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Editor: Richard E. Crouch
Assistant Editor: John Crouch

CHAIRMAN'S MESSAGE

I would like to take this opportunity to provide our Section members with an update on the activities of your Board.

Our "Spare the Child" video is nearing production. There had been a delay finding subjects to be filmed on camera. The subcommittee wanted participation by children; however they have been hard to come by. With that problem solved, weather became the next obstacle. The snowfalls throughout the Commonwealth this winter have hampered efforts to start filming. The subcommittee reports that they are hopeful that filming can take place shortly and that a finished product can be unveiled at the Annual meeting in June.

Our Five Year Plan committee has identified goals to be met this year as part of our broader mission to make this Section more valuable to our members as well as the general public.

Our CLE Committee has planned the Advanced Family Law Seminar for April 30 at The Jefferson. The Section will recognize the winner of our Section's Lifetime Achievement and Family Law Service Award after the luncheon at the Seminar. Thanks to both committees for their hard work in planning for this event.

Section membership continues to rise. Our Section's ability to meet the needs of family law practitioners is directly related to membership. Our budget is based upon the dues of Section members. So, if you find the Section and its newsletter and web site of value to you in your practice, please encourage others to join the section. And to that end, I cannot say enough about the continued fine work of Richard and John Crouch on our Section's newsletter. *Family Law News* continues to be a valuable asset to lawyers throughout the Commonwealth. I thank them both for their continued commitment to *Family Law News* and this Section.

Finally, in January I had the honor of providing a one-hour informational program to the House Courts of Justice Committee on divorce in Virginia. There was a lively interchange with Committee members and I appreciated being asked to present. Chairmen Albo felt that an overview of the existing law would be helpful to the Committee members, most of whom do not practice family law, as they commenced action on many family law bills this session. Come to the Advanced Family Law Seminar in April to get a summary of what changes, if any, the legislature has in store for us later this year.

Peter W. Buchbauer
Buchbauer & McGuire, P.C.

Winchester

EDITOR'S MESSAGE

Flattery from Section Chairpeople is always welcome – and especially from a Chairman so dedicated, efficient, totally engaged and widely respected as your current Chairman, Peter Buchbauer.

This Spring issue of *Family Law News* brings some new writers to the attention of readers, and some not-so-new. Tim Beason of Northern Virginia Legal Services, who has contributed articles before, reminds us all of an important but widely overlooked change in divorce-pleading nomenclature, and Norfolk practitioner Kimberly Phillips tells us why that change is far from unimportant: as interpreted by some court clerks, it costs your client money and gives us another small but crucial task to remember to do. A survey of court-clerk attitudes in several selected jurisdictions brings out some surprising variations in their understanding of the Rules and the statutes.

Charlottesville practitioner Steve Raynor, on the other hand, sets forth a comprehensive discussion of the statutory and case law on third-party visitation claims. Readers will remember Mr. Raynor's discussion of third party custody claims – the first half of his two-part study of these matters – in the last Issue.

It's no sense talking about our fine Retro-Winter, which so forcefully reminded us of the awesome power of Nature. Everyone else is, and everything's been said. Except of course that it wrought the ultimate insult to human weakness by delaying your Winter Issue of FLN! Dear Mother Nature and Old Man Winter must take on a major share of the blame for that.

Clinging To the Old Rugged Cross

By Tim Beason, Arlington

How do you respond to a complaint for divorce if you wish to file your own claim for divorce?

With a cross-complaint or cross-bill, right? We lawyers like the sound of that. Sounds like a boxing term. Let's hit them with a right *cross*.

I have been practicing over 15 years and I always called the responsive claim for divorce a cross-complaint or cross-bill.

But, really, there is no basis in the law for that any more. Yet I see pleading after pleading labeled “cross-claim.” Yes, I am talking to you.

Effective January 1, 2006 Equity Practice and Procedure, which was Part Two (Rules 2:1-2:21) of the Rules of the Supreme Court of Virginia, was repealed. Divorce cases are now “civil actions,” which are governed under Part Three (Rules 3:1-3:25) of the Rules of the Supreme Court.

Under Rule 3:9, if you are a defendant in a divorce, you only have one option: file a counterclaim. Cross-claims are governed by Rule 3:10 and these claims are reserved specifically for claims a defendant has against *other defendants* growing out of any matter pled in the complaint. A cross-claim, then, has a specific use and meaning. To continue to use cross-claim to designate a counterclaim is not just a matter of taste, it really is an error. It’s mispleading.

The comment to Rule 3:9 is very clear. It reads as follows: “As a consequence of the creation of the “single cause of action” via statute and rule, in a suit for divorce or for annulling a marriage, a defendant’s claim for affirmative relief against the plaintiff, formerly known as a “cross-bill” or a “cross-complaint” should be understood as a counterclaim.

So next time, before you throw a right cross, stop and use the right term.

Filing Fees for Divorce Counterclaims? **Not a Horse of a Different Color**

By Kimberly Hughes Phillips, Norfolk

In Virginia divorce matters, the 2006 creation of a civil “single cause of action” changed the pleading’s nomenclature from “Bill of Complaint” and “Cross-Bill” to “Complaint” and “Counterclaim”. This nomenclature change caused what I believe is an unintended consequence for divorce actions and the “new” filing fees.

Prior to 2006, the statute did not require a filing fee for a Cross-Bill. But, after the merger of law and equity, the statute seems to provide for a filing fee requirement for the responsive pleading of counterclaim in a divorce action. All of this without a substantive change in the law; rather this is the courts’ response to a mere name change. In other words, the divorce counterclaim is not a “horse of a different color” from the former Cross-Bill; it is the same responsive, affirmative pleading. In the movie, *The Wizard of Oz*, the same horse

looked different depending on who was looking at it and how they were looking at the horse. Query: Why did we go from no filing fee to a filing fee simply by calling the same pleading by a different name?

Historically, divorce actions were filed on the chancery or equity side of the Circuit Court. The equity side of the court required that an initial cause of action for divorce commenced with the filing of a pleading entitled “Bill of Complaint.” The defendant responded in the form of an “Answer,” and, if the defendant also had a cause of action for divorce in which the defendant could set out a claim for affirmative relief against the plaintiff, the defendant would file a “Cross-Bill of Complaint.” Along with the filing of the Bill of Complaint, the plaintiff was required to pay a filing fee. The defendant, however, was not assessed a fee for the filing of the “Cross-Bill.” The statute simply did not provide for such a fee.

After reviewing input from the Boyd-Graves Commission, Virginia eliminated the distinction between the law and equity practices in our court system and created the civil “single cause of action.” In so doing, some of the procedural nomenclature merged or changed. The elimination of the distinction between the law and chancery side of the Virginia Courts did not change the substantive posture of filing and responding to a divorce action. Nevertheless, when a clerk’s office received a pleading titled, “Counterclaim” it would attempt to pigeon hole such a pleading into the traditional civil law side of filings and thus charge a fee; or the clerk (understanding that there is a distinction between the counterclaim at law and a counterclaim in a divorce) assessed no fee.

During the summer of 2009, research was conducted at my direction to determine how each Clerk’s office in the Commonwealth of Virginia handled the issue of a filing fee for a divorce counterclaim. One hundred and nineteen (119) Circuit Court Clerk’s offices in the Commonwealth were contacted and asked the following questions: (1) Is there a filing fee for a counterclaim filed in a divorce action? If they responded affirmatively, the following questions were asked (2) How much is the filing fee, and (3) Do you waive the filing fee if the pleading is called a “Cross-Bill,” a “Cross Complaint,” or some other name? This research produced some very interesting results.

Astonishingly, forty-one Circuit Court Clerk’s offices, roughly one third of all of the Circuit Court Clerk’s offices in the Commonwealth, charge a filing fee for a counterclaim filed in a divorce action. Of the forty-one Clerk’s offices charging a filing fee, seven responded that *if* the pleading was called by an incorrect name, such as a “cross-bill” or a “cross-complaint,” there would be no fee. Some of the more interesting responses from the seven clerk’s offices that waived the filing fee if the pleading was incorrectly titled are as following: “If you call it a cross-complaint there is no charge;” “There is no such thing as a cross-bill;” “I put it in the computer and it says there is a \$79 charge. There’s no charge for a cross-bill. Just call it that;” “If you call it a counterclaim, there will be an \$84 charge. If you call it a cross-complaint, there is no charge. The name changed from a cross-bill to a cross-complaint when the courts merged. The charge is waived if it is called a cross-complaint.”

The clerk’s offices that do not charge a filing fee for divorce counterclaims also provided interesting insight. Several such offices stated that: “We don’t charge you because you are not claiming any money.” Exactly! This is not a counterclaim at law which seeks

money damages. It is an affirmative pleading in a divorce action just like its earlier counterpart, the cross-bill. This post merger divorce counterclaim is not a “horse of a different color” and many of the Commonwealth’s Clerk’s office understand this very concept. What is a divorce practitioner to do when faced with this information? Should he or she title the pleading incorrectly to save their client the fee? Or should he title the pleading correctly and have the client suffer what appears to be one of the unintended consequences of the civil “single cause of action” merger?

Virginia Code Annotated §17.1-275(A)(26) states, “A clerk of a circuit court shall, for services performed by virtue of his office, charge the following fees: In all divorce and separate maintenance proceedings, and all civil actions that do not include one or more claims for the award of monetary damages, the clerk’s fee chargeable to the plaintiff shall be \$60... The fees prescribed by this subdivision shall be charged upon the filing of a counterclaim or a claim impleading a third-party defendant. However, no fee shall be charged for the filing of a cross-claim or setoff in any pending suit...” Virginia Supreme Court Rule 3:9(a) states that, “a defendant may, at that defendant’s option, plead as a counterclaim any cause of action that the defendant has against the plaintiff or all plaintiffs jointly, whether or not it grows out of any transaction mentioned in the complaint, whether or not it is for liquidated damages, whether it is in tort or contract, and whether or not the amount demanded in the counterclaim is greater than the amount demanded in the complaint.”

Prior to the merger in 2006, Va. Code Ann. §17.1-275(A)(26) did not permit a filing fee for a defendant’s claim for affirmative relief against plaintiff. In fact, this statute expressly stated that no fee shall be charged for the filing of a cross-bill in any pending suit in chancery matters.

