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# VIRGINIA'S EXEMPTION STATUTES—THE NEED FOR REFORM AND A PROPOSED REVISION

JOSEPH E. ULRICH\*

In recent years the Virginia legislature has made several attempts to revise its exemption laws. The amount of the homestead exemption has been raised twice,<sup>1</sup> and the definition of householder has been broadened to permit more debtors to claim the homestead and poor debtor's exemptions.<sup>2</sup> These patches made in the scheme, however, are insufficient. Without more substantial changes these statutes cannot perform their function. An extensive overhaul is needed.

The need for reform is especially necessary because of the legislature's treatment of exemptions for bankrupts under the Bankruptcy Reform Act of 1978.<sup>3</sup> The new Act provides for a federal exemption,<sup>4</sup> but grants the states authority to preclude their residents from adopting the federal exemption.<sup>5</sup> The Virginia legislature accepted Congress' invitation; a Vir-

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<sup>1</sup> See text accompanying notes 82-83 *infra*.

<sup>2</sup> See text accompanying notes 29-33 *infra*.

<sup>3</sup> Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 522, 92 Stat. 2549 (1978), 11 U.S.C.A. § 522 (1979) [hereinafter only the section number of the Bankruptcy Reform Act will be used].

<sup>4</sup> § 522(d). Prior to the passage of the new Act many authorities called for a federal exemption to replace the traditional method of incorporating state exemptions laws into the Bankruptcy System as required by § 6 of the 1898 Bankruptcy Act. Countryman, *For A New Exemption Policy in Bankruptcy*, 14 RUT. L. REV. 678, 680 (1960) [hereinafter cited as Countryman]; Joslin, *Debtors' Exemption Laws: Time For Modernization*, 34 IND. L. J. 355, 356 (1959) [hereinafter cited as Joslin]; Note, *Bankruptcy Exemptions: A Full Circle Back to the Act of 1800?*, 53 CORNELL L. REV. 663, 665 (1968). But see Kennedy, *Limitation of Exemptions in Bankruptcy*, 45 IOWA L. REV. 445, 449 (1960) [hereinafter cited as Kennedy]. The Commission on Bankruptcy Laws, following the view of most commentators, proposed a federal exemption. See § 4-503, Proposed Bankruptcy Act of 1973. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, PART II, H.R. DOC. NO. 93-137, 93d Cong., 1st Sess. (1973) [hereinafter cited as COMMISSION REPORT II].

<sup>5</sup> § 522(b)(1). The original Senate Bill retained the traditional rule which incorporated the exemptions of the debtor's domicile. See S. REP. NO. 989, 95th Cong., 2d Sess. 75, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5787, 5861. The House Bill, on the other hand, offered the debtor a choice between the exemption of the state of his domicile and a federal exemption. H.R. REP. NO. 595, 95th Cong., 1st Sess. 126, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5963, 6087 [hereinafter cited as HOUSE REPORT]. Section 522(b)(1) of the Bankruptcy Reform Act represents the compromise. It provides that a debtor may exempt "property that is specified under subsection (d) [The Federal Exemption] of this section, unless the State law that is applicable to the debtor. . . specifically does not so authorize. . . ."

The precise basis for this compromise is unclear. The Informal Conference Committee Report, i.e., the report of those Senate and House members appointed to resolve differences

ginia bankrupt may claim as exempt only what the Commonwealth grants.<sup>6</sup> The reason for this decision seems clear. The Federal exemption is far more generous than that granted by local law.<sup>7</sup> Where the debtor fares better in bankruptcy than he would under state law, the number of voluntary petitions will tend to increase.<sup>8</sup> The reason for this is apparent if one considers the alternative offered the debtor. When the debtor is told that he can protect a greater amount of property and, in addition, discharge his obligations by filing a voluntary petition, and that his alternative is to get a lesser amount of property and to remain liable on his debts under state law, *res ipsa locquiter* — he chooses bankruptcy. Finding no

between the Senate and House versions of the Bankruptcy Acts, is silent in this regard. 124 CONG. REC. H.11095 (daily ed. Sept. 28, 1978), 124 CONG. REC. S.17412 (daily ed. Oct. 6, 1978). Senator Wallop of Wyoming, one of the Senate managers of S. 2266 and the amendments which eventually become the Bankruptcy Reform Act, declared:

In the area of exemptions, we have won an important victory for the rights of states to determine exemptions for the debtors of their states . . . States by legislation may elect not to have [the federal bankruptcy exemptions] . . . apply [to] their debtors. This option is most important since many states . . . have been responsive to the needs of debtors and have liberalized exemptions frequently in recent years.

124 CONG. REC. S.17406 (daily ed. Oct. 6, 1978).

See also Congressman Butler's explanation of his compromise, 95 CONG. REC. 6117 (1978). The opposition to a uniform federal exemption in bankruptcy reflected in Senator Wallop's comments is one of long standing. See 1A COLLIER, ¶ 6.01 & .02 (14th ed. 1977) [hereinafter cited as COLLIER].

<sup>6</sup> VA. CODE § 34.1-3 (Cum. Supp. 1979). As was true under § 6 of the 1898 Bankruptcy Act, lack of uniformity of operation of exemption statutes raises no constitutional question. All that is required is geographical uniformity. See *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 188 (1902). In fact, the view has been expressed that a uniform bankruptcy exemption covering cases in which interstate commerce had not been affected might violate the Constitution. See *Hearings Before the House Comm. on the Judiciary on Revision of the Bankruptcy Act*, 75th Cong., 1st Sess. 387-88 (1937).

<sup>7</sup> Section 522(d) permits a debtor to exempt his equity in real or personal property up to \$7500. § 522(d)(1) & (5). In addition, a debtor may shield his equity in an automobile up to \$1200, § 522(d)(2), any item of household furnishing, household goods, wearing apparel, or appliances up to \$200 per item without an aggregate limitation, § 523(d)(3), his equity in the tools of his trade up to \$750, § 522(d)(4), with the potential for at least \$5000 more. Where husband and wife file joint petitions in bankruptcy, each is entitled to claim an exemption. § 522(m). The Virginia exemptions are considerably lower. See notes 69-147 *supra*. The only instance in which the federal exemption is less generous than Virginia's is the personal injury claim. In Virginia, a personal injury claim is exempt from execution, *City of Richmond v. Hanes*, 203 Va. 102, 105-07, 122 S.E.2d 895, 897-99 (1961), while § 522(d)(11)(D) limits protection to no more than \$7500 for actual pecuniary loss plus compensation for loss of future earnings to the extent necessary to support the debtor and dependents. See also § 522(d)(11)(E).

<sup>8</sup> The converse of the proposition that the number of voluntary petitions will increase when a debtor does better in bankruptcy than he would under state law is equally true. If the exemptions under the Bankruptcy Act are less generous than those given by state law, creditors have an incentive to file involuntary petitions against the debtor. See generally Kennedy, *supra* note 4, at 446-53; Plumb, *The Recommendations of the Commission on the Bankruptcy Laws - Exempt and Immune Property*, 61 VA. L. REV. 1, 8-11 (1975). In addition the new Act makes it easier to throw a debtor into bankruptcy since an "act of bankruptcy" is no longer necessary. Compare § 303 with § 3 of the 1898 Bankruptcy Act.

benefits in encouraging local debtors to seek bankruptcy, the legislature acted.<sup>9</sup>

The legislature, however, has not completed its task. This article proposes legislation that will foster the dual goals of promoting the underlying policy of the exemption laws and increasing the attractiveness of the Virginia system to debtors as compared with bankruptcy. The current Virginia scheme better serves the first goal than its counterparts in other states because it is flexible and displays comparatively little favoritism to any class of debtors.<sup>10</sup> For these reasons much of the current design of the present exemption laws should be retained.<sup>11</sup> Nonetheless, the bankruptcy alternative still is more attractive to debtors than the state remedy despite the legislature's recent actions. Where possible the Virginia exemptions ought to provide the debtor with as much or more property as bankruptcy, thereby encouraging debtors to forego the bankruptcy remedy.<sup>12</sup> This reward, granted in lieu of a discharge, is offered in exchange for the debtor's tacit agreement to pay his existing obligations.

### The Fundamental Policies of Exemption Statutes<sup>13</sup>

The basic themes of exemption laws might be summarized as follows: The debtor must be protected against total poverty without undue prejudice towards claims of creditors through legislation which will not become obsolete quickly. Society has a clear interest in preventing any person from becoming a public charge.<sup>14</sup> By permitting a debtor to retain sufficiency property to maintain a minimum standard of living, he retains his status as an independent economic unit thereby increasing the

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<sup>9</sup> Cf. Lacy, *South Carolina's Statutory Exemptions and Consumer Bankruptcy*, 30 S. CAR. L. REV. 644 (1979) [hereinafter cited as Lacy]. The author, after noting the marked disparity of treatment of debtors under the proposed federal and current South Carolina exemptions, *id.* at 678-79, advised the legislature to deny debtors the right to claim the federal exemption to prevent giving debtors a "perhaps irresistible incentive to file consumer bankruptcies." *Id.* at 687. Concomitant with this proposal, he urged that the legislature revise its exemption laws so as to fulfill their appropriate objectives. *Id.* at 678-88.

<sup>10</sup> See text accompanying notes 13-22 *infra*. Farmers, however, have been granted a preferred position. See VA. CODE § 34-27. Moreover, many of the exemption items enumerated in § 34-26 are only available to farmers as a practical matter.

<sup>11</sup> This comment applies to Virginia's most significant exemption, the homestead.

<sup>12</sup> Beyond question, a state could not openly discriminate against a debtor who chooses bankruptcy. See § 522. As will be pointed out, however, the exemption may be written so that the debtor does better outside of bankruptcy. See text accompanying notes 61-65 & 99-109 *infra*. That the exemptions should be written in this way is argued in Note, 1978 B.Y.U. L. REV. 462.

<sup>13</sup> Vukowich, *Debtors' Exemption Rights*, 62 GEO. L.J. 779, 781-88 (1974) [hereinafter cited as Vukowich].

<sup>14</sup> While the usual emphasis of exemption laws, especially the homestead laws, has been the protection of the family, the needs of the individual debtor have not been forgotten. See, e.g., Consumer Credit Protection Act § 303, 15 U.S.C. § 1673 (1976), codified by Virginia in a slightly modified form, VA. CODE § 34-29 (Cum. Supp. 1979); Social Security Act § 208, 42 U.S.C. § 407 (1976); VA. CODE § 34-26 (Cum. Supp. 1979), §§ 38.1-448 & 449 (1976). All of these exemptions may be claimed by a non-family debtor.

chances of rehabilitation.<sup>15</sup> Since he is not impoverished, he has less need for bankruptcy. Where an exemption does not permit a comfortable existence, the debtor has an incentive to earn more income to supplement his estate which may then lead to payment of creditors.<sup>16</sup>

A more prominent policy underlying the exemption laws is the desire to protect the debtor's dependents, ordinarily the members of his family, from undue hardships.<sup>17</sup> A related idea is the preservation of the family unit.<sup>18</sup> Thus, an exemption system which permits the family to survive should at the same time stimulate the debtor to rehabilitate himself.

Statutes implementing the goals of dependent support and debtor rehabilitation must not, however, unduly prejudice the creditor's position. In a commercial society which is dependent on credit, the law must enforce contract obligations.<sup>19</sup> If too many of a debtor's assets are free from legal seizure, the risks of lending are increased, and the granting of credit will be retarded. Yet to a certain extent, society expects creditors to subsidize debtors. As Professor MacLachlan has pointed out, "exemption laws may be recognized as legalized frauds on creditors, in the sense that they declare a public policy in favor of having debtors retain certain essential aids to their support in preference to the satisfaction of creditors' claims."<sup>20</sup> As long as the exemption does not permit the debtor to live too well, creditors probably have no complaint. The debtor is still spurred to earn additional funds out of which their claims may be realized. Fairness dictates, however, that creditors be forced to subsidize only the primary

<sup>15</sup> See Rombauer, *Debtors' Exemption Statutes - Revision Ideas*, 36 WASH. L. REV. 484, 486-87 (1961) [hereinafter cited as Rombauer]; Vukowich, *supra* note 13, at 786-87. See also *Hollywood Credit Clothing Co. v. Jones*, 117 A.2d 226, 227 (D.C. 1955); *Slatcoff v. Dezen*, 76 So.2d 792, 794 (Fla. 1954); *Maschke v. O'Brien*, 142 Pa. Super. Ct. 559, 563, 17 A.2d 923, 924 (1941). The position that any debtor should be assisted through the exemption laws to rehabilitate himself is often couched in terms of obviating the need for public assistance programs. Most people agree that welfare legislation is not a satisfactory alternative to traditional methods of obtaining debtor rehabilitation. See Note, *Bankruptcy Exemptions: Critique and Suggestions*, 68 YALE L.J. 1459, 1497-1502 (1959).

<sup>16</sup> Rombauer, *supra* note 15, observes that in discussing exemptions the tendency is to emphasize the protection of the "debtor, family and society" and to forget the necessity of "guarding . . . the productive ability of a debtor for the benefit of all his creditors." *Id.* at 486.

