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Meet the New Juvenile and Domestic Relations District Court

Ingrid Michelsen Hillinger

MEET THE NEW JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT

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I. INTRODUCTION

Without trumpet or even modest fanfare, the 1981 Virginia General Assembly passed two new subsections to Title 16.1 of the Code of Virginia, amending the jurisdiction of the juvenile and domestic relations district courts (hereinafter cited as J & DR). Despite their uncontroversial passage, they portend significant changes for the J & DR court and the circuit court as well, and have generated surprise and bewilderment among the J & DR court judges.[1] This article explores the meaning of the amendments and their long-term implications.

II. THE AMENDMENTS

The amendments provide that the J & DR district courts shall have exclusive jurisdiction over all proceedings involving "[a]ny person who seeks spousal support after having separated from his or her spouse."[2] The parallel dispositional provision states that "[i]n cases involving a spouse who seeks spousal support after having separated from his or her spouse, the court may enter any appropriate order to protect the welfare of the spouse seeking support."[3] This fundamentally alters the jurisdiction and work of the J & DR court, authorizing its intrusion into the hitherto sacrosanct domain of the circuit court. In fact, these amendments may represent the first, albeit unwitting, step toward a true family law court in Virginia.

A. *Do the Amendments Establish a New Right?*

Virginia traditionally has denied support to a spouse guilty of

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1. The fall 1981 district court judges' conference devoted a full morning session to these amendments. The Honorable Richard Jamborsky of the 19th Judicial Circuit and this author led the discussion.

2. VA. CODE ANN. § 16.1-241(L) (Cum. Supp. 1981).

3. VA. CODE ANN. § 16.1-279(M) (Cum. Supp. 1981).

marital fault.[4] Read literally, the new amendments empower the J & DR court to enter *any* appropriate spousal support award to *any* separated spouse whose welfare requires protection. The new provisions do not mention marital fault, a pivotal issue in circuit court proceedings considering support.[5] Because they do not mention marital fault, they could be interpreted as establishing a new substantive right, namely, a spouse's right, regardless of marital fault, to seek support after separation if his or her welfare requires it.

Although this interpretation is possible, it is improbable. For one thing, noise and flurry generally accompany the creation of a new substantive right. These amendments crept in quietly, hardly a likely entry for a new right, especially one so radically different from that which existed before. Presumably, if the amendments were intended as a revolutionary departure from prior law, they would have sparked some controversy. Yet there was no apparent controversy surrounding their enactment. Furthermore, if the amendments do authorize a right to support regardless of fault, they would produce an anomalous situation. The General Assembly did not amend section 20-107, the statutory provision delineating circuit court powers with respect to civil support, and section 20-107 explicitly precludes the possibility of support for a spouse guilty of marital fault.[6] It would be incongruous to assume that the General Assembly intended fault to be determinative in circuit court, the traditional arena for pitched support battles, and irrelevant in J & DR court. In short, it seems most reasonable and probable to conclude that the amendments do not create a new substantive right cognizant in J & DR court.[7]

The sponsor of the bill giving rise to the amendments stated that they did not.[8] Delegate Clinton Miller stated that he proposed

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4. *See, e.g.*, House v. House, 102 Va. 235, 46 S.E. 299 (1904); Harris v. Harris, 72 Va. (31 Gratt.) 13 (1878); A. PHELPS, DIVORCE AND ALIMONY IN VIRGINIA AND WEST VIRGINIA § 11-3 (2d ed. 1963). In this, Virginia followed the English common law approach. 1 BLACKSTONE, COMMENTARIES 429 (1st ed. 1765, reprinted 1966) (where wife was at fault, she was not entitled to alimony).

5. VA. CODE ANN. § 20-107 (Cum. Supp. 1981) provides that '" . . . no permanent support and maintenance . . . for the spouse shall be awarded . . . from a spouse if there exists in his or her favor a ground of divorce. . . ."

6. VA. CODE ANN. § 20-107 (Cum. Supp. 1981).

7. Undoubtedly, some enterprising attorney will argue for the improbable interpretation. The broad, vague language of the amendments invites it. And, of course, some J & DR court may find the improbable quite likely.

