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Nicole Spain

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WHAT'S A WOMAN TO DO?: A LOOK AT PRIVATE CHILD SUPPORT AGREEMENTS IN VIRGINIA

NICOLE SPAIN

Over the years, state legislatures drastically changed family law guidelines in order to protect the interest of mothers and their children.¹ This phenomenon occurred in part because of a paradigm shift in belief about the rights of mothers and their dependent children.² In the past, the law recognized children as property of their fathers, but today mothers have input and control over issues regarding their children, especially post-divorce.³ As a result of the history and treatment of women in the past, state legislatures and courts, including the Virginia Legislature, developed and upheld statutes concerning child custody and child support that are gender neutral.⁴ Women benefit more from these statutes, however, because courts award most women physical custody of the children post-divorce.⁵ The Virginia Legislature established child support guidelines to keep mothers and children out of poverty post-divorce and to ensure that fathers remained at least financially responsible for their children.⁶ These guidelines are important because the Legislature did not think that all private agreements created between parents sufficiently protected women and their children.⁷ As a result, Virginia courts invalidated many private agreements in favor of the statutory guidelines.⁸ Virginia courts also held that the

1. See generally MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987) (discussing the cultural reasons for society's change in view that women are less than equal partners in marriage).

2. MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 16-18* (1994).

3. *Id.* at xv.

4. See VA. CODE ANN. §§ 20-108.1, 20-108.2 (Michie 2001), for a look at child support statutes that refer to the parents as parties. The statutes' drafters do not presume the gender of the custodial parent.

5. See MASON, *supra* note 2, at 16-17.

6. See *Kelly v. Kelly*, No. 7952, 1993 WL 946122, at *1 (Va. Cir. Ct. June 21, 1993).

7. See *id.*

8. *E.g.*, *Shoup v. Shoup*, 542 S.E.2d 9, 12 (Va. Ct. App. 2001) (holding divorced parties may not automatically modify a support order without court approval); *Riggins v. O'Brien*, 538 S.E.2d 320, 324 (Va. Ct. App. 2000) (holding parties must gain court approval of support modifications); *Solomond v. Ball*, 470 S.E.2d 157, 160 (Va. Ct. App. 1996) (holding that a court could not issue an order which automatically changes the support amount); *Goodpasture v. Goodpasture*, 371 S.E.2d 845, 848 (Va. Ct. App. 1988) (holding that parties, by their own agreement, could not modify the terms of the support order); *Kelly v. Kelly*, No. 7952, 1993 WL 946122, at *1 (Va. Cir. Ct. June 21, 1993) (holding a party may not unilaterally reduce a support amount). These cases represent that Virginia courts consider modification of

courts may not order an automatic future increase or decrease in support.⁹

Richard Byrd, member of the Virginia Bar Association's Coalition Committee on Family Law Legislation, proposed amendments to statutes sections 20-108.1 and 20-108.2 of the Virginia Code to address the above issue as they relate to agreements between parties settling child support issues.¹⁰ His proposed amendments will require courts to meet the same standard in overturning divorce agreements, as the court now must meet to deviate from the presumptive guidelines.¹¹

Part I of this note will explore the effect divorce has on women and the reasons why women have less bargaining power than men do. Part II will provide an analysis of Virginia's current child support statutes and Virginia courts assessment of unapproved private agreements. Part III will provide an analysis of the proposed amendments. Finally, Part IV will discuss the probable effect of the proposed amendments on women, if adopted.

I. EFFECTS OF DIVORCE ON WOMEN

Western society regarded women throughout history as the weaker sex.¹² Society structured women's lives to ensure their dependency on men.¹³ Women had no legal identity of their own.¹⁴ While women's fathers, and later their husbands, would be their voices, those men did not necessarily communicate the ideas and feelings of the women they purported to represent. Society pushed women into the background.¹⁵ The public sphere was uninviting of female involvement.¹⁶ As a result, women became financially and many times psychologically dependent on their husbands.¹⁷ If husbands were good providers, women did not have to worry about supporting themselves and their children. Husbands were responsible for maintaining a comfortable standard of living for their

support awards by the parties against public policy. Parties must petition the court whenever there is a substantial change in circumstances. The noncustodial parent is not entitled to any credits for overpayment based on any private modification agreement.

9. *Keyser v. Keyser*, 345 S.E.2d 12, 14 (Va. Ct. App. 1986).

10. VA. CODE ANN. § 20-108.1 (Proposed Amendment 2001); VA. CODE ANN. § 20-108.2 (Proposed Amendment 2001).

11. VA. CODE ANN. § 20-108.1 (Proposed Amendment 2001).

12. *See, e.g.*, ANTONIA FRASER, *THE WEAKER VESSEL* 1 (1984).