<sup>17</sup> This is the Virginia position. See text accompanying notes 67-116 *infra*. See also VA. CODE §§ 34-10, 34-11 & 34-15 (1976) which permit the widow and minor children to claim the homestead exemption after the husband's death which underscores the desire to protect the debtor's dependents. See also *Kennedy v. First Nat'l Bank of Tuscaloosa*, 107 Ala. 170, 180, 186, 18 So. 396, 397, 399 (1895); *Iowa Mut. Ins. Co. v. Parr*, 189 Kan. 475, 480, 370 P.2d 400, 404 (1962); *Wilcox v. Hawley*, 31 N.Y. 648, 657 (1864).

<sup>18</sup> *E.g.*, *Anderson v. Canaday*, 37 Okla. 171, 175, 131 P. 697, 699 (1913). Studies have shown that financial crisis often precipitates divorce. See, *e.g.*, H. CARTER & P. GLICK, *MARRIAGE AND DIVORCE: A SOCIAL AND ECONOMIC STUDY*, 264-67, 398-400 (1976).

<sup>19</sup> See REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES PART I, H.R. DOC. NO. 137, PART I, 93d. Cong., 1st Sess. (1973) [hereinafter cited as COMMISSION REPORT I].

<sup>20</sup> J. MACLACHLAN, *HANDBOOK OF THE LAW OF BANKRUPTCY* § 162 (1956).

goals of exemption laws—subsistence support and debtor rehabilitation.<sup>21</sup> There is no valid reason why creditors should also subsidize secondary purposes such as the purchase of homes or of insurance.<sup>22</sup>

### The Virginia System<sup>23</sup>

#### a. Definition of Householder

Any Virginia resident<sup>24</sup> may claim the exemption from wage garnishment,<sup>25</sup> but only householders are entitled to assert the Homestead,<sup>26</sup> Poor Debtors,<sup>27</sup> and Insurance Exemptions.<sup>28</sup> The Virginia Constitution defined a householder as a person who proved a legal or moral duty to support dependents.<sup>29</sup> As several cases made clear, the primary reason for distin-

<sup>21</sup> Vukowich, *supra* note 13, at 782. See COMMISSION REPORT I, *supra* note 19, at 171; Karlan, *Exemptions from Execution*, 22 BUS. LAW. 1167, 1169 (1967). See also O'Brien v. Johnson, 275 Minn. 305, 309-11, 148 N.W.2d 357, 360-61 (1967). For specific criticism regarding the over liberality of the insurance exemption, see note 137 *infra*.

<sup>22</sup> "Such laws [homestead exemptions] have also been considered to be devices to encourage home ownership and to attract settlers to areas in which the home is accorded maximum protection." Haskins, *Homestead Exemption*, 63 HARV. L. REV. 1289, 1289-90 (1950) [hereinafter cited as Haskins]. Arguably the insurance exemption has been used to promote the sale of insurance. See Davis, *Letting Affected Parties Communicate Standards - Exempt Property*, 53 IOWA L. REV. 366, 368-69 (1967) [hereinafter cited as Davis]. In some states exemptions were prompted for the purpose of promoting the growth of savings and loan institutions at a time when these were new forms of financial institutions. See Rombauer, *supra* note 15, at 487-88. Finally some legislatures have used exemptions to reduce the debtor's loss of judicial sales. See Vukowich, *supra* note 13, at 787-88.

<sup>23</sup> In addition to the four major exemptions discussed in this article, legislative protection has been given to various other kinds of property. See, e.g., VA. CODE § 19.2-368.12(A) (Cum. Supp. 1979) (compensation of crime victims); § 63.1-88 (welfare benefits); § 65.1-82 (workman's compensation); § 38.1-482 (group life insurance); § 38.1-488 (industrial sick benefits insurance); § 38.1-563 (burial society). Personal injury causes of action are also exempt from process. See note 8 *supra*.

<sup>24</sup> With the exception of the statute protecting against garnishment of earnings, Virginia restricts the benefits of its exemption laws to resident debtors. For example, VA. CODE § 34-4 grants the homestead exemption to a "householder. . . residing in this State. . ." The Poor Debtor's and Insurance exemptions have similar limitations. VA. CODE §§ 34-26 & 38.1-448 & 449. The full faith and credit clause does not mandate that a state accord a nonresident debtor protection equal to that granted by the exemption statutes of his domicile. UNIFORM EXEMPTIONS ACT § 3, Comment 1; Vukowich, *supra* note 13, at 838-41. Most states do adopt the exemption statutes of a nonresident debtor's domicile as a matter of comity. *Id.* at 839. See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 13 (1971). Most authorities would agree that § 3 of the UNIFORM EXEMPTIONS ACT adopts the proper principles:

(a) Residents of this state are entitled to the exemptions provided by this Act. Nonresidents are entitled to the exemptions provided by the law of the jurisdiction of their residence.

(b) The term 'resident' means an individual who intends to maintain his home in this state.

<sup>25</sup> VA. CODE § 34-29.

<sup>26</sup> *Id.* § 34-4.

<sup>27</sup> *Id.* § 34-26. Section 34-27 contains a special exemption for farmers. See note 10 *supra*.

<sup>28</sup> *Id.* §§ 38.1-448 & 449.

<sup>29</sup> The history of the term "householder," both as used in the Virginia Constitution and

guishing householders from other debtors was to protect dependents from want and suffering. Any benefit accruing to the householder was considered incidental.<sup>30</sup> When all reference to the homestead was omitted from the Constitution in 1970, the legislation defined householder in the traditional fashion.<sup>31</sup> In 1979, however, the traditional definition was dropped. Section 34-1 of the Virginia Code now defines householder as "any person, married or unmarried, who maintains a separate residence or living quarters, whether or not others are living with him."<sup>32</sup> The effect of this

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as used in the homestead statutes, is set forth in BURKS PLEADING AND PRACTICE §§ 440-42 (4th ed. 1952) [hereinafter cited as BURKS]. The Virginia courts have always interpreted the term as requiring the idea of dependence and support coupled with a legal or moral duty to support dependents. See, e.g., *Oppenheim v. Myers*, 99 Va. 582, 586, 39 S.E. 218, 219 (1901).

<sup>30</sup> In *Calhoun v. Williams*, 73 Va. (32 Gratt.) 18 (1879), the court stated that the homestead exemption was "intended not so much for the benefit of the person to whom it is given, as for the benefit of his family; to enable the person to whom it is given to save his family from want and suffering." *Id.* at 21. A mere group of individuals living together does not satisfy the family requirement. Thus, an unmarried infant supporting his mother living with him qualifies as a householder since the family requirement is present, *Epperty v. Holley*, 3 Va. L. Reg. (N.S.) 27, 30 (1917), but a social fraternity could not qualify. See BURKS, *supra* note 28, at § 442. *But cf.* *Wilkerson v. Merrill*, 87 Va. 513, 12 S.E. 1015 (1891). In *Wilkerson*, the debtor's claim of homestead was challenged on the ground that he no longer supported any dependents and therefore was not a householder. *Id.* at 1015. In response the debtor asserted that the challenging creditor had murdered his dependent grandson for the purpose of destroying his homestead claim. The creditor demurred to the allegation. The court held that once the homestead had been properly claimed, it was not lost by the death of all family members except the householder himself. *Id.* at 1016. The opinion emphasizes that the exemption is for the benefit of the householder as well as the family and overruled *Calhoun v. Williams*, 73 Va. 18 (1879) to that extent. *Id.* [It is hard to imagine the court reaching a different result on the facts and issues before it.]

The editors of the fourth edition of BURKS, however, argue that *Calhoun*, not *Merrill* state the law on this point, i.e., the householder may "enjoy the benefits of the homestead along with the family so long as the family exists." See BURKS, *supra* note 29, § 665 (emphasis in original). The issue has never been settled by the legislature.

<sup>31</sup> The word "householder" used in this title shall mean one who occupies such a relationship toward persons living with him as to entitle them to a legal or moral right to look to him for support and who, in turn, has the duty of supporting such persons. The word "householder" shall be equivalent to the expression "householder or head of a family, . . ."

VA. CODE § 34-1 (1976).

<sup>32</sup> VA. CODE § 34-1 (Cum. Supp. 1979). The amended definition was in part a reaction to the case of *In re Wilkes*, 2 Bankr. Ct. Dec. 957 (W.D. Va. 1976). To the bankrupt's claim of a homestead, the trustee responded that Wilkes' dependents did not live in the same house as the debtor. At that time § 34-1 defined a householder as one who supported "persons living with him." It was admitted that the debtor contributed some support to these dependents. To avoid what appeared to be an unfair result, the bankruptcy court ignored the precise wording of the statute and held the phrase "persons living with him" should be construed to mean "persons depending on the householder for their livelihood, support and maintenance for which the householder has the necessary legal or moral responsibility and not only those persons living under his roof." *Id.* at 959. In the course of its opinion the court noted other meritorious cases, such as the husband whose wife is confined to a mental institution, in which debtors would not be able to bring themselves within this requirement. In 1978 the legislature amended § 34-1 by defining householders in terms of "separate residence" as well as the traditional definition.

change is to expand the number of people who may qualify as householders.

Since this expanded definition of a householder fails to foster the basic policies of the homestead laws, it should not be viewed as a change for the better. The new definition includes people who should not be granted the exemption while excluding others who are worthy of its benefits. For example, the college student who is supported through school by his parents but who has his own apartment most of the year apparently now qualifies as a householder. Contrast this example with the situation of a young woman who has recently been divorced, supports both herself and her children, but lives with her parents to save expenses. A normal construction of section 34-1 forces one to conclude that she falls outside the new definition of householder even though she is supporting her family because of her lack of "separate residence."<sup>33</sup> The difficulty with the definition is the use of "separate residence" as the sole criteria for asserting the status of householder. There is no connection between having a separate residence and the goals of the exemption laws.<sup>34</sup>

Why the legislature chose to define householder in terms of separate residence is unclear. The legislature might have considered the prior definition, which required a person to support dependents, too restrictive and that an individual without a family was as much entitled to this hedge against poverty as a person with a family. If this was the legislature's position, self-support rather than separate residence is the crucial factor. The college student supported by his parents should not be granted householder status because he has no reason to fear imminent poverty or to require rehabilitation. The exemption simply grants the student a windfall without providing any corresponding societal benefits. On the other hand, the divorced wife is precisely the kind of person who merits protection under the policies of the exemption laws. If she cannot claim protection the possibility of her family falling below the subsistence level is very real. Furthermore, her chances of rehabilitation and the possibility of her return to the economic mainstream are diminished if all of her property were taken by creditors. For these reasons, section 34-1 of the Virginia Code should be amended to read that "a householder shall mean any person who is the primary source of support for any person including himself."

#### b. Wage Garnishment

In 1970 Congress preempted state law in the area of garnishment of

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<sup>33</sup> A proper result could be reached in this situation only by adopting a method of construction similar to that used in *In re Wilkes*, 2 Bankr. Ct. Dec. 957, 959 (W.D. Va. 1976). See note 32 *supra*.

<sup>34</sup> One of the goals of the homestead is protection of the family. Under the present definition both husband and wife may claim a homestead if they live apart. The present definition encourages families in financial trouble to separate in order to organize a greater exemption. One wonders if this was the intended result.



earnings.<sup>35</sup> Title 3 of the Consumer Credit Protection Act<sup>36</sup> limits the garnishment of earnings to the lesser of 25% of disposable earnings<sup>37</sup> per week or the amount by which disposable earnings for a week exceeds 30 times the federal minimum hourly wage.<sup>38</sup> This law is binding on all states,<sup>39</sup> but Congress expressly permitted a state to create restrictions on garnishment greater than those of the federal act.<sup>40</sup> Virginia immediately incorporated the federal provisions into section 34-29(a) of the Virginia Code.<sup>41</sup> The debtor need not qualify as a householder to claim this exemption.<sup>42</sup>

In determining the extent of the exemption from garnishment, the problem is to achieve a proper balance between the debtors' and creditors' interests. The greater the exemption, the greater the debtor's incentive to earn since he keeps all or most of what he makes. Thus, if all wages are exempted, the debtor has the maximum incentive to earn. Yet, such an allocation would unfairly ignore the creditor's right to be paid. Therefore, at some level of earnings, garnishment should be permitted. Presumably, the debtor should be permitted earnings free from creditor's process to the

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<sup>35</sup> Congress restricted the garnishment of wages because the unrestricted garnishment of earnings encouraged predatory extensions of credit which merely diverted money from the production of goods and flow of interstate commerce into excessive credit payments. Congress also considered garnishment to be a harsh creditor remedy as it often resulted in the loss of employment by the debtor. These employment disruptions were a substantial restraint on interstate commerce. Another consideration was the fact that state laws dealing with garnishment of wages were not uniform. This disparity destroyed the uniformity intended by the bankruptcy laws, thereby frustrating the Bankruptcy Act's purpose. Consumer Credit Protection Act (CCPA) § 301, 15 U.S.C. § 1671 (1976).

For more detailed analysis of the evils of wage garnishment, see WARREN & HOGAN, *DEBTOR AND CREDITOR LAW* 6-15 (1974); Kerr, *Wage Garnishment Should Be Prohibited*, 2 PROF. J. 371 (1969).

