evidence regarding Reginald's income or the financial condition of his business. *Id.* at *6–7.
139. *Id.* at *6–7.
140. *Id.* at *8–9.
141. *Id.* at *10.
142. *See id.* at *9.

for approximately twenty-seven years before separating and divorcing.[143] The husband, George Gordon ("George"), was a financial advisor who earned "a lucrative income," ranging annually from $366,431 to $898,549.[144] Elizabeth Gordon ("Elizabeth"), the wife, did not work after the birth of their first child, except sometimes as a seasonal, part-time volleyball coach.[145]

At trial, there was extensive testimony about Elizabeth's job prospects and her financial situation postdivorce.[146] She testified that she was in the process of learning ballroom dancing so that she could potentially obtain employment as an instructor at a rate of $20 an hour.[147] A vocational expert testified that Elizabeth's annual earning capacity was somewhere between $24,000 and $29,000.[148] He also testified that any skills she had acquired from previous employment as a technical illustrator were obsolete, although he did state that her extensive volunteer experience was likely "valuable."[149] The expert suggested that, with her lack of skills and expertise, Elizabeth was employable most likely as a retail clerk or member services representative.[150] In addition, a financial advisor testified that if Elizabeth received $1.5 million in equitable distribution assets, "she could expect to withdraw $65,000 annually, after taxes."[151] Furthermore, he testified that withdrawing that sum annually would deplete Elizabeth's savings entirely by the age of ninety-five.[152] Based in part on this testimony, the circuit court awarded Elizabeth $2.25 million in equitable distribution property and $12,000 a month in spousal support.[153]

George, displeased with this amount of spousal support, appealed the decision, claiming that the circuit court did not properly consider his wife's equitable distribution assets, improperly de-

143. No. 2038-16-2, 2017 Va. App. LEXIS 164, at *1 (July 11, 2017) (unpublished decision).
144. *Id*. at *1–2.
145. *Id*. at *2.
146. *See id*. at *1–3.
147. *Id*. at *2.
148. *Id*.
149. *Id*.
150. *Id*.
151. *Id*. at *2–3.
152. *Id*. at *3.
153. *See id*. at *4.

clined to impute income to Elizabeth, and ultimately awarded excessive spousal support in light of Elizabeth's needs.[154] None of these claims persuaded the appellate court.[155] The court of appeals stated that the trial court had, in all ways, considered the appropriate factors, balanced the equities, and reached an amount of spousal support that was not an abuse of discretion.[156]

For example, the appellate court remarked that the court had taken into consideration not only that the husband's adultery was a significant factor in the breakdown of the marriage, but also that "the wife 'enabled [her husband's] monetary contributions to grow into significant amounts by remaining home to take care of the parties' child and by willingly living a modest lifestyle when the parties had sufficient income to have lived a more extravagant lifestyle."[157] Moreover, the court did not impute employment income to Elizabeth "due to her long and mutually-agreed-upon absence from the workforce and her unsuccessful efforts to find meaningful employment after the parties' separation."[158]

The court also addressed the question of the equitable distribution property that Elizabeth received, explaining that

> The purpose of equitable distribution is to divide the marital estate "between spouses based upon each spouse's contribution to the acquisition, preservation, or improvement of property obtained during the marriage." In contrast, in determining spousal support, a circuit court must "consider the equities between the parties" as well as "[t]he standard of living established during the marriage."[159]

Again, the court of appeals remarked that the equitable distribution was a factor in the consideration, but the trial court had been within its discretion to take note of the expert testimony that Elizabeth would have to essentially liquidate all of her assets, at some point, in order to cover basic needs and expenses.[160] The appellate court found that the circuit court had weighed the appropriate factors in a proper way.[161] What had happened, the appellate court concluded, was that the circuit court "simply did not

154. *Id*. at *5–6.
155. *Id*. at *16–17.
156. *See id*.
157. *Id*. at *4.
158. *Id*. at *5,
159. *Id*. at *8 (alteration in original) (citation omitted).
160. *Id*. at *8–11.
161. *Id*.