The notes section of Rule 3:9 indicates that the defendant’s claim for affirmative relief against the plaintiff was formerly called a “cross-bill” and after the merger of the law and equity courts, said affirmative relief should now be known as a counterclaim. This current statute allows the fee for filing a counterclaim or a claim impleading a third party defendant. In a divorce action, there is no third party defendant. Actions for alienation of affection have long been abandoned. Further, there is no cross-claim or set off in a divorce action either. This post-merger fee statute is not well reasoned and lends to a great deal of confusion for attorneys and clerks alike.

Many of the Clerk’s offices reported that they derived their fee information from the Virginia Supreme Court civil fee schedule or fee calculator on the Court’s website located at <http://webdev.courts.state.va.us/cgi-bin/DJIT/ef_djs_ccfees_calc.cgi>. In reviewing this site in light of the divorce counterclaim fee issue, the problem is obvious. The site asks what type of civil suit are you filing, and the only counterclaim choice that is somewhat relevant is the choice for claims of between \$0 and \$50,000. In further examining the website’s calculator, there is a separate action for a divorce. But, there are three choices for a complaint seeking money damages that depends on the amount the plaintiff is seeking. In other words, this website recognizes that a divorce action, although titled a complaint, is different from other civil complaint filings. However, it does not recognize that a divorce counterclaim is different from a counterclaim which seeks a monetary award.

Not surprisingly, many of the Clerk's offices do not understand the distinction between a counterclaim filed in a traditional law action which seeks a monetary award and a divorce counterclaim which is essentially requesting equitable relief. Moreover, based upon the post merger statute, the legislature did not understand the distinction either. While it is not necessary to specifically provide a list of Clerk's offices along with their responses, it does appear to be important to address this issue. In my discussions with other divorce attorneys, not one attorney told me it was reasonable to be charging a filing fee for a divorce counterclaim. In fact, many were amazed that some clerk's offices were assessing a fee. So, the question remains, how did this "horse not of a different color," a cross-bill to a counterclaim, become a pleading which required a filing fee?

In order to have a consistent understanding of this issue by Circuit Court Clerks' Offices, the Virginia State Legislature, and Virginia practitioners, it doesn't seem unreasonable to recommend that the Virginia Supreme Court address this problem by communicating to the Virginia General Assembly guidelines relating to this once well-understood distinction. Frankly, the General Assembly should consider reviewing and amending Va. Code Ann. §17.1-275(A)(26)(2009), which presently requires the filing fee, in order to eliminate confusion, and thus eliminate the filing fee for a divorce counterclaim.

2010 FAMILY LAW LEGISLATIVE UPDATE

By Carl J. Witmeyer, II, Ashland

There were several Bills presented by the House and Senate regarding Family Law issues for the 2010 General Assembly. Some of the Bills presented were as follows:

- HB 14 Domestic Relations cases: witness refusal to answer question on ground that it may self-incriminate.
- HB 40 Disabled parent; subject to prosecution for desertion or nonsupport of another child
- HB 66 Child and spousal support; court to appoint vocational expert to conduct testing and interviews.
- SB 526 Mandatory dispute resolution; parties in cases involving custody, visitation, etc., must attend.
- SB 728 Child support orders; eliminates ability of DSS to order 2.5 percent cash medical support payments

Out of the Bills presented, SB526 was passed by indefinitely in the Courts of Justice Committee. It would have required any parties involved in any custody, visitation or child

support case, pending before any court, to be referred to and attend a dispute resolution orientation session.

Bill HB 14 was also passed by indefinitely in Courts of Justice. It provided that in actions filed on or after July 1, 2020, for spousal support cases, child custody cases or visitation cases, under Title 16.1 or in a divorce or separate maintenance matter filed under Title 20, the court may draw an adverse inference against any party or witness who refuses to answer a question regarding conduct of adultery, sodomy, or buggery outside of marriage, or fornication, on the ground that the testimony might be self-incriminating.

Bills that passed and were signed by the House Speaker and by the Senate President include HB 40 – Disabled parent; subject to prosecution for desertion or nonsupport of another child. This clarifies that a parent who is not subject to prosecution for criminal nonsupport because his child receives aid under a federal or state program for aid to the permanently and totally disabled is subject to prosecution for desertion and nonsupport of a spouse or of any children who are not receiving such aid.

A second Bill that passed and was signed by the House Speaker and Senate President was SB 728 regarding child support orders. This will eliminate the ability of the Department of Social Services to order 2.5 percent cash medical support payments from the non-custodial parent when the child is a recipient of Medicaid or the Family Access to Medical Insurance Security Plan. The bill also requires the Department to repay any 2.5 percent payments received since July 1, 2009.

The third Bill passed and also signed by the House Speaker and Senate President is HB 66 – Child and spousal support: court to appoint vocation expert to conduct testing and interviews. This allows a court to appoint a vocational expert to conduct an evaluation of a party in cases involving child support, spousal support and/or separate maintenance where the earning capacity, unemployment, or underemployment of a party is in controversy. The court may award costs or fees for the evaluation and the services of the expert at any time during the proceedings.

There were also a number of Bills presented to the House and Senate that have been continued to the 2011 Session in Courts of Justice by voice vote. Those include:

- SB 177 Juvenile Court Docket; cases of assault and battery against family or household member. This would require cases of assault and battery against a family or household member to be advanced on the docket and heard within 30 days of arrest or service of a summons or as soon thereafter as practicable.
- HB 822 Child support; single petition may be filed in Juvenile and Domestic Relations District Courts. It clarifies that issues of support, custody and visitation for a child may be included in a single petition in the Juvenile and Domestic Relations District Courts and that such issues may be included in a single petition involving two or more children if such children have the same parents or legal guardians.

- HB 748 Parental Rights; final orders for termination are appealed directly to Court of Appeals. Provides that final Orders involving the termination of parental rights and the approval of permanency plans with the goal of adoption that are entered by the Juvenile and Domestic Relations Court are appealed directly to the Court of Appeals. This Bill further establishes that the Juvenile Court functions as a Court of Record in such cases.
- Finally, HB 216 Assault and Battery against a family or household member. This bill provides that a person who commits an assault and battery against a person who is protected by the provisions of a protective Order is guilty of a Class 1 misdemeanor, and for a third offense, a Class 6 felony.

There were several other Bills presented that did not come out of the House and Senate Courts of Justice committees.

THIRD PARTY VISITATION IN VIRGINIA

By **Steven L. Raynor,**
Charlottesville

I. Introduction

Third party custody in Virginia was addressed in the Winter 2009 edition of *Family Law News*. This article addresses third party visitation in Virginia. Though the statutory foundation and the basic principles in the case law are the same as for third-party custody, the case law follows a somewhat different combination of precedents.

II. Statutory Basis

The statutory basis for third party visitation includes Virginia Code §20-124.2.B. (“The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest.”)

Virginia Code §20-124.1 says that “‘Person with a legitimate interest’ shall be broadly construed and includes, but is not limited to grandparents, stepparents, former stepparents, blood relatives and family members provided any such party has intervened in the suit or is

otherwise properly before the court. The term shall be broadly construed to accommodate the best interest of the child....”.

III. *Troxel v. Granville*

The seminal case regarding third party visitation is *Troxel v. Granville*, 530 U.S. 57; 120 S. Ct. 2054; 147 L. Ed. 2d 49 (2000), concerning the constitutionality of Washington Code §26.10.160(3). That section permitted any person to petition for visitation rights at any time, and authorized the Washington courts to grant visitation rights whenever visitation might serve the child’s best interests. *Troxel* involved the paternal grandparents' petition for the right to visit their deceased son’s daughters. The girls’ mother did not oppose limited visitation, but objected to the amount sought by the grandparents. The trial court ordered more visitation than the mother agreed to, and the mother appealed.

The Washington Court of Appeals reversed and dismissed the grandparents’ petition, a holding that was affirmed by the Washington Supreme Court, which declared § 26.10.160(3) unconstitutional as infringing on parents’ fundamental rights to rear their children. The court held that the federal constitution permits a state to interfere with this right only to prevent harm or potential harm to the child. The Washington code section was too broad in permitting any person to petition at any time, with the only requirement being that visitation serve the child’s best interests.

The United States Supreme Court affirmed, saying: “The visitation order in this case was an unconstitutional infringement on [the mother’s] fundamental right to make decisions concerning the care, custody, and control of her two daughters.”

IV. Reported Decisions

- a. *Thrift v. Baldwin*, 23 Va. App. 18, 473 S.E.2d 715 (1996).

In *Thrift*, the biological paternal grandparents of three adopted children petitioned the juvenile and domestic relations district court for visitation over the objection of the adoptive parents. Although the juvenile court granted visitation, the circuit court, on appeal, concluded that the adoption of the children severed the tie between the grandparents and the children, thereby depriving the grandparents of the legal standing to seek visitation.

The Virginia Court of Appeals reversed, holding that the term “party with a legitimate interest” used in Virginia Code §16.1-241(A) includes not only parties who possess legal rights with respect to a particular child or children, but also any parties having a “cognizable and reasonable interest in maintaining a close relationship” with the child or children. Furthermore, the statute expressly identifies “grandparents and other blood relatives” as parties with a legitimate interest. The Court concluded that, although the adoption of the children extinguished the legal grandparental relationship, the blood relationship between the grandparents and the children continued, and thus afforded the grandparents standing to seek visitation pursuant to the statute.

- b. *Williams v. Williams*, 256 Va. 19, 501 S.E.2d 417 (1998).

In affirming the Washington State Supreme Court holding, the United States Supreme Court in *Troxel* cited the Virginia case of *Williams v. Williams*. In *Williams*, the child's grandparents obtained court-ordered visitation over the parents' united opposition. The trial court determined that the child would benefit from continued contact with the grandparents and ordered visitation.

The Virginia Court of Appeals reversed. While it found Virginia Code §20-124.2(B) to be constitutional, it held that to interfere with the primacy of constitutionally protected parental rights, the court would have to find that a denial of nonparent visitation would be detrimental to the child's welfare. The Virginia Supreme Court affirmed. It found no need to remand the case to the trial court, because there was no allegation of proof in the case that denial of grandparent visitation would be harmful to the child.

c. *Dotson v. Hylton*, 29 Va. App. 635, 513 S.E.2d 901 (1999).