<sup>36</sup> CCPA §§ 301-03, 15 U.S.C. §§ 1671-73.

<sup>37</sup> Disposable earnings means "that part of the earnings . . . remaining after the deduction . . . of any amounts required by law to be held." CCPA § 302(b), 15 U.S.C. § 1672(b).

<sup>38</sup> CCPA § 303, 15 U.S.C. § 1673. Both federal and state laws prohibit an employer from discharging a debtor for one garnishment. CCPA § 305, 15 U.S.C. § 1675; VA. CODE § 34-29(f). No express civil remedy, however, is provided for violation of these sections.

<sup>39</sup> CCPA § 303(c); *Hodgson v. Cleveland Municipal Court*, 362 F. Supp. 419, 431 (N.D. Ohio 1971) (federal act preempts less restrictive state garnishment statutes). The CCPA provides no civil remedy if wages in excess of the federal ceiling are garnished. *Western v. Hodgson*, 359 F. Supp. 194, 200-201 (S.D. W. Va. 1973). The debtor may, however, protect himself against an illegal garnishment by demanding that the state court enjoin enforcement of this illegal process until state laws are amended to conform to the federal Act. CCPA § 303. See VA. CODE § 34-2.

In addition VA. CODE § 34-29(e) voids all wage assignments made by the debtor to the extent of the exemption. In the appeal of *Western v. Hodgson*, 494 F.2d 379 (4th Cir. 1974), it was held that wage assignments executed by debtors were not garnishments under § 303(a) since they were "negotiated between the parties and . . . implemented according to their tenor without judicial intervention." *Id.* at 382.

<sup>40</sup> CCPA § 307, 15 U.S.C. § 1677. See note 44 *infra*.

<sup>41</sup> The wage exemption does not apply to claims of the state for taxes. VA. CODE § 34-3.

<sup>42</sup> For many debtors the exemption from wage garnishment is the most significant exemption. See *Lines v. Frederick*, 400 U.S. 18, 20 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 338 n.1 (1969). *Joslin*, *supra* note 4, asserted that a statute which sufficiently protected the debtor's wages from garnishment was the only exemption needed. *Id.* at 363.

extent necessary to guarantee himself and his dependents a minimum standard of living. Any amount above the minimal level should be divided between the debtor and the creditor. This approach seems proper since the debtor has failed to pay legal judgments voluntarily, and quite often wages are the only practical source of payment.<sup>43</sup>

While the minimum level of exemption has been fixed by Congress, the legislature should consider whether the protection from wage garnishment ought to be increased in certain situations.<sup>44</sup> The principal difficulty with the current statute is that it treats individuals without dependents the same as persons supporting others. This must mean either that the latter are being treated inadequately or the former are granted protection in excess of that which is necessary.<sup>45</sup> The legislature has failed to recognize that debtors with dependents need more protection from wage garnishment than debtors with no dependents. In order to correct this apparent defect, 80% of the disposable earnings of a debtor with one dependent should be exempt; with two or three dependents, 85% of earnings should be exempt; with four dependents or more, the exemption should increase to 90%. At the same time a ceiling on the extra exemption should also exist.<sup>46</sup> Disposable income above \$500 per month should be subjected to garnishment at the standard 25% rate.<sup>47</sup> Such a scheme would favor the debtor with a family up to the point where need is evident without unduly prejudicing the creditor's interest in receiving payment, since the debtor still has every reason to earn more than \$500 a month take home pay. Such a change should lead to a reduction in the number of bankruptcies

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<sup>43</sup> See Vukowich, *supra* note 13, at 817.

<sup>44</sup> Several states give the debtor greater protection than the federal statute requires. Some states have abolished garnishment in most instances. See, e.g., FLA. STAT. ANN. § 222.11 (West 1977) (applies to wages but not commissions); PA. STAT. ANN. tit. 42 § 886 (Purdon 1966). Other statutes guarantee the debtor forty times the federal minimum hourly wage, e.g., MINN. STAT. ANN. § 550.36(13) (Cum. Supp. 1979), or a minimum dollar amount above the federal floor, e.g., MD. CODE ANN. § 15-601 (Cum. Supp. 1979), or a higher percentage exemption, e.g., N.J. STAT. ANN. § 2 A: 17-56 (Cum. Supp. 1979). The National Commission on Consumer Finance has recommended the adoption of the Minnesota alternative. NATIONAL COMM'N ON CONSUMER FINANCE IN THE UNITED STATES 33-34 (1972). In this light the position of the Bankruptcy provision should be noted.

<sup>45</sup> This failing mars the operation of the homestead laws in much the same way. See text and accompanying notes 131-35 *infra*. Moreover, the change in the definition of householder in § 34-1 accents the disparity of treatment. See text accompanying notes 33-34 *supra*.

<sup>46</sup> This escalator proposed is not unprecedented in Virginia. The predecessor of current VA. CODE § 34-29 (Cum. Supp. 1968) provided that wages were exempt to seventy-five percent, but never less than one hundred dollars nor more than one hundred fifty with a further proviso that such minimum and maximum would increase by fifteen dollars per month for each dependent child. Thus, the wage earner received an absolute exemption of one hundred dollars which increased as the number of dependents increased. (It would decrease as his responsibility lightened.) Both Rombauer, *supra* note 15, at 496, and Joslin, *supra* note 4, at 363-64, praise the escalator provision of this statute and suggest it as model for future legislation. Cf. WIS. STAT. ANN. § 272.18 (150(c)) (Supp. 1973.)

<sup>47</sup> An amount above \$500 per month does not seem inappropriate.

in Virginia.<sup>48</sup>

The question of whether section 34-29 should be amended so as to qualify as an exemption law for bankruptcy purposes also need be considered.<sup>49</sup> Under section 6 of the 1898 Bankruptcy Act,<sup>50</sup> bankrupts were accorded the exemptions given by state and federal law.<sup>51</sup> The new Bankruptcy Act does not change this rule.<sup>52</sup> The general rule is that unless the state law shields the protected property against all forms of creditor process, it is not an exemption law, and the property claimed as exempt passes to the trustee.<sup>53</sup> In *Kokoszka v. Belford*,<sup>54</sup> the Supreme Court held that the wage garnishment provisions of the Consumer Credit Protection Act did not create an exemption for bankruptcy purposes.<sup>55</sup> Subsequently, the Ninth Circuit decided that incorporation of the Consumer Credit Protection Act's garnishment provisions into a California state statute converted the statute into an exemption law for bankruptcy purposes because the debtors' earnings were shielded from all forms of creditor process.<sup>56</sup>

<sup>48</sup> Empirical studies have made a positive correlation between harsh exemption laws and the filing of consumer bankruptcies. Shuckman & Jantscher, *Effects of the Federal Minimum Exemption From Wage Garnishment on Non-Bankruptcy Rates*, 77 COMM. L.J. 360 (1972), found that in those jurisdictions in which garnishment restrictions were greater than those provided by the CCPA, the median bankruptcy rate decreased by 3% to 5% for the fiscal year 1971. See also STANLEY & GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* 28-31, 236-41 (1971). Other factors, such as the unemployment rate, consumer debt as a percentage of personal income, and size of exemptions are important, but Apilado, Danten & Smith, *Personal Bankruptcies*, 1978 J. LEG. STUDIES 371, conclude that wage garnishment is the most significant factor. The authors also note that "other explanatory variables have yet to be identified." *Id.* at 391.

<sup>49</sup> The general problem of identifying an exemption law is well treated by Vukowich, *supra* note 13, at 788-92.

<sup>50</sup> Section 6 of the 1898 Bankruptcy Act provided in pertinent part:

This Act shall not effect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State. . . .

<sup>51</sup> See generally 1A COLLIER, *supra* note 5, at 869-900.

<sup>52</sup> Section 522(b) reads in pertinent part:

[A]n individual debtor may exempt from property of the estate either-. . . (2)(A) any property that is exempt under Federal law, other than subsection (d) [the federal bankruptcy exemption] or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the dates of the filing of the petition, or for a longer portion of such 180 day period than in any other place.

<sup>53</sup> § 541(a).

<sup>54</sup> 417 U.S. 642 (1974).

<sup>55</sup> Rather than creating a bankruptcy exemption, the Court determined that the restrictions of the CCPA were an attempt to prevent bankruptcy. If bankruptcy did in fact occur, the debtor's remedy was contained solely within the Bankruptcy Act. *Id.* at 469.

<sup>56</sup> *In re Brissette*, 561 F.2d 779, 780 (9th Cir. 1977). CAL. CODE CIV. PROC. § 690.6 (West Cum. Supp. 1970) provided that protected earnings "shall be exempt from execution. . . ." The court found that this language indicated the legislative intention to give the debtor complete protection from all forms of creditor process. Moreover, the legislature stated its intention to create an exemption for bankruptcy purposes as clearly as it could, for to have

Even if the Ninth Circuit's test is employed, section 34-29 still cannot be considered an exemption law, since there is no section which indicates that earnings are protected from all forms of creditor process. The Virginia statute merely tracks the federal act and *Kokoszka* indicates that the federal Act is not an exemption law.<sup>57</sup> In addition, there is no reason to assume that the Virginia legislature intended to create a greater exemption than the federal act.<sup>58</sup> When the legislature desired to create a complete exemption, it made this intention clear. For example, section 34-4 of the Virginia Code, which establishes the homestead exemption, states that the debtor holds such property "exempt from levy, seizure, garnishment or sale under any execution, order or process. . . ."<sup>59</sup> Similar language can be found in other Virginia statutes creating total exemptions.<sup>60</sup> Presently, section 34-29 does not create an exemption which a debtor may use in bankruptcy.

The legislature could, however, convert section 34-29 into an exemption law and a good argument exists for doing so.<sup>61</sup> The reasoning is that since a minimum protection for earnings is generally regarded as crucial to the well-being of a debtor and dependents, earnings should be protected against all forms of creditor process. Most creditors garnish the debtor's employer because it is the most effective and least expensive remedy available. As soon as the debtor's employer receives the summons in garnishment, the wages must be withheld.<sup>62</sup> Once the debtor receives

gone further would have invaded an area granted by the Commerce Clause to Congress. 561 F.2d at 780.

<sup>57</sup> See *Dunlop v. First Nat'l Bank*, 399 F. Supp. 855 (D. Ariz. 1975), which held that the garnishment provisions of title III of the CCPA do not reach wages deposited by an individual in a bank account. *Id.* at 856. The court found that the purpose of the CCPA's provisions is to govern the relationship between employers and employees and not to limit garnishment generally. This decision rejected an opinion of the Deputy Assistant Secretary of Labor, reprinted in *RIESENFELD, CREDITORS' REMEDIES AND DEBTORS' PROTECTIONS*, 343 (2d ed. 1975) [hereinafter cited as *RIESENFELD*] who had opined that "[i]t would be contrary to the express mandate of the Act to assume that when a debtor deposits his earnings for safekeeping in a bank, the earnings are transformed into a bank credit which the Act's restrictions do not apply." *Id.* See generally Comment, 9 CREIGHTON L. REV. 761 (1976).

<sup>58</sup> Like the California statute in *In re Brissette*, 561 F.2d 779 (9th Cir. 1977), note 56 *supra*, the Virginia statute does not require a debtor to do anything to claim his exemption for wages. The exemption arises automatically. Compare VA. CODE § 34-29(c), with CAL. CODE CIV. PROC. § 690.6 (West Cum. Supp. 1979). The difference is that the Virginia statute is limited to garnishments of employers and not all other forms of "execution." For example, if a Virginia debtor deposits his funds in a bank, presumably he stands no better than the debtor in *Dunlop v. First Nat'l Bank*, 399 F. Supp. 855, 858 (D. Ariz. 1975). See note 57 *supra*. The California debtor, however, keeps the wages so long as they can be traced.

<sup>59</sup> VA. CODE § 34-4.

<sup>60</sup> See, e.g., VA. CODE § 34-26 (enumerated articles of personal property "exempt from levy or distress,"); VA. CODE § 38.1-482 (Group Life not "liable to attachment, garnishment, or other process, or to be seized, taken, appropriated, or applied by any legal or equitable process or operation of law" to pay any debt); VA. CODE § 8.01-522 (wages and salaries of state employees are exempt).

<sup>61</sup> See *Vukowich*, *supra* note 13, at 816-17.

