REPORT OF THE
FAMILY LAW SECTION OF THE
VIRGINIA STATE BAR ON

Equitable Distribution of Property in Divorce Proceedings

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

HOUSE DOCUMENT NO. 19

COMMONWEALTH OF VIRGINIA
RICHMOND
1991

MEMBERS OF COMMITTEE

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Carol B. Gravitt, Esquire
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Report of the
Family Law Section of the Virginia State Bar Studying
Section 20-107.3 of the Code of Virginia

To
The Governor and the General Assembly of Virginia
Richmond, Virginia
January, 1991

To: Honorable Douglas L. Wilder, Governor of Virginia
and
The General Assembly of Virginia

INTRODUCTION

Virginia's equitable distribution statute was enacted on July 1, 1982. Since that date, the courts have faced many issues not considered by the General Assembly when the statute was initially enacted, and they have resolved those issues to the best of their ability. After eight years of successful operation, however, the case law under the statute is unavoidably somewhat complex. This complexity has created a need for a comprehensive review and clarification of Virginia law on the classification, valuation, and allocation of marital property. House Joint Resolution No. 57 (see Appendix A) requested the Family Law Section of the Virginia State Bar to conduct such a review and to report its findings back to the General Assembly.

This review serves two important public interests. First, while the courts have made equitable distribution law as fair as possible, they have been limited by their role as statutory interpreters rather than statutory draftsmen. Legislative review permits a more complete response to any problems caused by the complexity of the statute. Second, when courts and attorneys can predict the likely result of the equitable distribution process, the basic fairness of our property division system is more apparent to the citizens of our state. Increased predictability also encourages settlements and discourages extended trials, thus reducing the volume of litigation in our courts.

Lawrence D. Diehl, a member of the Board of Governors of the Family Law Section of the Virginia State Bar and its legislative chairman, was selected chairman of the study committee. The additional members included current members of the Board of Governors of the Family Law Section, (James R. Cottrell, Richard E. Crouch, Ronald S. Evans, Frank W. Morrison and Ronald R. Tweel), as well as representatives of the Virginia Trial Lawyers

Association (Betty A. Thompson) and the Virginia Women's Attorneys Association (Carol B. Gravitt). Delegate Gladys B. Keating, patron of the resolution, also served on the committee. Brett R. Turner, a Senior Attorney for the National Legal Research Group, Inc., and author of the 1990 Supplement to the nationally recognized treatise, Golden, Equitable Distribution of Property, also served on the committee.

Meetings of the committee were held on June 13, 1990, September 12, 1990 and October 4, 1990. Subcommittees were formed for intensive research on specific issues, and voluminous memorandums and interchange of legal research, drafts of proposed legislation, and policy arguments on the issues were exchanged between committee members.

In order to maximize the input on some of the key issues to be studied by the committee, a survey was prepared and sent to all members of the Family Law Section of the Virginia State Bar, all Circuit Court and Experimental Family Court judges, members of the Virginia Women's Attorneys Association and members of the Family Law Section of the Virginia Trial Lawyers Association. (See Survey Appendix B) The results of the survey are shown in Appendix C.

HISTORICAL BACKGROUND

As a result of the recognition that there was a need for the equitable distribution of the property of spouses upon divorces, §20-107.3 of the 1950 Code of Virginia was enacted, effective July 1, 1982. This section provided for the division of marital property upon divorce, and has undergone numerous legislative amendments since its original enactment. These amendments have generally responded to issues raised by case law or evolving needs for statutory interpretation, and reflect an attempt to make appropriate responses to areas of the law requiring legislative clarification. For example, in specific response to the unitary theory of property classification as expressed in the Virginia Supreme Court's decision in Smoot v. Smoot, 233 Va. 435, 357 S.E.2d 728 (1987), the General Assembly significantly amended §20-107.3 effective July 1, 1990, by legislatively enacting a "source of funds" or "dual classification" methodology.

This history of an "ebb and flow" between case law and evolving issues of equitable distribution in other states, and the extensive revisions made to Virginia's statute to respond to such issues, is viewed by this committee as a positive and appropriate method of improving the practice of this complex area of divorce law.

The committee was of the unanimous opinion that the adoption of our equitable distribution statute was a necessary response to the pre-1982 inequities of property division upon divorce. This

need was previously recognized by the Report of the Joint Subcommittee Studying §20-107 of the Code of Virginia, House Doc. 21 (1982) leading to the initial adoption of our equitable distribution statute. The committee was also of the unanimous opinion that the statutory enactment of equitable distribution has basically met the remedial purposes of the original legislation and has greatly improved the fairness of property division upon divorce.

However, while recognizing that the 1990 legislative amendments adopting a "source of funds" methodology for property classification has primarily responded to and addressed the problems of property classification resulting from the transmutation consequences of the Smoot decision, the committee recognized certain specific issues that require further clarification to avoid any future case interpretation which might conflict with the intended results of said legislation.

FINDINGS AND CONSIDERATIONS

As a result of the meetings of the committee, the legal research and recommendations of the study subcommittees and an analysis of the survey results, the committee made the following recommendations.

No statutory amendments were recommended relating to (1) the enactment of a 50/50 or equal presumption of property division or (2) the addition of a new factor to §20-107.3(E) requiring the court to consider the future earning capacity of a spouse in making an equitable distribution award.

The committee did recommend statutory amendments to §20-107.3 in the following areas: (1) the apportionment of the proper burden of proof in establishing the part marital portion of property where based upon the increase in value due to the contributions of marital property or the personal efforts of either party; (2) the addition of a subdivision providing a dual classification to property that has been re-titled from separate to jointly titled marital property; (3) the clarification that a dual classification of property by a source of funds credit shall be made by the court pursuant to the 1990 dual classification amendments where separate property has been commingled into jointly titled or owned marital property; (4) the authority of the court to divide or apportion marital debt; (5) the authority of the court to divide or transfer jointly owned marital property, rather than merely ordering the division or transfer thereof; (6) the recognition of the validity of prior decrees containing in-kind division or transfer orders; (7) the addition of medical expenses to the extent not covered by health insurance to the "marital share" of the personal injury subsection; (8) additional authorities of the court for the effectuation and enforcement of equitable distribution orders, including the use

of contempt powers for the wilful failure to obey such orders; and (9) the authority of the court to have continuing jurisdiction to modify an order relating to pension divisions in order to ensure their enforcement by their compliance with applicable federal law.