assign the weight to those circumstances that the husband requested."[162] And, the court added: "The contention that the court 'should have weighed the evidence differently than it did . . . is not a proper appellate argument.'"[163]

b. Modification of Awards

In addition to questions concerning spousal support awards, modification of these awards was also a frequent subject of contestation. In *Davis v. Davis*, the court addressed the question of income versus wealth in the modification of spousal support.[164]

When the couple, Brian Davis ("Brian") and Meryl Davis ("Meryl"), divorced in 2009, each party received over $800,000 in equitable distribution.[165] After the divorce, Brian's assets increased to approximately $1.1 million and Meryl's decreased to approximately $700,000.[166] The court also awarded Meryl spousal support in the amount of $5100 per month.[167] At the time of the final divorce decree, Brian was earning about $18,000 per month in wages, while Meryl was not earning any income other than disability payments she began receiving in September 2008.[168] In 2013, Brian was laid off from his job, and the next year he was diagnosed with non-Hodgkin's lymphoma and advanced stage retinitis pigmentosa.[169] He also began to receive disability payments and, based on this change in income, he petitioned the court for modification of his spousal support.[170]

The trial court found that Brian met his initial burden of showing a material change in circumstances and "[a]fter considering the assets, income, and needs of both parties," the trial court reduced Brian's monthly support obligation from $5100 to $3500.[171] Not satisfied with this reduction, Brian appealed.[172] On appeal, he

162. *Id*. at *9.
163. *Id*.
164. No. 0703-17-4, 2017 Va. App. LEXIS 313, at *1–2 (Dec. 12, 2017) (unpublished decision).
165. *Id*.
166. *Id*. at *2.
167. *Id*. at *2–3.
168. *Id*. at *3.
169. *Id*.
170. *Id*.
171. *Id*.
172. *Id*. at *1.

claimed that the trial court failed to consider and appreciate the fact that he was going to be required to invade his assets to pay the required support obligation, and that the payment of the support would deplete all of his assets.[173] The Court of Appeals, however, was not persuaded.[174] It explained that the trial court had properly considered all the circumstances and that the trial court was not plainly wrong when it concluded that, although Brian clearly suffered a loss in income, he still "had significant assets" as well as expenses that he could reduce.[175] This was necessary, the trial court had added, because Meryl's financial needs continued to exceed her income even with her disability payments.[176] The "crucial question," the appellate court remarked, was:

> [T]he ability of the supporting spouse to pay. Husband's ability to pay was undisputed. The fact that the payor husband may have to draw from other sources, such as the principal of investment or savings accounts, in order to make his spousal support payment does not by itself require the trial court to suspend or reduce his spousal support obligation.[177]

Brian further argued that the continued payment of his spousal support obligation would render him bankrupt.[178] The appellate court was not sympathetic, stating that "the trial court must base its modification decisions on the circumstance within the immediate or reasonably foreseeable future, not on what may happen in the future."[179] There was, consequently, no further modification made to Brian's spousal support obligation.[180]

Similarly, in *Giambattista v. Giambattista*, a change in income did not necessarily mean a reduction in support.[181] In that case, Julie Giambattista ("Julie") and Scott Giambattista ("Scott") were married for almost twenty-two years before they separated in February 2010.[182] While they were married, Julie worked at home:

173. *Id*. at *6.
174. *Id*. at *7–8.
175. *Id*. at *5–6, *9–10.
176. *See id*. at *6.
177. *Id*. at *7.
178. *Id*. at *6.
179. *Id*. at *7–8.
180. *See id*. at *10.
181. No. 1043-17-14, 2018 Va. App. LEXIS 63, at *6–7 (Mar. 13, 2018) (unpublished decision).
182. *Id*. at *1.