<sup>62</sup> VA. CODE §§ 8.01-511-512.

these funds, they are far more difficult to reach. Yet, since a persistent creditor might be able to discover the location of the funds on many occasions,<sup>63</sup> loss of earnings through any form of process might frustrate the fundamental policies underlying section 34-29. Therefore, if this reasoning is followed, wages should be granted a complete exemption. There is, however, a counter argument. As section 34-29 now reads, it will not be deemed an exemption law for bankruptcy purposes. Therefore, according to *Kokoszka*,<sup>64</sup> all of the debtor's assets, including wages earned prior to filing of the petition, will pass to the trustee in bankruptcy. This would make bankruptcy less attractive to some debtors, encouraging them to forego a discharge in exchange for more property (wages) which is for most purposes exempt. The gap in the protection of earnings does not seem substantial, however, because few creditors appear to be willing to go after earnings by legal process other than wage garnishment. On balance, therefore, section 34-29 should retain its present form.<sup>65</sup>

### c. The Homestead Exemption<sup>66</sup>

"The homestead created by the law of Virginia is not a 'homestead' in any true sense of the word, but is an *exemption*, pure and simple."<sup>67</sup> In most states the homestead exemption covers only land, usually either the family residence plus all or some of the land on which it is situated, or the family farm, again with acreage limitations.<sup>68</sup> The Virginia homestead statute instead permits a householder to select \$5000 worth of property, either real or personal, which may be held free of the claims of certain creditors.<sup>69</sup> If the householder does not claim the exemption during his

<sup>63</sup> See *id.* §§ 8.01-506 which permits the judgment creditor to interrogate the debtor as to the location of his assets. Once the location of such wages is discovered, the court should order the debtor to turn these assets over to the sheriff. In the alternative, seizure by execution or garnishment could be employed.

<sup>64</sup> See text accompanying notes 54-55 *supra*.

<sup>65</sup> As a practical matter, restricting garnishment of earnings may create an exemption in fact. Once the debtor-employee receives his wages, he ordinarily spends them without interference from creditors. Thus, garnishment of the employer is often the only practical way to reach this asset. See NATIONAL COMMISSION ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES, 33-34 (1972); Vukowich, *supra* note 13, at 817.

<sup>66</sup> State homestead exemption laws are to be distinguished from the federal Homestead laws established during the last century. See 43 U.S.C. § 175 (1976). The purpose of the federal statute was to encourage the colonization of outlying districts by granting qualified applicants a quarter section or less of unappropriated public land after such person had occupied and cultivated it for a stated period. The land granted was exempt from "any debt contracted prior to the issuing of a patent therefor" but not from debts arising thereafter. In contrast, state homestead exemptions affect land already owned by the debtor and, under many statutes, only exempt the land from debts incurred subsequent to its dedication. See generally Note, *State Homestead Exemption Laws*, 46 YALE L. J. 1023 (1937) [hereinafter cited as *State Homestead*].

<sup>67</sup> BURKS, *supra* note 29, § 440 at 860.

<sup>68</sup> See generally Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289 (1950); *State Homestead*, *supra* note 66.

<sup>69</sup> VA. CODE §§ 34-1, 34-4, & 34-5.

lifetime, his widow or minor children may claim it in his place.<sup>70</sup> So long as the exemption is claimed before the property is "subjected by sale or otherwise"<sup>71</sup> to creditors' claims, it is effective. When the homestead is sold, the exemption continues in the proceeds.<sup>72</sup> The exemption may be claimed only one time,<sup>73</sup> and the householder's waiver of the exemption binds him and his dependents.<sup>74</sup>

The Virginia homestead scheme is markedly superior to those of other states. Permitting the debtor to choose which assets to protect avoids the traditional discrimination in favor of homeowners.<sup>75</sup> Instead, the total flexibility of the Virginia homestead scheme effectively makes it available to city dwellers who rent rather than own land.<sup>76</sup> The Virginia system also abrogates the debtor's need to convert nonexempt property into exempt property, especially on the eve of bankruptcy.<sup>77</sup> Unlike other homestead statutes, there is no premium for owning any particular type of property.<sup>78</sup>

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<sup>70</sup> VA. CODE §§ 34-10 to 12, 34-14 to 16. See RIESENFELD, *supra* note 57, at 306-08 (contrasting the Virginia provisions concerning the rights of the surviving spouse and minor children with those of California and Iowa).

<sup>71</sup> VA. CODE § 34-17 (1976). The leading case interpreting the phrase "subjected by sale or otherwise" is *Wilson v. Virginia Nat'l Bank*, 214 Va. 14, 196 S.E.2d 920 (1973). In *Wilson*, a judgment creditor garnished the debtor's bank account. Before the return date on the summons in garnishment had passed, the debtor claimed the bank account as her homestead. The judgment creditor argued that the lien of his writ of garnishment took priority over the debtor's homestead claim since the writ had been served on the bank before the debtor made her homestead claim. The Virginia Court, however, held that the language "subjected by sale or otherwise" referred to the issuance of a court order or decree directing the sale or otherwise ordering the payment of money by the garnishee to the judgment creditor or into court. *Id.* at 15, 196 S.E.2d at 921. Since the debtor's bank account had not been subjected to sale or otherwise but was still in the possession of the bank when the debtor recorded her homestead deed, she was entitled to claim her exemption. The decision makes clear that a debtor still may have property set aside as exempt after a lien has attached to it so long as the householder acts before the execution process has been completed. For an instance where property was held to have been "subjected" to a completed creditor's process, see *Smith v. Holland*, 124 Va. 663, 666, 98 S.E. 676, 677 (1919).

<sup>72</sup> VA. CODE §§ 34-7, 34-9, & 34-20.

<sup>73</sup> VA. CODE § 34-21. *Oppenheimer v. Howell*, 76 Va. 218 (1882), held that once a debtor has squandered the homestead, he cannot claim another, for this would be a gross fraud on creditors. Of course, if the amount of the homestead has been increased since the debtor claimed this exemption, the debtor may claim the additional amount. See *In re Waltrip*, 260 F. Supp. 448, 451 (E.D. Va. 1966). For those situations in which the homestead ceases, see § 34-24.

<sup>74</sup> VA. CODE § 34-22; see text accompanying notes 102-14 *infra*.

<sup>75</sup> "The homestead exemption law, like our tax law, is to some extent merely one evidence of a favoritism shown the upper-or middle-class citizen who has stability and owns a home." Davis, *supra* note 22, at 373. See also Kennedy, *supra* note 4, at 449; Vukowich, *The Bankruptcy Commission's Proposal Regarding Bankrupts Exemption Rights*, 63 CALIF. L. REV. 1439, 1458-60 (1975).

<sup>76</sup> In 1860, 14 out of 15 dwellings were occupied by single families. Home ownership was the norm and rental of apartments unusual. C. WRIGHT, *ECONOMIC HISTORY OF THE UNITED STATES* 230-231 (1941). By 1970, 37.1% of all families made their home in rental units. 1972 *STATISTICAL ABSTRACT OF THE UNITED STATES* 684.

<sup>77</sup> See generally 1A COLLIER, *supra* note 5, ¶ 6.11.

<sup>78</sup> In states such as California, experienced bankruptcy counsel often advise debtors to

Finally, Virginia is the only state to coordinate the homestead exemption with the Bankruptcy Act.<sup>79</sup> While the exact method which a debtor must employ to claim his exemption in bankruptcy has caused problems in many states, section 34-17 of the Virginia Code mandates precisely how a Virginia bankrupt obtains the exemption.<sup>80</sup>

Despite its many good aspects, this statute could be improved in several significant ways.<sup>81</sup> First, all exemptions stating fixed dollar amounts quickly become obsolete today. In the past five years the legislature has increased the amount of the exemption twice, raising it from \$2000 to \$3500 in 1975<sup>82</sup> and subsequently increasing it to \$5000 in 1977.<sup>83</sup> Presuma-

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maximize their exemptions by converting non-exempt into exempt property. *See, e.g., In re Wudrick*, 305 F. Supp. 1123, 1125 (C.D. Cal. 1969), *aff'd in part, rev'd in part sub nom Wudrick v. Clements*, 451 F.2d 988 (9th Cir. 1971). The general rule is that exemptions under these circumstances claimed are valid. 451 F.2d at 989. *See also* S. RIESENFELD, CREDITORS REMEDIES & DEBTORS' PROTECTIONS 610 (3d ed. 1979); 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 173 (rev. ed. 1940) [hereinafter cited as GLENN]. The common law limitation on the rule is that if the assets were obtained pursuant to a scheme to defraud creditors, the exemption is not permitted. *See, e.g., In re White*, 221 F. Supp. 64, 67 (N.D. Cal. 1963); *Stoner v. Walsh*, 24 Cal. App.3d 938, 943-44, 101 Cal. Rptr. 485, 488-98 (1972). For an interesting theory for narrowing this broad general rule, see Davis, *supra* note 22, at 371, 383-87. The traditional rule permitting a debtor to convert nonexempt into exempt property apparently was retained in Bankruptcy Code § 548. *See* HOUSE REPORT, *supra* note 5, at 361, [1978] U.S. CODE CONG. & AD. NEWS at 6317.

<sup>79</sup> VA. CODE § 34-17. *See generally* 1A COLLIER, *supra* note 5, ¶ 6.17-19; Countryman, *supra* note 4, at 684-95.

<sup>80</sup> VA. CODE § 34-17 provides that the householder must claim his exemption anytime before the property is "subjected by sale or otherwise" to execution. *See* note 71 *supra*. Section 37-17 further provides that "(1) any person who files a voluntary petition in bankruptcy may set it apart before or on the same day that he files his petition but not thereafter, or (2) any person against whom an involuntary petition in bankruptcy is filed may set it apart at any time before the expiration of the period after its adjudication within which he is required to file his schedules." In addition, Section 34-23 properly deals with the problem of marshalling in this context. Suppose that a mortgagee holds valid liens on both exempt and nonexempt property of a debtor. A second mortgagee holds a valid lien on nonexempt property only. The debtor, in the mortgage foreclosure proceeding of the first mortgagee, requests the first mortgagee to be required to satisfy his obligations out of the nonexempt property first. In contrast to the rule in the majority of states, § 34-23 denies the debtor's right to marshal the exempt property for his benefit. As one writer has pointed out, "no loss is suffered by the debtor other than that which he anticipated in his undertakings, whereas the [creditor] may be injured by losing the prerogative for which he contracted." Haskins, *supra* note 22, at 1320.

<sup>81</sup> One minor amendment should be made in the Virginia homestead statute in conjunction with the major proposed changes. Sections 34-10 to 12 and 34-14 to 16, which provide the method by which the exemption may be set apart if the householder does not claim it during his lifetime, presently is limited to allowing widows and minor children to claim the exemption. *See* text accompanying note 70 *supra*. The list of beneficiaries should be expanded to include any dependent of the decedent. As the cases make clear, the meaning of the word dependents in title 34 is not limited to the wife and children. *See, e.g., Epperty v. Holley*, 3 Va. L.\*Reg. (N.S.) 27 (1917) (dependent grandmother); *Wilkinson v. Merrill*, 87 Va. 512, 12 S.E. 1015 (1891) (dependent grandson).

<sup>82</sup> VA. CODE § 34-4 (Supp. 1975). Prior to the 1975 amendment, the dollar limitation on the Virginia homestead exemption had remained at \$2000 for over one hundred years. The fact that the \$2000 amount was stated in the Virginia Constitution probably accounts for

bly these increases were in recognition of the dollar's loss of purchasing power. Given the tremendous increase in the cost of living over the last two years, it is evident that \$5000 no longer represents the same amount of protection as it did in 1977. A reduction in purchasing power probably affects the poor more than others. To overcome this difficulty the stated amount should be adjusted periodically by tying it to some index which reflects the changing purchasing power of the dollar.<sup>84</sup> Otherwise, the debtor obtains a lower exemption than that thought proper in 1977, the last time the statute was amended.

Second, for the reasons suggested in the last section,<sup>85</sup> the amount of the exemption should vary according to whether the debtor supports dependents, and, if so, how many. Recommendations on this matter will be discussed in conjunction with the proposed reorganization of the homestead and poor debtor statutes set out below.

Third, section 34-5 grants the claims of certain creditors priority over the debtor's claim of homestead.<sup>86</sup> While most of the exceptions seem legitimate,<sup>87</sup> the one favoring state and local government creditors<sup>88</sup> does

this inaction. The 1970 constitutional amendments removed all reference to the homestead exemption.

<sup>82</sup> VA. CODE § 34-4 (Cum. Supp. 1979).

<sup>84</sup> A student article cogently points out the difficulties of using a fixed sum in an exemption statute and the appropriate remedy:

it is apparent that the amount of actual exemption which the homestead provides at any given time is, of necessity, largely an accident dependent upon fluctuating property values. A simple and reliable method of equalizing the amount of exemption from year to year would be to continue the same statutory figures, i.e., \$5000 and \$1000 but peg them to a date selected as the year of price levels at which these sums would purchase [property] reasonably adequate for the average family. The actual amount protected would then move up and down with the "index numbers" prepared by the Bureau of Labor and Statistics or with some similar "index."

Comment, *The Nature of the Homestead Right and Its Termination*, 16 CALIF. L. REV. 466, 471 (1938). See also UNIFORM EXEMPTIONS ACT § 2; UNIFORM CONSUMER CREDIT CODE § 1.106, (1974). But see Bankruptcy Act § 522(d) (establishing fixed sum exemptions).

<sup>85</sup> See text accompanying notes 44-47 *supra*.

<sup>86</sup> VA. CODE § 34-5 provides that the homestead exemption cannot be claimed against six classes of creditors: a purchase money creditor; a laboring person who had rendered services; debts owed to individuals by any public officer, court officer, fiduciary, or attorney for money collected; lawful claims for taxes, levies or assessments; a landlord's claim for rent; and the legal or taxable fees of a public officer or officer of court. Section 34-5(7) sets forth a special rule precluding the claim of an exemption in a shifting stock of goods. *Id.* The common law rationale for this section may be found in 1 GLENN, *supra* note 78, § 173.