13. MASON, *supra* note 2, at 14-15.

14. *Id.*

15. *Id.*

16. *Id.* at 15.

17. *Id.* at 14-15.

families.¹⁸ This approach to marital life worked out well, in a sense, when marriages lasted “until death do us part.” Today, however, when people complain about the loss of family values and high divorce rates,¹⁹ women take a great risk relying on the old approach to marital life. Today, women continue to play the more traditional role of wife and mother, performing at least twice the amount of routine housework as their male counterparts.²⁰ Unfortunately, divorce settlement negotiations do not fully protect women’s interests.²¹

The Financial Effect of Divorce

Divorce devastates many women financially.²² Divorce often results in a drastic decline from the marital standard of living, which often leaves women and their dependent children impoverished.²³ Although divorce decrees concerning distribution of property, child custody, and child support have improved over time,²⁴ they still need reformation.²⁵ Most marriages that end in divorce occur while the couples still have minor children.²⁶ Alone,

18. *Id.* at 13.

19. See Arland Thornton, *Comparative and Historical Perspectives on Marriage, Divorce, and Family Life*, 1994 UTAH L. REV. 587, 595 (1994) (predicting that one half of all marriages in the United States will end in divorce) (citing ANDREW J. CHERLIN, *MARRIAGE, DIVORCE, REMARRIAGE*, 24 (1992) and Larry L. Bumpass, *What's Happening to the Family, Interactions Between Demographic and Institutional Change*, 1990 Presidential Address before the Population Association of America, 27 DEMOGRAPHY 483, 485 (1990)). See also Gary B. Melton, *Children, Families, and the Courts in the Twenty-First Century*, 66 S. CAL L. REV. 1993, 2011 n.87 (1993) (noting that two-thirds of all marriages will end in divorce or separation) (citing Teresa Castro Martin & Larry L. Bumpass, *Recent Trends in Marital Disruption*, 26 DEMOGRAPHY 37, 40-41 (1989)).

20. Penelope Eileen Bryan, *Vacant Promises?: The ALI Principles of the Law of Family Dissolution and the Post-Divorce Financial Circumstances of Women*, 8 DUKE J. GENDER L. & POL'Y 167, 170 (2001) [hereinafter *Vacant Promises*] (citing Scott Coltrane, *Research on Household Labor: Modeling and Measuring the Social Embeddedness of Routine Family Work*, 62 J. MARRIAGE & FAM. 1208, 1212 (2000)).

21. Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1238 (1999) [hereinafter *Women's Freedom*].

22. ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, ch. 5, § 5.05 cmt. c. (Proposed Final Draft Part I, 1997).

23. *Women's Freedom*, *supra* note 21, at 1155.

24. Marsha Garrison, *Equitable Distribution in New York: Results and Reform: Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 627 (1991) [hereinafter *Equitable Distribution*]. Garrison notes that the reformation in divorce law was primarily to benefit women. *Id.* Equitable distribution is meant to divide property equitably, ensuring that both spouses are properly protected. *Id.* at 627-28.

25. *Vacant Promises*, *supra* note 20, at 167.

26. *Women's Freedom*, *supra* note 21, at 1157.

supporting children, and normally with a lower earning capacity than before the marriage, many women's financial status drops significantly, while their former husbands experience an increase in income.²⁷ Because in most homes women are the primary caretakers of the children, women's access to the marketplace is restricted.²⁸ Women's families often come before their careers, making it difficult to establish an economic identity of their own.²⁹ As a result, women who do work often earn less than their male counterparts.³⁰ Women's roles as caretakers often make career advancement difficult as well.³¹

Two solutions to divorcing women's plights are temporary child support and spousal support orders. The court awards orders to help women meet their basic needs until a final support order, reflecting more accurately the amount of support due, is issued.³² An all too common problem is that it may take months for a court to order temporary support and when the court does, many husbands simply ignore the order.³³ A harsh reality is that women whom find themselves financially dependent on their husbands during marriage are often at their husbands' mercy during and after divorce.

The Psychological Effect of Divorce

The mental state of women is important when dealing with divorce settlements. The fact that many women cannot afford attorneys³⁴ to represent them, and if they can, their attorneys are

27. For a discussion on the disparity between former spouses' income, see *Equitable Distribution*, *supra* note 24, at 720-23 tbl. 55. Garrison notes that the average post-divorce per capital income of wives and children approximates sixty-eight percent of their before-divorce per capita income, whereas the per capita income of husbands increases one-hundred eighty-two percent after divorce. *Id.*

28. *Women's Freedom*, *supra* note 21, at 1172.

29. *Id.*

30. Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 386-87 (2001). Kessler's article addresses why law has failed to solve women's burdens in regard to the workplace and family.

31. *Women's Freedom*, *supra* note 21, at 1172.