8. Delegate Clinton Miller from the Shenandoah Valley sponsored the bill, HB 1757. Both Judge Jamborsky and the author spoke independently with Mr. Miller about these amend-

the bill to obviate a spouse's need to go to circuit court for support when that spouse was already litigating other matters in J & DR court. Delegate Miller noted that the bill was intended to give the J & DR court concurrent jurisdiction over civil support. It simply authorizes the J & DR court to award support comparable to that already available in circuit court. No new substantive right was intended, no major change was contemplated. He also said that the Legislature had no intention of conferring exclusive original jurisdiction on the J & DR court. Of course, as Lord Mildew once said, "[i]f Parliament does not mean what it says it must say so."[9] Although it is helpful to know the legislative intentions and motivations behind these amendments, legislative history as such does not exist in Virginia. The statutory language alone provides the basis for interpretation. Section 16.1-241 provides that the J & DR courts shall have *exclusive original* jurisdiction over these new proceedings and neither subsection makes any reference to marital fault.[10] Absent further legislative action, the ultimate meaning of these new amendments rests with the Virginia Supreme Court. At this moment, only two things are clear: whatever the new proceedings entail, they must be brought initially in J & DR court, and they can only be brought after the spouses' separation.

B. *If the Amendments Do Not Establish a New Right, What Do They Mean?*

Assuming that the amendments do not establish a new right, it is necessary to ask what existing right is now available in J & DR court. The support right in question must relate to *civil* support because the J & DR court already had exclusive original jurisdiction over criminal support proceedings.[11] The "old" right to civil support, newly available in J & DR court, cannot arise from juris-

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ments. He proposed the bill in response to a complaint he received from two local attorneys. They were representing a wife in J & DR court and had requested support for her. The J & DR court refused to entertain the support petition holding that it did not have jurisdiction to award civil support.

9. *Bluff v. Father Gray*, A. HERBERT, THE UNCOMMON LAW 313 (1935).

10. VA. CODE ANN. §§ 16.1-241(L) to 279(M) (Cum. Supp. 1981).

11. VA. CODE ANN. § 20-61 (Cum. Supp. 1981) makes a misdemeanor the willful, unjustifiable refusal to provide support for a spouse in necessitous circumstances. VA. CODE ANN. § 20-72 (Repl. Vol. 1975) authorizes the J & DR court to enter a support award against the defendant spouse in lieu of or in addition to the criminal penalties. VA. CODE ANN. § 20-67 (Repl. Vol. 1975) gives the J & DR courts exclusive original jurisdiction over such proceedings. If the amendments related to criminal support proceedings, they would be superfluous. To be meaningful, they must relate to *civil* support.

diction to adjudicate the parties' marital status. The new amendments do not give the J & DR court power to annul, affirm or dissolve the marriage and according to section 20-96, the circuit court has exclusive jurisdiction over such suits.[12] Therefore, by a process of elimination, these amendments must involve a right to civil support which exists independently of a divorce, annulment or affirmation proceeding. In Virginia, there is only one such existing right to civil support. It is the common law right to separate maintenance. Historically, a wife, independently of a suit for divorce, could seek support from her husband by instituting a bill for separate maintenance.[13] Reasoning from these facts, the amendments seem to give the J & DR courts exclusive original jurisdiction over separate maintenance suits.

C. *Ramifications of Expanded Jurisdiction*

By vesting the J & DR court with exclusive original jurisdiction over separate maintenance, the amendments take away a significant, long-standing power of the circuit court. They fundamentally alter the traditional balance of power and operational spheres of the two courts. Jurisdiction to award separate maintenance entails jurisdiction to determine marital fault. A long line of Virginia cases establishes that a wife is entitled to separate maintenance only if she lives separate and apart from her husband, without fault on her part.[14] As early as 1810, the Virginia Supreme Court said that a wife was entitled to "alimony" only "if without any impropriety of behavior on her part, he [the husband] had separated himself from her without affording to her any support."[15] In Virginia, freedom from marital fault is the touchstone of any separate maintenance action. Thus, if the amendments confer separate mainte-

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12. VA. CODE ANN. § 20-96 (Cum. Supp. 1981) states in pertinent part: "The circuit court, on the chancery side thereof, shall have jurisdiction of suits for annulling or affirming marriages and for divorces."