(A) Areas Where Committee Made No Recommendations

(1) The Adoption of an Equal Presumption of Property Division

The original 1982 equitable distribution study committee and Report, House Document No. 21 (1982), recognized that any equitable distribution statute should recognize the contributions of the parties, "albeit unequal." In Papuchis v. Papuchis, 2 Va. App. 130, 341 S.E.2d 829 (1986) the Court of Appeals held that in making a monetary award pursuant to §20-107.3, there is no presumption of equal distribution. And in Pommerenke v. Pommerenke, 372 S.E.2d 630 (Va. Ct. App. 1988), the Court of Appeals held that it is not error to use an initial assumption of equality in making an equitable distribution award as a "starting point."

The committee recognized that the issue of whether an equal presumption of property division should be statutorily mandated was one of critical importance to the courts, the bar and the public, and was essentially one of policy, rather than merely a legal issue. The committee recognized that one of the major problems in the practical implementation of the equitable distribution statute is the lack of predictability of the percentage of divisions made to the parties, and the broad discretion of the trial court to fashion its award. On the other hand, the committee recognized the need to analyze cases on an individual basis, and that generally, trial courts have appeared to be making appropriate awards based upon their review of the required statutory factors. The committee also recognized that the enactment of the dual classification amendments in 1990 would resolve many of the source of funds credits issues that heretofore had arguably been inconsistently applied by the trial courts.

Due to the nature of this issue as one of the policy that should be adopted by Virginia on the issue, the committee used the survey (See Appendix A) to obtain the opinions of the bar and judiciary on the issue. The results of Question 2 of the survey (See Appendix B) indicated that almost 50% of the respondents favored maintaining the flexibility provided by an equal "starting point" for property division, with only 36% favoring an equal presumption by statute. Many of the comments on the survey expressed the opinion that the present law was generally working well, that trial courts should look to the individual facts of each case, and that a statutory equal presumption would invite

too much inflexibility in making a fair award. Based upon the survey results, the general opinions of the committee, and comments received by the committee from the judiciary and bar, the committee made no recommendation to change the present case law by statute on this issue.

(2) The Addition of a Factor to §20-107.3(E) Requiring the Court to Consider the Future Earning Capacities or Needs of a Spouse.

In Reid v. Reid, 7 Va. App. 553, 375 S.E.2d 533 (1989), the Court of Appeals held that the equitable distribution statute did not contemplate consideration of the future ability of one spouse to accumulate wealth or the future earning capacity or needs of a spouse in making its award. The subcommittee studying the issue noted that such a factor was a proper consideration in virtually all other states, and the issue of whether a statutory reversal of the Reid decision by adoption of such a factor was raised. The committee debated the legal implications of the issue, with some members noting the speculative nature of a future prediction of need where the property division was essentially a recognition of the efforts of the parties "during the marriage" leading to the accumulation of marital wealth. The committee further recognized the strength of Virginia's spousal support statute and laws, and some of the committee members were of the opinion that a spouse's future needs would be more appropriately protected by a spousal support award.

Since this was a highly debated issue, the committee felt that a survey question on what was essentially a policy issue should be included to address the topic. Over 53% of the survey respondent's opposed a legislative reversal of Reid, while 43% favored such a reversal. The survey comments reflected many of the concerns of some of the committee members that the court would have difficulty in dividing marital property based upon speculative future considerations not reflective of the prior contributions of the parties to the accumulation of such assets. The committee was of the opinion that no legislative reversal of Reid would be appropriate at this time.

(B) Areas Where Committee Made Recommendations For Statutory Amendments To §20-107.3

(1) Burden of Proof: Increase in Value of Separate Property.

In the 1990 legislative adoption of the dual classification statute, §20-107.3(A)(3)(a) provided a part classification as marital property of the increase in value of separate property to the extent that marital property or the personal efforts of either party contributed to such increases. Where personal efforts are the basis for such partial

classification, the efforts must be significant and result in substantial appreciation of the property.

The committee recognized the appropriateness of the adoption of such legislation which, in effect, adopted the "active" v. "passive" test for the appreciation of separate property during the marriage of the parties. The committee reviewed the legislative history of said provision and recognized said provision was enacted to reverse the unitary theory expressed in the Smoot case, but was not meant to unduly restrict the inclusion of the extent of the appreciation of property during the marriage. The specific protection of the non-owning homemaker spouse in including an appropriate portion of the appreciation in value of separate property, such as a pre-maritally owned business, was noted by the committee as a specific purpose of the 1990 statutory amendments.

The committee was concerned, however, that the adoption by the courts of strict or harsh burdens of proof on the non-owning spouse could defeat the remedial purposes of the dual classification statute as intended and enacted by the 1990 Virginia General Assembly. Similar harsh burdens have been adopted in other equitable distribution states, precluding the inclusion of any part of the appreciation in value of property to the detriment of the marital estate. See, eg., McNaughton v. McNaughton, 538 A.2d 1193 (Md. Ct. App. 1988); Hoffman v. Hoffman, 676 S.W.2d 817 (Mo. banc 1984); In re Marriage of Thornton, 486 N.E.2d 1288 (Ill. App. 1 Dist. 1985).

The committee preferred the statutory adoption of the "marital effort rule", as expressed in Shank v. Shank, 387 S.E.2d 325 (W.Va. 1989), which is summarized as follows:

> Increase in value during marriage should be presumed due to marital efforts. The burden of proof to show that the increase is due to economic conditions should be on the separate property owner. When this is not possible or when transmutation has occurred, commonly after a long marriage, all increase should be subject to division. If the separate property owner sustains the burden of showing that economic conditions enhanced the separate property and of establishing a reasonable return for that property, then the increase in value represented by that investment should be classed as separate property. The excess should be marital property. This

should be labeled the marital effort method to distinguish it from other apportionment methods.

The committee was of the unanimous opinion that a statutory enactment of such a rule would ensure that the intended results of the 1990 amendments to §20-107.3 would be promoted. The initial proof of personal efforts and increase in value would be properly placed upon the non-owning spouse. Once this threshold burden of proof is met, there would be a presumption that the increase in value was due to the personal efforts or contributions of marital property, in essence providing a presumption of "active" appreciation by presuming a causal nexus between the efforts or contributions, and the appreciation in value during the marriage. Such a presumption would address the case law difficulties evidenced by the contrary law cited above.

