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Virginia Family Law Quarterly

VFLQ

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Message from the Chair

Larry Vance, Chair
Family Law Section

It is my great pleasure to be elected as the Family Law Section Chair for this year, and I look forward to continuing the work of the Board in the upcoming year. Special thanks to the immediate past chair, Dan Gray. Dan chaired the Board through a very successful year, and closed the book on some very contentious issues, making the prospects for my year that much brighter. I look forward to his continued assistance.

I want to express appreciation to Chris Malinowski and John Huntington, our former Board members who completed their terms in June. Chris made a tremendous time commitment for several years as part of the group that put together our CLE programs. John consistently reminded the Board of our responsibilities to our Section members and to improve the focus of the Board on alternative dispute resolution. As members leave, new ones arrive, and I extend a warm welcome to our newest Board members, Bob Henley, Rich Orsino, and Melanie Peters. We look forward their contributions to improving the Section.

In the upcoming year the Board will continue to strive to provide the Section with high quality CLE programs, relevant resources through the Section's webpage, and continue to produce this wonderfully insightful and useful publication.

In response to the *Guardian ad litem* survey this Section completed a few years ago, the Court Improvement Committee of the Virginia Supreme Court has initiated a workgroup consisting of current and former Board members, judges from the Juvenile and Domestic Relations District Court, practicing Guardians ad litem and other stakeholders. In the most recent survey published by the Office of the Executive Secretary of the Virginia Supreme Court, the input from the members of this Section greatly aided in these efforts. Many good things are in the works, and we look forward to possible changes to address concerns of our Section members. Hopefully, a more uniform performance from our Guardians ad litem is on the horizon.

Please feel free to reach out to any of the members of the Board, or directly through the Section webpage with any concerns you may have or suggestions for improving, not only the section, but also the practice of family law in Virginia. ❖

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Editor's Note

Brian M. Hirsch

Lawyers are typically slow to change (admit it, we are), whether it is technology, a new statute or a new judge. Alternative dispute resolution has taken literally decades to catch on, possibly because it was fairly different than traditional litigation or negotiation. It went in fits and starts from the 1970's into the 2000's, and is now here to stay. At first, it was a matter of survival; now, it seems we are in a time of refinement. We are beginning to find out what works and what doesn't. We are better understanding what our roles are in the process, whether mediator, collaborative lawyer or traditional lawyer. This issue has two great ADR articles written by Larry Gaughan, Karen Keyes and David Ginsberg. Expect other ADR articles as we continue to use this process.

Thanks to Linda Ravdin, who has written a quite thoughtful article on the Uniform Premarital and Marital Agreements Act and how it compares with our Marital Agreements Act. It often is a matter of "when" and not "if" such acts are introduced in the General Assembly, so stay tuned. Finally, thanks to Dr. Ed Farber for another insightful article, this time on clients with personality disorders, their effect on children and possible treatment.

Articles for future issues are encouraged and welcome. If you have any ideas, questions or comments about the Quarterly, please feel free to contact me at BHirsch@NOVAFamilylaw.com.

Happy reading –
Brian M. Hirsch, Editor

HOW TO SUBMIT AN ARTICLE

If you would like to submit an article for publication, please email it to Brian Hirsch at BHirsch@NOVAFamilyLaw.com. Most articles are between 1,000 and 2,000 words, but this should not limit you in submitting a shorter or longer article. Deadlines for submissions are February 21, May 21, August 21 and November 21.

UPCOMING FAMILY LAW EVENTS

October 4
VSB Annual Family Law Seminar
(Fairfax)

October 6
VSB Annual Family Law Seminar
(Richmond)

October 10
VSB Annual Family Law Seminar
(Norfolk)

October 13 & 14
Virginia Chapter of AMML (Richmond)

November 7-11
AAML Annual Meeting
(Chicago, Illinois)

January 18, 2018
AAML VA CLE
(Richmond)

If you would like to have your organization's event listed in an upcoming issue of the Virginia Family Law Quarterly, please email BHirsch@NOVAFamilylaw.com.

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Should Virginia Adopt the Uniform Premarital and Marital Agreements Act?