Dotson v. Hylton was decided after *Williams* but before *Troxel*. In *Dotson*, the mother and father were divorced and joint custody was granted to the parties. Subsequently, the father was sentenced to ten years in the penitentiary, the mother moved for sole custody, and the father and the intervenor paternal grandmother requested visitation. The mother was granted sole custody and, after considering the statutory factors in Virginia Code §20-124.3, the trial court ordered visitation as being in the child's best interests.

The Court of Appeals affirmed. The trial court was not required to follow the holding of *Williams v. Williams* that a court could not interfere with a parent's constitutional right to raise a child unless the state had a compelling interest. In *Williams*, both parents objected to visitation by the grandparents and the family was intact. In this case the parents had separated and disagreed regarding visitation by the grandparent. The parent-child relationship has primacy, but the trial court can award visitation under these facts to a grandparent upon a showing, by clear and convincing evidence, that the best interests of the child will be served.

d. *Griffin v. Griffin*, 41 Va. App. 77, 581 S.E.2d 899 (2003).

In *Griffin*, the husband and wife were married in 1996 and separated in 1997. While separated the wife had sexual relations with the husband and another man and conceived a child, which she represented to the husband was his. The husband established a relationship with the child. The wife moved in with her mother in 1999, but continued to allow the husband to visit the child until a paternity test revealed that the husband was not the child's father. The husband filed an action seeking visitation rights, the trial court awarded visitation, and the wife appealed.

The Court of Appeals reversed. It held that, absent a showing of actual harm to a child, the constitutional liberty interests of parents take precedence over the best interests of the child. Also, Virginia Code §20-124.2(B) requires clear and convincing evidence before visitation can lawfully be awarded to a nonparent. The evidence in this case went no further than supporting the inference that the child would grieve over the loss of the emotional attachment he had for the mother's estranged husband, and could be emotionally hurt if visitation with him ended. While that might satisfy a trial court's "subjective notions of 'best interests of the child,'" it fell short of satisfying by clear and convincing evidence the "actual harm" test. Note that Lord Mansfield's Rule of automatic legitimacy for any child born in wedlock was apparently abandoned *sub silentio*.

e. *Yopp v. Hodges*, 43 Va. App. 427, 598 S.E.2d 760 (2004).

In *Yopp v. Hodges*, the mother and the child lived with the maternal grandparents for the first year and a half of the child's life. The mother moved to a residence immediately adjacent to the maternal grandparents' home, but the child continued to live with the maternal grandparents until the age of four and a half. When the child reached five years of age, the mother married and the child stayed with the mother only occasionally. The grandparents still cared for him a majority of the time, ensuring that he got to school, preparing his dinner, and helping him with homework. The relationship between the mother and grandparents deteriorated, and the mother denied the grandparents' request to take the child to the beach. The grandparents petitioned for visitation rights. The mother allowed the child to see the grandparents only one weekend per month. She said the grandparents badgered the child and consumed alcohol in his presence, and she said the grandfather had a violent temper. The child's father expressly requested that the maternal grandparents be granted visitation, and the child's guardian *ad litem* also recommended visitation.

The trial court ruled that *Troxel* is inapposite because this case involves two fit parents who disagree about visitation issues, and so *Dotson* controls. Visitation with the grandparents was held to be in the best interests of the child. Evidence established that the grandparents played a significant part in the child's life until the mother limited contact, and that the child loved his grandparents and cried when taken away. The grandparents were a source of stability that was lacking in the mother's household. The Court of Appeals affirmed.

f. *Surles v. Mayer*, 48 Va. App. 146, 628 S.E.2d 563 (2006).

In *Surles*, the parties were involved in a relationship for four years but never married. The mother had had a son by another man and Mr. Surles served as the primary father figure. The couple also had their own daughter. When the parties separated, they shared joint legal custody of their daughter and the mother had primary physical custody of the daughter. The son would occasionally accompany the daughter on visits with Mr. Surles. The mother relocated to Florida, and Mr. Surles petitioned for visitation with her son. The trial court granted the mother's motion to strike the petition for visitation because Mr. Surles was not a party in interest.

The Court of Appeals held that, while Mr. Surles was a "person with a legitimate interest" within the meaning of Virginia Code §20-124.1, and thus had standing to pursue visitation with the boy, he failed to establish that, in the absence of visitation, the boy would suffer actual harm. Accordingly, it affirmed the denial of Mr. Surles' petition for visitation with the boy.

g. *O'Rourke v. Vuturo*, 49 Va. App. 139, 638 S.E.2d 124 (2006).

In *O'Rourke v. Vuturo*, the husband and wife were married in September 1995. After approximately five years of marriage, the wife informed the husband that she was pregnant by another man. The couple agreed to continue the marriage and that the husband would raise the child as his own. The child was born in March 2001. Husband was named the father on the birth certificate, and for the first three years of her life the husband raised the daughter as his own. In March 2004 the wife moved out of the marital residence and in with the child's biological father. The husband and wife were divorced and the husband was granted visitation rights. In May 2005 the wife and the child's biological father were married. They changed the child's name and tried to end contact between the former husband and the child. Proceedings regarding the child continued. Husband originally filed for custody. Wife sought custody as well and sought to deny her former husband visitation. The trial court heard from five experts, and awarded visitation to the former husband.

The Court of Appeals held that the evidence supported the trial court's conclusion that the child would suffer actual harm if the former husband, not the child's biological father but the father who raised the child for the first three years of her life, was denied visitation. The evidence also supported the finding that visitation was in the child's best interest in that the child had developed a close bond with the former husband, believing him to be her father. The biological father, on the other hand, had asked the mother to terminate the pregnancy, and saw the child only about 25 times for an hour or two each time over a three year period. The trial court properly admitted evidence of non-M.D. mental health professionals on the issue of whether the child would suffer actual harm if visitation were denied. Here the injury was psychological and the witnesses' education, employment experience, and professional knowledge and skills regarding bonding qualified them as experts.

h. *Rice v. Rice*, 49 Va. App. 192, 638 S.E.2d 702 (2006).

In *Rice* the child was the daughter of divorced parents. The father was not permitted contact with the child as a result of his sexual abuse of her. In 2004 the juvenile court granted visitation to the paternal grandparents. The mother appealed to the circuit court, and a *de novo* hearing was held. The circuit court denied the grandparents' petition for visitation, applying the best interests of the child standard (apparently because the father supported the grandparents' petition for visitation).

The Court of Appeals affirmed. The trial court did not err in finding that it was in the child's best interest to allow the mother the right to make the decisions about how things were handled with the child, as it was clear that the child was suffering with problems and difficulties. The Court of Appeals did not reach the issue of whether the trial court should have used the actual harm test of *Williams* and *Griffin* rather than the best interests test, as the grandparents were unsuccessful under even the more lenient best interests test.

i. *Stadter v. Siperko*, 52 Va. App. 81, 661 S.E.2d 494 (2008).

In *Stadter*, the mother and her girl friend, who were involved in a cohabiting lesbian relationship, agreed to have a child through artificial insemination of the mother. The parties shared prenatal responsibilities and expenses throughout the pregnancy, and shared parenting responsibilities after the birth of the child, with the mother providing primary care and the girl friend providing substantial financial support. The latter did not legally adopt the child, nor

did the parties enter into any agreement concerning the girl friend's parental rights. The parties later separated, and the girl friend was awarded temporary, supervised visitation by the juvenile and domestic relations district court. On appeal, the circuit court found that, although she was "a party with a legitimate interest" in the child, she failed to prove by clear and convincing evidence that the child would suffer actual harm if visitation were not awarded. The girl friend appealed and argued that, where a biological parent has actively encouraged a parent-child relationship with a cohabiting partner who assumed parental responsibilities for a length of time sufficient to establish a bond with the child, the partner should be afforded the status of *de facto* or psychological parent, thus placing the partner on the same footing as the biological parent for purposes of seeking visitation.

The Virginia Court of Appeals affirmed the circuit court, refusing to adopt a *de facto* parent doctrine. The Court noted that the adoption of such a doctrine in other states is simply "the means by which those states give effect to the general principle that actual psychological harm to the child will overcome the *Troxel* presumption in favor of a biological parent in visitation cases." The Court concluded that the "person with a legitimate interest" and "actual harm" standards already in place in Virginia provide a similar and sufficient legal framework for the protection of a child who might suffer actual harm as a result of the denial of visitation with a nonparent, and therefore need not be rewritten to recognize a *de facto* parent doctrine.

j. *Damon v. York*, 54 Va. App. 544, 680 S.E.2d 354 (2009).

In *Damon*, the mother allowed her then-girl friend to move in with her and the child when the child was approximately six years of age. The two were subsequently married in Canada, and lived together in Virginia with the child for almost two years. Before the end of this relationship, the child's father and her maternal grandmother gained custody of the child, on the basis of evidence of neglect found by the local Department of Social Services. The court ordered the father and the maternal grandmother to prevent all contact with the girl friend. After the mother's relationship with the girl friend ended, and approximately two years since having any contact with the child, the girl friend petitioned the juvenile and domestic relations district court for visitation. The juvenile court denied the visitation, as did the circuit court on appeal, finding that the girl friend was not a "person with a legitimate interest" having standing to seek visitation over the objection of the child's biological parents.

The Virginia Court of Appeals affirmed. Pursuant to Virginia Code §20-124.1, the erstwhile friend was required to prove that she was a grandparent, stepparent, former stepparent, blood relative or family member, or assert some persuasive ground for being treated as a "functional equivalent" of one of those categories. Because her marriage to the mother in Canada was void in all respects under Virginia law, she had no legal family or stepparent relationship with the child. Furthermore, having been a girl friend of the mother and having lived with the child for only twenty-one months was not sufficient to establish her status as a "functional equivalent" of one of the enumerated categories of §20-124.1. Although the girl friend testified that she "stepparented the child" for those twenty-one months, the trial court did not err in accepting mother's contradictory evidence that this person was, "at best, a mere adult presence in the child's life."

V. Unpublished Decisions

a. *Davidson v. Davidson*, 2009 Va. App. LEXIS 381, Va. Ct. of Appeals, Rec. No. 0305-09-3 (September 1, 2009).

The trial court did not err in denying visitation of the child to the father's wife who had been helping the father raise the child for approximately four years. Despite evidence that the child referred to the wife as "mommy," and despite evidence that during her marriage to the father the wife made medical decisions for the child, disciplined the child, and for all purposes acted as the child's mother, the wife was not a party to the father's prior custody petition or award and was never awarded any custody or visitation rights by the court. Thus, the wife bore the burden of proving that the child would suffer actual harm if visitation were denied. The wife's evidence of her close bond with the child was insufficient to meet that burden.

b. *Wise v. Velazquez*, 2008 Va. App. LEXIS 489, Va. Ct. of Appeals, Rec. No. 3094-07-2 (November 4, 2008).