<sup>87</sup> Surprisingly, claims of creditors for alimony and support are not included in § 34-5. See UNIFORM EXEMPTIONS ACT § 10(a)(1)(i), Comment (1) (indicating that most states give such claims priority over the homestead). Such debts are the only ones not discharged under Chapter 13 Bankruptcy Code § 1328(a)(2). Presumably, such claims are excluded by § 34-5 because the legislature thought their priority over the homestead clear. Section 34-4 defines a "debt" as "liability on [a] contract. . . ." In *Eaton v. Davis*, 176 Va. 330, 338, 10 S.E.2d 893, 897 (1940) the court made clear that the right to alimony is based on a corresponding duty in which the public as well as the parties are interested, and not a contract. See also *West v. West*, 126 Va. 696, 699, 101 S.E. 876, 877 (1920) ("liability [for alimony] is not based upon a contract to pay money, but upon the refusal to perform a duty.")



not. By accepting this status the state has sacrificed two of the principal goals underlying the exemption - protection of dependents and debtor rehabilitation - for the sole purpose of protecting its revenue, although the loss to be anticipated from eliminating the preference is comparatively slight.<sup>89</sup> Only tradition supports this preference,<sup>90</sup> despite its almost universal acceptance.<sup>91</sup>

Fourth, the recent legislative decision to partially overrule Virginia's common law rule barring the interposition of the homestead exemption against any debt sounding in tort should be reversed.<sup>92</sup> In 1978 the legislature amended section 34-4 by defining debts subject to the homestead "to include a liability incurred as the result of an unintentional tort."<sup>93</sup> The issue is whether victims of unintentional (negligent) torts should be added to the class of creditors who normally subsidize the debtor's homestead exemption. Ordinarily this loss is placed on commercial creditors,<sup>94</sup> and logic dictates that Virginia follow the general rule. The commercial creditor voluntarily enters into relations with the debtor, is aware of the debtor's ever possible claim of exemption and is in a position to pass the loss onto his other customers by increasing the price of his wares.<sup>95</sup> In contrast, the negligence victim is in no position to protect himself. Furthermore, the types of injuries are markedly different because the contract creditor is hurt only in his pocketbook, while the victim of an unintentional tort often suffers personal injury. The law has long recognized that

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In VA. CODE section 34-29(b1)(2), the statute incorporating the CCPA's limits on wage garnishment, the exceptions for alimony and support are stated expressly. On this basis it might be argued that had the legislature wished to grant the right to these creditors to break through homestead, they would have been designated specifically in section 34-5. There are two arguments to the contrary. First, the CCPA contained the restrictions favoring those claimants. Second, alimony and support creditors are precisely the parties the homestead was designed to protect. This was especially evident under the traditional definition of householder in VA. CODE § 34-1. See text accompanying notes 29-32 *supra*.

<sup>88</sup> VA. CODE § 34-5(4).

<sup>89</sup> In fact, the governmental creditor exception runs counter to the policy favoring repayments of obligations to creditors, since it lessens the debtor's opportunity for rehabilitation. Presumably the non-governmental creditor would prefer to subsidize the debtor rather than the tax collector.

<sup>90</sup> The fact that the Internal Revenue Service also refuses to recognize exemptions, except to a limited extent, see Plumb, *supra* note 8, at 6-9, 17-18, is no reason to compound the error.

<sup>91</sup> See UNIFORM EXEMPTIONS ACT § 10, Comment (1).

<sup>92</sup> *Jewett v. Ware*, 107 Va. 802, 804-05, 60 S.E. 131, 131-32 (1908); *Burton v. Mill*, 78 Va. 468, 481-83 (1884); *Commonwealth v. Ford*, 70 Va. (29 Gratt.) 683, 692 (1878).

<sup>93</sup> VA. CODE § 34-4.

<sup>94</sup> See text accompanying notes 19-22 *supra*.

<sup>95</sup> Beyond the ability to pass bad debt losses onto his other customers, a commercial creditor also may deduct his bad debts in calculating their federal income tax. See I.R.C. § 166. According to the House Report, tax debts may not be discharged because the government can not choose its tax debtors and therefore cannot protect itself. Presumably Virginia's preferred position is similarly grounded. One need be very cynical to assert that the state's equities are better in this regard than those of a negligence victim. HOUSE REPORT, *supra* note 5, at 184-93, [1978] U.S. CODE CONG. & AD. NEWS at 6144-54.

the personal injury victim is entitled to greater protection than one whose loss is merely pecuniary.<sup>96</sup> Similarly, the loss of the personal injury victim and his dependents is often more serious than the loss of mere property to the debtor.<sup>97</sup> In sum, the policies in favor of payment to those who suffer bodily injuries is stronger than those which underlie the homestead exemption.<sup>98</sup>

Fifth, the question of waiver of the homestead exemption should be reviewed in light of the pertinent changes in the new Bankruptcy Act. Section 34-22 of the Virginia Code<sup>99</sup> permits the debtor to waive the homestead exemption.<sup>100</sup> Sections 522(e)<sup>101</sup> & (f)<sup>102</sup> of the new Bankruptcy Act,

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<sup>96</sup> See, e.g., U.C.C. § 2-719(3); *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

<sup>97</sup> The injury to the negligence victim may disable him permanently, thereby reducing his physical capacity to earn. Of course, if both parties suffered personal injury, the question is how to allocate the funds available. Arguably, this decision should be made by the court according to relative need.

Two other points should be brought out here. First, the claim of the negligence victim is dischargeable in bankruptcy. Bankruptcy Code §§ 502, 727(b). Second, insurance will cover the victim's claim only in some negligence cases. Where the victim of a negligent act is not insured against the resulting injury, his equity in the homestead is at least equal to the tortfeasor-debtor's.

<sup>98</sup> The legislature's rationale for permitting only victims of intentional torts to pierce the homestead exemption is unclear. One explanation may be that intentional bad acts are more reprehensible than mere negligence, and that the debtor should be punished by losing his homestead to the victims of his more egregious conduct. Stated differently, the homestead is a form of legislative grace which anyone may qualify for unless they are shown not to deserve it. Mere negligence, like simple nonpayment of debts, is the kind of common failing the legislature intended to partially forgive. More serious faults, such as intentional torts, demonstrate that the debtor is beyond redemption and is not entitled to this legislative forgiveness. Such a view closely parallels the basis for granting and denying discharges in bankruptcy. Compare Bankruptcy Code § 727(a) with 1898 Bankruptcy Act § 14c. See also Note, *Bankruptcy: 1970 Amendments to the Bankruptcy Act—An Attempt to Remedy Discharge Abuses*, 69 MICH. L. REV. 1347, 1362-63 (1971). Nonetheless, by emphasizing the debtor's conduct, this position misses the point. The focus should be upon the issue of which creditors should assume the burden of assisting the debtor's rehabilitation. Commercial creditors are the proper parties to bear this burden. See text accompanying notes 94-97 *supra*.

<sup>99</sup> VA. CODE § 34-22 reads in pertinent part:

If any person shall declare in a bond, bill, note or other instrument by which he is or may become liable for the payment of money to another or by a writing thereon or annexed thereto that he waives, as to such obligation, the exemption from liability of the property or estate which he may be entitled to claim and hold exempt under the provisions of the chapter, such property or estate, whether previously set apart or not, shall be liable to be subjected for such obligation, under legal process, in like manner and to the same extent as other property or estate of such person.

The statute also states that the debtor cannot waive the exemptions for property exempt under §§ 34-26, 34-27 and 34-29, and then sets out a form for making a permissible waiver. Sections 34-23 and 34-25 deal with various aspects of the waiver problem.

<sup>100</sup> The Virginia Supreme Court upheld the constitutionality of the homestead waiver provision in *Linkenhoker's Heir v. Detrick*, 81 Va. 44 (1885). See *Reed v. Union Bank of Winchester*, 70 Va. (29 Gratt.) 719 (1878). See also *In re Barbarossa*, 438 F. Supp. 840, 842 (E.D. Va. 1977). "It is for the legislature to say whether [the homestead exemption] may or

however, prohibit the enforcement of waivers in bankruptcy. These sections permit the bankrupt to void the liens of nonpurchase money creditors who fail to perfect consensual security interests in exempt property before the petition in bankruptcy is filed.<sup>103</sup> This means that the creditor who holds only the debtor's waiver of exemption but who has not obtained a lien on any particular asset of the debtor will find himself a totally unsecured creditor in bankruptcy.<sup>104</sup> At this point it should be emphasized that Sections 522(e) & (f) have no effect outside bankruptcy.<sup>105</sup> A waiver

may not be waived, and under what conditions. Virginia has spoken on the issue and established that the right to waive the homestead is not unconstitutional or against public policy." *Id.*

The homestead privilege is personal to the householder, and only a person so qualifying may take advantage of it. *White v. Owen*, 71 Va. (30 Gratt.) 43, 47 (1878). In *Linkenhoker's Heir v. Detrick*, 81 Va. 44 (1885), the widow of a householder who had waived the homestead exemption asserted that the family had a vested right to the exemption. In rejecting her claim the court noted that the householder could claim this shield or dispose of it as he saw fit, but the privilege belonged to him alone.

<sup>101</sup> Section 522(e) provides in pertinent part:

A waiver of exemptions executed in favor of a creditor that holds an unsecured claim against the debtor is unenforceable in a case under this title with respect to such claim against property that the debtor may exempt under [state law]. A waiver by the debtor of a power under subsection (f) . . . is unenforceable in a case under this title.

Bankruptcy Act § 522(e).

<sup>102</sup> § 522(f) provides:

Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under [state law], if such lien is

- (1) a judicial lien; or
- (2) a nonpossessory, nonpurchase-money security interest in any -
  - (A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;
  - (B) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or
  - (C) professionally prescribed health aids for the debtor or a dependent of the debtor.

Bankruptcy Act § 522(f).

<sup>103</sup> The purposes to be served by §§ 522(e) & (f) are stated in the HOUSE REPORT, *supra* note 5, at 166-81, [1978] U.S. CODE CONG. & AD. NEWS at 6127-42. See *Lacy*, *supra* note 9, at 673-77, 680-87, in which the writer emphasizes the interrelation of the waiver provisions with the sections dealing with reaffirmation of debts (524(c) & (d)) and redemption of exempt property (§ 722) as part of Congress' overall plan to aid the bankrupt in obtaining a fresh start.

<sup>104</sup> This represents a marked change from the 1898 Act. Under the rule of *Lockwood v. Exchange Bank*, 190 U.S. 294 (1903), a waiver creditor who has failed to acquire a security interest in or a judicial lien on the debtor's exempt property has the right to have the debtor's discharge stayed until the creditor could obtain a lien in a state court. All questions regarding the validity of liens on exempt property were to be determined by the state court, the court with jurisdiction over the bankrupt's exempt property under § 70(a). For an application of this procedure, see *Dockery v. Flanary*, 194 Va. 318, 73 S.E.2d 375 (1952). The rule of the *Lockwood* case was expressly overruled by § 522(e). See HOUSE REPORT, *supra* note 5, at 368, [1978] U.S. CODE CONG. & AD. NEWS at 6324.

<sup>105</sup> The waiver of the homestead exemption by a debtor on a note does not constitute a

of exemption still binds the debtor in a Virginia state court. Presumably most professional lenders hereafter will obtain contemporaneous waivers and security interests if exempt property is used as security for a loan.<sup>106</sup> Nonetheless, there undoubtedly will be cases in which the prohibition of waivers of exemption contained in sections 522(e) and (f) will cause bankruptcy to look more attractive than the Virginia alternative to some debtors.<sup>107</sup> For this reason the legislature should consider amending section 34-22 so that it will coincide with the waiver sections of the Bankruptcy Reform Act. "A waiver of exemption executed in favor of an unsecured creditor before levy on an individual's property is unenforceable, but a valid security interest may be given in exempt property."<sup>108</sup> Such a change would not undercut the true rationale of section 34-22. The debtor would still be able to grant a security interest in his homestead when he deemed it in his best interest.<sup>109</sup>

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lien on the homestead property. *In re Moran*, 105 F. 901 (W.D. Va. 1900). Unless the debtor consents to a sale of the property, the only way for the creditor to make use of his waiver is to obtain some kind of lien on the exempt property. Thus, the creditor must obtain either the right to sell the property by consent or acquire a judgment against the debtor and pursue his normal remedies as a judgment creditor. The only superiority that a creditor holding a waiver of exemption has over creditors not holding a waiver is that the former may use exempt property to satisfy his claim. *Home Owners' Loan Corp. v. Reese*, 170 Va. 275, 281, 196 S.E.2d 625, 627 (1938). The waiver of exemption does not operate in favor of non-waiver creditors.