"She managed the household, dealt with the majority of the children's schoolwork, cooked meals for the family, sorted and paid the bills, shopped, and cleaned."[183] Scott was the primary earner and worked for the United States Secret Service.[184] "For the majority of his career, he was a member of the Rapid Response team, an entity within the Secret Service posted at the White House and responsible for responding to security threats."[185]

When the couple's divorce was finalized in December 2012, the Property Settlement Agreement ("PSA") provided that Scott would pay $3100 monthly in spousal support.[186] Moreover, the PSA also stated that Scott would make these payments "until modified by a court of competent jurisdiction upon appropriate petition filed by either party based upon a material change of circumstances, such as, but not limited to, [Scott's] retirement from the United States Secret Service."[187]

For two years after the divorce, Scott earned approximately $140,000, and in 2015 he earned approximately $160,000.[188] However, starting in 2014 he was having difficulty "maintaining the necessary physical standards to remain on the team," and in 2015 he was required to take part in "remedial training."[189] Scott felt that his age was becoming a liability, "characterizing himself as a 'dinosaur' in comparison with the younger members of the team."[190] Accordingly, he retired from the Secret Service in 2016 at the age of fifty-six—one year before he would have been subject to mandatory retirement.[191]

Before retiring, Scott obtained a job as a security officer, making approximately $40,000 annually and, upon retirement, he began taking his retirement benefits.[192] His pension began providing almost $4000 a month, and he had a balance of about $347,000 in his

183. *Id*.
184. *Id*. at *2.
185. *Id*.
186. *Id*.
187. *Id*. (alteration in original) (emphasis omitted).
188. *Id*. at *3.
189. *Id*.
190. *Id*.
191. *Id*.
192. *Id*.

federal Thrift Savings Plan account ("TSP account").[193] Postdivorce, Scott remarried a woman who worked with the Secret Service and they shared expenses.[194] The new wife even assisted Scott with his spousal support payments in 2013.[195]

After the divorce, Julie gained employment as a "paraprofessional" at an elementary school, earning approximately $15,800 per year.[196] Julie's earning capacity was limited, however, by the fact that she suffered from congenital nystagmus, making reading difficult and limiting her distance vision.[197] This condition prevented her from spending too much time in front of a computer screen and precluded her from driving after sundown.[198] Julie also suffered from other health problems and was diagnosed with breast cancer in August 2010.[199] She underwent a mastectomy in September 2010 but did not complete the chemical treatment until late 2015.[200]

Soon after Scott's retirement, he filed a motion to reduce his spousal support payments based on his change in circumstances, requesting that his payments be reduced from $3100 to approximately $2300.[201] The trial court held a hearing and, based on "extensive evidence," denied Scott's request.[202] An appeal followed and Scott was similarly unable to persuade the appellate court.[203] The appellate court stated that, from the outset, the PSA "stipulated that appellant's retirement would constitute a material change."[204] The only issue, therefore, was whether the trial court erred in concluding that the change "did not warrant a reduction in the amount of spousal support."[205]

In reviewing the trial court's decision, the appellate court concluded that the trial court had properly considered the relevant

193. *Id*. at *3–4.
194. *Id*. at *5.
195. *Id*.
196. *Id*. at *4.
197. *Id*.
198. *Id*.
199. *Id*.
200. *Id*. at *4–5.
201. *Id*. at *5.
202. *Id*. at *5–6.
203. *Id*. at *6.
204. *Id*. at *7–8.
205. *Id*. at *8.

statutory factors.[206] A factor of particular importance to the trial court, the appellate court noted, was that Julie had been "a stay-at-home mother" while Scott "consistently worked long hours" during his career.[207] "Appellee ceased pursuing her own career and was the primary caregiver to the parties' children, managing the day-to-day events in the household almost entirely by herself."[208] Consequently, Julie's employment prospects were limited and her health problems intensified her limitations.[209] Another important factor was Scott's financial position, including the fact that he was remarried and sharing expenses, as well as income, with his new spouse.[210] The appellate court concluded, accordingly, that the trial court was correct in finding that Scott still retained the ability to pay the spousal support.[211] Like in the *Davis* case, then, a reduction in income did not result in a spousal support reduction because there was no showing that the payor was not able to meet the obligation.[212]