Thereafter, the burden of proof would shift to the owner spouse to prove that the appreciation in value was not due to "active" efforts, but was due to other "passive" or economic reasons.

The committee felt this rule was a proper apportionment of the burden of proof since the owner of a pre-marital asset, such as a business, would be in the best position economically to prove that the increase in value was due to "passive" or "economic" reasons, and thus excluded as marital property. The rule would further recognize that the facts to establish such a "passive" reason for increase would be more accessible to or within the knowledge of the owner spouse. The rule would essentially recognize the goals of the 1990 legislative amendments of excluding the pre-marital value of separate property from the marital estate, but broadly including into the marital estate the part of the appreciation in value reflective of the personal efforts or marital contributions of either party during the marriage.

The committee, therefore, specifically recommended the amendments to §20-107.3(A)(3)(a) contained in Appendix D. (lines 85-97, 123-127)

(2) Dual Classification: Re-Titled Property

The committee recommended the enactment of §20-107.3(A)(a)(f) providing for the dual classification of separate property that has been merely re-titled into the joint names of both parties. While the present statutory language contains such classification methodology for the "commingling" of marital and separate property, the mere re-titling issue was not addressed by the 1990 legislative amendments. If the original property is retraceable by a preponderance of the evidence and not a gift, it would retain its original classification, subject, of course, to

the part marital portion of any commingling or marital properties increasing its value specified in §20-107.3(A)(3)(a) or (d). This provision would be an exception to the general definition of marital property contained in §20-107.3(A)(2)(i) and the committee further recommended the clarification that the definition of marital property, as including jointly titled property, would be subject to the provisions of the dual classification provisions contained in §20-107.3(A)(3)(a)-(g). See proposed amendments, §20-107.3(A)(2)(i) in appendix D (lines 56-57) and §20-107.3(A)(3)(f) in Appendix D (lines 128-133).

(3) Retracing: No Presumption of Gift Due to Joint Title

The committee thoroughly reviewed an issue relating to a possible ambiguity in the statute as presently enacted. The committee felt the clear intent of the 1990 dual classification amendments, as evidenced by the examples contained in the Comment and Analysis document proferred in support of the legislation, was to permit automatic source of funds credits, even from jointly titled property, such as real estate or bank accounts. However, the definition of marital property as contained in §20-107.3(A)(2)(i) includes all jointly titled property as marital, thus arguably preventing a partial classification of property upon its commingling into jointly titled property. Further, the committee noted the majority rules in other equitable distribution states that a "source of funds" credit is precluded by the presumption of gift that arises where separate property is placed into joint accounts, or contributions are made to jointly titled property. See, eg., Kramer v. Kramer, 709 S.W.2d 157 (Mo. Ct. App. 1986).

On the other hand, some courts believe such a presumption of gift is not the real expectations of parties upon divorce, and that no such presumption should arise in the context of the division of property upon divorce. See Grant v. Zich, 477 A.2d 1163 (Md. App. 1984). Thus, source of funds credits are permitted and would not be precluded by a presumption of a gift to the recipient category of jointly titled property.

The committee was of the opinion that this was an issue of policy that should be addressed by the survey. The overwhelming results to Question 1 of the survey (See Appendix C) of all responding groups favored the rule set forth above whereby a partial classification based upon a source of funds credit should be required in joint title situations and that no presumption of gift should operate to preclude such classification. The survey comments consistently stated that such a rule would reflect the realistic expectations of spouses upon divorce. They further stated that such a rule would reinforce and promote the remedial purposes of the 1990 amendments by providing courts with clear and unambiguous tracing rules, and thereby promote settlements by avoiding litigation on such issues. The committee was also of

the opinion that the Comments and Analysis of the 1990 legislative amendments clearly anticipated such credits in the examples set forth therein as to jointly titled account situations.

Therefore, in order to more clearly promote the goals of the 1990 legislative amendments, and to clarify that the commingling of property into jointly titled or re-titled status will not preclude the dual classification of the contributed property due to a presumption of gift, the committee recommended the amendment set forth in §20-107.3(A)(2)(ii) and the addition of §20-107.3(A)(3)(g) contained in Appendix D (lines 56-57, 134-143).

(4) Marital Debt

In Day v. Day, ____ Va. App. ____, 381 S.E.2d 364 (1989) the Court of Appeals held that the trial court had no authority to order the payment of a specific debt of the marriage. Such authority is generally recognized in most other equitable distribution states and the need for such authority in Virginia to permit the court to order the payment or apportionment of debts incurred prior to the dissolution of the marriage was recognized by the committee. The committee was of the opinion that such statutory authority was widely favored by family law practitioners, the courts and other organizational groups such as the Virginia Trial Lawyers Association which had studied the issue.

The committee recommended the amendment to §20-107.3(C) and (E) to permit such authority. See Appendix D (lines 155-159, 194).

(5) In-kind division or Transfer Authority

In 1988, §20-107.3(C) was amended to provide the court with the authority to order the transfer, in-kind, of jointly owned marital property. The order could not itself effectuate the division, but merely order the parties to divide or transfer their property by their future compliance with such an order.

The committee recommended that the authority of the trial court be expanded to include the ability to divide or transfer property by its own orders as an additional remedy in effectuating the in-kind division of jointly owned property. Such a remedy would address the recurring problem of the refusal of a spouse to obey an order to transfer such property, for example, by refusing to execute a deed or title to the other spouse.

The committee recommended, therefore, an amendment to §20-107.3(C) contained in Appendix D (line 153).

(6) Validity of Prior In-Kind Division Orders

The committee was made aware that numerous orders entered prior to the 1988 in-kind division authority, had been entered containing such authorities. Although the Court of Appeals has held that no authority for such orders existed pursuant to the statute prior to the 1988 amendments, the committee was concerned about the effect of the apparently voluminous number of pre-1988 unappealed orders containing such provisions. In order to avoid any question as to the validity of such orders, and to further promote the remedial purposes of the 1988 amendment, the committee was of the opinion that retroactive recognition of the validity of such orders should be statutorily recognized. Such recognition would merely be the recognition of the procedural aspects of the division of property, and would not, in the committee's opinion, affect the substantive rights of the parties in their ultimate receipt of an equitable distribution award.