By Linda J. Ravdin, Esquire
LRavdin@PasternakFidis.com

Virginia adopted the Uniform Premarital Agreement Act (UPAA) in 1986, making it one of the first states to adopt.[1] The Legislature had the foresight to make the Virginia Marital Agreements Act (VMAA) equally applicable to postmarital agreements and divorce settlement agreements. The Uniform Law Commission (ULC)[2] approved the Uniform Premarital and Marital Agreements Act (UPMAA)[3] in 2012. The UPMAA creates more appropriate criteria for validity of premarital and postmarital agreements and makes subtle, but important, improvements in a number of other respects. It is a significant improvement over the UPAA and should be adopted in Virginia. The drafters of the UPMAA opted not to include divorce settlement agreements within its scope. However, the Legislature could include them, consistent with current law, so that all three types of spousal agreement would continue to be governed by the same rules.

The UPAA is unsatisfactory. Though adopted in half of U.S. jurisdictions, a number of adopting states made significant changes and a majority of the remaining states created validity standards that are more demanding than the UPAA. Thus, it did not succeed in creating uniformity. Moreover, it permits enforcement of an agreement that was unconscionable at execution. Yet a commercial contract that was unconscionable at execution is unenforceable.[4] It is difficult to justify this dichotomy. Further, the UPAA (and the VMAA) afford the most minimal procedural safeguards, allowing a proponent to present a premarital agreement close to the wedding with little opportunity for legal advice or a fair negotiation.

Both the UPAA and the UPMAA came out of a debate about the proper standards for validity of premarital agreements. One school of thought emphasized the need for predictability of enforcement and rejected the paternalism of the past that permitted courts to relieve a spouse of a bad bargain. The other school of thought considered substantive fairness more important and would have carved out a role for judges at divorce (but not at death) to reject a substantively unfair agreement. In both uniform acts the commissioners who favored predictability prevailed. The UPMAA requires a more robust process while adhering to the principle that parties are free to propose and accept (or reject) harsh terms.

The UPMAA provides for what practitioners generally call postmarital agreements – the UPMAA uses the term marital agreement -- to be governed by the same validity standards, and for the same freedom to contract as to property and spousal support, as a premarital agreement. A marital (or postmarital) agreement is an agreement executed by parties who intend to stay married and is distinguished from an agreement executed incident to a divorce or separation.

The criteria for validity of both types of agreement under the UMPMAA are: (1) voluntariness; (2) access to independent counsel; (3) if a party did not have counsel, a notice of waiver of rights or a plain language explanation of the marital rights or obligations modified or waived by the agreement; (4) financial disclosure or an effective waiver; (5) the terms must not be unconscionable as of execution.

The most important feature of the UPMAA is the requirement that the party receiving a proposed agreement have access to independent counsel before execution.[5] The UPMAA does not mandate actual representation, only a meaningful opportunity for such. Access means both the money to hire a lawyer and a reasonable time to find one, get advice, and consider that advice.[6] This requirement should make the process of entering into a premarital agreement more fair by forcing the party seeking the agreement to present the proposed agreement well in advance of the wedding date and, in some cases, to pay the legal fees of the recipient to enable him or her to retain counsel.

The UPMAA gives parties virtually a free hand as to disposition of property at death or divorce, and to completely waive or predetermine a fixed amount and duration of spousal support. It makes explicit that parties can waive a future claim for an award of legal fees and costs, something the UPAA only implied. It makes unconscionability at execution an

independent ground of attack, but does not alter the definition of unconscionability. This standard creates a high barrier for a party seeking to void an agreement. The challenging party must prove both substantive unconscionability – grossly unfair terms as of execution – and procedural unconscionability – a grossly unfair process.[7] Under the UPMAA, it will continue to be rare for an agreement to be thrown out on the ground of unconscionability. Moreover, access to counsel makes it less likely that an agreement will be unconscionable as each party will have a meaningful opportunity to get legal advice and negotiate the terms.

The UPMAA "is not meant to change the law"[8] as to what constitutes voluntariness or duress. A considerable body of law has developed around these concepts. The execution of a premarital agreement is often an implicit or an explicit condition for marriage. A choice between signing a contract a party does not like and not getting married is still a choice. Similarly, a decision to sign a disadvantageous postmarital or divorce settlement agreement is still a choice. Parties who have come to regret an agreement have tried a variety of duress theories but have rarely succeeded, even in the case of a premarital agreement presented at the 11th hour. The UPMAA will not alter this body of law, but the requirement for access to counsel will make it more difficult for a proponent to present the agreement at the last minute.

The UPMAA addresses the interests of the unrepresented party in several respects. First, as discussed above, it requires that the recipient have access to independent legal advice.[9] Second, the agreement must include either a "plain language" explanation of the marital rights or obligations that are modified or waived or a "notice of waiver of rights…conspicuously displayed."[10] The Act provides safe harbor text.