The trial court did not err in granting grandmother's petition to amend a prior visitation consent order without first applying the actual harm standard. Granting the petition did not actually expand the scope of grandmother's visitation beyond that set forth in the initial consent order. In fact, the grandmother received the same amount of visitation while the father received greater discretion to determine the timing of that visitation. Because visitation was not expanded, application of the actual harm test was unnecessary.

The trial court did not err in failing to explicitly find that the visitation it awarded to the grandmother was in the child's best interests. The trial court stated that the child had "become integrated into and part of her [maternal extended] family," and that "the case involves a deceased mother and more than an emotional bond...[t]here's a relationship that's been established here that maintains ties to [the child's] heritage and memory of her mother." The Court of Appeals found that, based on the child's age, memory, identity, development, heritage, and significance of relationships with the mother's family in the mother's absence, the trial court implicitly made a finding regarding the best interests of the child when making its statements on the record.

c. *Merritt v. Gray*, 2004 Va. App. LEXIS 415, Va. Ct. of Appeals, Rec. No. 2003-03-4 (September 7, 2004).

The trial court did not err in refusing to apply an actual harm analysis, where the parents of a child did not contest that it was in the child's best interests to have visitation with his maternal grandmother. Although a court may not interfere in a parent-child relationship by ordering visitation with a nonparent over a parent's objection absent a showing of actual harm, the parties here entered into a prior agreement, which was embodied in several subsequent consent orders, that visitation with the grandmother was in the child's best interests. The parents never voiced opposition to the visitation occurring, only disputing when it was to occur. Thus, the actual harm test need not be applied.

The trial court did not err in holding that the parents waived their constitutional rights, to a limited degree, with regard to the care and control of their child, by entering into consent orders agreeing that visitation with the grandmother was in the best interests of the child. Although parents have a fundamental liberty interest to determine how to raise their children

and are therefore entitled to a presumption that they act in their children's best interests, the parents here relinquished that presumption with regard to visitation scheduling when they entered into consent orders which provided for the visitation. The trial court correctly held that, although the presumption would be reinstated if the parents objected to the grandmother having visitation at all, the parents here objected only to the court's holding that they were no longer entitled to unilateral control over the scheduling of the agreed-upon visitation.

d. *Harris v. Boxler*, 2003 Va. App. LEXIS 461, Va. Ct. of Appeals, Rec. No. 0604-03-3 (September 2, 2003).

The trial court did not err in holding that the paternal grandmother and the incarcerated father of the child failed to prove by clear and convincing evidence that visitation with the grandmother would be in the child's best interests. Six weeks after marrying, the mother and father had separated. Prior to the birth of the child, the father was convicted and incarcerated for sexually assaulting and abducting the mother. The mother later remarried and the child, almost two years old at the time of trial, had had no relationship with the father or the grandmother since birth. Furthermore, the grandmother had previously rejected the mother's offer to allow the grandmother to visit the child at the mother's home, insisting instead that she be allowed to take the child to visit the incarcerated father.

e. *O'Leary v. Moore*, 2003 Va. App. LEXIS 391, Va. Ct. of Appeals, Rec. No. 3187-02-2 (July 8, 2003).

The trial court did not err in denying the grandmother's petition for visitation, basing its holding upon an objection by the child's father who was the child's sole surviving parent. The trial court refused to hold that an exception to the *Williams* rule should be created because of the fact that the child's mother was deceased, thereby leaving the family "not intact." The trial court applied the actual harm test and the Court of Appeals affirmed.

VI. Conclusion

The nonparent-versus-parent visitation cases involve grandparents, ex-stepparents, ex-boy friends, and ex-girl friends (homosexual and "straight").

Several of the cases in this area focus on the issue of standing under Virginia Code § 20-124.1. The Code requirement that "persons with a legitimate interest" be broadly construed has been honored — except in the *Damon* case involving an lesbian ex-girl friend. The most surprising result of this broad construction is the *Thrift* case, in which the biological grandparents were determined to have standing to seek visitation of their grandchildren, even after the legal connection was severed by an adoption.

The third party visitation cases fall under either the line of authority in which the actual harm test is applied (in deference to the parent's constitutional right to make child-rearing decisions without state interference), or under the line of authority in which the best interests of the child test is applied (the actual harm test not being required because there is a dispute between the parents effectively nullifying the constitutional presumption).

In several cases the Virginia Court of Appeals has been asked to institute a “*de facto* parent” rule which would obviate the need for a petitioner who has been in any parental role with the child to meet the actual harm test, but these requests have consistently been rejected.

Absent a prior consent order or having one of the parents as a litigation ally, a nonparent petitioning for visitation will have to meet the actual harm test by clear and convincing evidence. Instead of basing his or her case on a request to change the legal standard (e.g., by requesting a *de facto* parent rule), a nonparent petitioning for visitation would probably be best advised to focus on presenting evidence of actual harm from the absence of visitation.

O’Rourke is the only appellate case so far in Virginia in which a nonparent has received visitation by meeting the actual harm test by clear and convincing evidence. A comparison of *O’Rourke* and *Davidson* (in which a stepmother who had bonded with the child was denied visitation) highlights the need for mental health expert testimony to meet the actual harm standard.

Chief Judge: Courts, Litigants Choking on Discovery and Tactical Static

A recent article in the March Issue of the Cosmos Club Bulletin summarized a January 20 speech at the Club’s Legal Affairs Group luncheon by Chief Judge Paul R. Michel of the U.S. Court of Appeals for the Federal Circuit. The article was by Peter D. Efranhaft.

Declaring that a “quiet crisis” is undermining U.S. federal and state courts, Judge Michel portrayed an urgent and desperate situation. His thesis is that “excessive motions practice, diversionary trial tactics, and incredible discovery demands are preventing the courts from hearing and deciding civil cases” It is a matter of great concern to the federal judiciary that over 18,000 civil suits have been pending in the federal courts for more than three years, but more important is the fact that the cost of litigating a single case can easily run to as high as \$5 million or \$20 million. Part of this may be due to the huge number of patent cases which come before the Federal Circuit, but the problem is clearly one affecting all the federal courts.

The Chief Judge singled out discovery as being the major problem pervading all American litigation today. He considered a discovery system which allows parties to force their opponents to search their own files, and even others' files, for any conceivably useful material and disclose it immediately to their adversaries, unworkable. It is, he said, just too much to ask of any efficient system. Routine cases today, given the universal use of e-mails, may require a search through millions of individual records. Just contemplating that all of this must be not only found, but read by the responding party before turnover, and then must be read, filed, considered and *perhaps* made use of, is a very sobering thought. A recent survey, Judge Michel noted, found that less than one-tenth of one percent of the discovered material is actually used by either side at the trial. In the larger cases, the work force that all of this requires, in order to participate in discovery which is often quite futile, is not taking part in productive work. And although fees which somebody supposedly has to pay get run up, the work done is usually superfluous and shamefully wasteful.

As Judge Michel is retiring, he plans to start his own campaign of litigation reform, but he knows that no such reform will take place without a legislative solution. He seriously doubts that the legal profession is going to convince an already distracted and overburdened Congress to put much effort or attention into issues such as these. Judge Michel did recommend the English system, in which he says permissible discovery is limited to what will be used at trial, and mere fishing expeditions are absolutely prohibited.

What the availability of massive discovery has done to the field of divorce litigation was of course not the subject of this federal judge's talk, but a great many of his most urgent observations and complaints had a very familiar ring.

LEGAL QUOTATION OF THE QUARTER

In any event, under the clearly-erroneous standard, we cannot meddle with a prior decision of this or a lower court simply because we have doubts about its wisdom or think we would have reached a different result. To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must ... strike us as wrong with the force of a five-week-old, unrefrigerated dead fish. To be clearly erroneous, then, the ... panel's decision must be dead wrong, and we do not believe it is.

— *Parts and Electric Motors Inc. v. Sterling Electric Inc.*, 866 F.2d 22 (7th Cir. 1989)

SUBMITTING ARTICLES AND NEWS

Family Law News encourages Section members to submit articles, information of a newsworthy nature, etc. for this newsletter. Articles should be typed, double-spaced, and of a length comparable to what you have seen in this newsletter in the past. If you can, send a computer disc, which identifies the computer format and word processing program used. Even better, e-mail it to divorce@patriot.net, but tell us you are doing so, so that we don't miss it. Send as a Word file if possible, otherwise as WordPerfect 5.1. Contents should be

sent to the Editor, **Richard E. Crouch, 2111 Wilson Boulevard, Suite 950, Arlington, Virginia 22201.** [Note new street address, same suite number.]

We print four newsletters per year. We have had to move up the deadlines for all issues so that the Summer issue can be distributed at the Annual Meeting. Until further notice the deadlines for submission of copy are as follows:

Spring — February 10 | Summer — April 20
Fall — August 10 | Winter — November 10

Please remember that contents should be submitted well before the deadline to allow time for our working with the author on any needed revisions. Articles which come in nearest the deadline are subject to more arbitrary editing, or run more chance of being overset to the next issue. The Editor also actively solicits comments from Section members on what they would like to see in the newsletter, would rather see less of, etc. Do not expect to see these comments in print, however, as we do not have a letters column.

Notes on Recent Appellate Cases

ATTORNEYS – LEGAL ETHICS – ATTORNEY AS LITIGANT. Ah, those busy, busy appellate courts: they make your head spin sometimes. And with no better excuse than that, it appears that FLN missed (i.e., failed to NRAC) the third visit of the irrepressible Mr. Barrett's ever-entertaining disciplinary case (not to mention the several visits of his divorce case) to the Virginia Supreme Court. But hey! Ya gotta love a guy with all the moxie, mojo, creative effrontery, testosterone, and just plain cojones, to keep it going all this time. When the Virginia Supreme Court reviewed the case of an obstreperous lawyer-litigant this time, it held in *Barrett v. Virginia State Bar*, 277 Va. 412, 675 S.E.2d 827 (2009), that the lawyer was subject to the disciplinary rules even in his capacity as a husband representing himself in post-divorce litigation, and that the three-judge court below indeed had jurisdiction to apply those Rules to him even though his license to practice had already been suspended when he committed the particular violations in question. It further held that applying the disciplinary rules to a lawyer litigating in such family law matters did not violate his constitutional right to equal protection, and (once again) that he violated the Virginia Model Rules of Professional Responsibility by challenging his child support obligation with a claim that was frivolous.

