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NEWS NOTES

COLLABORATIVE FAMILY LAW TRAINING

A number of Northern Virginia, D.C. and Maryland lawyers have expressed interest in getting trained in "Collaborative Family Law", which is described in the ABA's recent publication, *Collaborative Law* by Pauline Tesler. In Collaborative Law, both parties agree to hire their lawyers for negotiation only, and to get new lawyers if either party litigates. In addition, Collaborative Lawyers are trained in the skills needed to combine dispute resolution with client advocacy and advising, to help attain the elusive "Good Divorce." There are approximately 52 regional collaborative law practice networks in the U.S. and Canada. These networks sometimes also include therapists, financial advisors, arbitrators and judges.

This effort is still very much in the exploratory stage. It aims to gather enough lawyers to make it economical to conduct a one-day training in Collaborative Law, perhaps as early as August. So far ten Northern Virginia lawyers have expressed a strong interest; there are somewhat more than that in Maryland and somewhat fewer in D.C.

For more information contact John Crouch, 703-528-6700, crouch@patriot.net.

TAKING PRO BONO A STEP FURTHER: COMPULSORY JUDGING

The most recent newsletter of the ABA Litigation Section discloses that Arizona not only compels lawyers to serve pro bono, but requires them to serve as court-appointed arbitrators. In this case, however, it is for $75.00 per day. When this was challenged in *Scheehle v. Arizona Supreme Court*, the U.S. Court of Appeals for the Ninth Circuit held that this is part of the noblesse oblige that goes with the privilege of practicing law. Attorneys, as a condition of being licensed, can be compelled to accept mandatory pro bono assignments that pay nothing at all, and criminal appointments that pay very little, so this is within the existing constitutional law. The Ninth Circuit also held that lawyers can be compelled to incur at least minimal amounts of unreimbursed costs when they step — or are pushed — into the arbitrator role. The Litigation Section article, at 27/1 Litigation News 4, also cites a case called *DeLisio v. Alaska Superior Court* as holding that the Alaska Supreme Court has held uncompensated compulsory representation to be an unconstitutional taking of private property without due process or just compensation. The *Scheehle* decision, of course, requires service not to a particular defendant who may be indigent, but to the court system itself. It involved arbitration which itself is compulsory for the litigants, and thus is very widespread. The attorneys cannot be required to serve more than two days per year under the Arizona statute involved.

SMART MARRIAGES CONFERENCE RETURNS TO ARLINGTON

The annual conference of the Washington-based Smart Marriages coalition, which explores marriage education and other initiatives to improve and strengthen marriages, will return to the Crystal City Gateway Marriott in Arlington, Virginia this July 9-14 after being held in Denver and Orlando for the last two years.

Marriage education is training in cooperation, listening, communication and other skills and attitudes necessary for marriage and co-parenting. Is it "faith-based" or secular, public or private, civilian or military, pre-marital or post-marital? It comes in all those varieties, and more.

The conference is really four conferences in one. It is a professional conference for marriage educators, but also includes:

• A "Family Expo" for the general public: Demonstrations of different kinds of marriage education (Saturday 7-8:30 p.m., Sunday 2-3:30, $10 admission). A "teach-in" on building local marriage coalitions to get your community involved in starting local marriage programs (Sun. 2-3:30, $10 admission). A three-hour introductory version of the PAIRS marriage education program, Sun. 6:30-9:30 p.m., is free and open to the public, as is the exhibitors' area throughout the conference. For those who cannot attend all or part of the conference, tapes of individual programs can be ordered for $11 each.

• One- to three-day sessions that train and qualify marriage educators, including lay volunteers as well as members of many related professions. One of these, a Thursday, July 11 session on school and youth programs, is free.

• The annual gathering of the "Marriage Movement" of social scientists, community activists, judges, lawmakers and public policy experts who are concerned about the state of marriage. Several sessions are devoted to the latest research on marriage and divorce, and policy initiatives including federal welfare reform programs, state legislation, school curricula, and innovative court programs.

A few of the many workshops: A new program providing marriage education for people with court house weddings, who are not reached by church programs; how Chesterfield County, Va. provides a marriage education program with minimal public expense or bureaucracy; blended families; military programs; marriageability programs for singles; how to work in African-American communities; and do men have special needs?

New social science research reported at recent Smart Marriages conferences includes studies on the effectiveness of various education programs, legislation, and ecumenical community marriage policies; how divorce affects children; a recent study of long-term outcomes for people in unhappy marriages who stayed together; and the "Fragile Families" study showing that most unwed parents live together and look forward to marriage at the time of birth, but face many obstacles to family stability.