The UPMAA retains the UPAA requirement for financial disclosure, for constructive knowledge in lieu of formal disclosure, and for an express waiver of disclosure in a separate signed writing.[11] It makes some subtle improvements. First, it includes income in the requirement for disclosure; the UPAA is silent as to disclosure of income. Second, it requires a good faith estimate of values. Of course, parties are free to waive some or all disclosure.

Section 10 creates an important innovation to protect victims of domestic violence. A term of an agreement is unenforceable insofar as it limits remedies available to a victim of domestic violence.

The UPMAA improves on the UPAA regarding governing law. First, it permits parties to choose the law governing "validity, enforceability, interpretation, and construction" of the agreement.[12] By contrast, the UPAA permits parties to choose the law to govern construction and interpretation but is silent as to choice of law to govern a dispute about validity. Second, it provides that the law of the forum will govern a dispute about the agreement when it is silent as to governing law; in that event, the forum court need not engage in a choice-of-law analysis before turning to the substance of the dispute. This provision would obviate one phase of potential litigation in cases where a disputed agreement lacks a choice-of-law clause.[13]

Notwithstanding a valid choice-of-law clause, a forum court may refuse to enforce an agreement whose terms are "contrary to a fundamental public policy" of the forum state.[14] An agreement compliant with the UPMAA is more likely to be upheld in a state with more demanding requirements for enforceability. For example, Maryland law rejects enforcement of a premarital agreement that was unconscionable at execution.[15]

Conclusion

The UPMAA will raise the standards for validity of premarital and postmarital agreements. It strikes an appropriate balance between the reasonable expectations of proponents for predictability of enforcement of their agreements and the needs of economically disadvantaged spouses and prospective spouses for a genuinely fair process. By imposing a more robust process, especially the requirement for access to counsel, it should give persons on the receiving end of a premarital agreement a fair chance to either negotiate acceptable terms or cancel the marriage plans. It also should give needed protection to spouses considering such an agreement who are not separated or planning to separate. However, it will not require lawyers who are currently employing best practices in the conduct of spousal agreement negotiations to alter their protocols. ❖

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VFLQ ASK THE EXPERT

Parents with Personality Disorders

By Edward D. Farber, Ph.D.

The first appointment had already been cancelled. The patient said, "I looked you up and the positive reviews were mostly from females. You're obviously against men and probably make recommendations in favor of custody of women. My lawyer said I had to see you anyway because that was part of the agreement he made with the other lawyer, but they're probably in cahoots anyway. They both went to law school together. The whole thing is a rip off."

In my first clinical meeting with this 44-year-old father of a 10-year-old girl, he questioned whether the blinking light of my office phone meant that I was recording him. He would not sign the new patient HIPPA health records form without talking first "to his lawyer and a couple of other people." He asked what would happen to the notes I was taking and whether the judge would be reading all of my notes or just the ones that I wanted to give to the judge.

But on interview, this father did not present with any other diagnosable disorder. He was not depressed or excessively anxious. He held a technology position for several years, although was suspicious why he had been passed over for promotions a few times. There were no problems with drinking, legal altercations or anger management. Until his separation, he functioned appropriately, although he had a hard time maintaining friendships. He thought his soon-to-be ex-wife had been plotting the separation for a long time. He readily told me in the first interview that he had placed a tracking signal on her phone and a keystroke program on their home computer because she probably would do the same thing to him. He told me he did "everything" for his child, and his wife did nothing but still the child often was in trouble in school, having learning and social problems. He described arguments with his daughter, often not believing she finished her fifth grade homework or actually went to bed when she promised she would. He frequently tells his daughter they can't trust the mother and that she must be having an affair. As his daughter withdraws from him more and more, he becomes more and more suspicious.

The child, on her first clinical interview, was withdrawn and described a level of mistrust and social isolation. Academics were acceptable, but she had recently stopped playing basketball because no one ever passed the ball to her. Bedtime was often a stress point, with the separated parents still living in the same household, often in conflict. The child whined a lot, spent way too much time on YouTube and was just negative about so many things in her life. Here we have an example of a paranoid personality disorder and the suggestion of its burgeoning impact on the mental health of a child.