The committee recommended the amendment to §20-107.3(C) on this issue as contained in Appendix D (lines 170-173).

(7) "Marital Share" of Personal Injury/Worker's Compensation Awards

The committee reviewed the 1990 legislative amendments relating to the classification of personal injury/worker's compensation awards contained in §20-107.3(H). The committee was of the opinion that the purpose of this section was to recognize those components of such awards that affect the economics of the marital partnership as properly includable as marital property. Thus, while pain and suffering is generally personal to the injured spouse and would be such spouse's separate property, loss of wages, which if received during the marriage, would be marital property.

The committee further reviewed the original draft of the 1990 legislative amendments which would have also included in the marital share of such awards the medical or hospital expenses relating to the injury. This component of personal injury awards is often recognized as having an economic impact on the marital relationship and, therefore, properly included in the marital estate in many other equitable distribution states. See, eg., Johnson v. Johnson, 317 N.C. 437, 346 S.E.2d 430 (1982). Landwehr v. Landwehr, 111 N.J. 491, 545 A.2d 738 (1988). The committee also recognized that, even where medical expenses may be paid out of a future settlement, the economic impact on spouses in terms of medical expenses can have a real and present impact on the family economic unit until settlement and payment of such accounts is made. However, the committee further recognized that where health insurance payments reduces such economic impact, to that extent the effect of such an adverse financial consequence

is diminished.

The committee was of the opinion that §20-107.3(H) should be amended to include in the marital share of personal injury/worker's compensation awards any "medical expenses to the extent not covered by health insurance." See Appendix D (lines 256-257).

(8) Enforcement Mechanisms

One of the major problems brought to the committee's attention was the lack of specific authority for the trial court to adequately enforce an equitable distribution order. The inability of the trial court to use its contempt powers or to have continuing authority to order the division or transfer property, or to order payment of an award on a future date certain, has caused hardship to the goals of a fair property division upon divorce. A subcommittee extensively studied this issue and proposed additional and clear enforcement authority for the court in ensuring that equitable distribution orders are complied with.

The committee recommended that a new section [Section 20-107.3(K)] be enacted to provide the court with such enforcement authority, including power to hold a party in contempt for their willful failure to obey or perform such an order. The committee further recommended the amendments to §20-112 and 115 to further provide contempt powers for the court. See Appendix D (lines 280-292).

(9) Pension/Deferred Compensation Awards

In 1988, Section 20-107.3(G) was amended to provide for the "if, when and as" methodology of pension division, where a spouse would receive a percentage of the defined marital share of a retirement benefit, upon the actual receipt of such benefit by the retired spouse. The committee was of the opinion that this marital share methodology was working well in promoting clear rules of pension division, and resulted in more settlements of cases, thus decreasing court litigation on such issues.

The committee examined the fact that, in many cases, the integrity and enforceability of such pension division orders, and the receipt by the spouse of such award in the future, relies on the present proper drafting of such orders in order to comply with applicable federal law. Thus, the future performance of such orders, and the receipt by spouse of their expected pension awards, will usually depend upon the future recognition of such orders by the pension plan, and the proper drafting of such orders at the time the decree is entered. The committee recognized that properly drafted decrees should contain, in the face of the order, the reservation of jurisdiction of the court

to revise such pension orders merely to conform said orders to applicable federal law, and thereby effectuate the intended division. However, the lack of such reservation in the body of such decrees may prevent the intended pension division where mere technicalities in the wording of the order would cure such defects.

In order to protect the interests of pension recipients from the unintended consequences of improperly or incomplete drafted pension orders, the committee was of the opinion that there should be a statutory reservation over the issue of pension divisions merely to permit the court to revise its orders to comply with language required by federal law to effectuate the intended pension award, but not to substantively change the pension award itself. Such an approach has been successfully implemented by legislation now in effect in Missouri. See Mo. Annot. Stat. §452.330(5) (Vernon Supp. 1989).

The committee recommended the enactment of an amendment to §20-107.3(K) to provide authority for the court to modify the pension provisions of a final decree in order to comply such order to applicable federal law, but not to substantively change such award. See Appendix D (lines 293-303).

Respectfully submitted,

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HP4095500

1990 SESSION
ENGROSSED

HOUSE JOINT RESOLUTION NO. 57

House Amendments in [ ] - February 13, 1990

[~~*Establishing a joint subcommittee*~~ *Requesting the Family Law Section of the Virginia State Bar*] *to study equitable distribution.*

Patrons--Keating, Van Landingham, Byrne, Glasscock, Munford, Cunningham, J.W., Johnson, Reynolds, Croshaw, Jackson, Abbitt, Finney, DeBoer, Andrews, Woodrum, Jennings, Cranwell, Christian, Cooper, Marshall, Stambaugh, Cunningham, R.K., Harris, R.E., Fisher, Woods, Fill, Callahan, Dillard, Plum, Parrish, Mayer, Cohen, Marks, McClanan, Diamonstein, Moss and Murphy; Senators: Waddell, Holland, E.M., Colgan, Saslaw, Miller, E.F. and Calhoun

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Referred to the Committee on Rules

WHEREAS, the problems pertaining to the classification, valuation, division, and allocation of real and personal property in divorce proceedings have become increasingly complex; and

WHEREAS, certain decisions of the Court of Appeals relating to property division in divorce proceedings have given rise to the need for clarification; and

WHEREAS, areas of the law which now appear to be unclear and conflicting may be resulting in disparate decisions due to confusion in the courts regarding how the law is to be applied; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That [a ~~joint subcommittee be created to study the status and present state of the law concerning the classification, valuation, division, and allocation of real and personal property in divorce proceedings as set forth in § 20-107.3. The membership of the joint subcommittee shall consist of eleven members and shall be appointed as follows: one member from the House of Delegates at large, four members of the House Committee for Courts of Justice, one circuit court judge, and one member of the Family Law Section of the Virginia State Bar to be appointed by the Speaker of the House of Delegates; and four members of the Senate Committee for Courts of Justice to be appointed by the Senate Committee on Privileges and Elections. The joint subcommittee shall complete its work in time to submit its findings and recommendations to the Governor and the 1991 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for processing legislative documents.~~

~~The indirect costs of this study are estimated to be $14,095; the direct costs of this study shall not exceed $9,000.~~ the Family Law Section of the Virginia State Bar is requested to study the status and present state of the law concerning the classification, valuation, division, and allocation of real and personal property in divorce proceedings as set forth in § 20-107.3.