Here is how a first-time participant described last year's conference: "It was an

awesome experience finding 1,500 other people who all feel the same way about the importance of marriage — it's not just me! … In the U.K. we would be well advised to keep our eyes on this fledgling U.S. 'marriage movement.' It carries with it a very broad coalition of persuasions and beliefs. It is underpinned by very convincing and reputable academic research. It is beginning to show a track record of success in cutting divorce rates and its social correlates. And it is attracting the attention of state and national policymakers. … There were no extremes touted — neither 'personal freedom at all costs' nor 'marriage at all costs.' Although the message for the future was uncompromising about promoting the purpose, benefits and secrets of successful marriage, and the offer of how to do it better, the common view was also of clear and widespread compassion for those disadvantaged by divorce, cohabitation or high-conflict marriages."

Registration information, tape-ordering information, a schedule, and much more information about marriage education are available at www.smartmarriages.com, 202-362-3332, or cmfce@smartmarriages.com.

A VERY COMPROMISED VIEW OF ATTORNEY-CLIENT PRIVILEGE

The Litigation Section of the American Bar Association is trying very hard to sell more of its best-selling book on the law of privilege, *The Attorney-Client Privilege and the Work Product Doctrine*, by Edna Selan Epstein. The new 2001 edition, like all ABA paperbacks, is far from cheap. It retails for $110, and $90 to Section members. The new edition includes a detailed treatment of what constitutes legal advice, and what legal advice is protected by the privilege, discussing as well just exactly who is a client and who is not. Ms. Epstein emphasizes the number of cases in which lawyers today think they are within the attorney-client privilege when they are not. She points out how having another person present during the initial client interview, whether it be family member, friend or "significant other," will usually waive the privilege. Nor is she convinced that a lawyer can broadly assert that information sought in discovery is protected, and then give even a partial disclosure while attempting to rely on the privilege. That generally blows the privilege for everything, in her opinion. The Litigation Section has committed to supplement this book every year or two years, and Ms. Epstein expects future supplements to provide a much broader discussion of privilege in international litigation.

ABA CONFERENCE ON CHILDREN AND THE LAW COMES TO WASHINGTON

Practicing "Children's Law" cuts across many legal fields, raises complex and varied legal and non-legal issues, and demands special skills and knowledge, whether one represents children, families, agencies, schools, or other entities. This conference, sponsored by the A.B.A. Center on Children and the Law, will address many of the tough issues facing lawyers, judges, non-attorney CASAs, guardians ad litem, and others.

Sessions include: Child Witnesses; Advocating Against "Zero Tolerance" Policies; Organizing and Running a Children's Law Center and Pro Bono Child Law Program; Advocating for Adolescents' Needs; Representing Immigrant Children; Educational Services for Foster Children; Ethics for Child Welfare Agency Attorneys and Caseworkers; Legal Ethics in Child Law Cases; Advocacy for Children and Families After Disasters (such as Sept. 11); and National Standards for Lawyers Representing Children in Divorce/Custody Cases.

There are also four day-long training programs before the conference: (1) Basic and Advanced Trial Skills Training for Child Welfare Attorneys (2) Best Practices to Implement ASFA; (3) Improving Child Questioning and Testimony: Latest Lessons from Practice and Research (with Anne Graffam Walker, Ph.D., Sharon Elstein, and Barbara Smith, Ph.D.); and (4) Interdisciplinary Training Program for Children's Representatives in Custody Proceedings.

Virginians speaking at the conference include the Hon. Nolan Dawkins, Anna Mary Coburn, John Crouch, and Nancy Hammer.

The conference will be held June 6-8 at the Capital Hilton Hotel in Washington. Go to http://www.abanet.org/child/2002conference.html or call 202-662-1720 to register or get a full conference schedule.

POPE UNCONDITIONALLY CONDEMNS DIVORCE AND DIVORCE LAWYERS

Vatican says lawyers, judges, have moral duty not to participate in "spreading plague."

> If you glance out your window toward the court house square and you happen to see some men in black robes piling up logs and brush around a big wooden post out there, don't relax: it could be for you. According to a Reuters News Service dispatch of January 28, Pope John Paul has issued a worldwide warning that lawyers and judges should not work on divorce cases, and should refuse to use their professional skills to contribute to ending marriages. This Papal bull came during the annual meeting of Vatican magistrates. The Pope explained that divorce "has devastating consequences that spread in society like the plague."

And while we divorce lawyers will miss our Catholic brethren, the Pope is quite unequivocal about the duty of those among the one billion or so Roman Catholics worldwide who labor in the legal profession. He declared that "lawyers, who work freely,

should always decline to use their profession for an end that is contrary to justice, such as divorce."

And while judges may find it hard to get out of divorce-related duty, that's no excuse: they must try to avoid hearing divorce cases. The Pope declared that no one should cooperate in divorce, and perhaps more naively, that everyone has a duty to look for marriage-friendly solutions such as mediation and conciliation.

Explaining that divorce and the concept of homosexual marriage are the two greatest threats to the institution of marriage today, Pope John Paul said that it makes no sense to talk of imposing human-made laws upon marriage, because marriage is natural, older than our statutes, and a part of divine law.