32. *See id.* at 1173.

33. *Id.* at 1173-74.

34. *Id.* at 1175-80. Bryan writes that many women, because of their economic instability and dependency, often cannot afford to fight long, drawn out, legal battles. As a result, women's financial situations force them to represent themselves, hire inadequate or unconcerned counsels, or accept joint representation by lawyers that their husbands chose. These women are very susceptible to legal maneuvers that prolong the divorce process with the hopes of forcing them to settle for any settlement that their husbands offer. Bryon writes that this tactic is commonly referred to as "starving her out."

often not as highly skilled as their husbands' attorneys,³⁵ severely impedes women's abilities to negotiate. Serious emotional issues also restrict women's capacity to negotiate.³⁶ There is always a fear that women will not use their best judgment and surrender to what their husbands dictate. Even during divorce, when theoretically women are gaining their freedom, they remain submissive to men.

Several factors lead women to have such a psychologically difficult time during divorce, which in turn make negotiations difficult.³⁷ One factor is naive trust.³⁸ To their detriment, many women believe that their husbands, lawyers, and the legal system will deal with them fairly and provide adequately for them after dissolution.³⁹ Women do not secure their own interest because they believe that others will do that for them.⁴⁰ In addition, old habits die hard. After years of marriage and dependency, many women are ignorant about their marital financial circumstances.⁴¹ They are used to their husbands dealing with monetary concerns.⁴² At the time of divorce, many women simply accept the financial situation that their husbands tell them.⁴³ Trusting that those figures are accurate, many women negotiate without realizing the true extent of the marital assets.⁴⁴ Unfortunately, however, for those women

35. *Id.* at 1175. *See, e.g.,* KAREN WINNER, *DIVORCED FROM JUSTICE: THE ABUSE OF WOMEN AND CHILDREN BY DIVORCE LAWYERS AND JUDGES* 13 (1996). Winner states:

The man who controls the family's money—and his wife's share—is in position financially and legally to overpower his spouse in the divorce proceeding. In 1991 Barbara L. Paltrow, President of the Nassau County Women's Bar Association, described the prototypical case in a letter to her peers: "He had access to high priced legal talent from the start, access to lawyers who knew how to use the system to great and often unfair advantage. The wife, on the other hand, quickly discovered that most lawyers would not represent her on the promise of getting paid, eventually, from family resources controlled by the husband. In order to have any representation these women had to exhaust their life savings, if they had any, and borrow to the hilt from family or friends. Even this was rarely enough to pay for the protracted litigation forced upon them."

Id. *See also* Report of the Florida Supreme Court Gender Bias Study Commission, 42 FLA. L. REV. 803, 810 (1990) (noting that many lawyers prefer to represent husbands in divorce proceedings because they have greater access to financial resources).

36. *Women's Freedom*, *supra* note 21, at 1186.

37. *Id.* at 1180.

38. *Id.* at 1181.

39. *Id.*

40. *Id.*

41. PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES: MONEY, WORK, SEX* 52-93 (1983) (noting that the husband has control over the marital resources of the family because he possesses things of value to the outside world, such as wages and prestige).

42. *Women's Freedom*, *supra* note 21, at 1173.

43. *Id.* at 1182.

44. *Id.* at 1177.

that are not totally convinced of their husbands' honesty, lack of financial resources makes it difficult to learn the truth.⁴⁵

Two other factors to consider are loss of self-esteem and depression.⁴⁶ In a world where society constantly bombards women with images of how they should look, the way should think, and the role they should play in society, it is no wonder that women commonly suffer from these conditions. Divorce can create or intensify these conditions.⁴⁷ Suddenly forced to reevaluate their lives and provide for themselves and their children, divorcing women face mental turmoil.⁴⁸ These women's situations worsen when they are also financially destitute.⁴⁹ Women who lose their places as dependent wives and find themselves independent mothers, who must protect their own interest after realizing that no one else will do so,⁵⁰ have a right to feel overwhelmed.

One solution to the problem might be remarriage. The standard of living of divorce a women normally rises with remarriage.⁵¹ The probability of remarriage declines, however, as a woman grows older.⁵² Many women never remarry and many of those women who do remarry out of economic hardship find themselves in poor relationships with the potential for abuse.⁵³ In addition, the time between divorce and remarriage may severely impact women's and children's lives.⁵⁴ Imagine after years of marriage, in which women may become economically dependent, divorce may grant them independence, but their needs may go unmet. Couple the above premise with the fact that the most probable way of returning to their old status quo is to remarry and once again become dependent on a man. The chances of that are

45. *Id.* at 1177. Byran notes that even if women try to discern the correct facts about marital assets their attempts may fail because of lack of resources. She notes that discovery is expensive, especially when trying to ferret out assets that their husbands deliberately conceal or misrepresent. Without conducting a proper and thorough discovery, women cannot possibly negotiate effectively. Their husbands all too often have the upper hand, once again leaving women at the mercy of their former spouse. Bryan goes on to note that even when discovery is successful and women identify all marital assets, appraisals are another problem. It is not enough for women to know what property is owned, women must also know what their assets are worth. For women with limited financial resources retaining experts for this duty is expensive. *Id.*

46. *Id.* at 1186-87.

