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broad,[42] but neither the terms of section 2056 nor the legislative history of the statute support a distinction that would allow the deduction of a statutory interest passing by acceptance and yet deny a reciprocal effect to will interests.

The underlying policy of the terminable interest rule is protected where interests are created either by statute or by will, because interests created by statute or will are still tested to determine whether the interests will fail because of a lapse of time or due to an occurrence other than the refusal of the interest by the spouse.[43] The Fourth Circuit's interpretation of the terminable interest rule will allow the deduction without conflicting with the policy behind the marital deduction, and insure that property interests passing to the spouse under a will election provision will remain under the absolute control of the spouse and be taxable in the spouse's estate.

The *Mackie* court established that alternative absolute bequests to a testator's spouse were non-terminable interests and, therefore, applicable to the estate marital deduction. Under *Mackie* a spouse can be given the opportunity to elect between alternative plans and to select sufficient property under one plan to maximize the estate marital deduction according to what the best alternatives are at that time. If the testator was forced to select the specific property before death in order to create a non-terminable interest, fluctuations in property values and subsequent conveyances could alter even the most careful planning.[44] *Mackie* will allow Fourth Circuit estate planners to take advantage of a flexible planning arrangement to maximize an estate marital deduction.

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XII. TORTS

The presence of a family relationship in an action often significantly affects the rights of the parties involved.[1] The recent Fourth Circuit Court

interests and interests created by will. *See* S. REP. No. 1013, 80th Cong., 2d Sess. 26, *reprinted in* [1948] U.S. CODE CONG. & AD. NEWS 1163, 1188; Brief for Appellant at 26-34, Mackie v. Commissioner, 545 F.2d 883 (4th Cir. 1976).

[42] For the scope of the terminable interest rule see notes 5 and 28 *supra*.

[43] 545 F.2d at 884; *see* Doughtery v. United States, 292 F.2d 331, 336 (6th Cir. 1961); United States v. Traders Nat'l Bank, 248 F.2d 667, 669 (8th Cir. 1957).

[44] American Bar Association Probate and Trust Divisions, Committee on Estate and Tax Planning, Subcommittee Report, *Estate Planning and the Marital Deduction*, 102 TR. EST. 934, 943 (1963); Minan, *A Scrivener's Delight—The Marital Deduction Formula Clause*, 37 OHIO ST. L. J. 81, 87 (1976).

[1] *See* W. PROSSER, THE LAW OF TORTS § 122 (4th ed. 1971) [hereinafter cited as PROSSER]; McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030 (1930); *see e.g.*, Bieker v. Owens, 234 Ark. 97, 350 S.W.2d 522 (1961) (vicarious liability of parent for tort of child); Hardison v. Gregory, 242 N.C. 324, 88 S.E.2d 96 (1955) (husband's suit for alienation of wife's affections); Shreve v. Faris, 144 W.Va. 819, 111 S.E.2d 169 (1959) (hus-

of Appeals case, *Sims v. Virginia Electric & Power Co.*,[2] presented an uncommon situation in which the fact that the persons involved were no longer members of the same family significantly affected the action. The plaintiff, Sims, and his wife were divorced in 1969.[3] The divorce decree granted custody of their two daughters to the wife[4] and required Sims to maintain support payments and full medical and hospital insurance on the two infant girls.[5]

In 1972, subsequent to the divorce decree, one of the daughters suffered injuries when she touched an electric wire allegedly under the control of Virginia Electric and Power Company [VEPCO].[6] The daughter brought suit against VEPCO[7] to recover for the injuries she had sustained.[8] In 1974,

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band's suit for loss of injured wife's services).

[2] 550 F.2d 929 (4th Cir.), *cert. denied*, 431 U.S. 925 (1977).

[3] *Id.* at 930.

[4] *Id.* Although the courts consider many factors in determining which parent will obtain custody of the offspring of the marriage, custody is granted to the mother in the majority of cases. Roth, *The Tender Years Presumption In Child Custody Disputes*, 15 J. FAM. L. 423 (1977). *See generally* Levy, *The Rights Of Parents*, 1976 B. Y. L. REV. 693; Podell, Peck & First, *Custody—To Which Parent?*, 56 MARQ. L. REV. 51 (1973); Watson, *The Children of Armagedon—Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55 (1970).