LEO 1761 ON FORMS FOR PRO SEs

A hypothetical legal aid office fields numerous inquiries from pro se litigants who are ineligible for free representation, and accordingly, they give out legal pleading forms to these people. The Standing Committee on Legal Ethics looked at Model Rule 3.4 on Fairness to Opposing Party and Counsel, and Rule 8.4 on Misconduct, which includes "dishonesty, fraud, deceit and misrepresentation." It distinguished LEO 1592, which was decided under the Code of Professional Responsibility and focused on the violation of the court rule which requires that all pleadings disclose the identity of the drafter.

The difference, says the Committee, is that the legal aid offices are only providing blank forms and not filling them out, and that is not the practice of law. (See UPL Opinion 73) Providing the forms is not "ghost writing" the pleadings for a pro se litigant, which would be wrong.

LEGAL MALPRACTICE FIGURES NATIONWIDE

In a report in the most recent issue of the ABA Litigation Section Newsletter, at 27/1 Litigation News 7, a nationwide survey is reported as revealing that things must be worse for divorce lawyers in Virginia than they are nationwide. According to the *Profile Of Legal Malpractice Claims, 1996-1999,* a report of the ABA Standing Committee on Lawyers'

Professional Responsibility, summarizing some 36,000 claims nationwide that malpractice carriers have dealt with, personal injury practice still tops the list. Twenty-four percent of claims come from this kind of litigation, and real estate conveyancing is second with 16.97%. Family law is third with 10.13% of all claims.

C.L.E. CALENDAR

Relocation and Job Loss in Custody and Support Cases. Sudden job loss and job searching in today's climate — how do they affect relocation and support modification issues? The Hon. Kathleen MacKay, The Hon. Charles Maxfield, Peter Fitzner, Brian Hirsch, and Marc Astore. Tuesday, April 9, 5-8 p.m., Fairfax Court House Cafeteria. Sponsored by the Fairfax County Bar Association, 703-246-2740.

Negotiating and Drafting Marital Agreements. Richmond Mar. 12, Roanoke Mar. 13, Norfolk Mar. 20, Tysons Mar. 21. Video Replays: Abingdon, Chantilly, Charlottesville, Danville, Fredericksburg, Winchester Apr. 16; Hampton, Harrisonburg, Richmond, Roanoke, Tysons Apr. 17; Virginia Beach, Warrenton Apr. 19. Edward Barnes, Terry Batzli, Craig Bell, Beth Bittel, Richard Crouch, Carol Gravitt, Dennis Hottell, Barry Kantor, Robert E. Lee, Christopher Malinowski, Betsy Phillips, Bill Scott, Ron Tweel, and Wanda Yoder. Sponsored by VCLE, 1-800-979-8253 (979-VCLE), www.vacle.org.

Alexandria Bar Association Family Law Seminar. April 11. To register or for more information contact Charles Unger, 703-548-1106.

Advanced Family Law Seminar. Legislative and Case Law Updates, Difficult Clients, *Brandenburg* Issues, and Setting Aside Agreements. Mona Flax, Cheshire Eveleigh, Larry Diehl, David Masterman, Carol Schrier-Polak, The Hon. Dennis Smith, Marilou Kollar, Ph.D. Richmond April 26. Video Replays: Abingdon, Charlottesville, Danville, Fredericksburg, Virginia Beach, Winchester May 29. Hampton, Harrisonburg, Leesburg, Richmond, Roanoke, Tysons, Warrenton May 30. Chantilly May 31. Sponsored by VCLE, 1-800-979-8253 (979-VCLE), www.vacle.org.

Advocacy in Mediation. The Hon. Jay Swett, John McCammon, Thomas Spahn, Charles Frank Hilton, Harris Butler, Charles Zauzig, John Obrion, Robert Hall, Geetha Ravindra, Mark Rubin. Richmond May 2, Tysons May 3. Sponsored by VCLE, 1-800-979-8253 (979-VCLE), www.vacle.org

Practical Legal Ethics for Virginia Attorneys and Law Office Personnel. With Rhetta M. Daniel. Richmond, May 17. 4 hours. Sponsored by Half Moon LLC, 715-853-6066.

Fairfax Circuit Court Manual Update Seminar. Tuesday, June 21, 3-7 p.m., Fairfax Court House Cafeteria. Sponsored by the Fairfax County Bar Association, 703-246-2740.

Practical Legal Ethics in Virginia: Issues and Answers. Arlington, May 29. John Coffey and Stephen Ratliff. Sponsored by NBI, 1-800-930-6182, www.nbi-sems.com.

A.B.A. 10th Annual Children and the Law Conference. June 6-8, Washington. Includes the following day-long training programs on June 6, in addition to many shorter sessions June 7-8: (1) Basic and Advanced Trial Skills Training for Child Welfare Attorneys (2) Best Practices to Implement ASFA; (3) Improving Child Questioning and Testimony: Latest Lessons from Practice and Research (with Anne Graffam Walker, Ph.D., Sharon Elstein, and Barbara Smith, Ph.D.); (4) Interdisciplinary Training Program for Children's Representatives in Custody Proceedings. Sponsored by the A.B.A. Center on Children and the Law, 202-662-1720, http://www.abanet.org/child/2002conference.html. See News Note above.