47. *Id.* at 1186.

48. *Id.* at 1186.

49. *Id.* at 1186.

50. *Id.* at 1183.

51. *Id.* at 1168.

52. *Vacant Promise*, *supra* note 20, at 172.

53. *Women's Freedom*, *supra* note 21, at 1168.

54. *Id.*

slim, and it does not leave much hope for divorced women. This thought is enough to make anyone depressed.

Divorce and Property Division

Property division is one way in which women can gain security post-divorce.⁵⁵ In most states, marital property is subject to equitable distribution.⁵⁶ An equitable distribution standard is favored because it theoretically provides that both spouses will share equally and fairly in the marital assets.⁵⁷ On the surface, equitable distribution seems like a beneficial standard for women, but many scholars suggest that at times equitable distribution is unfair or ineffectively applied.⁵⁸ Judges often use their own discretion and deviate from the award amount that the equitable distribution standard dictates.⁵⁹ All too often women end up receiving fewer of the marital assets than do men.⁶⁰

What about women that need more? Women's chances of receiving more than half of the marital property declined because of equitable distribution.⁶¹ Women who earn less money or have a lower earning capacity than their husbands may need more of the marital assets just to maintain the marital standard of living. Marriage is definitely a partnership, but divorce appears to be every man and woman for himself or herself.

The Risk of Losing Custody

It is only natural for women, who still fill the traditional role as mothers, to seek custody of their children after divorce. Women are still the primary homemakers⁶² and as such develop an intense bond with their children that they fear will dissolve post-divorce.⁶³

55. *Id.* at 1215.

56. *Id.*

57. See IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS*, 234 (3rd ed. 1991) (noting that some equitable distribution states have presumption of equal division of marital assets, but women are still receiving few marital assets than men).

58. See Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2251 (1994) (noting the presumption that the "he who earned it owns it" rule).

59. See Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 452-58 (1996). See generally Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827 (1988).

60. *Vacant Promises*, *supra* note 20, at 176.

61. *Women's Freedom*, *supra* note 21, at 1216.

62. *Id.* at 1192.

63. *Id.*

Historically, fathers had all legal rights to the children after divorce.⁶⁴ Modern history, however, favors mothers, who are the primary caretakers.⁶⁵ Within the last few decades, father's groups fought to have this presumption overturned.⁶⁶ Today, it is a substantial reality that women may lose custody of their children to their husbands.⁶⁷ This new trend leaves any woman vulnerable.⁶⁸ Scared that they will lose custody of their children, many women agree to financial terms that are not in their or their children's best interest just to avoid prolonged custody battles.⁶⁹ These proceedings are often expensive and nerve-wracking.⁷⁰ A woman's anxieties heighten⁷¹ with the knowledge that many states favor joint custody because of an assumption that joint custody is in the best interest of the child.⁷² Many states also employ a friendly parent provision in their child custody guidelines.⁷³ States intended to place fathers on the same playing field as mothers with the best interest of the child standard and friendly parent provision.⁷⁴ These two factors reduce women's chances of a successful custody battle.⁷⁵

II. ANALYSIS OF VIRGINIA'S CURRENT CHILD SUPPORT STATUTES

Virginia enacted its child support laws, sections 20-108.1 and 20-108.2,⁷⁶ in order to ensure that both parents honored their duty to support their children.⁷⁷ The Virginia Legislature views two

64. MASON, *supra* note 2, at 16-18.

65. *Id.* at 63-64.

66. *Women's Freedom*, *supra* note 21, at 1193.

67. *Id.* at 1200.

68. *Id.*

69. *Id.* at 1201.

70. *Id.* at 1200.

71. See Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 455-57 (1984). Joint custody is the term for shared legal and physical custody of children by divorced or separated parents. The purpose of joint custody is to ensure that both parents maintain an active relationship with the child. The authors note that most states favor joint custody. Between 1975 and 1983, twenty-nine states adopted joint custody laws. *But see* Gerald W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 FAM. L.Q. 201, 201-02 (1998) (noting that at first judges resisted joint custody laws). In California, 68.8 percent of judges disfavored joint custody commenting that joint custody, creates too many problems, such as poor parental cooperation, instability of the child, distance between parental home and revenge. *Id.* (citing Thomas J. Reidy et al., *Child Custody Decisions: A Survey of Judges*, 23 FAM. L.Q. 75, 80 (1989)).