CONTEMPT – DIRECT OR INDIRECT – PROCEDURAL AND CONSTITUTIONAL RIGHTS – DUE PROCESS – ATTORNEY MISCONDUCT. Unsurprisingly to many people, the convictions of Mr. Scialdone, the overreaching Virginia Beach criminal defense lawyer, were reversed by the Virginia Supreme Court. *Of course* you can't change the Rules in the middle of the game and shift gears from indirect to direct contempt, and then justify the one kind of contempt conviction by the legal principles that apply to the other, the Supreme Court explains to the intermediate court majority. Thus the summary contempt convictions and jail

times for two lawyers and their law clerk are at last overturned. The judge, facing what she considered a scandalous libel of herself, held these lawyers in contempt for perpetrating a fraud with forged evidence produced on their own computers in their office to get a criminal defendant off and for sort of, in a roundabout way, calling her a Nazi. With this conduct, the Supreme Court unanimously finds that the misbehavior certainly didn't take place in the presence of the court. This judge had run her own investigation of the matter, bringing the three defendants and their secretary into the courtroom under oath to testify about it, and had ordered a deputy to go to the law office and rummage for incriminating documents. This is not the kind of "misconduct under the eye of the court" that can allow the defendant to be convicted totally without constitutional due process. This, you will remember, is the case in which the Court of Appeals panel reversed the convictions as unconstitutional, and that was reversed by the en banc Court of Appeals. In a long and tangled opinion the en banc court held that these defendants had failed to preserve their crucial argument as to constitutional due process. That was error, the Supreme Court holds, as was the trial judge's refusal to give these defendants a full due process hearing. *Scialdone V. Commonwealth*, ___ Va. ___, ___ S.E.2d ___, 24 VLW 1050 (2/25/10).

APPEALS – TRIAL COURT ORDERS AFTER APPEAL NOTED – SEPARATION AGREEMENTS – INSURANCE CLAUSES – ALIMONY. In *McCoy v. McCoy*, 55 Va. App. 524, 687 S.E.2d 82 (1/12/10), the Court of Appeals says that once this appeal had been noted, the trial court then lacked jurisdiction to vacate, on husband's motion, its own prior order holding husband in contempt. The way the husband got held in contempt was failing to provide the wife with health insurance that was called for in their separation agreement. Husband argued that it was really a form of alimony, which should have terminated when the wife remarried, but the Court of Appeals disagrees.

APPEALS – MOTION TO STRIKE – *LEE v. LEE*, §8:01-384(A), ETC. Regardless of how many times you have seen a defendant say "I renew my motion to strike" at the end of his own case, be warned that doing that won't satisfy the appellate courts and insulate your appeal of an unsatisfactory decision against dismissal. No, the Supreme Court explained in a commercial case known as *United Leasing Corp. v. Lehner Family Business Trust*, ___ Va. ___, ___ S.E.2d ___, 24 VLW 1049 (2/25/10), you have to tell the judge once again what each of your grounds for renewing your motion to strike is, and, apparently, argue them all over again. If you haven't done that, then you haven't fairly informed the trial judge of what you object to, and given him or her a "chance to correct his error," and obviously you're just shrewdly trying to sandbag him into a reversal on appeal.

APPEALS – DISMISSAL – OUTSIDE APPELLATE COURT JURISDICTION – FEE AWARDS. The Court of Appeals continually reminds us when it dismisses premature appeals, and emphasizes that such cases are not even within their jurisdiction. So then what happens when the appellate court wants to grant a fee award to one of the parties? It's a good question, since Court of Appeals jurisdiction is all statutory, and the authorizing statute gives them jurisdiction only over final orders. In the en banc opinion in *Kotara v. Kotara*, ___ Va. App. ___, ___ S.E.2d ___, 24 VLW 1024 (2/23/10), the Court of Appeals decided that a circuit court ruling denying husband's Motion to Dismiss for lack of circuit court jurisdiction over wife's alimony and modification action couldn't be appealed. The problem is that the husband appealed again when the trial court case was over. The Court of Appeals had first ruled that it lacked jurisdiction to reach the substantive issues. Then it had ordered a fee award to wife.

Husband of course appealed that, pointing out very logically that if the Court of Appeals lacked jurisdiction to consider his appeal, then where did it get off making awards against him? Conceding that it was a good question, the en banc court concluded that it had authority to do it. Yes, it explains why: “We conclude that this Court has the authority to award attorney’s fees in cases over which we do not have subject matter jurisdiction.” As to the limits of §17.1-405(3), which grants the appeal of right in domestic relations cases, husband cited *Fairfax County DHD v. Donald*, 251 Va. 227, 467 S.E.2d 803 (1996), in support, but the judges distinguished that case. After all, it came up as a de novo circuit court trial of an appealed juvenile case, and the Supreme Court had much a much more complex ruling to reverse that case, basing it on the specially limited nature of circuit courts’ powers when doing de novo “appeals” under the wording of §16.1-278.19. The Court of Appeals explained that since this was an alimony award under Title 20, the jurisdictional bar that affected the circuit court decision coming up to it now was all different. “We see no reason why the authority of the Court to award attorneys’ fees should be limited to those cases over which we have subject matter jurisdiction under §17.1-405,” the Court says. The Court makes these no-final-order dismissals all the time, and it does so because as the Court of Appeals it has the power to determine its own jurisdiction. And thus if it wishes to reach out and take jurisdiction of a fee award question it can. When the husband filed his Notice of Appeal the Court of Appeals acquired personal jurisdiction over the parties, and that gives it the authority to order fees that after all the circuit court had had under §20-99(5). Then an appellate court has “the authority to enter orders relating to the disposition of the case.”

“APPEALS” TO CIRCUIT COURT OF DSS ABUSE FINDINGS – “LEVEL TWO” ABUSE. In *Chabolla v. DSS*, 55 Va. App. 531, 687 S.E.2d 85 (1/12/10), the Court of Appeals found that a father “appealing” a DSS finding of abuse to the circuit court for trial could be heard even though his petition for appeal did not state his assignments of error or request appropriate relief. It was nevertheless timely filed under Rule 1:8 and 2A:4 and in accordance with case law making the timely filing of such petitions an “absolutely mandatory” requirement. It notes that §9-6.14:16(A) says that appeals from agency determinations to circuit courts must conform to the Virginia Supreme Court rules. There is nothing wrong with the circuit courts allowing such a petition to be amended. This father was certainly well advised to appeal, because the “abuse” charge was undeniably a borderline, cutting-edge, ground-breaking one of first impression – though it did him no ultimate good since the Court of Appeals affirmed the trial court’s decision upholding the abuse finding, which under 22 Virginia Administrative Code 40-700-20 and 40-705-30 needs only to have been supported by substantial evidence. The conduct here supposedly created a substantial risk of death, disfigurement or impairment to his children. The unique fact situation included the teenage daughter’s extremely rude, unreasonable and defiant behavior which impelled the frustrated father to make the point that she was driving him to thoughts of suicide. To do this he took his loaded handgun down off the top of the china cabinet in the dining room, took it out of the holster and showed it to the daughter, in the presence of his four-year-old son. Child Protective Services got a “referral,” alleging physical abuse and threat of harm to the teenager and sent a woman out to the house, who waited all afternoon for the family to come home. But confronting Mr. Chabolla, she found him “resistant,” as well as “argumentative” and though he allowed the social worker to interview the daughter, he “interfered with” the interview of the son. He admitted keeping a loaded pistol on top the china cabinet and he knew that the older child knew where it was. The father admitted that he took the gun with him on family outings, to restaurants and places they went in the car. The social worker later testified that this conversation “escalated quite a bit”

and that the father became increasingly hostile so that she “developed real concerns,” and went out and called the police. And when they got there, the investigator testified, the father was “demanding control of the situation,” and “refusing to cooperate with the police, with myself,” and “refused to surrender the gun,” so “the police actually had to get physical.” Eventually the police never did take the man’s gun from his house and he agreed to lock it up in the bedroom. This of course resulted in both children being removed from their home and placed in foster care. The Court of Appeals of course found all of this sufficient to prove physical child abuse of the man’s own children. The Court of Appeals emphasizes that it doesn’t take much to require the upholding of one of these agency determinations, since “the sole determination as to factual issues is whether substantial evidence exists in the agency record.” Nor does it require that the evidence be any good.

ADOPTION – CONTESTED – GOVERNING CONSTITUTIONAL STANDARD – “DETRIMENTAL” REQUIREMENT. Yet another case from the appellate courts reiterates the basic truth and constitutional requirement that you can’t have an adoption over parental objection, terminating the natural parent’s rights and permanently extinguishing her status as a parent, without the court’s making a finding that for the child to continue a filial relationship with the natural parent would constitute an “actual detriment” to the child. Except that this time the Court of Appeals puts its finger squarely on the real problem. And the culprit — and temporarily, at least, the solution. In *Todd v. Copeland*, ___ Va. App. ___, ___ S.E.2d ___, 24 VLW 1075 (3/9/10), that detriment finding was not made by the trial judge, and thus the trial court’s use against the mother of §§ 63.2-1203 and 1205 was a deprivation of Fourteenth Amendment Due Process of Law. That’s so even though this child was born in prison, the mother did not have relatives to take the child, and she voluntarily let the jail chaplain and a friend of hers have temporary custody. (It was only the friend who then kept custody and tried to adopt the child.) This friend was unable to say that the mother hadn’t visited the child or maintained a good relationship with her, and in fact the court-appointed “mental health professional” (name, sex and credentials unspecified) had recommended (A) that the child should be told who her real mother was, and (B) that the mother should have unrestricted and unlimited visitation, and in fact, (C) that what would be detrimental would be a termination of the mother-daughter relationship. What the mother had done, it turns out, is to be out of contact with the child for six months. (Oh yes, and of course, the classic ground, that the mother’s withholding of her consent to this made-in-heaven matchup was against the child’s best interests.) The appellate court officially explains that (contrary, perhaps, to some very surprising things it has said before in such situations) the “detriment to the child” requirement and mere best interests are two different things, and that the detriment standard derives not from the Virginia Code but from the United States Constitution’s Fourteenth Amendment as explicated (many times) by the U.S. Supreme Court. Our Court of Appeals even makes, this time, the candid statement, “We conclude that a trial court must make a detriment-to-the-child determination regardless of the language of the relevant [Virginia] statute, before entering an adoption order, in order to protect the Fourteenth Amendment rights of a non-consenting biological parent.” It adds that: “Since the Virginia Supreme Court decided *Malpass* in 1972, Virginia courts have emphasized that there must be more than a mere finding that granting an adoption over the parent’s objection would be in the child’s best interests.” It even makes the further candid statement that *before 1995*, Virginia’s adoption statutes, as interpreted by our appellate courts, were constitutional. They didn’t have to have an express “detrimental,” etc. standard because the Court had read that requirement into our law. It was clear back then, the

Court says, that both (A) best interests *and* (B) that it would have to be detrimental to continue the natural parent-and-child relationship have to be found.