Business Valuation. Manassas Court House, June 21. (Tentative) Sponsored by the Prince William Bar Association. To register or for more information call Alissa Hudson, 703-393-2306. $35 Members/$45 Non-Members.

CORRECTION

We apologize for an error in the Winter, 2001 CLE Calendar. The cost of the Arlington County Bar Association Annual Family Law Seminar was misstated. $25.00 plus a commitment to handle four pro bono uncontested divorces was the cost of the Association's "Uncontested Divorces" CLE, not the Annual Family Law Seminar.

NOTES ON RECENT APPELLATE CASES

PRE-MARITAL AGREEMENTS — PENSION WAIVER REQUIREMENTS. *Hagwood* v. *Newton*, ___ F.3d ___ (4th Cir. 02/26/2002). Though some sweeping statements have appeared in articles summarizing this case and some loose dicta in the opinion itself, it essentially stands for the oft-noted proposition that a waiver of survivor benefits from ERISA-qualified plans must be signed during the marriage, not before. The appeals court quotes to that effect 29 U.S.C. § 1055(c)(2)(A), which also requires that the written waiver "designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or … expressly permits designation by the participant without any requirement of further consent by the spouse)." The opinion says the there is also no valid waiver "because

the agreement did not designate a beneficiary," which is true in this case, but does not express a universal, exception-less rule. In the usual situation where a waiver is prepared along with the prenup and signed soon after the wedding, it does not always make sense, at least at first glance, for the spouse to designate the substitute beneficiary. Thus the alternative in parentheses in the statute, "or … expressly permits designation by the participant without any requirement of further consent by the spouse," is what should be done in all such waivers, in addition to designating the substitute beneficiary where possible.

This is not a case where the prenup itself was faulty. It had a provision requiring the parties to sign any additional documents thereafter in order to carry out the intent of the prenup. However, the court pointed out, the surviving spouse never did so, and the deceased spouse had never tried to make the surviving spouse do so, so there was no evidence that it was the parties' intent, during the marriage, to change the beneficiary. The prenup might have achieved its purpose nonetheless if it had had language imposing a constructive trust on the benefits in the event that a valid waiver was not signed, but evidently it did not.

The ERISA-covered plans in this case included an Employee Stock Ownership Plan, not just a pension, and the decision applies to both of them.

PRE-MARITAL AGREEMENTS — INHERITANCE — WAIVER — WIDOW TAKING AGAINST WILL. The Virginia Supreme Court decided in *Pysell v. Keck*, ___ Va. ___, ___ S.E.2d ___, 28 FLR 1214, 18 VLW ___ (3/1/02) that a pre-marital agreement, when it talks about waiving "any claim whatsoever," in the property of the husband, does not waive inheritance rights. Thus the widow never lost her statutory right to overturn the will that said nothing about her, and take her statutory share. The language about waiving all her rights to the husband's property, a majority of the court says, simply expressed the intent that each spouse's holdings would remain separate property and not be divided in the event of a divorce. The majority saw nowhere in the agreement any provision wherein rights in the "estate" were mentioned. To dissenting Chief Justice Carrico and Justice Koontz, this does not make any kind of sense. The majority should have looked at the clear intent of the parties, rather than the words you could, if determined, construe out of the agreement, they explain. After they got through waiving rights in one another's property, this contracting couple had also said that their respective rights to "each other's property acquired by operation of law" would be solely determined by the agreement. Moreover, there is nothing expressly stating that the parties intended that the rights waived during life to share in the property of one another should return at the time of death. To them, "operation of law" includes operation of the estate and inheritance laws.

CHILD SUPPORT — AGREEMENTS — MODIFICATION — MANDATORY RESORT TO COURT IN ALL CASES. Somebody who likes to see as many court hearings as possible in family law cases has obviously been talking to the Virginia Supreme Court because it has now picked up the unique and unprecedented doctrine invented by the panel in the much-publicized *Shoup* case, and enunciated it as the governing law in Virginia

notwithstanding the Court of Appeals's unanimous abandonment of the novel doctrine when it reversed *Shoup* en banc a month or so ago. (See the digest below, which was written after the *Shoup* en banc reversal and before the instant opinion in *Riggins v. O'Brien*, ___ Va. ___, 559 S.E.2d 673 (3/1/02)). Like the *Shoup* panel majority, the Supreme Court majority, over the dissent of Justices Koontz and Kinser, cites a number of rather tenuously related prior cases to justify this result because — as everyone has known for many years now — "parents can't contract away their children's rights to support," and "courts can't be precluded by agreement" from exercising their child support powers, and because an obligated father cannot "vary the terms of the order to suit his convenience" by nonpayment or partial payment. "Specifying future changes in the amount of child support is inappropriate," the majority says, because it precludes judges from determining child support "based on contemporary circumstances." The majority admits that there is an exception and that this exception is the ending of child support upon majority. In the *Riggins* case, the agreement said that when each child became of age, child support would be renegotiated, and that agreement was ratified and incorporated in a court order. "We think it logically follows," the Supreme Court majority says, that when the court order said child support could be renegotiated, what it really meant is that the parties would agree and present a consent decree and if not, the court would adjudicate child support. And since the trial court did not "expressly dispense with the requirement of court approval" in such instances, then "therefore, as was the case with the original negotiation, any renegotiation would be subject to court approval," this requirement being "implicit in the divorce court's decree." And since the parties went ahead and renegotiated child support upon each majority, and did not "obtain court approval of their renegotiations," the hapless Mr. Riggins is obligated to pay arrearage and interest at the rate of all three of his long-since-grown kids with interest from all those prior years.