72. Scott & Derdeyn, *supra* note 71, at 457.

73. *Women's Freedom*, *supra* note 21, at 1193.

74. *Id.* at 1194.

75. *Id.* 1195.

76. VA. CODE ANN. § 20-108.1 (Michie 2001); VA. CODE ANN. § 20-108.2 (Michie 2001).

77. See *Kelly v. Kelly*, No. 7952, 1993 WL 946122, at *1 (Va. Cir. Ct. June 21, 1993).

parents whom are both supporting their children in the "best interest of the child."⁷⁸ The statutes provide the courts with certain factors and formulas to consider when ordering a support decree.⁷⁹ In order to deviate from the guidelines the party must provide evidence that such a deviation is appropriate in his or her particular case. Section 20-108.2 A of the Virginia Code states:

There shall be a rebuttable presumption in any judicial or administrative proceeding for child support under this title or Title 16.1 or Title 63.1, including cases involving split custody or shared custody, that the amount of the award which would result from the application of the guidelines set forth in this section is the correct amount of child support to be awarded. In order to rebut the presumption, the court shall make written findings in the order set out in §20-108.1, which findings may be incorporated by reference, that the application of the guidelines would be unjust or inappropriate in a particular case as determined by relevant evidence pertaining to the factors set out in §§ 20-107.2 and 20-108.1.⁸⁰

The rebuttable presumption provision of the statutes allow for some flexibility. The provisions allow the parties to justify why the support award should be increased or decreased from the amount calculated through the schedule set out in section 20-108.2.⁸¹ Section 20-108.1 provides eighteen factors that the court can take into account when determining whether the support award should deviate from the guidelines.⁸² By giving the parties a chance to address specific circumstances involved in their case, the court may render a decree that both parties may view as fair and accurate.

78. VA. CODE ANN. § 20-108.1B (Michie 2001).

79. VA. CODE ANN. §§ 20-108.1, 20-108.2 (Michie 2001).

80. VA. CODE ANN. § 20-108.2A (Michie 2001).

81. VA. CODE ANN. § 20-108.2B (Michie 2001) (determining child support need by looking at the combined gross income of both parents compared with the number of children entitled to support).

82. VA. CODE ANN. §20-108.1B (Michie 2001). Three of the factors are of particular importance. Factor 3 allows the court to impute income to the noncustodial parent if the court deems that the parent is voluntarily unemployed or voluntarily under-employed. Factor 10 allows the court to consider the standard of living that was established during the marriage and factor 16 allows the court to consider a written agreement between the parties that includes a child support amount. Factors 3 and 10 determine the legislature's commitment to maintaining that noncustodial parents at least provide their fair share of their children's needs as well as maintain children's financial stability. Factor 10 allows the court to recognize private agreement, but as evident from the case law, it does not influence courts very much.

Court Approval, Private Agreements, and Modification

Virginia courts have stressed, in its child support jurisprudence, the importance of court approval before parties can modify their child support awards.⁸³ In *Goodpasture v. Goodpasture*,⁸⁴ both parents agreed that the court awarded child support would discontinue during the period that the mother was out of the state with the child.⁸⁵ The mother moved back to Virginia, but the father never resumed paying the court awarded child support.⁸⁶ The father, however, still supported the child financially in an amount less than the court award.⁸⁷ The mother eventually sued the father for arrearages dating back to when she first moved out of the state.⁸⁸ The court held the father in contempt for past due child support stating:

Parties cannot contractually modify the terms of a support order without the court's approval. . . . Should circumstances change requiring alteration in the amount of support, a party's remedy is to apply to the court for relief. . . . The payor has the obligation to pay the specified amounts according to the terms of a support order and cannot vary these terms to suit his or her convenience. To allow a party to make payments other than as specified in the support order would lead to continuous trouble and turmoil. Furthermore, it would substitute the self-determined interests of one or both of the parties over the court-determined best interests of the child.⁸⁹

Goodpasture reflects Virginia's public policy to ensure that the best interest of the child is met. The case also demonstrates the court's unwillingness to allow parents to decide without the court's scrutiny a satisfactory amount of support. *Goodpasture* is one prominent case that sets the stage for Virginia's child support jurisprudence.

Not only do Virginia courts require court approval before parties may modify their child support amount, but they also display hesitancy in honoring initial private agreements. In *Kelly v. Kelly*,⁹⁰ the Virginia Circuit Court invalidated a private agreement that set the monthly child support owed below the minimum

83. See *supra* note 8.

84. 371 S.E. 2d 845.

85. *Id.* at 846.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 847-48 (citations omitted).