13. *See, e.g.*, White v. White, 181 Va. 162, 24 S.E.2d 448 (1943) (alimony is not a mere incident of divorce but instead an independent substantive right); Heflin v. Heflin, 177 Va. 385, 14 S.E.2d 317 (1941) (Virginia divorce and non-support statutes have not abridged the jurisdiction of equity courts in suits for separate maintenance); Jolliffe v. Jolliffe, 10 Va. Law Reg. 1098 (1905) (equitable jurisdiction to award alimony exists independently of divorce: court can award it even if there is no prayer for divorce and no jurisdiction to grant a divorce); Williams v. Williams, 188 Va. 543, 50 S.E.2d 277 (1948); see also Purcell v. Purcell, 14 Va. (4 Hen. & M.) 507 (1810). *See also*, A. PHELPS, *supra* note 5, at § 12-1.

14. *See, e.g.*, Aichner v. Aichner, 215 Va. 624, 212 S.E.2d 278 (1975); Montgomery v. Montgomery, 183 Va. 96, 31 S.E.2d 284 (1944); Hendry v. Hendry, 172 Va. 368, 1 S.E.2d 340 (1939). *See also*, A. PHELPS, *supra* note 5, at § 12-2.

15. Purcell v. Purcell, 14 Va. (4 Hen. & M.) 507, 507-08 (1810).

nance jurisdiction on the J & DR court,[16] they *ipso facto* give the J & DR court jurisdiction to determine marital fault. Once the exclusive preserve of the circuit court, now the whole body of common law relating to marital fault will apply in J & DR court, although detached from its traditional mooring, the divorce proceeding. Indirectly, the amendments involve the J & DR court in all of the statutory grounds for divorce and the permitted common law defenses of condonation, connivance, collusion, recrimination, the absence of corroboration, etc. In effect, the amendments blur the two courts' traditionally distinct legal domains. Both courts now are authorized to determine two of the most significant aspects of the "domestic relation," fault and support.

A J & DR court determination under these amendments could bind the circuit court. A right of *de novo* appeal does exist from J & DR court to circuit court,[17] however, if no appeal were taken, a J & DR court finding of fault would bind the circuit court under traditional legal principles.[18] Unappealed, a J & DR court determination of fault would preclude a later circuit court inquiry into fault for purposes of either support or divorce. The amendments, therefore, significantly expand the breadth and depth of J & DR court involvement in domestic relations. They indirectly sanction J & DR court encroachment upon the circuit court's once hallowed and exclusive authority to determine marital fault and to award or deny a fault divorce. Clearly, the amendments have potentially far-reaching consequences for the J & DR court, the circuit court and the balance of judicial power with respect to domestic relations matters. In the absence of an appeal, the J & DR court could forever establish or preclude a spouse's right to support; it could establish or preclude a spouse's ability to obtain a fault divorce in circuit court.

The potentially enhanced significance of J & DR court determi-

16. At common law, the wife alone had a right to seek separate maintenance because only the husband owed a duty of support. H. CLARK, LAW OF DOMESTIC RELATIONS § 14.1 (1968). The amendments speak of "spouse" not wife. Strictly speaking, then, they are not coterminous with separate maintenance. They are broader. This no doubt reflects the General Assembly's attempts since 1975 to make Virginia's laws sexually neutral. It also follows the mandate established by the United States Supreme Court in Orr v. Orr, 440 U.S. 268 (1979).

17. VA. CODE ANN. §§ 16.1-106, -113 (Cum. Supp. 1981).

18. The traditional legal principle would be "estoppel by judgment" rather than *res judicata*. A suit for separate maintenance would be a different cause of action from a divorce suit even though the parties would be the same. Therefore, *res judicata* would not apply. As to issues actually litigated and determined in the original action, however, estoppel by judgment would preclude their relitigation. A. PHELPS, *supra* note 5, at § 15-5.

nations may affect the J & DR court's actual daily operations. Parties can and frequently do appear without counsel in J & DR court. In a proceeding under these amendments, parties would be ill-advised to do so because of the potentially high stakes and complex issues. So too, as a "court not of record," the J & DR court hitherto has not created a written record of its proceedings. Since, under this proceeding, its determination may be binding, the J & DR court should give a written opinion. In terms of practical consequences, these amendments push the J & DR court closer to "full courthood" status. The actual proceedings in J & DR court may be indistinguishable from proceedings in circuit court, thereby further blurring the historic lines of demarcation between the two. Only two distinctions remain to differentiate the two courts: the circuit court retains exclusive jurisdiction to adjudicate the parties' marital status, and it has the power to vitiate the work of the J & DR court if a *de novo* appeal is taken.