[5] 550 F.2d at 930. The pertinent provisions of the decree and settlement agreement in the divorce case are set out in the opinion. *Id.* at 931 n.1. Sims and his wife obtained their divorce in Alabama. *Id.* at 930. Where both parites are before the court and the court has jurisdiction over the subject matter, a divorce granted in one state is entitled to full faith and credit in all other states. A. LINDEY, 2 SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS 31-139 (2d rev. ed. 1964 & Supp. 1977); *see* Davis v. Davis, 305 U.S. 32 (1938); Evans v. Asphalt Roads & Materials Co., 194 Va. 165, 72 S.E.2d 321 (1952); U.S. CONST. art IV, § 1; 28 U.S.C. § 1738 (1970).

[6] 550 F.2d at 931.

[7] The daughter's suit, brought by her mother as next friend, was styled *Jennifer Sims, a child by her natural mother and next friend, Marilyn Brandon v. Virginia Electric and Power Co.*, and was filed in the Circuit Court of Fairfax County, Virginia. Any minor entitled to sue may do so by a next friend. When this is done, however, the suit must be brought in the infant's name because the infant is the real party plaintiff. Kirby v. Gilliam, 182 Va. 111, 28 S.E.2d 40 (1943); VA. CODE § 8.01-8 (1977).

[8] 550 F.2d at 931. In cases of injury to an unemancipated minor by the wrongful act of another, two causes of action ordinarily arise. One cause of action is on behalf of the minor to recover damages for pain and suffering, permanent injury and impairment of earning capacity after attaining majority. The other cause of action is on behalf of the parents of the minor for the loss of the minor's services during minority and for recovery of necessary expenses incurred for the minor's treatment. Moses v. Akers, 203 Va. 130, 122 S.E.2d 864 (1961); *accord* Emanuel v. Clewis, 272 N.C. 505, 158 S.E.2d 587 (1968); Hughey v. Ausborn, 249 S.C. 470, 154 S.E.2d 839 (1967); *see* C. MCCORMICK, LAW OF DAMAGES § 591 (1935) [hereinafter cited as MCCORMICK]. The two causes of action that arise when a child is tortiously injured are separate and distinct. VA. CODE § 8.01-36 (1977). *See generally* 1976 WIS. L. REV. 641.

The common law rule that two separate causes of action arise when a child is tortiously injured arose out of the laws governing the master-servant relationship. PROSSER, *supra* note 1, at § 125. Personal injury to a servant which rendered him unfit to perform his duties deprived the master of his services. When an injury occurred, the law permitted the master to sue the tortfeasor to recover for the loss of his servant's services. *Id.* Because the parents were entitled to the services of their child and injury to the child deprived the parents of the

the daughter and VEPCO agreed to settle the case for $475,000 and an order approving the settlement was entered.[9] Sims, the father, subsequently brought suit against VEPCO to recover medical expenses he had incurred, and expected to incur, as a result of his daughter's injury.[10] Sims relied on the collateral source doctrine[11] to support his contention that he was entitled to recover monies expended by the insurance company in connection with his daughter's injuries.[12] The jury returned a verdict against VEPCO in the amount of $35,000.[13] VEPCO appealed contending that the final settlement of the daughter's suit barred Sims' action[14] and that Sims could not recover the expenses of curing his daughter since he was not liable for payment of those expenses.[15]

The Fourth Circuit vacated the judgment and remanded the case with directions that the district court enter judgment for VEPCO.[16] The court held that Sims had not suffered damage because he had paid nothing for his daughter's cure that he was not obligated to pay prior to the accident

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child's services, a similar common law cause of action developed for the benefit of the parents to recover for the loss of the child's services when the child was tortiously injured. Jones v. Brown, 170 Eng. Rep. 334 (1794); Norton v. Jason, 82 Eng. Rep. 809 (1653); PROSSER, *supra* note 1, at § 125; *see* Goodman, Oberman & Wheat, *Rights and Obligations of Child Support*, 7 SW. U. L. REV. 36 (1975) [hereinafter cited as Goodman, Oberman & Wheat]; 1976 WIS. L. REV. 641.

In the original suit brought by the daughter, the mother waived the right to recover the expenses involved in her daughter's cure. Sims v. VEPCO, 550 F.2d at 931. This waiver allowed the daughter to recover those expenses as well as damages for her pain and suffering. *Id.*; *accord*, Hazeltine v. Johnson, 92 F.2d 866, 869 (9th Cir. 1937); Sox v. United States, 187 F. Supp. 465, 469 (E.D.S.C. 1960); Brown v. Seaboard Air Line R. R., 91 Ga. App. 35, 84 S.E.2d 707, 709 (1954); Thompson v. Lassiter, 246 N.C. 34, 97 S.E.2d 492, 495 (1957); *see* VA. CODE § 8.01-36 (1977).