90. 1993 WL 946122, at *1.

amount of support determined by section 20-108.2.⁹¹ The agreement permitted Mr. Kelly to pay \$125 per month per child.⁹² The court, however, calculated that, under the guidelines, with the information provided by the parties, Mr. Kelly's support obligation was \$140 per month per child.⁹³ The court, therefore, imputed income to Mr. Kelly, ruling that he was voluntarily under-employed.⁹⁴ In the instant case, the court ignored the private agreement between the parties in favor of the guideline figures. By invalidating the agreement and imputing income to Mr. Kelly, the court enforced the same public policy arguments set forth in *Goodpasture*.

Virginia courts are not only willing to invalidate initial private agreements between parents and agreements that modify the court's mandated award, but Virginia courts are also willing to place checks on the amount of authority the courts themselves have on modification. In *Keyser v. Keyser*,⁹⁵ the Virginia Court of Appeals reversed a provision from an order provided by the Circuit Court that allowed the father's obligation to be subject to a yearly automatic adjustment.⁹⁶ The adjustment was to reflect any increase or decrease in his salary.⁹⁷ The Court of Appeals held that a clause allowing for an automatic change in the support amount was an abuse of the court's discretion. The court noted that:

[a]ny change in the amount of the husband's child support obligation should result from a change in the parties' circumstances and be based upon a consideration of the factors set forth in Code § 20-107.2 . . . The statutory scheme provided by the General Assembly does not contemplate automatic changes or escalator clauses.⁹⁸

The court makes it clear that courts should review any modifications of support at the time the parties' circumstances substantially change.

Although *Keyser* pre-dates the enactment of sections 20-108.1 and 20-108.2 of the Virginia Code, its holding has still been followed. In *Solomond v. Ball*,⁹⁹ the trial court, instead of ordering

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. 345 S.E.2d 12.

96. *Id.* at 14.

97. *Id.* at 13.

98. *Id.* at 14.

99. 470 S.E.2d 157.

a specific support amount, set the father's support obligation as a percentage of his children's educational needs.¹⁰⁰ The Court of Appeals invalidated the order on the same grounds that it reversed the order in *Keyser*.¹⁰¹ The court noted "[a] trial court may not abrogate its responsibility to determine that a material change of circumstances justifies a modification of child support by entering an order that results in an automatic increase in the support obligation upon the occurrence of future events."¹⁰² *Keyser* and *Solomond* demonstrate Virginia's public policy to ensure that the courts adjudicate any request for child support modifications.

Along the same lines, as the many cases before it, *Shoup v. Shoup*¹⁰³ appears to uphold Virginia's child support modification jurisprudence. In *Shoup*, the parties had in their final divorce decree a self-executing clause that allowed the father to reduce the amount of support required by section 20-108.2 of the Virginia Code until each child either died, married, became self-supporting, reached eighteen years old, or was emancipated.¹⁰⁴ As provided in the clause, the father unilaterally reduced the child support amount as each child turned eighteen years old.¹⁰⁵ On petition, the trial court held the father in contempt of court and the Court of Appeals affirmed the decision.¹⁰⁶ The Court of Appeals once again held that a self-executing child support modification was invalid and that the noncustodial parent remains responsible for the full amount of the court-mandated support.¹⁰⁷ The court stated that:

[t]he prevailing and well-established principle of law requiring contemporaneous court approval of modification has not been diminished or eroded by the Commonwealth's public policy favoring "prompt resolution of disputes concerning the maintenance and care of minor children. . . . [P]arents cannot contract away their children's rights to support, any provision which

100. *Id.* at 160.

101. *Id.* ("Determination of support awards must be based on contemporary circumstances and modified in the future as changes in circumstances occur.") (quoting *Keyser v. Keyser*, 345 S.E.2d 12, 13 (Va. Ct. App. 1986)). See also *Kelley*, 449 S.E.2d at 56-57 (holding unilateral, automatic, or agreed-upon child support modifications are void and unenforceable without court approval).

102. *Solomond*, 470 S.E.2d at 160.

103. 542 S.E.2d 9.

104. *Id.* at 11.

105. *Id.* at 12.

106. *Id.* at 11.

107. *Id.* at 14.

impinges upon the rights of children to support is void, and a decree which incorporates such provision is likewise void.¹⁰⁸

The *Shoup* decision struck another blow to advocates of private agreements.