The Family Law Section of the Virginia State Bar shall complete its work in time to submit its findings and recommendations to the Governor and the 1991 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.]

THE FAMILY LAW SECTION
OF THE
VIRGINIA STATE BAR

House Joint Resolution No. 57 - Survey

The 1990 General Assembly enacted House Joint Resolution No. 57 directing our Section to further study the present status of the law of equitable distribution in Virginia. Although the enactment of S.B. 90 permitting a hybrid classification using a source of funds approach was passed in response to the transmutation problems created by the Smoot case, many other potential areas deserve further study. In accordance with the directives of the Committee formed for purposes of this study, the following questionnaire has been prepared relating to certain areas that require further data and study. The **confidentiality of all responses will be maintained**. Your response to the following survey is critical to the success of our study and, accordingly, we hope you will give the following questions your time and consideration so that as much data as possible can be obtained by our Study Committee. All responses are due no later than **AUGUST 15, 1990**, and should be mailed to the Committee's Chairman as follows: Lawrence D. Diehl, Marks & Harrison, P. O. Box 170, Hopewell, Virginia 23860.

DEMOGRAPHIC INFORMATION:
City/County of your office: ____________________
Judicial circuit: ____________________________
Age:_____ Years in Practice:_____
Percent of Practice Relating to Family Law: ________________

INDICATE YOUR CAPACITY IN RESPONDING TO THIS STUDY (CHECK ONE ONLY):

1. Member, Family Law Section ____
2. Member, Virginia Trial Lawyer Assoc. ____
3. Judge: ____
4. Virginia Women Attorneys Association: ____
5. National Organization of Woman: ____
6. Local Bar Family Law Section (specify): ________________________
7. Other (specify name of organization): ________________________

SURVEY QUESTIONS:
Pursuant to the 1990 Amendment to §20-107.3(A), where property is commingled, a credit to the contributing estate will be made as a part or hybrid classification if the contribution was not a gift. Many non-Virginia states have a presumption that a contribution of money or property to a joint title or joint account presumes a gift, which would preclude an automatic "source of funds" credit to the contributing estate should this presumption be adopted by Virginia case law. Other states (e.q., Maryland, North Carolina) do not have such a gift presumption by the mere commingling of separate property into a joint title or account. Our Committee needs to know if a legislative clarification on this should be made, and the expectations of parties under such circumstances. On this issue, please respond to the following question:

1. Should there be a presumption of a gift in Virginia by the mere commingling of separate property into a joint title or joint account, thus precluding an automatic source of funds credit to the contributing estate?

   Yes: _____ No: _____ No Response: _____
   Comments: ____
   ____

At the present time, Virginia case law does not have a 50/50 presumption for equal division of marital property (Papuchis case), but does have a 50/50 "starting point" for marital property division (Pommerenke case). Many practitioners feel the present Virginia law with unequal division works well, and that each case should be individually assessed. Other argue that, for ease of settlement and court ordered division, a 50/50 presumption would go far towards a fairer implementation of equitable distribution, and one that is more predictable. This policy question is of critical concern to our Committee. On this issue, please respond to the following questions:

2. Which of the following standards for the division/transfer or granting of a monetary award of the marital property in equitable distribution cases should be adopted in Virginia (**check one only**):
   a. 50/50 presumption _____
   b. 50/50 starting point (present Virginia law) _____
   c. No presumption or starting point _____
   d. Other (specify): ______________________________

3. Do you believe that some standard is needed at the present time to provide more certainty to the ultimate division of marital property:
   Yes _____ No _____ No Opinion _____

In Reid v. Reid, the Court of Appeals ruled that the future income and/or future earning capacity of a spouse is not a relevant factor for consideration by the trial court in equitable distribution proceedings (as opposed to its proper consideration in spousal support issues). Most other states permit such a factor as an equitable distribution factor for the court's consideration.

4. State whether you favor or oppose a legislative reversal of the Reid v. Reid case by the enactment of an amendment to permit the trial court to consider the future income and/or future earning capacity of a spouse as a factor pursuant to §20-107.3(E).
   Yes (I favor amendment): __ No (I oppose amendment) __
   No Opinion: __

One of the criticisms often expressed in equitable distribution cases is the lack of predictability of the ultimate division due to the failure of trial court opinions to provide guidance on the weight of each factor given in rendering its opinion. Some states require the trial court to make findings of fact as to each statutory factor and the weight given by the court to each factor.

5. State whether you favor or oppose a legislative amendment requiring the trial court in equitable distribution cases to make findings of fact as to each factor pursuant to §20-107.3(E), and to state the weight given to each factor in rendering its opinion.
   Yes (I favor amendment): __ No (I oppose amendment) __
   No Opinion: __

PLEASE RETURN ALL QUESTIONNAIRES TO:

Lawrence D. Diehl
Marks & Harrison
P. O. Box 170
Hopewell, VA 23860

DUE DATE: AUGUST 15, 1990

SUMMARY OF RESULTS OF SURVEY
HOUSE JOINT RESOLUTION NO. 57

General Response Data:

	Total Surveys Sent	Group Responses	% Response
Judges	143	55	38.5%
Family Law Sect.	912 *	327	35.8%
VTLA	575	205	35.7%
VWAA	469	59	12.6%
TOTAL	2,099	646	30.8%

* Responses on Family Law Section return sheets include 106 members of VTLA and 9 members of local bar associations. Assuming 106 responses of VTLA duplications, actual total response % is 646/1903 = 34%.

1. Should there be a presumption of a gift in Virginia by the mere commingling of separate property into a joint title or joint account, thus precluding an automatic source of funds credit to the contributing estate?