[9] 550 F.2d at 931; *see* VA. CODE § 8.01-424 (1977) (court approval of settlements required).

[10] Sims filed the action against VEPCO in a North Carolina state trial court. VEPCO answered and removed the action to the United States District Court for the Middle District of North Carolina. Thereafter, VEPCO moved to have the action transferred to the United States District Court for the Eastern District of Virginia pursuant to 28 U.S.C. § 1404(2) (1976). The court granted VEPCO's motion and transferred the case. 550 F.2d at 930.

[11] The collateral source doctrine is a judicially created rule which prevents a wrongdoer from reducing his liability by proving that the plaintiff has received or will receive compensation or indemnity for the loss from a third party wholly independent of the wrongdoer. *See* 3 L. FRUMER, R. BENOIT, & M. FRIEDMAN, PERSONAL INJURY § 4.03 (1965 & Supp. 1977); Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669 (1962) [hereinafter cited as Maxwell]; text accompanying note 21 *infra*.

[12] 550 F.2d at 932. Courts uniformly allow parents of an injured minor to sue for the medical expenses of curing the minor. *See* note 8 *supra*. In addition to the monies expended in curing his daughter, Sims sought punitive and compensatory damages for the loss of her services. Brief On Behalf Of Appellant at 3. Sims abandoned these additional claims during the course of the litigation. *Id.*

[13] 550 F.2d at 930.

[14] *Id.* at 931. VEPCO argued that allowing each parent of a minor to recover identical expenses was unfair because such an allowance would result in double recovery from the same tortfeasor. Brief On Behalf Of Appellant at 8-9.

[15] 550 F.2d at 931.

[16] *Id.* at 930.

under the divorce decree.[17] In concluding that Sims had made no expenditures for the cure of his daughter, the court noted that Sims' payments for his daughter's medical insurance were in the nature of support payments under the divorce decree, and therefore were not expenses for her cure.[18] Since the medical insurance payments had not increased because of the injury, the Fourth Circuit asserted that the father could not recover his routine medical and hospital insurance payments as a cost of cure.[19]

In addition, the court reasoned that the collateral source rule is inapplicable when the father is not injured and is not required to pay more for his daughter's cure than he was required to pay by the divorce decree.[20] Under the collateral source rule, when an injured party receives compensation for his injuries from a source wholly independent of the wrongdoer, that compensation is not deducted from damages which the injured party would otherwise collect from the wrongdoer.[21] In *Sims,* VEPCO already

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[17] *Id.* at 934. The disposition of the damage issue obviated the need for consideration of whether the settlement barred Sims' suit. *Id.; see* note 14 *supra.* The court's holding also obviated the need for the court to consider VEPCO's argument that upon satisfaction of all claims from the first suit, VEPCO should be discharged from all further liability. 550 F.2d at 934.

[18] 550 F.2d at 932-33.

[19] *Id.* at 933. The court implied that had Sims' insurance payments risen, his damages would have been equal to the amount of the increase. *Id.* The court also denied Sims any recovery for the future expenses of his daughter's cure. *Id.* Sims presented only one witness, the Chief of Surgery at the hospital where the daughter was treated, who testified that further medical treatment might be required. Brief for Plaintiff-Appellee at 24-25. However, Sims did not present evidence that the costs of possible future surgery would not be paid by the insurance company. 550 F.2d at 933. Since damages cannot be proven by speculation or conjecture, the court held that Sims could not recover absent proof of future expense. *Id.* at 932-33, *citing* Wine v. Beach, 194 Va. 601, 74 S.E.2d 149 (1953) (denial of recovery for property damage when the plaintiff failed to show that future damage would result from erosion caused by the defendant's wrongful removal of timber); *accord,* Lester v. Dunn, 475 F.2d 983 (D.C. Cir. 1973) (construing Maryland law); Fletcher v. Taylor, 344 F.2d 93 (4th Cir. 1965) (construing Virginia law); Elliot v. United States, 329 F. Supp. 621 (D. Me. 1971) (construing Virginia law); Trueman v. United States, 180 F. Supp. 172 (E.D. La. 1960) (construing Virginia law); Awrey v. Norfolk & W. Ry., 121 Va. 284, 93 S.E. 570 (1917).

[20] 550 F.2d at 932.