III. The New J & DR Court—Proposals to Finish the Job

Regardless of interpretation, the 1981 amendments seem clearly intended to promote judicial economy. To achieve this laudable purpose, however, further steps are necessary and appropriate to help clear up the confusion they have generated.

A. *The Legislature Should Confer Divorce Jurisdiction on the J & DR Court*

Under the 1981 amendments, the J & DR court can adjudicate marital fault. In short, at this moment, the J & DR court has the power to do everything but grant a divorce. In light of its existing powers, it seems irrational, in fact, uncommonly silly, to deny it divorce jurisdiction. By its own enactments, the Legislature has recognized J & DR court competence to adjudicate all of the relevant, important domestic relations issues. Having gone this far, the Legislature should consider completing the job, and confer divorce jurisdiction on the J & DR court.

In addition to satisfying the superficial issue that a court's name should accurately portray its function, it would make logical and economical sense to have a single court which specialized in all aspects of domestic relations. J & DR court jurisdiction over all domestic relations questions would free the circuit court to consider other matters. In addition, it would eliminate some of the shuffling between the two courts. There is no apparent reason for not giving

divorce jurisdiction to the J & DR court. In enacting section 20-79, the Legislature tacitly acknowledged that J & DR courts were better suited to enforce domestic relations decrees regarding custody, support and maintenance.[19] Section 20-79(c) currently empowers the J & DR court to make initial determinations of support and custody[20] under some circumstances. It also authorizes the J & DR court to modify a prior circuit court decree.[21]

At one time, perhaps, it made sense to deny divorce jurisdiction to the J & DR court. That time, however, has passed. In 1973, Virginia reorganized and reformed its district courts.[22] As a result, full-time judges with legal training now preside over each court. The J & DR courts now are fully competent to handle divorce jurisdiction. Such jurisdiction would benefit the citizens of Virginia. It would provide spouses with access to an expert, inexpensive forum which could provide complete relief.[23] Circuit court involvement is no longer inherently necessary. J & DR court jurisdiction is eminently rational.

B. *De Novo Review to the Circuit Court Should Be Eliminated*

De novo review from J & DR court to circuit court also is not necessary. Although no one seriously would question the need for appellate review, the issue of *de novo* review is controversial. Frequently it makes J & DR court proceedings a dress rehearsal. It causes tremendous duplication of judicial time and energies. It lowers the self-esteem of J & DR court judges. Their hard work and serious deliberations become worthless if an appeal is noted.[24] The new amendments accentuate the problems created by *de novo* review. Unlike custody which, at the petitioner's election, can be brought in circuit court and unlike divorce which must be brought

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19. VA. CODE ANN. § 20-79(c) (Cum. Supp. 1981) authorizes the circuit court to transfer its orders for support and custody to the J & DR court for enforcement. The Virginia Supreme Court interpreted § 20-79(c) as an overt recognition of the J & DR court's supervisory and enforcement abilities. Werner v. Commonwealth, 212 Va. 623, 186 S.E.2d 76 (1972).

20. VA. CODE ANN. § 20-79(c) (Cum. Supp. 1981).

21. *Id.*

22. COMMONWEALTH OF VIRGINIA STATE OF THE JUDICIARY REPORT (1980) (annual address by Virginia Supreme Court Chief Justice I'Anson).

23. Court filing fees as well as attorney's fees are considerably lower for J & DR court than circuit court.

24. "The judgment of the trial justice is completely annulled by the appeal and is not thereafter effective for any purpose." Addison v. Salyer, 185 Va. 644, 650, 40 S.E.2d 260, 263 (1946).

in circuit court, all suits for separate maintenance must be brought initially in J & DR court.[25] Because the amendments require that everyone go there, and the stakes are potentially high, many litigants will appeal; the work of the J & DR court will be undone. These amendments verily multiply the potential duplication of time and effort inherent in *de novo* review.