Between 1995 and 2006, the statutes were facially constitutional because they were amended to expressly include the requirement. But in 2006, spurred by aggressive federal and state campaigns to accelerate “freeing children up for adoption”, a new adoption statute was passed which deleted the “detrimental” standard. Until this is fixed by the Legislature, it will be fixed by the Court of Appeals, once again saving the constitutionality of our defective statute by reading that requirement in.

CUSTODY – UCCJEA, PKPA – REGISTRATION – HOMOSEXUAL THIRD-PARTY CASES – DOMA – SMA – MAA. If you know it’s a conflict between DOMA, plus its local Virginia cousins, and the UCCJEA and PKPA, you can be pretty sure what the outcome is going to be. Whether or not somebody up there doesn’t like these interfering statutes, the legal answer is that DOMA, etc. don’t override interstate custody jurisdiction statutes, which are the Uniform Child Custody Jurisdiction Act (UCCJEA, §20-146) and the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. §1738A, which together establish a uniform system to prevent forum-shopping in child custody cases. It surely didn’t help the mother in this case that the whole thing started with a surrogacy agreement way off in Minnesota between her and two homosexual men who wanted to have a baby together by getting her, Mrs. Prashad, artificially inseminated with the sperm of both of them. When the child was born in Minnesota in 2004, one homosexual, Copeland, was listed on the birth certificate as the father. The mother even consented to these two fellows moving the child to North Carolina. Pretty soon, though, the relationship went bad and the mother’s requests to keep on visiting or seeing the child and her inquiries about the child’s welfare went unanswered. When she and her husband went to North Carolina, there was an unpleasant confrontation, mother was not allowed to see the child, and the two “fathers” moved with the child – first to California to get a “Declaration of Domestic Partnership” there, and next to Virginia. When the mother filed for custody in North Carolina, and the DNA test ordered there showed that Spivey, not Copeland, was the father, the North Carolina court determined that it had custody jurisdiction and ordered “primary custody” to the “fathers” and then immediately ratified an agreement reached by the three more-or-less parents.

This order-incorporated agreement gave the two males “primary and legal physical custody,” and the mother “secondary legal and physical custody.” Fifteen months later Mrs. Prashad filed petitions in the Fairfax Juvenile Court to enforce this North Carolina order and to modify it. Actually this was a bundle of four North Carolina orders, but no single one of them embodied exactly what the mother wanted — an award of immediate custody to her. Thus she asked the Fairfax JDR court to register the foreign orders only to the extent that they concerned the parental rights of herself and Spivey, and not to register the other parts, and to modify what was registered so as to give her sole legal and physical custody. The court of course registered the orders in their entirety, and the mother appealed to circuit court, which upheld it. The Court of Appeals first said that full faith and credit had to be given to any North Carolina order under the Constitution and that if you don’t like that, the PKPA makes it quite clear that this principle

extends to custody orders, and for good measure the UCCJEA requires straightforward registration and enforcement in Article 3, which is Virginia Code §20-146.24. It's true that the foreign order has to have been from a court exercising jurisdiction in substantial conformity with the UCCJEA, and the North Carolina court did so herein. The Court of Appeals turned to the Prefatory Note from the Official Comments to the UCCJEA found at 9 U.L.A. 649, 663 (1997), for its reasoning. All this, the Court of Appeals says, is quite separate and distinguishable from the concerns addressed by the Defense of Marriage Act (DOMA), 28 U.S.C. §1738C. And here, the Court of Appeals points out, neither party is asking the Virginia courts to recognize the homosexual marriage of the two men. The North Carolina custody orders did not arise from the treatment of their relationship by the California courts as something like a marriage. As for the Virginia Marriage Amendment (VMA), Constitution Article 1 §15-A, the answer is the same: No, the custody rights do not arise from the homosexual-marriage-like thing. The mother argued that to register the custody orders would "tacitly" recognize the forbidden formalization of the homosexual relationship, but the Court of Appeals doesn't buy that. Even assuming *arguendo* that the VMA prohibits tacit recognitions, the wife would have to prove that the custody order arose from the relationship, and she has not. North Carolina in fact has one of its own similar statutes defining marriage as only the normal thing we have known for tens of thousands of years. As for the Marriage Affirmation Act (MAA), Code §20-45.3, it just doesn't forbid the registering of a custody order. It forbids recognizing a civil union so as to bestow the privileges and obligations of marriage, but you can — it should be abundantly clear by now — have a custody order in this state without having or proving marriage. The homosexual domestic partnership document from California played no part in this litigation. Judge Beales dissented because he does not believe that the Court of Appeals has any business entertaining, much less addressing the merits of, a case based on non-final orders. He does not believe that a UCCJEA determination in a given case is anything but a temporary and preliminary holding. *Prashad v. Copeland*, 55 Va. App. 247, 685 S.E.2d 199 (11/24/09).

DIVORCE – PRIVACY STATUTES – E-MAIL – UNAUTHORIZED ACCESS – DEFENSES – EMPLOYER'S CORPORATE AUTHORITY AND RESPONSIBILITY — PLEADING — STANDARD FOR MOTIONS TO DISMISS — MERE CONCLUSORY ALLEGATIONS. An Eastern District (Alexandria Division) case, preliminary because the case is still in the demurrer/summary judgment phase, is unpleasantly complex and weird. Still, it holds a number of instructive lessons for divorce practitioners here, who constantly struggle with the issues posed by e-mail snooping – and of course the outraged and indignant accusations that are always brought by spectacularly guilty "victims" thereof. In this suit brought by the business-partner/wife of the business-partner/husband who did the successful "accessing," the federal judge threw out some counts, but let others stand. Let's see what his reasoning was. Yes, the wife can sue her husband and so can the LLC lobbying business that they had, which is now represented only by the third of the three partners. They can do so not only under federal statutes but under Virginia law, for the alleged unauthorized access that the husband got to what is described as the wife's business e-mail account. (He had apparently got the first password simply by looking at his own computer, on/in which she had put it when they were still friends, and inadvertently forgot to remove it.) What's the damage she alleges? That the knowledge husband gained prejudiced her during divorce negotiations. (Does this mean they've already settled the divorce with an agreement, or did that negotiation go nowhere? And either way, how can she sue about that? — a simple divorce lawyer might ask). Husband wanted to dismiss all of the counts that wife brought under state and federal statutes,

but the judge gave him only partial relief. First, the Electronic Communications Privacy Act, 18 U.S.C. §2511(1)(a), and the Virginia parallel statutes, Code §19.2-62(A), require “interception” as defined therein, and the wife and corporation failed to allege that. They alleged that they successfully stopped the husband by wife’s change of her e-mail account password, so that he had to ask the IT consultant (unsuccessfully) for it. That’s not the same thing as intercepting e-mail messages during their transmission and before they have reached the intended recipient account on the server. And whether wife had actually read them or not, they had definitely reached their destination before husband did anything effective. Thus they were not “transmissions,” which are the sorts of things you can “intercept.” Also dismissed were two counts under §18.2-162.3, as neither statute nor Virginia case law supports the claim that simply reading an electronic communication is §18.2-162.3 “Conversion of Property.” Another count was dismissed because it failed to state a claim for unauthorized examination of personal information without saying, at least in some way or another, what that plundered personal information was. After all, §18.2-152.5 requires that. A lot of issues in this pending case swirl around the question of husband’s status in the partnership. Five counts allege civil liability because he acted without authority or exceeded his authority in using “a computer network” — whatever that phrase (see earlier FLN article on the dumbness of that statutory term) stands for these days. These counts all include and hinge upon a prohibition against unauthorized access, and husband contended that he was fully authorized: he contended that Florida law allows the manager of an LLC total access to computer networks, including the password-protected accounts of co-managers like his wife. One of the reasons the court did not buy that is that he cited no Florida statute or case law saying so. The federal judge does make the interesting point that in addition, the concept of “access” cannot ever turn simply on a business title or position, because computer networks have “expected norms of intended use,” which is a matter of proof for trial – and the plaintiffs’ pleadings really show that such an inquiry will be needed. They say that he used someone else’s password to gain access to this account and had no legitimate business reason. This is enough of a factual issue to withstand a motion to dismiss. *Global Policy Partners LLC v. Yessin*, ___ F. Supp. 2d ___, 24 VLW 698 (11/24/09). (The language about “expected norms of intended use” comes from *U.S. v. Phillips*, 477 F.3d 215, 219 (5th Cir. 2007).)

Incidentally, the Computer Fraud and Abuse Act (CFAA) is 18 U.S.C. §1030(a), the Electronic Communications Privacy Act (ECPA) is 18 U.S.C. §2511, the Stored Communications Act (SCA) is 18 U.S.C. §2701, and the three Virginia statutes were Code §§ 18.2-152.3, and .5, and §19.2-62(A).

Apparently husband when he had access read some e-mails coming to his wife from her lawyer which she had not yet read. She alleged that the snooping was discovered, or suspected, when he began to use phrases during negotiations that she and the divorce lawyer had used in e-mail conversations. When she changed her password on June 25, 2009, his attempts to get the new one from the IT specialist were unsuccessful. Further offenses concerned *attempts* to get into her e-mail. Damages that were alleged to the LLC were that the compromise had impaired the value of their computer system and forced them to spend money to secure the network, and that the damages to her were a “loss of bargaining power” in her on-going divorce proceedings.

The problem with the claim that husband “obtained, embezzled, or converted property” under one of the Virginia statutes is that none of the allegations gives rise to a plausible

inference that he viewed the “employment or financial information” that one of the Virginia statutes requires.