[21] *E.g.,* Pemrock, Inc. v. Essco Co., 252 Md. 374, 249 A.2d 711 (1969); Johnson v. Kellam, 162 Va. 757, 175 S.E. 634 (1934); Maxwell, *supra* note 11. The collateral source rule has been criticized for placing the injured party in a better monetary position than he was in before the accident. Note, *Unreason In The Law Of Damages: The Collateral Source Rule,* 77 HARV. L. REV. 741 (1964). Nevertheless, the rule is supported by the equitable notion that an injured party is more justly entitled to a windfall than a wrongdoer. *See* Kassman v. American Univ., 546 F.2d 1029 (D.C. Cir. 1976); Sweep v. Lear Jet Corp., 412 F.2d 457 (5th Cir. 1969). In addition, the injured person recovers only once from the tortfeasor for the wrong and receives insurance payments because of a contract that he has made with the insurance company for which he has paid premiums. The wrongdoer is not privy to the contract and should not benefit by it. Perrott v. Shearer, 17 Mich. 48 (1868); Maxwell, *supra* note 11, at 673. Most jurisdictions have adopted the collateral source rule. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law,* 54 CAL. L. REV. 1478 (1966); *see, e.g.,* Kassman v. American Univ., 546 F.2d 1029 (D.C. Cir. 1976); Blake v. Delaware & Hud. Ry., 484 F.2d 204 (2d Cir. 1973); Haughton v. Blackships, Inc., 462 F.2d 788 (5th Cir. 1972).

paid for the daughter's medical expenses in the compromise settlement and was not attempting to reduce its liability because of the insurance recovery.[22] The court recognized, however, that a proper situation for application of the collateral source doctrine might have existed if VEPCO had attempted to defend the daughter's action on the ground that an insurance carrier paid the medical and hospital expenses.[23]

Sims further contended that the father alone had the right to bring the parents' cause of action.[24] He argued that since the father is primarily responsible for the necessary bills incurred in an infant's treatment, only he should be entitled to sue.[25] The court rejected this argument concluding that the parents' cause of action could be brought by the wife, and thus, could be waived by her.[26] The Fourth Circuit reasoned that when the mother is the parent who is entitled to recover the costs of the daughter's cure, she may bring the parents' cause of action.[27] In *Sims*, the divorce decree, by granting custody of the daughter to the mother, ended the father's right to her services.[28] Moreover, Sims had no responsibility for the expenses of the daughter's cure beyond the payment of the court-ordered insurance premiums.[29] Therefore, as the parent entitled to the daughter's services and responsible for the expenses of her cure, the mother had the right to bring and waive the parents' cause of action.[30]

The Fourth Circuit's resolution of this case is consistent with the increasing rights and responsibilities of the mother. This increase is demonstrated by recent legislation enacted in Virginia.[31] Presently, the mother

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[22] 550 F.2d at 931; Reply Brief On Behalf Of Appellant at 4.

[23] 550 F.2d at 932. If there had been an attempt to defend the daughter's action on the ground that an insurance carrier paid the medical and hospital expenses, VEPCO would have been attempting to benefit from the monies received from an independent source, the insurance company.

[24] *Id.* at 933.

[25] Brief for Plaintiff-Appellee at 7-12. In the past, the general rule was that the action for the expenses of curing a minor of tortiously inflicted injuries belonged solely to the child's father. The father was required to pay the child's medical bills, and accordingly, most courts held that the cause of action for recovery of these expenses belonged to him. Wade v. Rogala, 270 F.2d 280 (3d Cir. 1959); Constance v. Gosnell, 62 F. Supp. 253 (W.D.S.C. 1945); Goodyear v. Goodyear, 257 N.C. 374, 126 S.E.2d 113 (1962); Goodman, Oberman & Wheat, *supra* note 8; 27 ARK. L. REV. 157 (1973). *But see* text accompanying notes 27-29 *infra.*

[26] 550 F.2d at 934.

[27] *Id.* Although the court's reasoning had not been used previously in the divorced parent situation, courts had used the analysis that when an injured minor's father is dead, the mother becomes primarily responsible for the medical expenses incurred in the treatment of the minor's injuries. Ordinarily, the mother possesses the right to bring an action for recovery of the expenses incurred in this situation. Ellington v. Bradford, 242 N.C. 159, 86 S.E.2d 925 (1955); Moses v. Akers, 203 Va. 130, 122 S.E.2d 864 (1961); *see* text accompanying note 29 *infra.*

[28] 550 F.2d at 934.

[29] *Id.* at 933. In addition to the effect of a divorce on Sims' responsibility for the expenses of the daugher's cure, the court noted that under Virginia law, the father is no longer primarily responsible for supporting a minor. *Id.* at 934; *see* note 32 *infra.*

[30] 550 F.2d at 934.