There is no question – the ability to effectively parent a child and the mental health of a child are clearly linked. Children of parents with significant personality problems have more social, academic and behavioral issues. They have greater incidences of attention-deficit disorder, learning disability, depression, anxiety and oppositional defiant behaviors. They are at greater risk for substance abuse, criminal activity and acting out behaviors as compared to children of parents who do not have diagnosed psychological or personality problems. But what we do not know is how much of the child's emotionality or behavior is due to genetics, the passing on of the traits of mental illness, how much is due to faulty parenting – a schizoid parent not able to demonstrate appropriate affection to an infant, how much is due to parent/child conflict with a dysfunctional parent, or how much is due to vicarious learning – a child modeling inappropriate behaviors or thinking by living with and observing these behaviors in a parent.

But not all children with a dysfunctional parent develop poor behavioral, emotional, social, academic or cognitive outcomes. There are many other factors, in addition to one parent's illness that clearly influence outcomes in the child. The emotional stability of the other parent or adults in the life of the child clearly

plays a powerful role. The presence or absence of poverty and marital conflict is important. The temperamental style of a child – is she an easy baby to care for or a "mother killer," – will influence outcome. Does the child have special needs? Is the parent's illness chronic or situational? Are there periods of healthier parent/child interactions and periods of bad interactions? It is often not a question of good versus bad parenting, but where on a continuum do these interactions fall. Was the parent more emotionally functional until a significant stressor, such as marital discord or divorce? A parent with suspiciousness and paranoia will have a different impact on a toddler than on a 16-year-old who already has a driver's license. Some children are just more resilient, and even with very powerful stressors, do not demonstrate mental illness. There is tremendous variability from personality problems on the ability to parent. Personality difficulties themselves do not always translate to poor parenting. The question becomes, "how does mental illness functionally impact parenting?"

Report of mood and personality functioning can come from many sources. We ask questions about functioning and systems – how much do you sleep, how much of an appetite do you have, are there changes in your sex drive, do you enjoy being with others, do you cry for no apparent cause, are you optimistic or pessimistic about your future? Obviously the context and severity of each of these responses is important. Structured specific questionnaires and psychological tests such as the Minnesota Multiphasic Personality Inventory (" MMPI-II"), the Millon Clinical Scales, Beck Depression Inventories, Behavioral Assessment Scales, all either evaluate the individual's responses compared to a normative sample or match an individual's pattern of responses to those patterns of responses of individuals with known psychological problems.

Behavioral observations are important in both making the initial diagnosis and exploring the functional impacts of these diagnoses. Is the person excessively sad? Does he have emotional energy to deal with problem situations? Is her thinking excessively negative, hopeless and helpless? Is energy level excessively low? We observe parent/child interactions in structured situations and in a natural environment. Can the depressed parent set structure and boundaries for a child, can he respond to an infant's needs with appropriate emotional fortitude or do significant or subtle needs of the baby go unfulfilled?

Mental illness in adults falls into four broad categories: major mental illness, adjustment reaction, specific disorders, and personality disorders.

1. **Major mental illness.** These are thought disorders or affective diseases. Thought disorders, such as schizophrenia, impact individuals who have a severely distorted perception of reality. Thinking is disorganized and reactions to events in the world are exaggerated or inappropriate. These individuals may be delusional and have odd or illogical beliefs. Hallucinations, sensory disturbances – all lead to a belief that these individuals are seeing or hearing or behaving or believing things that others do not. Affective disorders show severe psychopathology and distortions in emotions in activities rather than in thinking. People can be extremely depressed or manic, that is hyperagitated or hyperexcited, or in the case of a bipolar disorder, can shift from one mood to another rapidly from depression to mania from mania to depression.
2. **Adjustment reaction.** Adjustment reactions are temporary, distorted or exaggerated responses to a severe stress. They can take the form of any of the behavioral or emotional features. You may see depression or anxiety or excessive anger, but these are temporary in nature and a not a fixed part of the individual's personality. The life history is healthier and more solid and shows time periods of psychological stability and flexibility in the individual. The current symptoms of distress are a stress reaction to a specific situation and not an indication of ongoing pathology. The individual has an ability to regain the prior higher level of functioning.
3. **Specific disorders.** There may be one or two specific behaviors that impact the individual's functioning. These can vary in intensity and how they impact the child. The parent who has a specific fear of heights or driving on bridges would have a very limited parenting negative impact compared to a parent with a specific eating disorder that may severely limit a child's eating repertoire.
4. **Personality disorders.** A personality disorder describes an individual who is "locked in" for many years with exaggerated personality traits that influence and interfere with many aspects of functioning in life. Personality disordered individuals are not likely to change their behaviors or attitudes. They believe their perception of re-

ality and interpersonal relationships are accurate. They are minimally aware that their perceptions are exaggerated or distorted.