	Yes	No	No Response
Judges	24 (43.6%)	29 (52.7%)	2 (3.7%)
Family Law Section	94 (28.7%)	226 (69.1%)	7 (2.1%)
VTLA	69 (33.7%)	136 (66.3%)	0 (0%)
VWAA	25 (42.4%)	29 (49.1%)	5 (8.5%)
TOTAL	212 (32.8%)	420 (65.0%)	14 (2.2%)

2. Which of the following standards for the division/transfer or granting of a monetary award of the marital property in equitable distribution cases should be adopted in Virginia

	50/50 Presumption	50/50 Starting Point	No Presumption	Other
Judges	18 (32.8%)	28 (50.9%)	7 (12.7%)	2 (3.6%)
Family Law Section	106 (32.4%)	173 (52.9%)	43 (13.1%)	5 (1.6%)
VTLA	78 (38.1%)	97 (47.3%)	30 (14.6%)	0 (0.0%)
VWAA	29 (49.1%)	24 (40.7%)	5 (8.5%)	1 (1.7%)
TOTAL	231 (35.8%)	322 (49.8%)	85 (13.2%)	8 (1.2%)

3. Do you believe that some standard is needed at the present time to provide more certainty to the ultimate division of marital property:

	Yes	No	No Opinion
Judges	22 (40%)	26 (47.3%)	7 (12.7%)
Family Law Section	214 (65.4%)	89 (27.2%)	24 (7.4%)
VTLA	144 (70.2%)	52 (25.4%)	9 (4.4%)
VWAA	41 (69.5%)	15 (25.4%)	3 (5.1%)
TOTAL	421 (65.2%)	182 (28.2%)	43 (6.6%)

4. State whether you favor or oppose a legislative reversal of the Reid v. Reid case by the enactment of an amendment to permit the trial court to consider the future income and/or future earning capacity of a spouse as a factor pursuant to §20-107.3(E).

	Yes	No	No Opinion
Judges	18 (32.7%)	35 (63.7%)	2 (3.6%)
Family Law Section	146 (44.6%)	173 (52.9%)	8 (2.5%)
VTLA	84 (41.0%)	114 (55.6%)	7 (3.4%)
VWAA	31 (52.5%)	22 (37.3%)	6 (10.2%)
TOTAL	279 (43.2%)	344 (53.3%)	23 (3.5%)

5. State whether you favor or oppose a legislative amendment requiring the trial court in equitable distribution cases to make findings of fact as to each factor pursuant to §20-107.3(E), and to state the weight given to each factor in rendering its opinion.

	Yes	No	No Opinion
Judges	2 (3.6%)	53 (96.4%)	0 (0%)
Family Law Section	186 (56.9%)	122 (37.3%)	19 (5.8%)
VTLA	118 (57.6%)	75 (36.6%)	12 (5.8%)
VWAA	39 (66.1%)	11 (18.6%)	9 (15.3%)
TOTAL	345 (53.4%)	261 (40.4%)	40 (6.2%)

1

2 SENATE BILL NO. .... HOUSE BILL NO. ....

3 A BILL to amend and reenact Section 20-107.3 of the Code of
4 Virginia, relating to the definition of marital and
5 separate property in equitable distribution
6 proceedings.

7 Be it enacted by the General Assembly of Virginia:
8 1. That Section 20-107.3 of the Code of Virginia is
9 amended and reenacted as follows:
10 **Section 20-107.3. Court may decree as to property of**
11 **the parties.** -- A. Upon decreeing the dissolution of a
12 marriage, and also upon decreeing a divorce from the bond
13 of matrimony, or upon the filing with the court as provided
14 in subsection I of a certified copy of a final divorce
15 decree obtained without the Commonwealth, the court, upon
16 request of either party, shall determine the legal title as
17 between the parties, and the ownership and value of all
18 property, real or personal, tangible or intangible, of the
19 parties and shall consider which of such property is
20 separate property and which is marital property, and which
21 is part separate and part marital property in accordance
22 with subdivision A 3. The court shall determine the value
23 of any such property as of the date of the evidentiary
24 hearing on the evaluation issue. Upon motion of either
25 party made no less than twenty-one days before the
26 evidentiary hearing the court may, for good cause shown, in
27 order to attain the ends of justice, order that a different
28 valuation date be used. The court, on the motion of both
29 parties, may retain jurisdiction in the final decree of
30 divorce to adjudicate the remedy provided by this section
31 when the court determines that such action is clearly
32 necessary because of the complexities of the parties'
33 property interests, and all decrees heretofore entered
34 retaining such jurisdiction are validated.
35 1. Separate property is (i) all property, real and
36 personal, acquired by either party before the marriage;
37 (ii) all property acquired during the marriage by bequest,
38 devise, descent, survivorship or gift from a source other
39 than the other party; (iii) all property acquired
40 during the marriage in exchange for or from the proceeds
41 of sale of separate property, provided that such property
42 acquired during the marriage is maintained as separate
43 property; and (iv) that part of any property classified as
44 part separate pursuant to subdivision A 3. Income received
45 from separate property during the marriage is separate
46 property if not attributable to the personal effort of
47 either party. The increase in value of separate
48 property during the marriage is separate property, unless
49 marital property or the personal efforts of either
50 party have contributed to such increases and then only
51 to the extent of the increases in value attributable to such

52 contributions. The personal efforts of either party must be
53 significant and result in substantial appreciation of the
54 separate property if any increase in value attributable
55 thereto is to be considered marital property.
56 2. Marital property is (i) except as provided by
57 subdivision A 3, all property titled in the names of both
58 parties whether as joint tenants, tenants by the entirety or
59 otherwise (ii) that part of any property classified as
60 marital pursuant to subdivision A 3, or (iii) all other
61 property acquired by each party during the marriage which is
62 not separate property as defined above. All property
63 including that portion of pensions, profit-sharing or
64 deferred compensation or retirement plans of whatever
65 nature, acquired by either spouse during the marriage, and
66 before the last separation of the parties, if at such time
67 or thereafter at least one of the parties intends that the
68 separation be permanent, is presumed to be marital property
69 in the absence of satisfactory evidence that it is separate
70 property. For purposes of this section marital property is
71 presumed to be jointly owned unless there is a deed, title
72 or other clear indicia that it is not jointly owned.
73 3. The court shall classify property as part marital
74 property and part separate property as follows:
75 a. In the case of income received from separate
76 property during the marriage, such income shall be marital
77 property only to the extent it is attributable to the
78 personal efforts of either party. In the case of the
79 increase in value of separate property during the marriage,
80 such increase in value shall be marital property only to the
81 extent that marital property or the personal efforts of
82 either party have contributed to such increases, provided
83 that any such personal efforts must be significant and
84 result in substantial appreciation of the separate property.
85 "Personal effort" of a party shall be deemed to be
86 labor, effort, inventiveness, physical or intellectual
87 skill, creativity or managerial activity, promotional or
88 marketing activity, applied directly to the separate
89 property of either party. For purposes of this sub-
90 division, the non-owning spouse shall bear the burden
91 of proving that contributions of marital property or
92 personal effort were made and that the separate
93 property increased in value. Once this burden of
94 proof is met, the owning spouse shall bear the burden
95 of proving that the increase in value or some portion
96 thereof was not caused by contributions of marital
97 property or personal effort.
98 b. In the case of any pension, profit-sharing or
99 deferred compensation plan or retirement benefit, the
100 marital share as defined in subsection G shall be marital
101 property.
102 c. In the case of any personal injury or workman's
103 compensation recovery of either party, the marital share
104 as defined in subsection J shall be marital property.
105 d. When marital property and separate property are