<sup>106</sup> Under the 1898 Act exempt property could not be the subject matter of a preferential transfer. *Rutledge v. Johansen*, 270 F.2d 881 (10th Cir. 1959). The Bankruptcy Commission proposed abolition of the Rutledge rule. See COMMISSION REPORT II, *supra* note 4, at 170. It is arguable that the new Act adopts the Commission's position; note the phrase "property of the debtor" in § 547(b) and compare it with the language of § 541(a)(1). A. COHEN, DEBTOR-CREDITOR RELATIONS UNDER THE BANKRUPTCY ACT OF 1978 349 (1979). Thus, the granting of a waiver and then a security interest in exempt property within three months of bankruptcy appears to be voidable by the trustee under § 547.

<sup>107</sup> A debtor probably would opt for bankruptcy over the Virginia exemption in the common situation in which the debtor waived his homestead to obtain a loan. Under state law the waiver creditor may use homestead property to satisfy his claim, but if the debtor files a voluntary petition in bankruptcy, § 522(e) of the Bankruptcy Act would permit the debtor to ignore the waiver unless he had given the creditor a security interest in the property. See note 106 *supra*.

<sup>108</sup> UNIFORM EXEMPTIONS ACT § 12.

<sup>109</sup> On several occasions the Virginia Supreme Court has stated the policy underlying § 34-22. The basic idea is that the householder should be permitted to employ the exemption for what he sees as the best interest of the family, rather than having to cling to a particular piece of property selected by him if he determines that such course is detrimental to the family. Presumably, the debtor knows best how to use the homestead. See *Linkenhoker's Heirs v. Detrick*, 81 Va. 44, 56-57 (1885); *Reed v. Union Bank of Winchester*, 70 Va. (29 Gratt.) 719, 726-27 (1878). These cases emphasize that precluding the debtor's use of an exemption waiver could lock him into his current economic position, a state of affairs which is not altogether to his or his dependents' benefit. To some extent VA. CODE § 34-24, which provides that the homestead ceases when the debtor removes from the state, seems contradictory to the policy of § 34-22. Limiting the debtor's mobility may hamper the chances of self-rehabilitation through distant employment. The legislature should consider amending this section to allow the debtor to protect the homestead if he chooses to move elsewhere.

The argument for prohibiting waiver of the homestead is that few debtors understand

One related matter, which should be re-examined is the continued vitality of the tenancy by the entirety.<sup>110</sup> The Virginia rule is that a tenancy by the entirety "is completely immune from the claims of creditors against either husband or wife alone," but may be subjected to satisfy the claims against both spouses.<sup>111</sup> In effect, a married couple holds a judicially created partial exemption.<sup>112</sup> Unless there is some sound reason or policy beyond adherence to historical patterns for continuing this unique form of protection to married couples, it should be abolished.<sup>113</sup> Given that this form of co-ownership is apparently recognized in all forms of property by Virginia<sup>114</sup> and not merely real estate, the protection it grants is particularly far-reaching. Certainly, a rule permitting a wealthy individual to accumulate a large amount of assets immune from creditor process, whether the creditors be commercial, tort, or even governmental, seems hard to justify.<sup>115</sup> A statute permitting the debtor's interest in tenancies by the entirety to be severable at the instance of creditors of either spouse would be an improvement.<sup>116</sup>

#### d. The Poor Debtor's Exemption

Only a householder may protect from creditor process the articles enumerated in section 34-36, the so-called Poor Debtor's Exemption.<sup>117</sup> The

the implications of the waiver. HOUSE REPORT, *supra* note 5, at 166-284, [1978] U.S. CODE CONG. & AD. NEWS at 6127-6241, indicates that few debtors do. See also *Iowa Mutual Insurance Company v. Parr*, 189 Kan. 475, 370 P.2d 400 (1962). For a discussion of the difficulties attending the no-waiver position, see Woodward, *The Homestead Exemption: A Continuing Need For Constitutional Revision*, 35 TEX. L. REV. 1047 (1957). Total abolition of waivers of exemption should be carefully considered. See text accompanying notes 123-27 *infra*.

<sup>110</sup> See Plumb, *supra* note 8, at 114-29, for an excellent summary of the tenancy by the entirety problem. Plumb's arguments for the abolition of the tenancy by the entirety as it affects creditors' rights seems irrefutable.

<sup>111</sup> *Vasilion v. Vasilion*, 192 Va. 735, 740, 66 S.E.2d 599, 602 (1951).

<sup>112</sup> See, e.g., *Vance v. Maytag Sales Corp.*, 159 Va. 373 (1932). In many ways the tenancy by the entirety is analogous to the situation in which a debtor transfers property, while insolvent, or which causes his insolvency, in consideration of the grantee's agreement to support the debtor for life. Such a transaction is uniformly considered a fraudulent conveyance. 1 GLENN, *supra* note 78, § 277.

<sup>113</sup> See *Vasilion v. Vasilion*, 192 Va. 735, 744, 66 S.E.2d 599, 604 (1951) (the matter of abolition of the estates for the legislature).

<sup>114</sup> In *Moore v. Glotzbach*, 188 F. Supp. 267 (E.D. Va. 1960), Judge Hoffman, after looking at the pertinent Virginia statutes and case law, concluded that Virginia would recognize the tenancy by the entirety in all forms of personal property. His statement, however, was dictum.

<sup>115</sup> See Plumb, *supra* note 8, at 137; Bienenfeld, *Creditors v. Tenancies by the Entirety*, 1 WAYNE L. REV. 105 (1955). In fact even the tax gatherer gives way. See text accompanying note 114 *supra*.

<sup>116</sup> Bankruptcy Act § 363(h) & (i) permits a severance of the non-debtor spouse's interest in order that the trustee may sell the property for the benefit of the estate. The spouse's interest is protected by allowing him or her a right of first refusal at a sale of the property. § 363(h). If the spouse does not select this alternative, the trustee must pay to the spouse the value of the spouse's interest if the property is sold to a third party. § 363(i).

<sup>117</sup> Section 34-27 grants an additional exemption to those engaged in agriculture. VA.

list includes clothes of the debtor and dependents, necessary beds and bedding, many common household and kitchen articles, plus various other items.<sup>118</sup> The debtor may not waive this exemption or encumber any of the designated articles.<sup>119</sup> Unlike the homestead exemption, this privilege cannot be exhausted, but the householder may assert the exemption at any time on any of the enumerated articles in his possession.<sup>120</sup> The evident function of the statute, therefore, is to guarantee even the poorest householder the minimum essentials of living.<sup>121</sup> The statute also contains an exemption for the "tools and utensils" of a mechanic's trade and for the boat and tackle of a fisherman and oysterman up to \$1500. To this limited degree the legislature provided for debtor rehabilitation.

There are at least three fundamental changes which should be made in the Poor Debtor's Exemption. First, all residents should be eligible for the Poor Debtor's Exemption. The essentials enumerated in the statute are necessary to the existence of householders and non-householders alike. When an unprotected debtor, stripped of all property, goes on welfare, the items listed must be replaced at market cost by the state. Moreover, the articles protected by section 34-26 are generally worthless at a creditor's sale.<sup>122</sup> Thus, since creditors lose little while the public definitely benefits, the Poor Debtor's Exemption ought to be opened to everyone.

Second, despite the fact that the legislature has expressly prohibited waiver of the Poor Debtor's Exemption, creditors commonly demand either security interests in all the debtor's household goods and furnishings or include waiver of exemption clauses in loan notes. The Report of the Committee of the Judiciary on the Bankruptcy Provisions describes the "in terrorem"<sup>123</sup> effect of threats to repossess the debtor:

In fact, were the creditor to carry through on his threat and foreclose on the property, he would receive little, for household goods

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CODE § 34-27. Burks declares that Virginia's poor debtor's exemption includes both §§ 34-26 & 34-27. BURKS, *supra* note 28, § 454.

<sup>118</sup> Most of the other items specified in § 34-26 pertain only to rural families, for example, "one cow and her calf until one year old, one horse, . . . two hoes; fifty bushels of shelled corn, or in lieu thereof, twenty-five bushels of rye or buckwheat; five bushels of wheat. . . ." VA. CODE § 34-26.

<sup>119</sup> VA. CODE § 34-28. Section 34-22 specifically states that the § 34-26 exemption may not be waived.

<sup>120</sup> Compare VA. CODE § 34-26 with § 34-20.

<sup>121</sup> If the householder dies, his widow, children or unmarried daughters may claim the exemption in his stead. VA. CODE § 64.1-127. Section 64.1-127 should be amended to allow "dependents" of the decedent to claim this exemption. See note 153 *infra*.

<sup>122</sup> See text accompanying notes 123-24 *infra*.

<sup>123</sup> Frequently, creditors lending money to a consumer debtor take a security interest in all of the debtor's belongings, and obtain a waiver by the debtor of his exemptions. In most of these cases the debtor is not aware of the consequences of the forms he signs. The creditor's experience provides him with a substantial advantage. If the debtor encounters financial difficulty, creditors often use threats of repossession of all the debtor's household goods as a means of obtaining payment.

HOUSE REPORT, *supra* note 5, at 127, [1978] U.S. CODE CONG. & AD. NEWS at 6088.

have little resale value. They are far more valuable to the creditor in the debtor's hands, for they provide a credible basis for the threat, because the replacement cost of the goods are generally high. Thus, creditors rarely repossess, and debtors, ignorant of the creditors' true intentions, are forced into payments they simply cannot afford to make.<sup>124</sup>

To insure that the debtor attains the benefits of this no-waiver policy, the legislature should establish punitive remedies against any creditor effort to subvert it.<sup>125</sup> For example, in all cases in which a creditor either takes security in household goods specifically exempted by the poor debtor law or requires a waiver of this exemption, the debtor should be permitted to cancel the outstanding indebtedness or recover from the creditor three times the property involved.<sup>126</sup> Reasonable attorney fees also should be awarded along with the cost of suit.<sup>127</sup> As an added precaution, the debtor's rights under section 34-26 and his right to claim a homestead exemption should be set forth on all writs of execution and distraint.<sup>128</sup>

Third, the legislature should do more to encourage the debtor's rehabilitation. The current statute gives protection only to persons engaged in farming, fishing, and oystering.<sup>129</sup> Yet, one would think that providing op-

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<sup>124</sup> *Id.* at 126-27, [1978] U.S. CODE CONG. & AD. NEWS at 6087-88. My discussions of this matter with Mr. Henry Woodward, Director of Roanoke Legal Aid, indicated that this activity is the common practice of many Virginia creditors.

<sup>125</sup> *Cf.* Equal Credit Opportunity Act § 1691e(b), 15 U.S.C. § 1691e(b)(1976), (punitive damages up to \$10,000); Truth In Lending Act § 1640a, 15 U.S.C. § 1640(a) (1976), (twice amount of finance charge); Fair Credit Reporting Act § 1681(N), 15 U.S.C. § 1681(n) (1976) (punitive damages as court may allow).

<sup>126</sup> The problem presented by creditors circumventing the policy against waivers is analogous to that found in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) and *Fuentes v. Shevin*, 407 U.S. 67 (1972). In *Fuentes*, the Court used the due process clause to invalidate statutes which permitted prejudgment seizure of a debtor's property under attachment and replevin (detinue) statutes without notice and a hearing. Many states, including Virginia, amended their statutes to comply with this decision. *See* VA. CODE § 8.01-114 (1978).

This method of handling the problem is inefficient. The effect of decisions like *Fuentes* merely is to increase the cost of installment sales contracts, a dubious blessing to consumers. If the purpose is to prevent harassment of debtors by creditors, the best method of doing so is to create an economic disincentive to the use of these creditor tactics. *See* POSNER, *ECONOMIC ANALYSIS OF LAW* 275 (1973). Similarly, an economic disincentive must be established to prevent creditors from getting debtors to waive exemptions. Otherwise, creditors have everything to gain and nothing to lose by violating VA. CODE § 34-28. *Cf.* VA. CODE § 34-32 which makes it a misdemeanor for a Virginia creditor to garnish the wages of a Virginia debtor in another state.

The majority of illegal waiver clauses were drafted by attorneys who should know that they violate § 34-28. Such activity by attorneys should mandate disciplinary action.

<sup>127</sup> *See* Bankruptcy Act § 523(d) (grants reasonable attorneys fees and court costs where false financial statements are used as basis for excepting particular debts from a discharge pursuant to § 523(a)(2)), Equal Credit Opportunity Act § 1691e(d).

<sup>128</sup> *See* text accompanying note 151 *infra*.

<sup>129</sup> VA. CODE § 34-27 exempts farming articles not mentioned in § 34-26, including a tractor worth up to \$3000 and fertilizer worth up to \$1000. VA. CODE § 34-26 protects the boats of fishermen and oystermen up to \$1500.

portunities for a fresh start for everyone would be the heart of the poor debtor's statute. The exemption should be extended to the implements, professional books, and tools of any trade or occupation<sup>130</sup> with some necessary limitation on the exemption's dollar amount. The \$1500 amount for fishermen and oystermen seems appropriate. Such a change would assist in rehabilitating the debtor, preclude an excessive claim of exemption, and recognize no favorites.