Justice Koontz, dissenting and joined by Justice Kinser, does not think the prior cases mean what the majority says at all. He agrees with the majority that the Court of Appeals was wrong in finding the *Riggins* decree as a result of all this reasoning to be "void ab initio," but says the majority fails to appreciate that the decree does not prevent the court from modifying child support, nor does it permit a retroactive modification of child support, or violate any public policy. And he notes in passing that the Court of Appeals would probably now agree, considering that they reversed *Shoup* en banc at 37 Va. App. 240, 556 S.E.2d 783 (12/27/01). He disagrees, however, with the majority's conclusion that somehow the *Shoup*-panel reasoning is "implicit" in the trial court decree that said that renegotiated child support is void without a return to court, since "the express language of the court's decree dictates the opposite conclusion." The decree, like the agreement, directs the parties to try to renegotiate upon the occurrence of emancipation events, which are reasonably ascertainable, and the reference to which does not violate the best interests of the children or any law or public policy. And since the decree says that they can renegotiate the amount "or" if unsuccessful they can submit the matter to a court for adjudication, Justice Koontz refuses to read that as saying “and if successful, they must go to court for a determination and ruling.” He remains unconvinced that the majority can convert

"or" to "and." And, the dissenter adds, "because the court's 1991 decree is not void, the parties were not merely required to adhere to its provisions, but they also were entitled to rely upon its provisions." The real question, Justice Koontz says, is whether the parties renegotiated the amount at all, or whether on the other hand the husband simply unilaterally reduced his payment. He would reverse and remand with instructions to try the issue and find that out.

SEPARATION AGREEMENTS — CHILD SUPPORT — PROVIDING FOR FUTURE MODIFICATION — "SELF-EXECUTING" — CONTEMPT. [PREPARED BEFORE *RIGGINS*, ABOVE] You can forget everything you read about the much-analyzed *Shoup* case, because it has been reversed en banc. That's probably all there is useful to say on the subject, but for those who haven't yet got the opinion or haven't taken the time to sit down and read it, a few notes. First, the panel opinion is apparently reversed on all points, so that the trial judge ends up in part refuted and in part vindicated. Throughout the en banc opinion there is apparently not a single word about the panel making a mistake or getting anything wrong, and now seeing that the law is not really that way — which would not be unusual except that the new opinion is written by the author of the panel opinion. No hint nor guidance is given anywhere as to what wrong prong was taken at what fork, leading the prior analysis down a cold trail.

The en banc majority opinion (there being no dissents, but a two-judge concurrence) starts out by reciting the long-standing Virginia law, which probably hovered disquietingly in the back of most readers' minds as they went through the perplexing panel opinion, about how Virginia public policy encourages divorcing parents to make agreements, provide for future events, and keep these cases out of court. It holds that the parties' agreement wasn't void, nor was the original decree incorporating it, and that the trial court couldn't hold the original decree void and at the same time hold the father in contempt for violating it. However, since that leaves the agreement and decree in place, and this father didn't in fact do what the agreement said and recalculate per guideline — but instead simply reduced child support by one-third each time a minor child reached adulthood — the case is remanded for the trial court to determine whether he was in violation and contempt.

The new opinion is at great pains to assure that we understand how the principles that govern the court's jurisdiction to enter child support awards and "the parties' right to reach agreement on the issue" intersect but differ. Following the declaration of this concern is a lengthy recitation of the statutory and case law that presumably everyone knew about. Perhaps there is some great subtlety here that had previously escaped Virginia practitioners and continues to escape the simpler-minded among us, but it will have to be smoked out by exegesis of a more professorial kind. Citing such cases as *Solomond v. Ball*, 22 Va. App. 385, 470 S.E.2d 157 (1996), the opinion repeatedly says that trial courts "may not award support prospectively, including upon the emancipation of...children." It cites a 1986 unitary-award-for-tax-purposes case (involving a 1973 decree) for the proposition that a court can't award support in such a way that it reduces automatically upon a child's adulthood, without the father having to come into court and petition for a new determination upon each majority. The opinion recites that such cases limit a court's discretion in setting child support, but

observes that the same body of law does not necessarily govern *agreements* that a court may *incorporate.* It acknowledges the three limitations placed by §20-109 upon the parties' rights to contract about child support: that the court has to review the provisions of the agreement in the best interests of the children; that an agreement can't keep the court from modifying or enforcing; and thirdly, the prohibition on parties contracting away the child support duty. It expressly says that neither Code nor case law creates *any further* restriction on parents' child support contracting ability. It cites the 1997 holding in *Moreno*, 24 Va. App. 227, 232; 481 S.E.2d 482, 485, for the assurance that when child support is based on an agreement, the trial judge does not have to determine the "presumptive amount."