The Diagnostic and Statistical Manual 5 ("DSM 5") gives very detailed criteria for diagnosing personality disorders. These include an enduring pattern of inner experience and behavior that deviates markedly from the expectation of the individual's culture. It can affect cognition, affectivity, interpersonal functioning and impulse control. It is inflexible and pervasive across a broad range of personal and social situations and leads to clinically significant distress or impairment in social, occupational or other important areas of functioning.

The DSM 5 clusters personality disorders into three groupings based on descriptive similarities. Cluster A includes paranoid, schizoid and schizotypal personality disorders. Individuals with these discords often appear odd and eccentric. Cluster B includes antisocial, borderline, histrionic and narcissistic personality disorders. Individuals with these disorders often appear dramatic emotional and erratic. Cluster C includes avoidant, dependent and obsessive-compulsive personality disorders. Individuals with these disorders often will appear anxious or fearful.

The DSM 5 also includes a hybrid dimensional and trait based diagnostic model that accounts for a range of functioning from high, competent and consistent capability to inconsistent, fluctuating and low functioning with co-morbid mental illness. It also focuses on both internal more emotional states as well as external more behavioral states.

Individuals frequently present with co-occurring personality disorders from various clusters. Prevalence estimates for the different clusters suggest 5% of the population for Cluster A, 1-2% of the population for Cluster B, and 6% of the population for disorders in Cluster C. About 9% of individuals will be evaluated as having any type of personality disorder. Data from the 2000 and 2002 National Epidemiologic Survey and Alcohol-Relation Conditions, suggest that approximately 15% of U.S. adults will have at least one personality disorder.

The difficulty is that most personality disorders will not change without treatment, and the vast majority of individuals with personality disorders never seek treatment. Those who do, typically drop out of treatment. Various studies have demonstrated that over 70% of such individuals who begin treatment drop out of treatment.

Cognitive behavioral therapies can help personality disordered patients identify and change core beliefs and/or behaviors that underlie inaccurate perceptions of themselves and others and problems interacting with others. Cognitive behavior therapy may help reduce a range of mood and anxiety symptoms and reduce the number of suicidal and self-harming behaviors that are most typically seen in these patients with personality disorders.

Dialectal Behavior Therapy or DBT, utilizes the concept of mindfulness, of being aware and attentive to the current situation and moods. It teaches skills to control intense emotions, reduce self-destructive behaviors and improve relationships. No medications have been approved for the treatment of personality disorders by the Food and Drug Administration. Use of mood stabilizers and antidepressant medications can somewhat help with symptom reduction for these individuals. Many individuals with personality disorders will show other powerful co-morbid behavioral and emotional symptoms – anger, depression and anxiety and there is an attempt to treat those.

Personality disorders are often seen as problems of emotional regulation. The goal is to teach a patient alternative ways to control overwhelming and confusing feelings and to accurately observe emotions without overreacting to them or seeking instant relief through self-harm. As therapists, we accept the reality of a client's emotions, while presenting alternative behavioral responses. Therapists also challenge the dysfunctional core beliefs that personality disorder patients have about themselves and others in their world. We would work with both the parent and the child in the introductory case study to help them perceive their environment more appropriately and to make better behavioral and emotional response. Sadly, however, there is little empirical evidence that shows powerful success in treating the core personality disorders and most therapists will work on amelioration of symptoms in attempts to manage the behavioral difficulties that arise from the personality disorder.

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Dr. Farber is a clinical psychologist is Reston, Virginia. He is also a clinical assistant professor at George Washington University School of Medicine, and author of ***Raising the Kid You Love with the Ex You Hate****. An earlier version of this article was presented at the Conference for Juvenile and Domestic Relations District Court Judges in May 2017.* ❖

What ADR Professionals Can Learn from Litigating Divorce Lawyers

By Lawrence D. Gaughan, Esq.
ldgaughan@gmail.com

A vast majority of divorce cases are resolved by agreement. However there are two divergent methods for negotiating those agreements. Much current interest is focused on alternative dispute resolution ("ADR"), consisting mainly of mediation and collaborative practice, with the other approach being conventional divorce law practice. Although a growing number of divorce lawyers are actively involved in ADR, there needs to be more interaction between adherents of each approach.