From the foregoing discussion, it is obvious that the Homestead and Poor Debtor's Exemptions should be changed in several ways. In contrast to the present two-tiered exemption system based upon the distinction between householders and nonhouseholders, a three-tiered system should be adopted. First, every resident should be able to claim the Poor Debtor's Exemption. The list of items protected should include health aids<sup>131</sup> and heirlooms<sup>132</sup> with a dollar limitation. The debtor also should have the option of protecting other items not included in the list, so long as the additional amount claimed does not exceed \$1000.<sup>133</sup> A statute severely penalizing creditors who breach the no-waiver policy of the poor debtor law must be enacted.<sup>134</sup> Second, the definition of householder should be altered to cover only individuals who provide substantial support for someone, including themselves. For all householders there should be an exemption for tools, books, and implements of any trade up to the amount of \$1500 plus an exemption of \$3000 worth of property of any kind.<sup>135</sup> Third, when a householder supports one dependent, the claimant is entitled to an additional \$2000 exemption plus \$500 for each additional dependent. This three-tiered system merely recognizes that the greater the number of dependents, the greater the need of the debtor

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<sup>130</sup> See, e.g., Bankruptcy Reform Act § 522(d)(6); UNIFORM EXEMPTIONS ACT § 8(c). The suggested exemption is smaller than either of these. Both Joslin, *supra* note 4, and Rombauer, *supra* note 15, emphasize the need to grant this kind of exemption for all trades.

<sup>131</sup> UNIFORM EXEMPTIONS ACT § 5(2) grants the debtor an exemption in "health aid reasonably necessary to enable the individual or a dependent to work or sustain health." Comment (2) points out that the section does not include such items as a swimming pool, golf clubs, or sauna, but would include items such as a wheelchair for a person unable to walk and an air conditioner for a person suffering from asthma. See also Bankruptcy Act § 522(d)(9).

<sup>132</sup> Cf. UNIFORM EXEMPTIONS ACT § 8(a)(3) (heirlooms of particular sentimental value to the individual exempt up to \$500 in value).

<sup>133</sup> The poor debtor's exemption does not necessarily benefit everyone. A single person who maintains a separate residence may eat out and pay to have his laundry done. Thus, the VA. CODE § 34-26 exemption, which is worth at least \$1000 to some people, is worth nothing to this person because of the way he chooses to live.

<sup>134</sup> The statute would penalize only attempts to waive the exemption as to the enumerated items in § 34-26, and would not aid a debtor who chooses property not on the list.

<sup>135</sup> The amount of the cash exemption should be reduced from \$5000 to \$3000 for the following reasons. All households are entitled to supplement their homestead exemption by protecting their earnings and claiming the poor debtor's exemption. Furthermore, recall that when the Virginia legislature increased the amount of the homestead exemption from \$3500 to \$5000 in 1977, a householder was defined as one who supported dependents. If \$5000 was proper for the support of at least two persons, more than half that amount should suffice for an individual.



for assets. Any statute using a fixed dollar amount also should provide a method for periodic adjustments of this figure by tying it to some economic index.

e. The Life Insurance Exemption<sup>136</sup>

In contrast to most other states,<sup>137</sup> Virginia provides a modest exemption for life insurance. Sections 38.1-448 to 449 provide that where the debtor-insured retains the right to change the beneficiary,<sup>138</sup> the policy's cash surrender value<sup>139</sup> is exempt from creditors' claims to the extent of \$10,000 in face value of the policy, but only if the debtor is a householder.<sup>140</sup> The statute further provides that all transfers made with intent

<sup>136</sup> The fact that the life insurance exemption has not been given extended treatment here does not mean that the area is settled. Indeed, the law surrounding this exemption is often complex. The limited discussion stems from the fact that apparently few Virginia debtors have used this exemption.

Of the several fine treatments of this subject, the leading article is Riesenfeld, *Life Insurance and Creditors' Remedies in the United States*, 4 U.C.L.A. L. Rev. 583 (1957) [hereinafter cited as Risenfeld]. See also 1 GLENN, *supra* note 78, §§ 175-83; Vukowich, *supra* note 13, at 808-13; Worthington, *Exemption of the Debtor's Life Insurance in Virginia*, 42 VA. L. Rev. 239 (1956) [hereinafter cited as Worthington].

<sup>137</sup> Life insurance has been described as "the most privileged capital asset in the United States," Riesenfeld, *supra* note 136, at 617, and the exemptions granted to life insurance are "indefensible." Vukowich, *supra* note 13, at 810. Such comments are directed at statutes that place either no limit or very large limits on the amount the insured may protect from creditors' claims. While the policy originally underlying such statutes was that exemptions were necessary to protect the debtor's family, Worthington, *supra* note 136, at 241-42, many persons have come to recognize that insurance is a good investment which is especially attractive because it can be put beyond the reach of creditors. In this regard, see Plumb, *supra* note 110, at 61-69.

<sup>138</sup> VA. CODE § 38.1-448 provides that where the policy is payable to a third party, and the insured may not change the beneficiary, creditors of the insured may not execute on the policy. This is a codification of the rule at common law. VANCE ON INSURANCE §§ 106, 122 (2d ed. 1951).

<sup>139</sup> The cash surrender value of an insurance policy is built up and increased from time to time from premiums paid in excess of the amount required to provide life insurance, and constitutes an investment which resembles and is of the nature of a savings account. The policy is of a dual nature; in one aspect it is an obligation of the insurance company to pay the stipulated amount on the death of the insured; in the other aspect is an investment, pure and simple, obligating the company on surrender to pay in the cash amount of the surrender value.

*Hardin v. Volunteer State Life Insurance Co.*, 193 S.W.2d 554, 556 (Tex. App.), *rev'd on other grounds*, 197 S.W.2d 105 (Tex. 1946).

<sup>140</sup> Most of the early cases held that the insured's creditors could reach the cash surrender value of the debtor's life insurance policy. See Riesenfeld, *supra* note 136, at 595-96. When the Supreme Court, in *Cohen v. Samuels*, 245 U.S. 50 (1917), arrived at the same result, many states passed statutes exempting the cash surrender value of the policy, while the courts of other states often protected this asset without the aid of exemption statutes. See Riesenfeld, *supra* note 136, at 596.

Prior to the passage of VA. CODE §§ 38.1-448 & 449, the rule in Virginia concerning creditors' rights in life insurance was quite clear. While policies which have no cash surrender value or loan value may not be reached by creditors, *Boisseau v. Bass*, 100 Va. 207, 40 S.E. 647 (1902), the cash surrender value of a life insurance policy may be reached by creditor process. *Smith v. Coleman*, 184 Va. 259, 35 S.E.2d 107 (1945).

to defraud creditors are void<sup>141</sup> and that premium payments made without consideration<sup>142</sup> may be recovered by creditors. To this extent, Virginia has incorporated its fraudulent conveyance rules into this exemption statute.<sup>143</sup>

The life insurance exemption provisions should be amended in four ways. First, the legislature should clarify whether this exemption is part of the homestead exemption or intended to be an independent exemption. The current statute fails to make clear whether a householder may claim \$5000 as a homestead and also assert the life insurance exemption under section 38.1-448 and 449.<sup>144</sup> Second, the protection granted should be

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The precise nature of the creditor's remedy, however, remains unclear. Garnishment will not lie since the debtor cannot be forced to extinguish the liability of the insurance company by surrendering the policy to the insurance company. See COUCH ON INSURANCE § 32:155 (2d ed. 1961); Annot., 37 A.L.R.2d 268 (1954). Neither the interrogatory procedure (§ 8.01-506) nor the common law creditors' bill are of assistance to the creditor. See Worthington, *supra* note 135, at 247-51. Yet, the Virginia Supreme Court has held that the cash surrender value is subject to proper creditor process. *White v. Pacific Mutual Life Ins. Co.*, 150 Va. 349, 145 S.E. 340, 344 (1929).

<sup>141</sup> The statute incorporates VA. CODE § 55-80 (1974) by implication.

<sup>142</sup> VA. CODE § 38.1-448 expressly incorporates § 55-81, the so-called voluntary conveyance statute, but limits its application to donations of premiums by the insured.

<sup>143</sup> A common factual pattern will illustrate the interplay between the insurance exemption and fraudulent conveyance law. Assume that a Virginia debtor has a life insurance policy with a cash surrender value payable to his estate. While deeply in debt he changes the beneficiary from his estate to his wife, giving up the right to change the beneficiary in the future. Before VA. CODE §§ 38.1-448 & 449 were passed, creditors could have reached this asset, *see* note 140 *supra*, but the statute placed the policy beyond their reach. Virginia creditors, however, might attack this transaction as fraudulent under VA. CODE § 55-80 which mandates that the transfer to be set aside if actual intent to defraud creditors is present. While the general rule is that an interfamily transfer does not necessarily show fraud, it does mean that the court will closely scrutinize the transaction. Moreover, where the transfer is made by an indebted husband to wife, the burden shifts to the wife to demonstrate by clear and convincing evidence that the transfer was a bona fide gift. *Morrisette v. Cook & Bernheiner Co.*, 122 Va. 588, 95 S.E. 449 (1918). If the wife could carry her burden of proof and demonstrate that the transaction was not tainted by fraud, she apparently takes free of her husband's creditors' claims even though the transfer to her was made without consideration. Now assume that the original transfer from husband to wife was proper in all respects, but the insured became indebted after changing the beneficiary, and continued to pay the premium on the policy. Even if one assumes that the wife owns the policy and that it cannot be reached by creditors, she would still necessarily be a pure donee as to the premiums. Clearly, these premiums can be recovered, but the remedy to be used is uncertain.

<sup>144</sup> Judge Worthington asserted that the insurance provision exemption was part of the homestead exemption and that their combined value therefore was limited to the amount set out in title 34 of the Virginia Code. Worthington, *supra* note 136, at 253-55. He argued that a debtor could claim \$2000 (now \$5000) worth of property, with one of the assets being a life insurance policy with a face value of \$10,000 and a cash surrender value of \$2000 or less. In reaching his conclusion, Judge Worthington relied on the fact that the homestead figure of \$2000 which was at that time stated in the Virginia Constitution, limited the exemption claim of all householders to that amount. Nonetheless, at least as strong an argument can be made for the opposite result. If the exemption for life insurance is merely a part of the homestead exemption, there would be no need for it. In Virginia, as in most other states, a policy *owned* by a third party is not subject to the claims of the insured's creditors. *See* note 138 *supra*. Where the insured may change the beneficiary, creditors may in the absence of an

stated in terms of cash surrender value. Tying the exemption to face value makes sense for matured policies, but is irrelevant where the debtor is still alive. From the debtor's point of view, the cash surrender value is an asset which may be used like any other, while the creditor sees it as property which may be used to satisfy the obligation owed. Thus, a \$1500 cash surrender value should be protected, provided also that the debtor may ransom the policy by paying to the creditor the amount of cash surrender value in excess of \$1500.<sup>145</sup> Third, this exemption should arise only if the policy beneficiary is the debtor's spouse or minor children, or, in the alternative, only dependents of the debtor. The statute now provides that the designated beneficiaries take free of the claims of his or her creditors up to \$10,000. While the primary premise of the statute must be that the debtor should be able to protect his family (dependents) through life insurance, no restrictions were placed on who may be named as beneficiaries. For example, one of the debtor's creditors could qualify for this special protection, a ridiculous result. This exemption should only run in favor of the debtor's spouse or minor children, or, in the alternative, only dependents of the debtor. If this change were enacted, the legislature would be justified in significantly raising the amount of protection to \$25,000.<sup>146</sup> Finally, the creditors' remedies in cases in which the debtor makes premium payments without compensation is unclear.<sup>147</sup> The remedy should be made clear, and the proposed statute does so.

### CONCLUSION

The proposed statutes do not markedly alter the current Virginia exemption system. All lawyers familiar with the current scheme would have no difficulty understanding the one offered. With one exception—treatment of waivers—no radical changes are proposed. In particular, the

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exemption statute reach the cash surrender value. See note 140 *supra*. The exemption statute changes this rule with regard to policies with a face value of \$10,000 or less. Yet, if the debtor had claimed the insurance policy under the homestead exemption before the passage of VA CODE §§ 38.1-448 & 449, such policy would have been exempt just like any other species of property. Therefore, unless these two sections are surplusage, they must have been intended to create an independent exemption.

<sup>145</sup> See UNIFORM EXEMPTIONS ACT § 7; 1898 Bankruptcy Act § 70a(5). Permitting the insured to ransom his policy provides the additional protection necessary to aid the debtor in obtaining his fresh start. If the creditor were allowed to take all or part of the cash surrender value, the policy might be terminated. Termination could affect the debtor adversely in two significant ways. He might henceforth be deemed uninsurable, and therefore unable to obtain further insurance. Moreover, even if he could obtain a new life insurance policy, his premiums might be significantly increased due to advanced age or poor health.

<sup>146</sup> See Vukowich, *supra* note 13, at 871 (proposed insurance statute). Vukowich suggested that the exemption should be lost if the insured exercises the option to take the cash surrender value of the policy. There is merit to this contention, especially in light of the debtor's ability to put the policy beyond creditors' reach by making a bona fide gift of it or by changing the beneficiary. See note 143 *supra*. Yet, to make this change runs counter to the policy of § 34-22 that the debtor, knowing where the best interests of the family lie, may waive the homestead. See note 109 *supra*.

<sup>147</sup> See note 140 *supra*.

amounts of exemptions were retained. So long as some method is provided to deal with the effects of inflation, the amounts provided seem adequate.