[31] *See* text accompanying notes 32-33 *supra.* An example of legislation demonstrating the

has an equal duty with the father to support her minor children.[32] A divorced mother with sole custody of her minor child has the right to compromise the claim of the child.[33] By granting the right to compromise the parents' suit for the child's medical expenses to a divorced mother who has sole custody of a tortiously injured child, the Fourth Circuit has recognized the increasing rights of the mother and has continued this trend.

The Fourth Circuit's analysis is also consonant with the spirit of the collateral source rule as interpreted by the other circuits[34] and with generally accepted concepts of compensation for damage.[35] Courts uniformly have expressed a desire to prevent the wrongdoer from benefiting from payments that the injured party receives from an independent source.[36] In *Sims,* VEPCO did not attempt to reduce damages by setting off the compensation received from the insurance carrier. The compromise of the daughter's case included a substantial payment by VEPCO to settle all claims including the claim for the daughter's cure.[37] In these circumstances, recovery by the father would have resulted in double payment by

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increasing rights and responsibilities of all women is the Married Women's Act which gives the wife the same rights as her husband regarding contracts and law suits. VA. CODE § 55-36 (1974); *see* Wright v. Standard Oil Co., 470 F.2d 1280 (5th Cir. 1972), *cert. denied,* 412 U.S. 938 (1973); Carrey v. Foster, 221 F. Supp. 185 (E.D. Va. 1963), *aff'd,* 345 F.2d 772 (4th Cir. 1965); Vigilant Ins. Co. v. Bennett, 197 Va. 216, 89 S.E.2d 69 (1955); C. VERNIER, AMERICAN FAMILY LAWS §§ 167 & 179 (1935). In addition, the Virginia legislature created the Commission on the Status of Women to conduct research into and study the status of women and to suggest ways in which women may reach their potential and make their full contribution as wage earners and citizens. VA. CODE §§ 9-116 to 9-119 (1973 & Supp. 1977).

[32] VA. CODE § 20-61 (Supp. 1977). This statute declares that *"any parent* who deserts or willfully neglects or refuses or fails to provide for the support and maintenance of *his* or *her* child . . . shall be guilty of a misdemeanor." *Id.* (emphasis added).

The United States Supreme Court decisions of Planned Parenthood v. Danforth, 428 U.S. 52 (1976), and Roe v. Wade, 410 U.S. 113 (1973), imply that perhaps there should be no duty on the father to support his minor child. The imposition of a duty has been traditionally justified by the presumption that the father, in voluntarily creating life, impliedly assumes the duty of supporting that life. *See, e.g.,* Hunter v. State, 10 Okla. Crim. 119, 126, 134 P. 1134, 1138 (1913). Since *Danforth* and *Wade,* however, the creation of life is subject to interruption by voluntary abortion. The final decision to have a child, resulting in the legal demands for support, is exclusively the mother's. Planned Parenthood v. Danforth, 428 U.S. at 67-72; *see* Shinall v. Pergeovelis, 325 So.2d 431 (Fla. Dist. Ct. App. 1975); Swan, *Abortion on Maternal Demand: Paternal Support Liability Implications,* 9 VAL. L. REV. 243 (1975); Note, *Implications of Abortion on Relative Parental Duties,* 28 U. FLA. L. REV. 988 (1976).

[33] VA. CODE § 8.01-424 (1977); *accord,* S.C. CODE § 15-21-50 (1976); W. VA. CODE § 56-10-4 (Supp. 1977). In the daughter's suit against VEPCO in *Sims,* the mother compromised the daughter's claim. *See* text accompanying note 9 *supra.*

[34] *See, e.g.,* Kassman v. American Univ., 546 F.2d 1029 (D.C. Cir. 1976); Blake v. Delaware & Hud. Ry., 484 F.2d 204 (2d Cir. 1973); Haughton v. Blackships, Inc., 462 F.2d 788 (5th Cir. 1972).

[35] *See* McCORMICK, *supra* note 8, at §§ 20 & 137; James, *Damages In Accident Cases,* 41 CORNELL L. Q. 582 (1956) [hereinafter cited as James].

[36] *E.g.,* Kassman v. American Univ., 546 F.2d 1029, 1034-35 (D.C. Cir. 1976); Blake v. Delaware & Hud. Ry., 484 F.2d 204, 206 (2d Cir. 1973); Haughton v. Blackships, Inc., 462 F.2d 788, 790-91 (5th Cir. 1972).

[37] 550 F.2d at 932.