106 commingled by contributing one category of property into
107 another, resulting in the loss of identity of the
108 contributed property, the classification of the
109 contributed property shall be transmuted to the category
110 of property receiving the contribution. However, to the
111 extent the contributed property is retraceable by a
112 preponderance of the evidence and was not a gift,
113 such contributed property shall retain its original
114 classification.
115 e. When marital property and separate property are
116 commingled into newly acquired property resulting in the
117 loss of identity of the contributing properties, the
118 commingled property shall be deemed transmuted to marital
119 property. However, to the extent the contributed property
120 is retraceable by a preponderance of the evidence and was
121 not a gift, the contributed property shall retain its
122 original classification.
123 ~~"Personal--effort"--of--a--party--shall--be--deemed--to--be~~
124 ~~labor,--effort,--inventiveness,--physical--or--intellectual~~
125 ~~skill,-creativity-or-managerial-activity,-promotional-or~~
126 ~~marketing-activity,-applied-directly-to-the-separate~~
127 ~~property-of-either-party.~~
128 f. When separate property is re-titled in the joint
129 names of the parties, the re-titled property shall be
130 deemed transmuted to marital property. However, to the
131 extent the property is retraceable by a preponderance of the
132 evidence and was not a gift, the re-titled property shall
133 retain its original classification.
134 g. Subdivisions A 3 (d), (e) and (f) of this section
135 shall apply to jointly owned property. No presumption of
136 gift shall arise under this section where (i) separate
137 property is commingled with jointly owned property; (ii)
138 newly acquired property is conveyed into joint ownership; or
139 (iii) existing property is conveyed or re-titled into joint
140 ownership. Property is jointly owned for purposes of
141 subdivision A 3 of this section when it is titled in the
142 name of both parties, whether as joint tenants, tenants by
143 the entireties, or otherwise.
144 B. For the purposes of this section only, both
145 parties shall be deemed to have rights and interests in the
146 marital property; however, such interests and rights shall
147 not attach to the legal title of such property and are only
148 to be used as a consideration in determining a monetary
149 award, if any, as provided in this section.
150 C. The court shall have no authority to order the
151 division or transfer of separate property or marital
152 property which is not jointly owned. The court may, based
153 upon the factors listed in subsection E, divide or transfer
154 or order the division or transfer, or both, of jointly owned
155 marital property, or any part thereof. The Court shall
156 also have the authority to apportion and order the payment
157 of the debts of the parties, or either of them, that are
158 incurred prior to the dissolution of the marriage, based
159 upon the factors listed in subsection E.

160 As a means of dividing or transferring the jointly
161 owned marital property, the court may (i) order the transfer
162 of real or personal property or any interest therein to one
163 of the parties, (ii) permit either party to purchase the
164 interest of the other and direct the allocation of the
165 proceeds, provided the party purchasing the interest of the
166 other agrees to assume any indebtedness secured by the
167 property, or (iii) order its sale by private sale by the
168 parties, through such agent as the court shall direct, or
169 by public sale as the court shall direct without the
170 necessity for partition. All decrees hereinbefore entered
171 which divide or transfer or order the division or transfer
172 of property directly between the parties are hereby
173 validated and deemed self-executing.
174 D. In addition, based upon (i) the equities and the
175 rights and interests of each party in the marital property,
176 and (ii) the factors listed in subsection E, the court has
177 the power to grant a monetary award, payable either in a
178 lump sum or over a period of time in fixed amounts, to
179 either party. The party against whom a monetary award is
180 made may satisfy the award, in whole or in part, by
181 conveyance of property, subject to the approval of the
182 court. An award entered pursuant to this subsection shall
183 constitute a judgment within the meaning of §8.01-426 and
184 shall not be docketed by the clerk unless the decree so
185 directs. The provisions of §8.01-382, relating to interest
186 on judgments, shall apply unless the court orders otherwise.
187 Any marital property, which has been considered or
188 ordered transferred in granting the monetary award under
189 this section, shall not thereafter be the subject of a suit
190 between the same parties to transfer title or possession
191 of such property.
192 E. The amount of any division or transfer of jointly
193 owned marital property, and the amount of any monetary
194 award, the apportionment of marital debts, and the method of
195 payment shall be determined by the court after consideration
196 of the following factors:
197 1. The contributions, monetary and nonmonetary, of
198 each party to the well-being of the family;
199 2. The contributions, monetary and nonmonetary, of
200 each party in the acquisition and care and maintenance of
201 such marital property of the parties;
202 3. The duration of the marriage;
203 4. The ages and physical and mental condition of
204 the parties;
205 5. The circumstances and factors which contributed
206 to the dissolution of the marriage, specifically including
207 any ground for divorce under the provisions of §20-91 (1),
208 (3) or (6) or §20-95;
209 6. How and when specific items of such marital
210 property were acquired;
211 7. The debts and liabilities of each spouse, the
212 basis for such debts and liabilities, and the property
213 which may serve as security for such debts and liabilities;