It's easy for an ADR professional outside of conventional family law practice to feel a certain moral superiority over divorce litigation. Such litigation can be expensive, time-consuming, and emotionally draining. What may get lost in this context, is that divorce litigators also resolve most of their cases through negotiated agreements. This is true even though these lawyers generally handle more of the more difficult cases. It's time for ADR professionals to consider with an open mind what they can learn about divorce negotiating from the experience of lawyers in conventional divorce practice.[1]

Divorce settlements differ from other areas of ADR as they were informed by the adversarial legal system prior to the advent of ADR for divorces in the late 1970's. When a case was settled by agreement – as most were – the immediate goal in settling was to avoid litigation. So, it seemed sensible to try to figure out what the court might do, and then use an agreement to do approximately the same without the need to appear before a judge.

Since litigating attorneys often handle some of the more difficult cases, they tend to have a different client base from ADR professionals. ADR professionals should recognize that there are definable categories of cases that resist being settled, and that when they are settled, it may even have to be done in ways that don't always fit into "proper" ADR negotiating methods. These adversarial means include using procedural court strategies, such as civil discovery devices and motion hearings, to put pressure on settlements. They can also involve the use of threats based on predictions of court outcomes or taking certain unilateral actions, such as withholding finances.

In ADR circles, the use of tactics deemed coercive is considered unethical. Litigating attorneys would argue that the primary goal of reaching an agreement has to be to settle a case that would otherwise need judicial resolution, which is an even more coercive process. However, attorneys in conventional family law practice can be, and often are, as skilled as ADR professionals in framing creative settlement options.

If we accept that there will always be some divorce cases that get litigated, the issue becomes how to resolve by agreement as many of the most difficult cases as possible. The fact that court is the clear alternative to reaching an agreement is already a coercive element that hovers over many negotiations. In order to consider the interplay between conventional "legal" and ADR process options, let's take a look at a realistic domestic relations situation that illustrates the possible limitations of both adversarial negotiations and ADR problem-solving.

James and Marie have been married for 22 years and have three children ages 19, 15 and 13. James has an MBA and is a hedge fund manager. Marie has been a stay-at-home parent. They graduated from college and were married in the same year, and James then got his MBA. Their youngest child, Chester, has serious ADHD problems, and has struggled in school. James became a beneficiary of a large family trust fund at age 21. Since then he has used his trust income to finance his financial consulting business. For years, he has spent an average of 55 hours a week managing the money he received from the trust fund and working with his clients on their investments.

Four years ago, James started an affair with a woman in Baltimore named Jennifer. The affair continued even after Marie found out about the relationship 11 months ago. Marie believes that James has spent well over $200,000 on Jennifer, including buying her a new BMW convertible. The parties still re-

side in the same house, although James moved into a separate bedroom after Marie found out about the affair. When Chester experienced serious behavior problems at age 4, Marie started drinking frequently. Her drinking increased after she learned of the affair, and she assaulted James on several occasions when she was inebriated. In one incident he suffered a broken nose. Marie also yells at James and calls him obscene names.

The parties consulted a mediator, but the meetings were not productive. James refused to produce documents concerning his income and expenditures, and Marie consistently failed to fill out forms as to her financial needs. James' extended family has insisted that he retain the income from the trust fund and his business. Marie's parents separated when her father walked out when she was 9, and her mother has urged Mary to "take that philanderer for every cent."

When the mediator declared an impasse, the parties decided to try the collaborative process. Both parties retained collaborative lawyers. The attorneys recommended both a neutral financial specialist and divorce coaches. Despite the terms of the collaborative agreement, James turned over less than half of the requested financial documents. Marie refused to list her expenses and other needs, saying that she would do so only when James produced the requested documents.

James said that he was willing to pay Marie enough to live separately and have clear title to her own home, insisting she did not deserve more. Marie said she was entitled to substantial lifetime spousal support and to half the marital assets, and would not accept less. At the three collaborative meetings, Marie screamed at James and James stonewalled on further disclosures and walked out. Marie announced she was going to hire the toughest lawyer available to file for divorce. The frustrated professionals terminated the collaborative process.

Where does this case go from here? Let's consider some perspectives on the difficulties that a case such as this one might pose:

The applicable law is relevant to the settlement. Clearly this case requires legal expertise, which consists of the statutes, case law, and counsels' trial and settlement experience. The most immediate legal issues relate to marital property. Although James' family trust and the income directly from it are separate property, James' personal efforts during the marriage to manage and increase those funds may make the resulting assets marital property to the extent they result from those efforts. This results in a complicated situation of hybrid marital and separate property. One such hybrid asset is James' business. Furthermore, to the extent that marital property is dissipated by a spouse for non-marital purposes, it may be "recaptured" for settlement purposes. This means that there are two substantial tracing issues. These suggest a need for financial as well as legal expertise.