III. CHILDREN

A. *Child Support*

1. Significant Legislative Activity

This year, the legislature passed new bills—House Bill 1360[213] and Senate Bill 982[214]—that now require child support guideline worksheets to be placed in either the court or the Department of Social Services file. This rule also requires that the parties each

206. *Id*. at *11 (analyzing VA. CODE ANN. § 20-107.1(E) (Repl. Vol. 2016 & Supp. 2017)).

207. *Id*.

208. *Id*.

209. *Id*. at *11–12.

210. *Id*. at *12; *see also* Driscoll v. Hunter, 59 Va. App. 22, 34, 716 S.E.2d 477, 482 (2011) (stating that spousal support is not automatically reduced merely because a payor-spouse must "draw from other sources, such as the principal of investment or savings accounts"); Davis v. Davis, No. 0703-17-4, 2017 Va. App. LEXIS 313 (Dec. 12, 2017) (unpublished decision) (finding that trial court does not have to reduce spousal support if husband has to draw from non-wage assets or reduce the principal of investments).

211. *Giambattista*, 2018 Va. App. LEXIS 63, at *12.

212. *See id*. at *12–14.

213. Act of Feb. 26, 2018, ch. 22, 2018 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 20-108.2(B) (Cum. Supp. 2018)).

214. Act of Mar. 2, 2018, ch. 10, 2018 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 20-108.2(B) (Cum. Supp. 2018)).

receive a copy of the guideline worksheet.[215] This new rule is meant to ensure that, in the event of modification or enforcement motions, all parties can refer to the basis for the original child support award.[216]

2. Significant Judicial Decisions

In the realm of child support cases, most of the courtroom activity involved requests to modify. For example, in *Nashnoush v. Yousef*, a father sought to modify his child support payments downward after a change in employment.[217] Abdul Nashnoush ("Abdul") and Asma Yousef ("Asma") divorced in May 2016 and the final decree provided that Abdul would pay his ex-spouse $2355 monthly in child support for twelve months beginning May 1, 2016, $2255 per month for twenty-four months beginning May 1, 2017, and then $2237 per month "for as long as a child support obligation exists for three children, or until there is a material change in circumstances that results in a further order of the Court."[218] The decree also included language about the modifiability of the agreement:

> The parties jointly acknowledge that Husband suffered a stroke in February 2016 and is currently in rehabilitation. Husband was placed on short term disability beginning April 1, 2016, and will be receiving a maximum of 60% of his income for the duration of the disability benefit. Husband anticipates returning to full time employment in May 2016; however, his inability to do so shall be considered a material change in circumstance and the court shall have the authority to hold an evidentiary hearing to review the change and make any adjustments it deems appropriate retroactive to the date he provided Wife with written notice of the inability to return to regular employment.[219]

Only a month after the final decree was issued, Abdul filed a petition to reduce child support, stating that his employment had been terminated after he told his employer that he needed reasonable accommodations for his health.[220] During the trial regarding his request, Abdul testified that prior to his termination, he had been

215. VA. CODE ANN. § 20-108.2(B) (Cum. Supp. 2018).

216. *See id*. § 20-108.2(A)–(B) (Cum. Supp. 2018).

217. No. 1768-16-4, 2017 Va. App. LEXIS 190, at *4 (Aug. 1, 2017) (unpublished decision).

218. *Id*. at *2.

219. *Id*. at *2–3.