214 8. [Repealed.]
215 9. The liquid or nonliquid character of all marital
216 property;
217 10. The tax consequences to each party; and
218 11. Such other factors as the court deems necessary
219 or appropriate to consider in order to arrive at a fair
220 and equitable monetary award.
221 F. The court shall determine the amount of any
222 such monetary award without regard to maintenance and
223 support awarded for either party or support for the
224 minor children of both parties and shall, after or at the
225 time of such determination and upon motion of either
226 party, consider whether an order for support and maintenance
227 of a spouse or children shall be entered or, if previously
228 entered, whether such order shall be modified or vacated.
229 G. In addition to the monetary award made pursuant
230 to subsection D, and upon consideration of the factors set
231 forth in subsection E, the court may direct payment of a
232 percentage of the marital share of any pension, profit-
233 sharing or deferred compensation plan or retirement
234 benefits, whether vested or nonvested, which constitutes
235 marital property and whether payable in a lump sum or
236 over a period of time. However, the court shall only
237 direct that payment be made as such benefits are
238 payable. No such payment shall exceed fifty percent
239 of the marital share of the cash benefits actually received
240 by the party against whom such award is made. "Marital
241 share" means that portion of the total interest, the right
242 to which was earned during the marriage and before the
243 last separation of the parties, if at such time or there-
244 after at least one of the parties intended that the
245 separation be permanent.
246 H. In addition to the monetary award made pursuant
247 to subsection D, and upon consideration of the factors set
248 forth in subsection E, the court may direct payment of a
249 percentage of the marital share of any personal injury
250 or workman's compensation recovery of either party, whether
251 such recovery is payable in a lump sum or over a period of
252 time. However, the court shall only direct that payment
253 be made as such recovery is payable, whether by settlement,
254 jury award, court award, or otherwise. "Marital share"
255 means that part of the total personal injury or workman's
256 compensation recovery attributable to lost wages <u>or medical</u>
257 <u>expenses to the extent not covered by health insurance</u>
258 accruing during the marriage and before the last separation
259 of the parties, if at such time or thereafter at least one
260 of the parties intended that the separation be permanent.
261 I. Nothing in this section shall be construed to
262 prevent the affirmation, ratification and incorporation
263 in a decree of an agreement between the parties pursuant
264 to §§20-109 and 20-109.1. Agreements, otherwise valid as
265 contracts, entered into between spouses prior to the
266 marriage shall be recognized and enforceable.
267 J. A court of proper jurisdiction under §20-96 may

268 exercise the powers conferred by this section after a court
269 of a foreign jurisdiction has decreed a dissolution of a
270 marriage or a divorce from the bond of matrimony, if (i) one
271 of the parties was domiciled in this Commonwealth when the
272 foreign proceedings were commenced, and (ii) the foreign
273 court did not have personal jurisdiction over the party
274 domiciled in the Commonwealth, and (iii) the proceeding is
275 initiated within two years of receipt of notice of the
276 foreign decree by the party domiciled in the Commonwealth,
277 and (iv) the court obtains personal jurisdiction over the
278 parties pursuant to §8.01-328.1 A 9, or in any other manner
279 permitted by law.
280 K. The court shall have the continuing authority
281 and jurisdiction to make any additional orders necessary
282 to effectuate and enforce any order made by the court
283 under this section, to include the authority to order a
284 date certain to transfer or divide any jointly owned
285 property under subsection C hereof or to pay any monetary
286 award under subsection D hereof, and the court shall have
287 authority to punish as contempt of court any willful
288 failure of a party to comply with the provisions of any
289 order made by the court under this section and to
290 appoint a special commissioner to transfer any property
291 under subsection C hereof where a party refuses to comply
292 with the order of the court to transfer such property.
293 The court shall have the continuing authority
294 and jurisdiction to modify any order intended to affect or
295 divide any pension, profit-sharing or deferred compensation
296 plan or retirement benefits pursuant to the U.S. Internal
297 Revenue Code or other applicable federal laws, only for
298 the purpose of establishing or maintaining the order as
299 a qualified domestic relations order or to revise or
300 conform its terms so as to effectuate the expressed
301 intent of the order. The provisions of this paragraph
302 shall apply to all orders entered pursuant to this section
303 in any case filed on or after July 1, 1982. (1982, c.309;
304 1984, c. 649; 1985, cc. 4, 442; 1986, cc. 533, 537; 1988,
305 cc. 745, 746, 747, 825, 880; 1989, c. 70.).

1

2 SENATE BILL NO. .... HOUSE BILL NO. ....

3 A BILL to amend and reenact Section 20-112 of the Code of
4 Virginia, relating to notice when the proceedings are
5 reopened to increase, decrease or terminate
6 maintenance and support for a spouse or for a child.

7 Be it enacted by the General Assembly of Virginia:
8 1. That Section 20-112 of the Code of Virginia is
9 amended and reenacted as follows:
10 **Section 20-112. Notice when proceedings reopened. --**
11 A. When the proceedings are reopened to increase, decrease
12 or terminate maintenance and support for a spouse or for a
13 child, or to request additional orders to effectuate
14 previous orders made pursuant to §20-107.3, the petitioning
15 party shall give such notice to the other party by service
16 of process or by order of publication as is required by law.
17 No support order may be retroactively modified, but may be
18 modified with respect to any period during which there is a
19 pending petition for modification, but only from the date
20 that notice of such petition has been given to the
21 responding party.

1

2 SENATE BILL NO. .... HOUSE BILL NO. ....

3 A BILL to amend and reenact Section 20-115 of the Code of
4 Virginia, relating to failure to comply with order or
5 decree.

6 Be it enacted by the General Assembly of Virginia:
7 1. That Section 20-115 of the Code of Virginia is
8 amended and reenacted as follows:
9 **Section 20-115. Commitment and sentence for failure**
10 **to comply with order or decree.** -- A. Upon failure
11 or refusal to give the recognizance provided for in
12 §20-114, or upon conviction of any party for contempt
13 of Court in failing or refusing to comply with any
14 order or decree for support and maintenance for a
15 spouse or for a child or children, <u>or willfully</u>
16 <u>failing or refusing to comply with any order made</u>
17 <u>pursuant to §20-107.3 or 20-103</u>, the Court may
18 commit and sentence such party to the state
19 correctional institution for women, a workhouse,
20 city farm or work squad, or the state convict road
21 force, at hard labor, as provided for in §§20-61
22 and 20-62, for a fixed or indeterminate period or
23 until the further order of the Court, in no event
24 however for more than twelve months, and the sum or
25 sums as provided for in §20-63, shall be paid as
26 therein set forth, to be used for the support and
27 maintenance of the spouse or the child or children
28 for whose benefit such order or decree provided.