The new opinion expressly states that "in this case, the agreement as incorporated ... does not purport to circumvent the court's jurisdiction to enforce support, modify support, or intervene upon petition of either party." And further, "nothing in our case law invalidates a decretal provision reflecting the parties' agreement to address and make future modifications of support as circumstances change." It cites such cases as *Tiffany*, 1 Va. App. 11, 332 S.E.2d 796 (1985), to the effect that agreements can allow a father to reduce payments by fixed amounts upon each child's majority. It even states that "a rule requiring parents to return to court for approval of a renegotiated amount of child support, as provided in an agreement that has been [incorporated]...would undermine the Commonwealth's policy...." It quotes *Moreno* to the effect that no statute nor decision requires a trial court to hear evidence on child support where the parties have agreed to an amount and are not seeking a new court determination, and that this would be wasteful in requiring parties to litigate a settled matter.

The *Shoup* agreement required the parties, upon change of circumstances, to use "guidelines and other relevant law" to redetermine child support, and because the trial court “failed to enforce” (i.e. give effect to) that provision, its contempt holding is held erroneous. On the other hand, the trial court's decision to give the father a credit for his payment of child care costs after the mother quit using child care, is proper and is now affirmed.

Judge Agee, joined by Judge Frank, concurs to raise some additional points, of which some may continue to elude the less academic or intellectually gifted practitioner. The concurring judge begins by stating how unthrilled he is with the coinage of the new term "self-executing," which was all over the panel opinion and shows up very little in the new one. He wants to state separately, and more emphatically, that "self-executing" agreements, if you have to call them that, are O.K. However, Judge Agee does not think this particular agreement provision was indeed self-executing. He finds decrees for future modification, triggered by children's majorities, all right if the trial court scrutinizes the future amounts and approves them to assure consistency with the children's best interests. However, the court couldn't really do that in the *Shoup* case since the agreement there did not state what the dollar amounts of the future adjustments would be, but did obligate the parties to recalculate — and worse than that, they were to recalculate on the fuzzy basis of the guidelines plus "other relevant law." Not knowing what the future amounts would be, nor even what principles and factors would be involved, the trial judge couldn't very well vet that agreement for best interests, so in this particular case, future judicial intervention would indeed be

required, in this judge's view. Judge Agee seems to hint in a footnote that it would have been O.K. if the agreement had referred more specifically to whatever guidelines should happen to be in effect upon a child's far-off 18th birthday. *Shoup v. Shoup* (en banc), 37 Va. App.240, 556 S.E.2d 783 (12/27/01).

SEPARATION AGREEMENTS — FORMALITIES OF — AUTHORITY OF LAWYER — CONTRACT OR NOT. Given the language in Code §20-109C about separation agreements signed by a party, and the requirement of a "properly acknowledged" agreement for certain purposes in §20-109.1, it is well known that most lawyers have departed from the old custom and started seeing to it that separation agreements are signed by the parties, rather than their counsel. Trying to sort its way through a dispute that would probably have been unheard of a few years ago, over whether a lawyer had authority to bind his client, a majority of the Court of Appeals apparently finds that he had authority to negotiate the agreement but not to sign it.

Dissenting Judge Annunziata doesn't think that the wife, who hired this lawyer, should be let off the contractual hook, and she emphasizes that clients negotiating agreements are generally bound by their lawyers and sees no reason to hold that this one wasn't. But for good measure, she throws in another paragraph emphasizing her belief in oral agreements as binding and incorporatable under §§20-109 and 109.1.

In this case, *Walson v. Walson*, ___ Va. App. ___, ___ S.E.2d ___, 16 VLW 749 (12/18/01), a lot of emphasis seems to be placed on the concept of the wife acting as an independent negotiator separately from her lawyer, with considerable analysis of her direct dealings with the husband and husband's counsel, and what matters she chose to let him in on and what not. The majority finds itself making a determination that she made no "representations" to the husband or husband's lawyer, either in words or by actions, that her attorney had "apparent authority" to sign a contract for her. Thus the trial court's determination that she was bound by the agreement he signed is reversed. Husband of course argued that his lawyer should be able to rely on the apparent authority of counsel whether he had actual authority or not. The majority's observation about lack of "representations" is the way that issue is determined. In fact, the majority finds it determinative that the record shows no direct communications between husband and wife *or between husband's lawyer and wife* to the effect that wife's lawyer was authorized. And this even though the majority acknowledges the wife plainly "held out" the lawyer as one possessing authority to negotiate for her. And because the attorney admits that he would not accept the husband's counter-offer without first calling the wife to check it with her, the majority finds it unmistakably clear that the wife was in charge of the negotiations and the lawyer was not. Thus husband was not safe in relying on the wife's attorney's authority to conclude an agreement. Moreover, the majority can't find from the evidence that the wife's lawyer had even apparent authority to sign. To Judge Annunziata the authority was obvious and clear, and you can't start letting a client fully manifest authorization of the lawyer to negotiate and then let her say that the lawyer lacked authority to agree. She believes that