Waivers of exemption by debtors are a special case. Our present statutes prohibit waiver of the articles in the Poor Debtor's Exemption. Nonetheless, creditors commonly ignore this prohibition. Unless this egregious practice is to be winked at, stringent measures are needed, such as those suggested in the proposed statute. The rationale for permitting waiver of the homestead appears plausible in theory, but in practice few debtors understand its significance. So long as they do realize what their waiver means, it should be permitted. Section 522 of the new Bankruptcy Act accomplishes this result, and the proposal offered is consistent with the federal Act.

By limiting its residents to local exemptions even in bankruptcy cases, the Virginia legislature has tacitly accepted the obligation to provide the soundest system possible. The proposed statute offers the lawmakers several means by which they can adequately fulfill that obligation.

#### Proposed Revision of Virginia's Exemption Statutes<sup>148</sup>

§ 34-1.1 *Definitions.* For the purpose of this title, the following definitions shall apply:

(a) "Householder" shall mean an individual who is the primary source of support for some person including himself.<sup>149</sup>

(b) "Dependent" shall mean an individual who derives support primarily from another person, and who does not have assets sufficient to support himself.

(c) "Laboring person" shall include all persons who receive wages for their services.

(d) "Debt" shall mean a legally enforceable monetary obligation or liability of any individual whether arising out of a contract or otherwise, but not an obligation sounding in tort.

(e) "Exempt" means protected, and "exemptions" means protection, from levy, seizure, garnishment, or sale under any execution, order, or process to collect an unsecured debt

§ 34-1.2 *Adjustment of Dollar Amounts.*

(a) The dollar amounts in Title 34 and § 38.1-449 change, as provided in this section, according to and to the extent of changes in the Consumer Price Index for Urban Wage Earners and Clerical Workers: U.S. City Average, All Items, 1967 = 100, compiled by the Bureau of Labor Statistics, United States Department of Labor, and hereafter referred to as the Index. The Index for December of the year preceding the year in

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<sup>148</sup> Only the statutes involving noteworthy changes have been set forth.

<sup>149</sup> This definition opens the very real possibility that at least two people in a family could each claim a homestead exemption. Two parents working to support themselves and their dependents is a clear example. This possibility exists under the present definition of householder in § 34-1 only if the parents maintained separate residences. See note 34 *supra*.

which this Act becomes effective is the Reference Base Index.

(b) The dollar amounts change on July 1 of each even-numbered year if the percentage of change, calculated to the nearest whole percentage point, between the Index for December of the preceding year and the Reference Base Index, is 10 percent or more, but:

(1) the portion of the percentage change in the Index in excess of a multiple of 10 percent is disregarded and the dollar amounts change only in multiples of 10 percent of the amounts appearing in this Act on the date of enactment; and

(2) the dollar amounts do not change if the amounts required by this section are those currently in effect as a result of earlier application of this section.

(c) If the Index is revised, the percentage of change is calculated on the basis of the revised Index. If a revision of the Index changes the Reference Base Index, a revised Reference Base Index is determined by multiplying the Reference Base Index applicable by the rebasing factor furnished by the Bureau of Labor Statistics. If the Index is superseded, the Index referred to in this section is the one represented by the Bureau of Labor Statistics as reflecting most accurately changes in the purchasing power of the dollar for consumers.

(d) The appropriate state official shall adopt a rule announcing:

(1) on or before April 30 of each year in which dollar amounts are to change, the changes in dollar amounts required by subsection (b); and

(2) promptly after the changes occur, changes in the Index required by subsection (c) including, if applicable, the numerical equivalent of the Reference Base Index under a revised Reference Base Index and the designation or title of any index superseding the Index.<sup>150</sup>

§ 34-2 *Injunction Restraining Sale of Exempted Property or Garnishment of Wages.* An injunction may be awarded to enjoin the sale of any property exempt under the provisions of this title, and to prevent wages exempted by § 34-29 from being garnished or otherwise collected by an execution creditor.

§ 34-3.1 *Articles Not Exempt From Certain Creditors.* The exemption under §§ 34-26, 34-27, and 64.1-127 shall not extend to liens for the purchase price of these items or to fines and damages or either arising from trespass by animals under § 8-874 as to such animal so trespassing.

§ 34-4.1 *Exemption Created.* Every householder in this state shall be entitled, in addition to the property or estate exempted under §§ 34-26, 34-27 and 34-29, to hold exempt from any demand for a debt his real or personal property, or either, to be selected by him, including money and debts due

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<sup>150</sup> This section incorporates § 2 of the UNIFORM EXEMPTIONS ACT. As comment (2) to the proposed statute indicates, the enacting state may opt for a regional consumer price index in subsection (a) in lieu of the Index for the U.S. City Average. The National Index is recommended in the interest of attaining greater uniformity in the operation of the Act. For the writer, the primary goal is the adoption of some index.

him, to the value not exceeding \$3000 [and tools, books, instruments and machines which are necessary to the debtor in the course of his occupation not to exceed \$1500 in value. An automobile shall be considered "necessary" only if it is used in the performance of the debtor's occupation or if it is the only reasonable means for the debtor to go to and from the place where his occupation is carried on.]<sup>151</sup>

§ 34-4.2 *Additional Exemption for Householder With Dependents.* Upon a showing by a householder that he supports a dependent, he shall be entitled, in addition to the exemption created in § 34-4.1, to hold exempt from any demand for a debt his real or personal property, or either, to be selected by him, including money and debts due him, to the value not exceeding \$2,000; and for each additional dependent the householder shall be entitled to claim an additional \$500 exemption.

§ 34-4.3 *Additional Exemption for Certain Veterans.*<sup>152</sup> Every veteran residing in this State having a service connected disability of forty per centum or more, as rated by the Veterans Administration of the United States, shall be entitled, in addition to the exemption created in § 34-4.1 & 34-4.2 to exempt from any demand for a debt, his real and personal property, or either, to be selected by him, including money and debts due him, to a value not exceeding \$2,000.

§ 34-10 *How Real Estate, So Set Apart, Held After Death of Householder.* The real estate set apart by any householder in his or her lifetime shall, after his or her death, be held by the surviving spouse, minor children or other dependents,<sup>153</sup> or such of them as there may be, exempt as before and also from the debts of such surviving spouse, children and dependents, or any of them, until the death or remarriage of the spouse, by such children until they respectively attain the age of eighteen, or marry, if they marry before attaining that age, and by dependents until death or they attain assets sufficient to support themselves.

§ 34-22 *Waiver of Exemption Prohibited; Security Interest in Exempt Property.* A waiver of the exemption granted under § 34-4, of this title executed in favor of an unsecured creditor is unenforceable, but a valid security interest may be created in exempt property unless the court finds that the security interest was obtained by overreaching or that the debtor did not fully understand the legal significance of the security interest.<sup>154</sup> The language of this section shall not be construed to permit the creation of a valid security interest in property or estate exempt under § 34-26, 34-27

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<sup>151</sup> Bracketed clause to be used in lieu of § 34-26(7) *infra*.

<sup>152</sup> A similar additional exemption for the handicapped and those over seventy should be considered.

<sup>153</sup> VA. CODE §§ 34-11, 34-15, & 34-16 should all be changed to include the phrase "or other dependents."

<sup>154</sup> This section is adapted from Vukowich, *supra* note 13, at 873-74. The last clause goes beyond that necessary to bring Virginia law in line with § 522(e) & (f), but is consonant with the policy underlying suggested § 34-22.

and 34-29.

§ 34-26 *Exempt Articles Enumerated.*

(1) The family Bible.

(1a) Wedding and engagement rings.

(2) Family portraits, heirlooms of sentimental value not to exceed \$300, school books and library for use of family.

(4) (as set forth presently)

(4a) Health aids reasonably necessary to enable the householder or a dependent to work or to sustain health.

(5) (as set forth presently)

(6) In lieu of the exemption of articles enumerated in the preceding five subsections of this statute, an individual is entitled to hold exempt articles of value not to exceed one thousand dollars.<sup>155</sup>

[(7) tools, books, instruments, and machines which are necessary to the debtor in the course of his occupation not to exceed \$1500 in value. An automobile shall be considered "necessary" only if it is used in the performance of the debtor's occupation or if it is the only reasonable means for the debtor to go to and from the place where his occupation is carried on.<sup>156</sup>

§ 34-28 *No Waiver or Security Interests Permitted on Exempt Property; Penalty for Violation of This Section.* The exemptions provided in § 34-26 are nonwaivable and security interests, other than purchase money security interests, may not be taken in the property listed in § 34-26. Any purported waiver or grant of a security interest in violation of this section is void. Any person who accepts a waiver of exemption or creates a security interest in violation of this section shall be liable to the debtor for three (3) times the replacement value<sup>157</sup> of the exempt article or articles, costs of a proceeding to enforce such liability, and a reasonable attorney's fee.<sup>158</sup>

§ 34-29 (a) Except as provided in subsections (b) and (b1), the maximum

<sup>155</sup> See text accompanying note 133 *supra*.

<sup>156</sup> Section (7) should be added to § 34-26 if the three tier scheme suggested in the text accompanying notes 131-35 is not used. See note 152 *supra*.

<sup>157</sup> Even though Virginia law already prohibits creditors from creating security interests or contracting for waivers in items exempt under § 34-26, Virginia creditors, following the practices of others throughout the country, see text accompanying notes 123-24 *supra*, use such devices to harass debtors into payments they cannot afford. The suggested statute's objective is to make such creditor actions so unprofitable that they will be discontinued. An actual damages remedy will not suffice for three reasons. First, demonstrating actual damages will often be difficult; second, the gain to the debtor may provide an insufficient incentive to use the remedy; and third, most debtors will not have heard of the remedy. By increasing the amount of recovery to three times replacement value, the recovery becomes worthwhile and debtors will become increasingly aware of their remedy. Presumably, the expectation of pecuniary loss will cause the creditor to think twice before engaging in these practices.

<sup>158</sup> The writ of execution should set forth the exemptions in § 34-26. See also § 8.01-512 (requires the § 34-29 wage garnishment exemption to be set forth on all writs of garnishment).

part of the aggregate disposable earnings of an individual for any work week which is subjected to garnishment may not exceed the lesser of the following amounts:

- (1) twenty-five percent of his disposable earnings for that week, or
- (2) twenty percent of his disposable earnings for that week if the individual supports one dependent, or
- (3) fifteen percent of his disposable earnings for the week if the individual supports two or three dependents, or
- (4) ten percent of his disposable earnings for the week if the individual supports four or more dependents, or
- (5) the amount by which his disposable earnings for that week exceed thirty times the federal minimum hourly wages prescribed by § 206(a)(1) of Title 29 of the United States Code in effect at the time earnings are payable.
- (6) The additional exemptions set forth in subsection (2) (3) and (4) of this subsection (a) do not apply with regard to that part of his disposable earnings above one-hundred twenty-five dollars per week.

§ 38.1-448 *Proceeds of Policies Payable to Others Free of Claims Against Insured.* If a policy of insurance, whether heretofore or hereafter issued, is effected by any person on his own life or on another life, in favor of a person other than himself, or, except in cases of transfer with intent to defraud creditors, if a policy of life insurance is assigned or in any way made payable to any such person, such lawful beneficiary or assignee thereof, other than the insured or the person so effecting such insurance of the executors or administrators of such insured or the person so effecting such insurance, shall be entitled to its proceeds and avails against the creditors and representatives of the insured and of the person effecting the same, whether or not the right to change the beneficiary is reserved or permitted, and whether or not the policy is made payable to the person whose life is insured if the beneficiary or assignee predeceases such person; provided, that, subject to the statute of limitations, the amount of premiums for such insurance paid with intent to defraud creditors, or paid under circumstances as to be void under § 55-81 with interest therein may be recovered in a garnishment action brought by the creditors against the company.

§ 38.1-449 *Amounts of Such Proceeds Limited in Certain Cases.* In the case of policies under the terms of which the right to change the beneficiary is reserved and as to which the cash surrender or loan value thereof is claimed by creditors, such insurance shall not be entitled to the protection afforded by § 38.1-448, except that a householder may in addition to exemptions claimed under Title 34, exempt \$1500 of the cash surrender or loan value of policies in which the named beneficiary is a dependent of the insured. If the cash surrender or loan value of the insurance is more than \$1500, a creditor may obtain a court order requiring the insured householder to pay the creditor, and authorizing the creditor on the debtor's behalf to obtain payment from the insurer of cash surrender or



loan value in excess of \$1500 or the amount of the creditor's claim, whichever is less.<sup>159</sup>

Benefits paid or payable to beneficiaries who qualify under this section are exempt from the claims of creditors of the insured and the creditors of the beneficiary to the extent of \$25,000. Exempt benefits remain exempt after payment so long as the beneficiary follows the procedure set forth in § 34-20.<sup>160</sup>

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<sup>159</sup> This change is based upon § 7 of the UNIFORM EXEMPTIONS ACT.

<sup>160</sup> See Vukowich, *supra* note 13, at 874. Cf. UNIFORM EXEMPTIONS ACT § 6(a)(4), which limits payments to those reasonably necessary for support.

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