In case you wondered, in throwing out several of the wife’s counts, the federal court shows that it is well aware of “the tenet that a court on Motion to Dismiss or Summary Judgment must accept as true all of the allegations contained in a complaint”. But it also notes that that rule “is inapplicable to *legal conclusions*,” citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). It added from *Walker v. Prince George’s County*, No. 08-1462 (4th Cir., July 30, 2009), that “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” That of course describes the claims wife made and how she phrased them.

Specifically, the Court holds that interception “does *not* include “accessing” the messages stored on a destination server.” Of course once it gets there, it becomes “stored communication” within the meaning of the Stored Communications Act. However, violations of that Act, do not constitute interception within the meaning of ECPA or Virginia §19.2-62. It does not matter whether the intended recipient person has actually read the e-mail messages on the server at the time: what controls is where they are. Plaintiffs argued in reply that they had used the word “intercepted” at least 13 times in their complaint, but as the Court had previously explained, the answer to that is “So what?”, since that is a mere conclusory recital. As for the allegation that the husband gained strategic information in the pending divorce proceedings, the Court holds that “legal strategy does not fall into any of the [§18.2-152.5] statute’s enumerated categories either literally or [by] *ejusdem generis*”

SEPARATION AGREEMENT SET ASIDE – UNCONSCIONABLE – GROSS DISPARITY AND NECESSITY. The Court of Appeals in *Sims v. Sims*, 94 Va. App. 580, 27 S.E.2d 436, 24 VLW 750 (12/15/09), came up with a new ruling which should provide a short cut to decisions that a separation agreement can be set aside as unconscionable. Serious gross disparity, when there is financial necessity on the part of the dissatisfied spouse, the Court says, in fact establishes unconscionableness as a matter of law. This agreement ended a 38-year marriage by taking the wife off the \$100,000 liability for the outstanding mortgage balance on the former marital home worth \$300,000, and gave her a 1999 pickup truck and her personal property that Husband described as “some of the stuff she had purchased over the years at yard sales.” Husband got the whole rest of the marital estate (but there are not many clues as to what that was) and his deferred compensation account, which was valued at \$128,000, plus his \$2,400 per month retirement. The Court of Appeals cited testimony by the parties’ son that he would have to agree that in the circumstances wife’s bargain was “not good judgment,” and the trial court’s own finding was that “this is about as grossly disparate a deal as probably anybody has ever seen.” The Court of Appeals accepted as supported by the evidence the trial judge’s finding that husband did not engage in any covert over-reaching or oppressive conduct. But since the agreement left this woman “literally penniless,” and with no practical means of supporting herself, and by qualifying for food stamps she had already “become a public charge,” the Court of Appeals reversed the trial court’s finding that the agreement was O.K. The evidence had also established a degree of infirmity, in that wife had diabetes, mood swings, rheumatoid arthritis and other painful illnesses. Wife had a third grade education and at age 56 lacked the education to “pay bills and stuff of this nature,” as husband put it. Apparently the work outside the home that she had ever done for pay was minimal. Her physical condition left her totally disabled at the time of the trial, so husband made no claim

she was capable of supporting herself. The personal property she got did include a car. She had recently had employment gathering Christmas greens for a florist during the winter months when such compensated employment is sometimes available.

PROPERTY DIVISION – MARITAL AND SEPARATE – TRANSMUTATION – GIFTS – DISCRETIONARY BUT UNEXPLAINED RULINGS – VESTING OF SHARES – SEALING OF FILES. In *Shiembob v. Shiembob*, 55 Va. App. 234, 685 S.E.2d 192 (1/24/09), a husband wove such a tangled web when he first practiced his stockbroker/financial adviser trade so as to deceive his wife by discreetly and disastrously “borrowing” from her accounts, that the resolution of their divorce and property case might leave a great many of us confused. And though the Court of Appeals finds nothing wrong with the trial judge sealing and then unsealing the record, and in fact reaffirms the “presumption of openness” of court records as the policy stated in §17.1-208, it found the remedy that the judge granted without explaining why he was doing it required a remand. This couple both worked as financial advisers for a stockbroker outfit, and husband quietly borrowed from his wife’s investment account and lost it playing the stock market. The question facing the Court of Appeals in light of an unexplained ruling at trial was whether the money that he then put back when caught in this and a lot of other financial shenanigans was marital property, or was a gift to her (and you know what the Court of Appeals always says after that, apparently regarding the §20-107.3A1(ii) definition of non-separate property as including inter-spousal gifts as repealed *sub silentio* by the “not a gift” language of ¶A3(d)--(g): “A gift between spouses [and therefore] wife’s separate property.”) Another issue – apparently – is whether some money that husband got in the form of restricted shares from a sale of wife’s family’s partnership to a bank was in part his separate property because it was received in stages and some of the vestings were after the separation date. It took a long time for the wife and the family to discover just exactly how many tricky financial shell games husband was playing, and this complicates the analysis. The trial court did find that a deposit of \$37,000 that husband made into wife’s account “as a way”, as someone who is quoted put it, “to kind of safeguard so he wouldn’t feel tempted to trade that money in the stock market or shuffle it around to pay credit card bills that she didn’t know about...[and] for safekeeping in an effort to rebuild trust with wife”, was marital funds and a gift. It was the relationship between those designations or conclusions that remained obscure, and the matter was even further muddied by the fact that it was apparently a part of an \$81,000 loan that the husband got from the bank that bought the partnership. While all of this lies within a judge’s discretion, the Court of Appeals says that one limitation on that discretion is the obligation to explain the rationale when making these legal/factual determinations in the marital/separate property area. They say it also wasn’t clear “whether husband retained any access to that account after he deposited the \$37,000, or whether he intended to relinquish all title and interest....” The need for a remand was therefore clear. The bank deal was especially unclear, as the underlying agreement provided that husband was entitled to receive dividends and had full voting rights as to the yet-unvested shares, but that if his employment was terminated for cause before a vesting date, unvested shares were forfeited. The Court of Appeals held the shares which were unvested at the time of separation to be husband’s separate property, applying *Cirrito v. Cirrito*, 44 Va. App. 287, 605 S.E.2d 268 (2004). Husband also took issue with the trial court’s vacating an interim protective order issued under Rule 4:9 as to discovery material that prohibited disclosures of information or documents obtained. But without any legal authority cited, it’s easy for the Court of Appeals to dismiss that claim under Rule 5A:20. Husband also objected on appeal to the judge’s vacating his earlier order that sealed the trial record in order to protect the financial privacy of the parties, but there is

nothing to stop a judge from undoing such an order. Nothing in the implementing statute, §17.1-208, indicates a judge can't change these orders. The Court of Appeals supplies many useful quotations as to the draconian, anti-traditional and counter-intuitive nature of a record-sealing order. Though husband attacked it out of an undefined concern for his professional reputation, all the damaging information in the record was the result of some very unwise professional decisions he made, and the presumption of openness of judicial records is more important. The Court of Appeals even quotes a New Jersey case to the effect that the desire of parties to preserve their reputations may be perfectly understandable, but is insufficient to overcome the presumption. When husband objected on appeal to the trial court's fee award against him, the Court of Appeals found a new way of dismissing such claims, or at least of phrasing it. Since the only basis for the husband's argument, the Court of Appeals said, "is contained in the transcript," and that transcript was not timely filed, husband can't make the argument. As for attorneys fees on appeal, however, the Court of Appeals denied wife's motion since "husband substantially prevailed on appeal." So the matter must go back to the trial court because the trial judge never explained the basis of his determination that the \$37,000 deposit into wife's account (which she had owned since before marriage) was a gift, and whether the transfer of that \$37,000 into a separate property account transmuted it to marital property, or whether it determined that that money was indeed part of the marital estate, and simply awarded it to the wife as a matter of distribution, rather than classification.

PROPERTY DIVISION – MARITAL CONTRIBUTION AS SEPARATE (AND POSSIBLY VICE-VERSA) – “HYBRID PROPERTY” CONCEPT – PROCEDURE — CLASSIFICATION, VALUATION AND DISTRIBUTION. The Court of Appeals got into some very refined and abstract areas in trying to explain to an errant trial judge just exactly the procedure that, as the Court of Appeals sees it, must be followed in the statutory classification, evaluation and distribution of property under §20-107.3, and the amendments which created the phenomenon of hybrid property. The case is *Duva v. Duva*, 55 Va. App. 286, 685 SE2d 842 (12/8/09). It says some very subtle and also some very strong and decisive things, which might be hard to rationalize away if it ever wanted to take them back. A husband who bought a house in Rhode Island before marriage, and apparently made five mortgage payments on it before the wedding, and then made mortgage payments out of marital funds, handed the trial judge a case which that judge considered in a very traditional way, regarding those marital payments as converting it to marital property. A frequently-seen, traditional divorce-case scenario. But, the Court of Appeals explains, that trial court did not consider whether this could be seen as the marital funds losing their classification and becoming separate property (or something like it) when they were commingled with that originally-separate Rhode Island house. The judge in fact did not consider – as a lot of judges might not consider – whether wife had traced and proved the course of those marital funds into the originally separate asset, instead of forcing the husband to prove that he used separate funds. An incorrect standard, the Court of Appeals says, was used. Nor is it proper to consider the concept of hybrid property until a court establishes the initial classification of the property, and then teases out the course of the transmutation. The Court of Appeals then, as it so often does, went beyond what it might be necessary to say so as to make a sweeping pronouncement: this time, that it “rejects the source-of-funds rule as an initial classification concept.” And, it explains to the wife, her argument is an argument that the acquisition of equity in a piece of real estate is the triggering event which determines whether and when it was “acquired” for separate/marital/etc. classification purposes. No, not so at all. The rest of this opinion explains that the date of acquisition is – or seems to be – the date one takes title to the property.