The problem of duplication of effort with respect to separate maintenance actions has more than academic importance. Separate maintenance actions are not a remembrance of things past. The Virginia Supreme Court recently has recognized the critical importance of separate maintenance as a support tool.[26] In an *ex parte* foreign divorce situation, a Virginia spouse can protect and enforce his or her support rights only through the vehicle of separate maintenance.[27] In addition, 1981 amendments to Virginia's long-arm statute[28] portend that an increasing number of separate maintenance actions will be brought in Virginia. Separate maintenance actions are an important, vital aspect of Virginia domestic relations law. Under the section 16.1 amendments, the authority, involvement and work load of the J & DR court in domestic relations matters will increase substantially. Paradoxically, because of *de novo* review, the circuit court's power to nullify that work will increase concomitantly.

C. *The Authority of the New J & DR Court Should be More Clearly Delineated*

The amendments fail to delineate the court's exact authority. They do not mention the court's ability to modify an existing order in light of changed circumstances, nor do they discuss the effects on an original order of an obligor or obligee's death or the obligee's remarriage. They do not address the effect of a separation agreement upon the court's authority to enter a separate maintenance award. In each of those situations, statutory provisions limit circuit

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25. VA. CODE ANN. § 16.1-241 (Cum. Supp. 1981). The provision on jurisdiction provides in pertinent part: "Except as hereinafter provided, each juvenile and domestic relations district court shall have, within the limits of the territory for which it is created, exclusive original jurisdiction . . . over all cases, matters and proceedings involving . . . ."

26. Newport v. Newport, 219 Va. 48, 245 S.E.2d 134 (1978). *See also* A. PHELPS, *supra* note 5, at § 12-1.

27. *See* Hosier v. Hosier, 221 Va. 827, 273 S.E.2d 564 (1981); Newport v. Newport, 219 Va. 48, 245 S.E.2d 134 (1978); Osborne v. Osborne, 215 Va. 205, 207 S.E.2d 875 (1974).

28. VA. CODE ANN. § 8.01-328.1(9) (Cum. Supp. 1981).

court jurisdiction.[29] In the interests of symmetry, consistency and social policy, the existing limitations on circuit court jurisdiction should apply to the J & DR court. If they do not,[30] case law on separate maintenance may serve the same function. The Virginia Supreme Court stated in dictum that separate maintenance awards were fluid and subject to modification. "The right of the wife during coverture to support and maintenance . . . is uncertain in duration, lasting possibly a day, a month, or a year or more. It ceases entirely upon the death of either husband or wife."[31] Whether by statute or case law the existing restrictions on circuit court power should govern the J & DR court to avoid serious and socially objectionable discrepancies.

The amendments create another curious problem. Prior to the amendments, the circuit court could entertain a bill for divorce and a cross-bill for separate maintenance. In fact, the Virginia Supreme Court encouraged such economy of law suits.[32] Under the amendments, that is no longer possible. Even though section 20-107 still authorizes the circuit court to award support in the event a divorce is not granted,[33] its award cannot be denominated separate maintenance because any request for separate maintenance must be made initially in J & DR court. If the J & DR court acquired separate maintenance jurisdiction before the circuit court acquired divorce jurisdiction, the J & DR court would be entitled to complete its deliberations.[34] If no appeal were taken, the J & DR court determination of fault would bind the circuit court. If an appeal were taken, the circuit court would have to relitigate the separate maintenance action. It could entertain the divorce action only after resolution of the separate maintenance question. Thus, at a minimum two and at a maximum three law suits would be required, where before one would have sufficed. Because separate maintenance is a transitory action,[35] the domicile and residency re-

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29. *See* VA. CODE ANN. §§ 20-109, -107 (Cum. Supp. 1981).

30. The statutory provisions circumscribing the circuit court's support power may not apply to its separate maintenance powers because separate maintenance is a non-statutory, equitable right. Montgomery v. Montgomery, 183 Va. 96, 315 S.E.2d 284 (1944); Heflin v. Heflin, 177 Va. 385, 14 S.E.2d 317 (1941); *contra,* A. PHELPS, *supra* note 5, § 12-12.