Singer Sewing Machine Co. v. Farrell, 144 Va. 395 (1926) fully controls the law of marital agreements. Because the majority finds that it was not proved that the attorney had apparent authority to sign, it expressly does not address the issue of whether a lawyer can bind his client to a written marital agreement by apparent authority. (Like the trial judge, Judge Annunziata believes that *Singer* controls). The majority does make the distinction that in the *Singer* case, the attorney consulted with his client about the compromise in the presence of the other party — which the wife's lawyer in this case did not. Judge Annunziata is convinced from the evidence that there was apparent authority. Nor does Judge Annunziata like the appellate court's majority overturning the fact-finding of the trial judge that was based on credibility and weight of the evidence.

CUSTODY — RELOCATION — JOINT CUSTODY — STANDARD AND BURDEN OF PROOF. While it sounded in the *Cloutier v. Queen* opinion last year (at 35 Va. App. 413, 545 S.E.2d 574) as though joint custody might make a difference in relocation cases, the Court of Appeals now makes it clear that it doesn't. Affirming a trial court decision to let a mother destroy the joint custody by moving the child to Arizona, the Court of Appeals also rejects an argument the father made that there should be a presumption against relocation in shared or joint custody cases. And while the father urged that the moving party (which apparently the mother was, procedurally as well as geographically) has the burden of proof in all custody-change cases, including relocations, the appellate court says that the Fairfax trial court was not mixed up about that burden. The record shows that the judge considered all the factors appropriate to any ordinary custody determination. As to the 10-year-old child's preference to stay in Virginia in the custody of her father, which apparently came out in her testimony in chambers as well as the testimony of her psychologist, the record shows that this factor was not ignored. Finally, the Court of Appeals says that the father presented no evidence that his relationship with the child could not be maintained just as well with her living in Arizona with the mother and her new husband as it could if she were living in Virginia with him. The Court of Appeals emphasizes that in a custody decision the court is not deciding which adult is the better person to have custody, but instead should focus on the effect that relocation will have on the child. *Goodhand v. Kildoo*, ___ Va. App. ___, ___ S.E.2d ___, 16 VLW 1027 (3/5/02).

PARENTAL RIGHTS TERMINATION — PROCEDURE — SUMMARY AFFIRMANCE. An unfortunate DSS recently caught the Court of Appeals in a pro-parent mood and lost on appeal after a circuit court had summarily affirmed the juvenile court's termination of a mother's parental rights. Can a circuit court always safely affirm summarily a juvenile court termination? No, not in a case where the Court of Appeals sees this action as a punitive "sanction" against a mother for not complying with the rules of the process and the court's procedural orders. It seems the mother in

Ange v. York/Poquoson DSS, ___ Va. App. ___, ___ S.E.2d ___, 16 VLW 1045 (3/12/02), had a right to her day in court, and she was deprived of it. The DSS argued that this mother had failed to file on time her "best interests proffers" or show up in court as an alternative, to file notarized proffers by another court deadline, to cooperate with DSS in a home study, and to cooperate with DSS in completing a "parental evaluation," and had violated numerous court orders. One thing the Court of Appeals observes is that requiring her to cooperate with DSS was not good enough, since there was no deadline set forth, and no description of the required extent of cooperation necessary for compliance, so that the mother did not know what kind of compliance was expected of her. Moreover, the Court of Appeals could not find in the record any order requiring "parental evaluation" cooperation. The Court of Appeals explains that the "sanction" was wrong because the mother's non-compliance was not absolute. The trial court's pre-trial orders were non-complied with, but it was not a complete failure to comply. Thus the sanction of summary judgment of termination was extreme, and an abuse of discretion. Drastic measures such as this are generally not favored, the Court of Appeals says. There was a need to protect the mother's rights in a full hearing. Concurring Judge Agee does not agree that the decision to proceed with the trial without waiting further for a party to comply should be described as a punitive "sanction." As he sees it, the court below decided to proceed in summary fashion, not in order to punish the mother, but because it thought it had a procedural right to do so.