220. *Id*. at *4.

the "vice-president and head of national sales for [an] Islamic home finance provider."[221] In 2014, he earned $310,000, and in 2015 he earned $325,000.[222] Abdul also explained that, prior to his termination in 2016, his employer had given him two options.[223] One option was a severance package worth $170,000 with a signed one-year noncompete provision.[224] The other option was to take a job in Kentucky as an "area manager."[225] He would earn his same salary for the first year in Kentucky, and after that, would earn a lower salary in line with the decreased responsibility.[226] Abdul declined both offers and "found a job as vice-president with a competitor," earning substantially less than he had been with a base salary of $120,000 per year.[227] Abdul would, however, have the opportunity to earn bonuses in the future.[228] To support her case for no reduction in support, Yousef presented evidence from a vocational expert who stated that Abdul was "underemployed and that his earning capacity was approximately $240,000."[229] Ultimately, the circuit court found that there was "a material change in circumstances, but that modification of child and spousal support was not warranted" because Abdul was "voluntarily underemployed."[230] "And when you're voluntarily underemployed," the circuit court declared, "the court is not going to reduce [your] income or [your] obligations that [you] agreed to in this calendar year, less than six months ago."[231] The appellate court affirmed, concluding that the evidence supported the trial court findings.[232]

B. *Parenting and Adoption*

One adoption case this year stands out as interesting and important—*Geouge v. Traylor*.[233] The case, involving an adoption against the wishes of the birth mother, engaged the court in a

221. *Id*. at *5 (alteration in original).
222. *Id*.
223. *Id*.
224. *Id*.
225. *See id*.
226. *Id*. at *5–6.
227. *See id*.
228. *Id*. at *5–6.
229. *Id.* at *6.
230. *Id*.
231. *Id*. at *10.
232. *Id*. at *9–10.
233. 68 Va. App. 343, 808 S.E.2d 541 (2017).

lengthy analysis of the Indian Child Welfare Act ("ICWA") alongside application of the adoption rules.[234]

Jocelyn Geouge ("Jocelyn"), the mother in question, is the biological mother of L.T., her child with the father, Jason Traylor ("Jason").[235] Jocelyn had a long and difficult history with pain medication that led to her frequent incarceration.[236] She was "convicted of prescription fraud in late 2013 and again in March 2014.[237] Not long after, she was convicted of breaking and entering, several counts of larceny, and illegal possession of drugs."[238] In February 2015, she was sentenced to a total of ten years and sixty months, with all but one year and three months suspended and credit granted for time already served.[239] On February 18, 2015, while incarcerated, "the corrections medical unit informed [Jocelyn that she] was pregnant."[240] Jocelyn was released under six months later and was promptly convicted of identity fraud and obtaining drugs using a false name.[241] This resulted in a prison sentence, the bulk of it suspended except for six months.[242]

Because her pregnancy was high-risk, Jocelyn was placed on house arrest, but when she failed a drug-screening test, she was incarcerated.[243] While incarcerated, she gave birth to the child in question.[244] Jason, the father, at that point, stated he was willing to take the child.[245] The child was transferred to the father, but he quickly filed a "Petition to Accept Consent for Adoption and Transfer Custody," requesting the Juvenile and Domestic Relations Court to accept his consent for an adoptive family, the Griffiths, to adopt the baby.[246] Jocelyn subsequently filed a motion to stay, invoking the ICWA and "asserting that [Jocelyn's] father was 'known by the family to be of Cherokee descent,' but making no represen-

234. *Id.* at 347, 808 S.E.2d at 542 (analyzing 25 U.S.C. §§ 1901–1923 (2012)).
235. *Id.* at 347, 808 S.E.2d at 542.
236. *See id.* at 347–41, 808 S.E.2d at 543.
237. *Id.* at 347–48, 808 S.E.2d at 543.
238. *Id.* at 348, 808 S.E.2d at 543.
239. *Id.* at 348, 808 S.E.2d at 543.
240. *Id.* at 348, 808 S.E.2d at 543.
241. *Id.* at 348, 808 S.E.2d at 543.
242. *Id.* at 348, 808 S.E.2d at 543.
243. *Id.* at 348, 808 S.E.2d at 543.
244. *Id.* at 348, 808 S.E.2d at 543.
245. *Id.* at 348, 808 S.E.2d at 543.
246. *Id.* at 349, 808 S.E.2d at 544–45.