Judge Benton, who wrote the dissent in *Shoup*, noted that it was unnecessary for the parties to return to court because the court had no jurisdiction to award support for children that reach their majority.¹⁰⁹ In addition, the self-executing clause still required the use of the guidelines to determine the modified amount.¹¹⁰ Why then should the parties return to court for approval for modification? Virginia's public policy encourages the agreements between parents about their minor children.¹¹¹ Judge Benton stated:

I believe that our cases do not bar the parties from agreeing to voluntarily modify their child support payments annually according to Code s 20-108.2. . . . Yet, it appears from the majority opinion that members of the Bar should be placed on noticed that despite good faith efforts to resolve amicably the child support arrangements by agreements that incorporate the schedules of Code § 20-108.2, the parties have no safe harbor and can only protect themselves by filing in court a petition to seek modification for any change in circumstance that has been recognized and specifically identified in their court-approved agreement.¹¹²

Judge Benton's dissent allows the parties to have more flexibility, thereby giving parents more control over the amount of support.

Up until this point in time, Virginia courts were very clear in their requirement for court approval in order to modify a support order. Practitioners were surprised when a few months after the Court of Appeals decided *Shoup* it reheard the case *en banc*. This time the court recognized the enforceability of private agreements without court approval.¹¹³ Surprisingly, the court agreed with Judge Benton's public policy argument.¹¹⁴ The court reasoned that

108. *Id.* at 13 (quoting *Kelley v. Kelley*, 449 S.E.2d 55, 56-57 (Va. 1994); *Morris v. Morris*, 219 S.E.2d 864, 867 (Va. 1975)).

109. *Id.* at 17.

110. *Id.* at 16.

111. *Id.* at 17.

112. *Id.* at 17.

113. *Id.* at 785.

114. *Id.* at 789.

requiring court approval for private agreements ultimately weakened Virginia's prompt resolution policy.¹¹⁵ The court wrote:

[w]e are aware of neither holding nor statute that requires a trial court to hear evidence on the matter of child support where the parties have agreed to the amount of support and do not seek the court's determination of the matter. . . . [T]he resources of both the court and the parties would be wasted by requiring a trial judge to *sua sponte* require parties to litigate a settled matter.¹¹⁶

The court's conclusion is that even though the courts cannot award support based on future circumstances, the parties may agree to future modifications as circumstances change. This public policy encourages both parents to cooperate and promotes an efficient use of judicial resources.

The second ruling in *Shoup* changed the court's long established jurisprudence requiring court-approved modification. The court validated self-executing clauses to which the parties agreed.

Approximately two months after the second Court of Appeals *Shoup* decision the Virginia Supreme Court affirmed *Riggins v. O'Brien*.¹¹⁷ In *Riggins*, the parties had a self-executing clause that allowed the father to reduce the amount of support when the children died, reached eighteen years of age, became self-supporting, or requested emancipation.¹¹⁸ The decree went on to state that the amount payable for child support "shall be renegotiated or submitted to a court for adjudication on the first event of emancipation."¹¹⁹ The father argued that the clause allowed him to unilaterally reduce the support amount without court approval.¹²⁰ The Virginia Supreme Court, however, interpreted the above quoted provision to mean that the parties could either provide the court with a new agreed upon support amount for approval or could petition the court to adjudicate the matter.¹²¹ Ultimately, the court decided in favor of court approval before the parties may recalculate any support award. The court stated that "as was the case with the original negotiation, any renegotiation would be subject to court

115. *Id.*

116. *Id.* (quoting *Moreno v. Moreno*, 481 S.E.2d 482, 485-86 (1997)).

117. 2002 Va. LEXIS 31, at *1 (Va. Mar. 1, 2002).

118. *Id.*

119. *Id.*

120. *Riggins v. O'Brien*, 538 S.E.2d at 322.

121. *Riggins* 2002 Va. LEXIS 31, at *7.

approval. We think this requirement is implicit in the divorce court's decree."¹²²

III. A LOOK AT THE PROPOSED AMENDMENTS

The Virginia Supreme Court's opinion in *Riggins* may confuse advocates, such as family mediators, who are supportive of the Court of Appeals second decision in *Shoup*.¹²³ The *Riggins* decision also has other practitioners questioning the future of private court unapproved agreements in Virginia's child support jurisprudence. James A. Watson II, who represented Mrs. O'Brien, stated, "time will tell, but I think the opinion really calls into question the continued validity of *Shoup*. I think *Shoup* is severely undermined by this decision."¹²⁴ As a result of the conflict between the Virginia Supreme Court in *Riggins* and the Virginia Court of Appeals in *Shoup*, a statutory amendment to the child support statutes sections 20-108.1 and 20-108.2 may be necessary. Richard Byrd's proposed amendments to sections 20-108.1 and 20-108.2 aim to end the conflict.¹²⁵ Byrd's proposal, however, will in a sense codify the *en banc* decision in *Shoup*. Byrd's goal is for Virginia courts to meet the same standard in overturning private agreements, as it must to deviate from the presumptive guidelines.¹²⁶ Byrd proposed two important changes to the statutes. His first change is for private agreements to follow contract principles. The proposed amendment states:

B.2.(b) In any judicial or administrative proceeding for child support, the parties may agree as to how they are each to provide for the financial needs of their children. Such agreements may include child support amounts and the terms and conditions of payment, and may provide for direct payment to persons providing goods or services to a child, and may provide as to how such support will change in the future as the circumstances of the parties and children may change. The formation and construction rules applied to such contracts or agreements

122. *Id.* at *8-9.