LAWYER MISCONDUCT — SANCTIONS — FRIVOLOUS ARGUMENTS. A case from the Fourth Circuit on Federal Rule 11 sanctions show what a distorting effect the sanctions rule can have on the law if trial judges do not try to apply it with a certain amount of logic, common sense and concern for justice. It appears the Fourth Circuit has already rejected the view that arbitration and collective bargaining is not mandated unless there is a specific arbitration clause in the union's contract. A lawyer made the argument that specific contract language would be required to mandate arbitration. The Fourth Circuit voids the sanctions. It notes that the defendant corporation waited 14 months after the summary judgment award to move for sanctions under Rule 11. Even though the lawyer did not assert prejudice from the late filing, the Fourth Circuit stresses that one who wants sanctions has an obligation to inform the victim and the court of its intention to pursue sanctions at the earliest possible date. Finding the record confusing, though, the appellate court assumes for the sake of argument that the sanctions were imposed *sua sponte*. It is true that the Fourth Circuit four years ago had rejected the interpretation of the law that this lawyer advanced in her contentions. However, she certainly had a good faith basis for asserting her position, since the fourth Circuit stands alone on one side of a split of federal circuits. It would be "reaching," the Fourth Circuit opinion says, to conclude that she had no chance of success with her argument — especially in light of an intervening U.S.

Supreme Court opinion which seems to take her position. Thus the district court's erroneous view of the law and its sanction suspending this lawyer from practice in the District was an abuse of discretion. And this is true even though she did not explain to the sanctioning court the circuit split and the Supreme Court decision. The trial court's assertion that the disliked lawyer was lacking in "judgment and skill," is not a lawful ground for sanction under Rule 11, and an observation by the trial court that it did not like the lawyer's conduct in a prior case is not a basis, since there was no sanctionable conduct this time for that other conduct to aggravate. *Hunter v. Williams,* ___ F.2d ___, 16 VLW 904 (C.A. 4, 1/30/02).

DISCOVERY — "SANCTIONS." In a personal injury case discovery dispute, the Virginia Supreme Court held that when a judge threatens to dismiss the suit if discovery is not forthcoming, he is not forced to make good on that threat, but can instead let the offending party take a nonsuit. *Liddle v. Phipps,* ___ Va. ___, 559 S.E.2d 690, 16 VLW 1025 (3/1/02).

ALIMONY — FACTORS — INCOMES AND EXPENSES. An **unpublished** affirmance by the Court of Appeals in *Settle v. Settle*, 16 VLW 1046 (2/26/02), gives a bit of insight into the Court of Appeals's thinking in alimony cases. There was no error in ordering permanent alimony for this wife, the appellate court explains, because the husband has a princely income of $47,000 per year while the wife, by stark contrast, earns a mere $40,000. Husband had been awarded (along with $10,000 in marital debt) a house that has $16,000 in equity. While no mortgage-payment amount is mentioned, he spends $425 per month for food and $50 per month for lunches, and has two cars. The wife has no house and "no assets" and one car and the money she spends monthly for groceries for herself and her three children add up to $600. This was thus a clear case of need for alimony, and ability to pay.

SEPARATION AGREEMENTS — RECONCILIATION — LIABILITY FOR ALIMONY AND CHILD SUPPORT DURING RESUMED MARITAL COHABITATION — FOREIGN LAW — TRANSMUTATION BY GIFT — MALPRACTICE TRAPS. The hostility of present-day Virginia courts to reconciliation is ratcheted up another notch by an **unpublished** opinion in which we are informed that not only will a reconciliation clause keep a marital reconciliation from voiding the obligations of a separation agreement, *but so will the standard clause that "modifications" have to be in writing*. In other words, the reconciliation clause might be viewed as mere surplusage, because the "no modification except by written contract with same formalities" clause accomplishes the same thing and keeps a reconciliation from having any legal effect. (Thus the traditional common law that reconciliation voids a separation agreement is completely out the window, whether the agreement contains one of those reconciliation clauses or not). And therefore a husband's promises in a 1978 separation agreement governed by New York law giving wife a half interest in the house and some bank accounts remained valid and

enforceable despite the intervening *years* of resumed cohabitation. The only thing that saves the hapless husband and father from having to pay many years of back alimony and child support for the years during which *the wife and daughter lived with him* and were supported by him is the fact that the Court of Appeals applies New York law, and construes New York law to give him credit for "in-kind support payments" during these years. The husband showed and the trial court found that the money he spent on the wife and daughter during the years of reconciliation exceeded what the agreement said he owed in alimony and child support, so, being lucky enough to be saved by foreign law, he gets offsetting credit. The Court of Appeals remands, however, to see how much husband might owe the wife in alimony from the 1995 re-separation until her 1997 remarriage (to another guy) and whether he has to pay child support from that 1995 separation until (New York law being less helpful here) the daughter's 21st birthday. The majority also upholds the trial judge's ruling that the husband made "gifts" of separate property, real estate and bank accounts to the wife. Concurring and dissenting Judge Benton finds nothing in the way of trial-level-fact-findings to support that conclusion, and would reverse on that point. *Fries v. Fries,* **unpublished,** 16 VLW 910 (1/15/02)

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LEGAL QUOTATION OF THE QUARTER

"This is the Nineties."

— A Virginia judge on Feb. 14, 2002, explaining a custody award of three girls to their mother, who was romantically involved with her husband's 20-year-old nephew (the children's cousin) and had illegitimate twins by him.

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