tation that either he or [Jocelyn] were members of a federally recognized Cherokee tribe."[247] The circuit court denied the stay after concluding that Jocelyn had not met the requirement of proving that the child was a member or eligible to be a member of a federally recognized tribe.[248] The burden of proof, the court noted, was on Jocelyn to show that the ICWA applied.[249]

The circuit court next held a hearing over two days "to address whether [Jocelyn] was withholding her consent to the adoption contrary to the best interests of L.T."[250] Mrs. Griffith testified about how the child was healthy and engaged, "playing cook, reading, taking walks, and occasional play dates."[251] The father testified that, while he had planned on parenting, he quickly "realized he would not be capable when also raising the other children."[252] He testified to the state of Jocelyn's home and her lifestyle: "He testified to observing fentanyl patches, empty pill capsules, and liquor at the residence."[253] Additionally, "[h]e commented on the condition of Geouge's mother's house when they resided there, noting that it had rotted wood, missing bricks, and mold."[254] He also testified to Jocelyn's violent temper and acts toward him, as well as the fact that she "inappropriately consumed cough syrup and had pawned some of the children's toys."[255] Based on the totality of this and other testimony, the circuit court concluded that Jocelyn was withholding her consent to the adoption contrary to the best interests of the child.[256] The adoption could, therefore, go forward.[257] Jocelyn filed a motion to reconsider that the circuit court denied; the adoption was finalized, and this appeal ensued.[258]

The two major issues the Court of Appeals of Virginia analyzed were the application of the ICWA and whether the lower court had properly determined that Jocelyn's withholding her consent to the

247. *Id.* at 351, 808 S.E.2d at 544–45.
248. *Id.* at 352, 808 S.E.2d at 545.
249. *Id.* at 352, 808 S.E.2d at 545.
250. *Id.* at 352, 808 S.E.2d at 545.
251. *Id.* at 352, 808 S.E.2d at 545.
252. *Id.* at 353, 808 S.E.2d at 545.
253. *Id.* at 353, 808 S.E.2d at 545.
254. *Id.* at 353, 808 S.E.2d at 545. "He acknowledged that he could not say whether there had been improvements made after he moved out." *Id.* at 353, 808 S.E.2d at 545.
255. *Id.* at 353, 808 S.E.2d at 545–46.
256. *Id.* at 358, 808 S.E.2d at 548.
257. *Id.* at 358, 808 S.E.2d at 548.
258. *Id.* at 358–59, 808 S.E.2d at 548.

adoption had been contrary to the best interests of the child.[259] The court of appeals began with an examination of the ICWA, which it noted had been enacted in 1978 "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families."[260] The general rule, the court stated, was that the party seeking the protection of the statute bore the burden of demonstrating its applicability.[261] "Despite this [rule]," the court continued, "[W]e disagree with the[] assertion that the invoking party must 'prove' that the child is an 'Indian child' before any provisions of the Act are implicated."[262] The court remarked that "recently adopted regulations implementing the Act" do not require actual proof that the child is a tribe member or eligible to be one.[263] The standard, instead, is whether or not the person invoking the ICWA knows or has "reason to know."[264] All that was required of Jocelyn, then, was to "assert in good faith a belief that the child 'is an "Indian child."'"[265] The problem was, the court concluded, that neither Jocelyn nor "her counsel ever made such an assertion."[266] The ICWA argument, therefore, failed.[267]

The court of appeals also addressed the circuit court's determination that the adoption going forth without Jocelyn's consent had been in the best interest of the child.[268] Best interest in the adoption context, the court commented, differed from best interest in a custody case because of the gravity of the terminating a parental relationship.[269] In the adoption context, the trial court was to consider both the interests of the parent as well as the child.[270] Adopting this baseline of serious inquiry into the needs and capacities of

259. *Id*. at 359–60, 808 S.E.2d at 549.