123. For a discussion on how *Shoup* benefits family mediation, see *Shoup v. Shoup*, RESOLUTIONS (Mar. 2002), available at <http://www.courts.state.va.us/drs/resolutions/march2002/shoup.html>.

124. John D. Tuerck, *Dad Owes Back Support Despite Pact In Decree*, VIRGINIA LAWYERS WEEKLY, Mar. 11, 2002, at 1.

125. See Letter from Richard Byrd, Attorney, Virginia Bar Association, to Virginia Bar Association Coalition (July 25, 2001) (on file with the Virginia Bar Association Coalition Committee of Family Law Legislation).

126. *Id.*

shall be the same as the rules applied to other contracts. If a written stipulation or contract regarding child support is filed with the court or administrative agency, or is embodied in a consent order or decree endorsed by counsel or the parties, then such agreement or consent order will be presumed to be the correct amount of child support to be awarded. In order to rebut this presumption, the court shall make written findings in an order, which findings may be incorporated by reference, that the terms of the parties' agreement, stipulation or consent order would be unjust or inappropriate as determined by relevant evidence pertaining to the factors set forth in Section B.2.(a) above, and giving due regard to the other considerations set forth in the agreement or consent order of the parties.¹²⁷

By applying contract principles to these agreements, parties are bound by their word and cannot petition the court for arrearage that conflicts with their agreements. This change to the statute also presumes that the amount is correct and the court must make a written finding to deviate from the agreement.¹²⁸

The second important change to the statute allows the parties to determine the amount of future support. Section B.2.(d) of the proposed amendment states:

B.2.(d) Upon a finding by the court of a material change in circumstances since the previous determination of support set forth in an existing agreed order, the court shall determine whether in the existing order, the parties provided for the means to determine future changes in support with respect to the demonstrated material change in circumstances.

(i) If the parties did, in the existing support order, provide the means, method or formula for determining a new child support amount considering the demonstrated changed circumstances [in support with respect to the demonstrated material changed circumstances], then those provisions will be presumed to be the correct method of determining the new child support provisions to be awarded.¹²⁹

This part of the proposal forces the courts to accept provisions that the parties already agreed to about future support. In the absence, however, of a preconceived agreement about future

127. VA. CODE ANN. § 20-108.1 B.2(b)(Proposed Amendment 2001).

128. VA. CODE ANN. § 20-108.1 B.2(b)(Proposed Amendment 2001).

129. VA. CODE ANN. § 20-108.1 B.2(d)-B.2(d)(i)(Proposed Amendment 2001).

support, section B.2.(d) allows the court to presume that the support amount determined by the schedule in section 20-108.2 is correct.¹³⁰

This proposal will nullify years of case law. It will weaken the power that courts have to modify support orders. Although there are many who will support its passage,¹³¹ a question remains as to how the proposals actually will affect divorce proceedings. Perhaps, more importantly, the question remains as to how the proposals actually will affect women in divorce proceedings.

IV. CONCLUSION

Richard Byrd's proposed amendments to the Virginia child support statutes will foster Virginia's public policy for prompt resolutions. Divorcing couples, especially women, can significantly save money by avoiding lengthy court proceedings every time there is a material change in circumstances. Women and their children, however, will pay a tremendous price if the General Assembly adopts his proposal. The main problem is ensuring that women want these agreements and that the amendments are in the best interest of women and their children. Presumably, requiring the court to meet the same standard in overturning these agreements as it does the child support presumptive guidelines will protect mothers against coercion and the interest of the child. Standard commercial contract principles, however, may not be able to take into account how highly emotional and vulnerable women are when dealing with support issues. Instead of the courts at least having the ability to protect women, even if it sometimes seems that courts do not, Virginia courts might have to rule a "deal is a deal." Even though Byrd's proposals include a rebuttable presumption that these agreements are correct, private agreements may be rubber-stamped. Virginia should not be willing to take this risk.

130. VA. CODE ANN. § 20-108.1 B.2(d)(ii)(Proposed Amendment 2001).

131. Tuerck, *supra* note 120, at 4. Glenn C. Riggins, who represented Riggins, stated: [W]hen Shoup was decided in en banc there were patrons in the legislature prepared to make amendments to ensure that these agreements were respected. The General Assembly was going to fix the problem made by the court. The courts apparently fixed the problem. And now, with the end of the session, we are absolutely back in a hopeless situation.

Id.