31. Eaton v. Davis, 176 Va. 330, 340, 10 S.E.2d 893, 898 (1940) (*dictum*).

32. Brewer v. Brewer, 199 Va. 626, 101 S.E.2d 516 (1958).

33. VA. CODE ANN. § 20-107 (Cum. Supp. 1981).

34. Westfall v. Westfall, 196 Va. 97, 82 S.E.2d 487 (1954). *See* A. PHELPS, *supra* note 5, at § 12-2.

35. Goodwine v. Sup. Ct. of Los Angeles, 63 Cal. 2d 481, 407 P.2d 1, 47 Cal. Rptr. 20 (1965); Jolliffe v. Jolliffe, 10 Va. Law Reg. 1098 (1905); *See also* A. PHELPS, *supra* note 5, at

quirements for divorce jurisdiction do not apply to it. Separate maintenance jurisdiction can exist even though divorce jurisdiction does not exist. Thus, the likelihood is great that the J & DR court will frequently assume jurisdiction before the circuit court could. The amendments entail consequences which become "curiouser and curiouser." The transitory nature of the separate maintenance action also makes it possible for a court wholly unrelated to divorce jurisdiction to decide the fundamental issues of divorce, fault and support.[36]

D. *The Authority of the Circuit Court to Extinguish J & DR Support Orders Should Be Redefined*

The amendments create another theoretical thicket. Prior to the amendments, the circuit court in a subsequent proceeding could extinguish any prior J & DR court support order.[37] One might assume that the circuit court would have comparable power with respect to J & DR court support orders entered under the new amendments. That assumption, however, is questionable. Section 20-79(a) states in pertinent part:

> In any case where an order has been entered *under the provisions of this chapter,* directing either party to pay any sum or sums of money for the support of his or her spouse . . . the jurisdiction of the court which entered such order shall cease and its orders become inoperative. . . .[38]

Support orders entered under the new amendments will not be orders "entered under the provisions of this chapter," i.e., chapter five. They will be orders entered under section 16.1. Section 20-79(a) only refers to J & DR court support orders entered under sections 20-61 through 20-88, the criminal non-support provisions.[39] Thus, by negative implication, J & DR court support orders entered under section 16.1 will continue to exist despite a subsequent circuit court award of support.

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§ 12-6.

36. Any J & DR court could enter a valid separate maintenance award if no objection to venue were made.

37. VA. CODE ANN. § 20-79(a) (Cum. Supp. 1981).

38. *Id.* (emphasis added).

39. VA. CODE ANN. §§ 20-61 to -88 (Repl. Vol. 1975).

IV. CONCLUSION

It seems fair to conclude that the ramifications of this recent legislation were neither intended nor contemplated. Once the General Assembly appreciates what it has done, it could repeal the amendments returning the situation to the *status quo ante*. If it did that, a spouse in J & DR court would have to institute a separate circuit court proceeding to obtain civil support.[40] On the other hand, it could retain the new amendments but enact further legislation to alleviate some of their problems. For example, the Legislature could articulate the precise boundaries of J & DR court authority with respect to separate maintenance suits. It could make separate maintenance jurisdiction concurrent with circuit court jurisdiction. It could amend section 20-79(a) to allow circuit court nullification of J & DR court orders entered under section 16.1. Even if the Legislature did all that, however, the 1981 amendments still would fundamentally affect both the J & DR court and the circuit court. If a spouse elected to proceed in J & DR court, that court still would have to consider legal issues traditionally reserved solely for circuit court determination. So, too, the J & DR court determination would continue to bind the circuit court if an appeal were not taken. Short of their repeal, nothing can eliminate the significant changes wrought by the 1981 amendments. As a final alternative, the Legislature could carry to completion what it unwittingly began with these amendments. It could give the J & DR court original jurisdiction over divorce, annulment and affirmation suits thereby making it a true family law court. Creation of one court with full responsibility to adjust the domestic relation and determine and enforce the rights and liabilities flowing from that relation would eliminate many of the problems generated by the amendments and the present system in general. It also could abolish *de novo* review and provide for traditional appellate review. The establishment of a true family law court would vastly simplify and improve the present situation. Greater access to a court with full expertise is a desirable objective. The General Assembly should pursue it . . . with vigor and haste.

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40. A spouse could institute *criminal* non-support proceedings against the other spouse in J & DR court under VA. CODE ANN. §§ 20-61 through -88 (Cum. Supp. 1981).