Grounds for divorce may be legally relevant to settlement, depending upon state law and the context. Adultery remains a ground for divorce, and fault is a factor in spousal support and equitable distribution, and these may make a difference in settlement in some states. The law governing spousal support and equitable distribution is quite contextual, often leaving broad areas of discretion for a trial judge.

Litigating attorneys are acutely aware of the impact of the law, especially in complex situations. Some aspects of a judicial outcome may be relatively predictable, while others are not. Although it is difficult to accurately predict the outcome of a particular case in court, these lawyers are aware of the legal parameters and how to obtain needed financial or accounting expertise. There are many ways skilled divorce lawyers use their technical legal knowledge to understand the risks and benefits a client may encounter in court, and to identify tradeoffs that might not be obvious to someone less skilled. Lawyers are also aware that litigation often actually encourages the parties to get serious about negotiating when settlement discussions have stalled or there are disclosure problems.

Framing creative settlement options. ADR professionals clearly do not have a monopoly on creative settlements. Possible solutions include: (a) dealing in advance with future contingencies; (b) involving tradeoffs that a court might not otherwise be able to order; (c) taking into consideration expert advice from a variety of sources; and/or (d) fine-tuning specific needs and goals of the parties. Family law attorneys have been doing this kind of negotiating long before the advent of ADR. There is no reason why such negotiating cannot be done effectively in adversarial cases. Using creative options should be treated as an area of basic commonality between the best adversarial and ADR negotiators.

ADR adherents might argue that option-based negotiating works better and is less expensive if it is done in a problem-solving rather than an adversarial

context. A lawyer might respond that all contested divorce negotiations have a certain adversarial component. Every model of dispute resolution in some way or another takes this basic fact into consideration. The expertise lawyers have in understanding the legal framework and the impact of possible court outcomes may work better in resolving some divorce cases. In others, the broader (less legalistic) views of ADR professionals and their ability to consider a fuller range of options as relevant may afford more scope to be creative. Neither set of options should be deemed exclusive. Nothing says that a negotiating professional may not draw ideas from both sides.

The importance of proper disclosures. Many difficult cases present not only legal complexities, but also disclosure problems. It's easy to understand why James and his family might resist full disclosure, but equally clear that such disclosure is necessary for settlement decisions. In a case that calls for expert analysis, such as that of an accountant skilled in tracing, there is no way that the expert can produce an informed opinion without the documents. Both the attorney and the expert will know which documents are needed for the tracing. Counsel also know how to draft non-disclosure orders and agreements to protect confidentiality of such information.

If a party refuses to produce needed documents, the default way to obtain them is to file a divorce action and invoke the civil discovery rules, including questions that a party must answer under oath, depositions of parties and witnesses, subpoenaing documents and requests for production of documents. In the case of James and Marie, the request for relevant documents could legitimately cover the entire period of the marriage and be quite extensive for any given year. Not producing the relevant documents is just not an option.

The emotional context. The emotions experienced by James and Marie have a basis in their marital history, nature of their conflict, and influence of their extended families. Their roles in the marriage have been so different and their goals so diverse to make effective negotiating difficult. Here, the husband controlled the finances and the wife was willing to play a role with which she was comfortable. With their separate futures on the line, it is understandable how each may respond to their present conflict in ways that are positional, competitive, and inflexible.

Even the most experienced divorce attorneys are not necessarily skilled enough to understand the impact of the various emotions on a possible settlement. In a negotiating context, assessing the type and level of the parties' emotional involvement is critical as it affects how disputes can be resolved. Marie will probably achieve a generous settlement, but less than if the assets had been all marital property. Directing the attention of each of them to future-based options relating to their respective goals can take their focus off the past problems and incidents of the marriage.

Divorce lawyers can be part of the solution rather than contributors to the problem. Thoughtful legal advice can address responsible solutions in ways that legal information coming from a mediator or counseling from a collaborative coach cannot. However, such advice is not likely to be followed, unless the attorney understands and respects the client's emotions in the matter. A lawyer must be able to assess the nature and extent of the client's emotional investment in the conflict itself, as well as in the particular details of the conflict. The next step is to determine if those emotions extend beyond the client's own rational self-interest, and if so, to determine how to keep the negotiations on track.