260. *Id*. at 360–61, 808 S.E.2d at 549 (quoting 25 U.S.C. § 1902 (2012)).

261. *Id*. at 363, 808 S.E.2d at 550.

262. *Id*. at 364, 808 S.E.2d at 551.

263. *Id*. at 365, 808 S.E.2d at 551.

264. *Id*. at 363–64 n.6, 808 S.E.2d at 551 n.6.

265. *Id*. at 367, 808 S.E.2d at 552.

266. *Id*. at 367, 808 S.E.2d at 552.

267. *Id*. at 368, 808 S.E.2d at 553.

268. *Id*. at 368–69, 371, 808 S.E.2d at 553–54.

269. *Id*. at 370, 808 S.E.2d at 554 ("[[T]he statutory requirements] encompass far more than mere consideration of the child's best interests as defined in cases involving a contest between natural parents." (first alteration in original)).

270. *Id*. at 370, 808 S.E.2d at 555.

> [I]n determining whether the valid consent of any person whose consent is required is withheld contrary to the best interests of the child . . . , the circuit

both the parent and child, the appellate court observed that the circuit court had "heard the testimony of more than twenty witnesses over the course of a two-day trial."[271] "In addition to the testimony, more than thirty exhibits, ranging from medical records to home visit reports, were admitted and reviewed by the circuit court."[272] Jocelyn did not challenge any of the findings that the court made based on all of the evidence; rather, she challenged the ultimate conclusion, arguing that the circuit court "failed to fully appreciate" her recovery and progress.[273]

The appellate court's response was this: "This argument misunderstands our role on appeal."[274] "Although the circuit court could have made different factual findings regarding the statutory factors or weighed the significance of the factors differently, nothing in the statutory scheme required it to do so."[275] The circuit court exercised its discretion appropriately in making all the relevant determinations, the appellate court stated—adding that, "[e]ven if we might have rendered different factual findings or weighed the statutory factors differently, we will not second-guess the circuit court's exercise of judgment regarding the statutory factors."[276] The Griffiths' adoption of the child stood.[277]

> court or juvenile and domestic relations district court, as the case may be, shall consider whether granting the petition pending before it would be in the best interest of the child. The circuit court or juvenile and domestic relations district court, as the case may be, shall consider all relevant factors, including the birth parent(s)' efforts to obtain or maintain legal and physical custody of the child; whether the birth parent(s) are currently willing and able to assume full custody of the child; whether the birth parent(s)' efforts to assert parental rights were thwarted by other people; the birth parent(s)' ability to care for the child; the age of the child; the quality of any previous relationship between the birth parent(s) and the child and between the birth parent(s) and any other minor children; the duration and suitability of the child's present custodial environment; and the effect of a change of physical custody on the child.

Id. at 369, 808 S.E.2d at 553–54 (citing VA. CODE ANN. § 63.2-1205 (Repl. Vol. 2017 & Cum. Supp. 2018)).

271. *Id*. at 370–71, 808 S.E.2d at 554.

272. *Id*. at 371, 808 S.E.2d at 554.

273. *Id*. at 371–72, 808 S.E.2d at 554–55.

274. *Id*. at 372, 808 S.E.2d at 555.

275. *Id*. at 372, 808 S.E.2d at 555.

276. *Id*. at 372, 808 S.E.2d at 555.

277. *Id*. at 372, 808 S.E.2d at 555.

CONCLUSION

In conclusion, Virginia courts at every level continue to grapple with claims about marriage, divorce, and parenting. These claims concern procedures around entry into marriage, financial sharing and disclosure between spouses, and the right to parent. These claims, more broadly, reflect new patterns in economic partnership, continuing questions about what one spouse owes to another, and what constitutes the marital relationship.