However, the rest of the opinion sort of defies condensation. The quoted parts that follow could hardly be summarized more tightly. Thus the most useful treatment seems to be just to pull out, in the Court's own words, these parts:

The trial court found that the property's mortgage was paid from marital funds, i.e., that the marital funds were commingled with the separate property. The court concluded that the Rhode Island property was transmuted to marital property. This analysis did not address tracing the commingled funds or hybrid property. ... The trial court's classification of property as marital or separate is a factual finding. Therefore, that classification will be reversed on appeal only if it is "plainly wrong or without evidence to support it." ... Under Code § 20-107.3(A)(3)(d), the marital funds, by paying the mortgage on the separate property, were commingled with the Rhode Island property (the receiving property) and were transmuted into the separate property. The burden would then be on the wife to trace the contribution for the marital funds to retain the classification of marital property. ... However, to the extent the marital funds reduced the principal of the mortgage, that amount is traceable from the separately acquired equity. ... Here, the trial court did not consider marital funds losing its classification as marital property when commingled with the receiving property. It did not consider whether wife traced the marital funds. Thus, the trial court applied the incorrect standard in determining whether the property is separate, marital, or hybrid. In that respect, we find the trial court erred. ... We conclude, therefore, that the basis of wife's argument here is dicta which does not bind our decision in this case. ... The Virginia Supreme Court addressed the source of funds doctrine in *Smoot v. Smoot*, 233 Va. 435, 357 S.E.2d 728 (1987), and rejected it. *See also Marion v. Marion*, 11 Va. App. 659, 401 S.E.2d 432 (1991). ... Source of funds does not determine the original classification. If it did, there would have been no need for the *Smoot* Court to reject the rule. ... A reading of Code § 20-107.3(A)(3) clearly supports this position. One acquires property either as separate or marital. [sic.] We begin with the premise that 'property acquired during the marriage is presumed to be marital and property acquired before marriage is presumed to be separate.' *Robinson v. Robinson*, 46 Va. App. 652, 662, 621 S.E.2d 147, 152 (2005). Any analysis of hybrid property must begin with these presumptions. First, we determine whether the property is separate or marital. Then, we apply Code § 20-107.3(A)(3) to determine what portion of the separate property or marital property is hybrid. If hybrid property is an original classification category, the presumptions would be meaningless. ... Essentially, wife made the same argument in *Wagner* that we address here, namely, that the date of acquisition was not the date of titling the property, but rather the date when equity was realized. We rejected that argument in *Wagner*. [You noticed, didn't you, Gentle Reader?] ... Under the facts of this case, the date of acquisition is a fixed date and is determined when husband took title to the property.

APPEALS – LAW OF CASE DOCTRINE – REPEATED APPEALS. In another **unpublished** *Miller v. Jenkins* case, at 24 VLW 1026 (2/26/10) the Court of Appeals upheld a

trial court order that the JDRC registration and enforcement of a foreign (Vermont) order giving visitation to a homosexual former “wife” of the mother was proper. The Court of Appeals upheld it, saying that the “law of the case” doctrine governed, because the appellant mother raised the issues of jurisdiction and enforceability in the first case she filed, and that any distinction argued by her is a distinction without a difference. The issues were all reached and decided in *Miller-Jenkins I*.

DOMESTIC VIOLENCE – INITIALLY-INSUBORDINATE CITIZEN CONDUCT (IN OWN HOME) – FOURTH-AMENDMENT INVOCATION – CRIME OF JUSTICE OBSTRUCTION – MOMENTARY DELAY OF INSTANT OBEDIENCE AND OBEISANCE. Here’s a fine civics lesson for young American future citizens. In a case which began as a domestic violence investigation based on a third-party phone call, the Court of Appeals instructs local cops and prosecutors as to what §18.2-460(A) “obstruction of justice” ... isn’t. It does so in a ringing opinion (**unpublished** of course) in *Kee v. City of Hampton*, 24 VLW 679 (11/10/09). Mr. Kee was charged with that crime for *initially* and momentarily refusing to let the police officer into his own home. That, of course, the prosecutor explained, kept the officer from being able to continue his investigation by stepping inside, and therefore Mr. Kee was convicted of obstruction of justice in the city circuit court. However, the Court of Appeals notices, the citizen immediately backed out of his doorway and into his house with his hands in the air, because the cop forced him to. The record establishes beyond dispute that despite this initial act of momentary insubordination to an armed member of the upper classes, he did in fact allow the officer in because the officer ignored his refusal, walked right in, and then did all the investigating he wanted. Oh, and by the way, the Court of Appeals adds, “courts have repeatedly held that such indirect acts are not enough to constitute obstruction,” and “obstruction of justice does not occur when a person fails to cooperate fully ... but does not impede or prevent the officer from performing his task.” (quoting *Ruckman v. Commonwealth*, 28 Va. App. 428, 429, 505 SE2d 388, 389 (1998)). But none of these “momentary insubordination” opinions answer the real question — which supposes that it’s not just momentary: What’s the Fourth Amendment worth if you can commit a crime by invoking it?

DIVORCE – VOID MARRIAGES – JURISDICTION – FEE AWARDS. The appeals in the **unpublished** *Harbison v. Harbison* case at 24 VLW 1026 (1/12/10) held that a trial court properly awarded fees to a wife when deciding that because of husband’s prior marriage, making his current marriage bigamous and thus void *ab initio*, there could not be a divorce since there was no longer a marriage.

PROPERTY DIVISION – MARITAL-SEPARATE – TRANSMUTATION – “GIFT.” “Hard cases make bad law” is a maxim that appellate courts should never forget, and have at times forgotten of course. But it’s one that the Virginia Court of Appeals takes particularly to heart in a case of spectacular unfairness – unfairness of a sort anyway – to an Accomack County wife who apparently believed everything her husband said, and read more into it, didn’t watch her money very closely, and didn’t begin to do as good a job of divorce planning as her husband did. Whether she married for love, which everyone knows is blind, or married for money, met her match and got the worst of it, may never be known, but she ended up getting financially snookered, and hugely so, in every conceivable way. The Accomack trial judge tried to help out this damsel in distress, but, as the Court of Appeals points out, his

interpretation of the gift exception to the source-of-funds statute, §20-107.3 A 3 f, is an unwarranted stretch and just simply isn't supported by the wording of the statute. With the Eastern Shore real estate, as with other assets, husband didn't say anything about "love and affection," when he transferred it into joint ownership, but simply said – repeatedly – that this formerly separate property (and the others) "is now ours." Yes, "ours to live on, grow old on, and die on," but not as something transmuted to marital property. That is not, as the now-reversed trial judge held, a statutorily-contemplated transmuting "gift" of separate to marital. *Jones v. Jones*, **unpublished**, (4/28/09).

PROPERTY DIVISION – MARITAL CONTRIBUTIONS TO SEPARATE REAL ESTATE – PERSONAL EFFORT – STUDENT LOAN USE. A trial court that awarded the wife in *Layne v. Layne*, **unpublished**, 24 VLW 555 (10/20/09), \$28,676 of the equity in a condominium that husband had owned before marriage did it right, the Court of Appeals held. To do that, the Court perhaps need have gone no further than its holding that joint funds reduced the mortgage debt on the condo during the marriage and increased its equity, but the Court of Appeals (perhaps knowing what it was going to do in *Duva*, *this issue*) goes on to say that wife had made substantial contributions toward the increase by helping to find tenants, handling the leases once or more, calling repairmen, collecting the rent and "paying" the mortgage (presumably with those joint funds). The husband had of course argued that these were all things a spouse could do without making a substantial contribution of personal effort. The Court had found the marital share of the equity in that condo to be \$57,352 and awarded wife half of that. The Court also required husband to pay \$11,000 of wife's outstanding balance on her student loan. And while husband argued that there was no way he should be responsible for paying off loans when he would not be benefitting from that education of his wife's, the Court points out that while she studied she used those funds to maintain the household. Thus he has benefitted already.

CHILD ABUSE – CPS DUTY TO TAPE RECORD INTERVIEWS – HARMLESS ERROR – BURDEN OF PROOF. In *Hobbs v. Conyers*, **unpublished**, 24 VLW 1026 (1/26/10), the Court of Appeals held that it was not harmless error for the CPS to fail or refuse (in violation of §22 Virginia Administrative Code ¶40-705-80(B)(1)) to tape record two interviews of an alleged victim. It was not proved to be harmless error. However, Judge McClanahan dissented, believing that the appellant has the burden of proving that the error was not harmless, and that the CPS should not be required to prove that it was.

PARENTAL RIGHTS TERMINATION – TRUANCY – NON-CORRECTED PARENTAL BEHAVIOR. The Court of Appeals does make it clear, at least in the **unpublished** opinion in *Disher v. DSS*, 24 VLW 1076 (2/23/10), that truancy, standing alone, is not a ground for parental rights termination under §16.1-283(B) and it reverses a trial court holding to that effect. But all's well that ends well for the DSS in this case however: the truancy here did not stand alone – at least as the Court of Appeals sees it. After all, the Court points out, this child was removed from her mother's home because of excessive absence from school, not once but twice. And as soon as the child got back to her mother's home (allowed upon a condition that the mother ensure school attendance), the mom did not actively-enough cooperate with the "Family Assessment and Planning Team," nor get the child to all of her mental health and medical appointments. And the child quit seeing the psychiatrist and still was very truant.

That's enough, under §16.1-283(C)(2), which requires clear and convincing evidence that termination would be in the child's best interests.

PARENTAL RIGHTS TERMINATION – VOLATILE PERSONALITIES – DURATION OF HYPOTHETICAL THERAPY CONSIDERED IN THERAPEUTIC PROGNOSIS. Whether the Virginia appellate courts evaluate such thinking and such arguments with a view to what the U.S. Constitution or the U.S. Supreme Court might think is a matter we can wonder about and perhaps have no right to actually know, but an **unpublished** Court of Appeals opinion in *Derr v. DSS*, 24 VLW 702 (12/1/09) sounds a loud warning to natural parents about the sorts of things that courts will consider if the DSS doesn't like them, but wants their kids. A couple who had at least one fight when the mother was holding the child, and who certainly had other arguments besides that one, completed an anger management class and a "batterer's intervention program," but they might as well have saved their time because the Court of Appeals says that was insufficient to allow them to retain those parental rights they had. The trial judge complimented them for trying, and in fact "completing many of the Department's requirements," but found it not enough. This was a serious situation: to have a child growing up in a household that included arguing parents. Someone, perhaps an expert witness, convinced the judge that only years of therapy could re-educate these parents sufficiently to allow them to have a child in their home. This child had already been in foster care for 19 months, so there you are. DSS couldn't wait any longer, nor could the child, while the parents might improve themselves or not, to free up this child for adoption.

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Richmond, Virginia 23219-2800

Richard E. Crouch, Newsletter Editor
2111 Wilson Boulevard, Suite 950
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