Lawyers work with experts to identify settlement options. In a case where sufficient assets are available, skilled attorneys have a better opportunity to identify future-directed settlement options. For James and Marie, this might permit James to retain the majority of the assets sufficient to keep his business viable, while providing Marie with a generous settlement that makes her comfortably self-sufficient. The skill required from a lawyer or a financial expert, such as a CPA or financial planner, is to identify reasonable parameters for such possible settlements. It's possible that such advice could come from a neutral expert, but there is always the question of the extent to which each party will trust such neutral advice.

There are differing but legitimate legal and financial methods to analyze how much of James' income and assets are marital and how much are separate. These approaches can be used to define the credible parameters within which a compromise settlement might occur. The final consideration is to ascertain where any compromise agreement leaves each party for the future. That could even be better as a final test for a possible agreement than any speculation as to what a court might do in a case such as this.

The case of James and Marie is just one illustration of the kinds of complexities that make cases difficult to settle. Suppose, for example, that issues arise

concerning the stability of each party and the parenting that the minor children, and especially Chester, may need. A special kind of mental health expertise pertains to children whose parents are separated and divorcing. Due to the strong emotions surrounding litigation over custody, it is not unusual for both sides to agree upon an independent evaluation by an experienced mental health professional.

Such a neutral evaluating professional is generally precluded from making a fixed recommendation on how the case should be decided, but can provide useful information and specific findings that may have an impact on the judge's decision. While the expert's report is often then used as a step in the process of reaching an agreement, there may be some room for further negotiation. Each party still needs to be able to trust the legal advice he or she receives regarding the terms of an agreement. Custody evaluators and parenting coordinators are probably used more in contested adversarial cases than in family mediation or collaborative practice.

Summary

An ADR professional who has not been involved in divorce negotiations between first-rate lawyers in difficult cases may not appreciate the level of skill and knowledge they bring to settlement discussions. It's certainly possible that a case such as that of James and Marie could also be resolved by a skilled and experienced mediator using appropriate experts (including attorneys on each side), or in a properly structured collaborative practice case. But it's easy to understand why each party may only fully trust his or her own attorney in the process, and why some pressure may be required to obtain the necessary exchange of disclosures and foster sufficient incentives to reach a full agreement.

In summary, here are important structural aspects of divorce negotiating that ADR professionals can observe in negotiations between experienced litigators:

- Even though there may be many reasons why the legal framework may not be the only or final factor, it is certainly a relevant factor and may be crucial to the settlement.
- Settlement options can be creative; yet, choosing among them may also require taking into account practical legal considerations.
- It is essential in all difficult cases to identify the appropriate need for disclosures and determine the best means to obtain them.
- The settlement process must take into account the emotional context of the dispute as well as the substantive issues.
- The types of expertise needed and the proper experts should be identified as early as possible in difficult cases.
- In suitable cases, a credible assessment of the parameters of a "global" compromise may be useful. This involves comparing different but legitimate methods of legal and financial analysis.
- Every settlement should have a final review as to where the resulting agreement will leave each party for the future.

There are still cases that will need to be litigated, and others in which any negotiations may seem to require certain "hardball" tactics. There are many cases in which ADR styles of negotiating may be more effective, regardless of the particular structure of the negotiations. The challenge is finding the style of negotiating that best fits the context and needs of any given case. The process of negotiating divorce agreements will better serve the public interest if we recognize the ongoing value of professional exchanges between lawyers in conventional family law practice and ADR professionals. Each has something of value to offer the other. ❖

Endnotes

1. A prior article, *Using ADR Ideas to Negotiate Divorce Agreements*, takes the other side of this same issue, namely that lawyers in conventional family law practice could profit from becoming better acquainted with ADR ideas. That article postulates that spousal negotiations are dysfunctional to the extent that the spouses are *positional, competitive,* and *inflexible*. All of these attitudes not only result from, but also add to, the emotional level of marital conflicts. The article suggests that when these impediments to productive negotiations appear in the divorce process, they probably existed during the marriage and were likely to have also been involved in the decision to divorce. See, http://www.creativedivorce.net/wp-content/uploads/2016/09/Using-ADR-Ideas-to-Negotiate-Divorce-Agreements-1.pdf

How Collaborative Divorce Can Be Different

By Karen L. Keyes, Esquire
kkeyes@keyeslaw.com
and
David L. Ginsberg, Esquire
dginsberg@cgglawyers.com

Every family is unique. When marital problems arise, the family needs a process that offers the flexibility to meet the specific challenges and needs of that family. Collaborative divorce enables the parties to organize a team of professionals to design a process that fits their situation.

Those in the legal profession frequently ask: "How is Collaborative divorce different? Isn't that what we already do when we settle a case? What does the client get out of a collaborative settlement that they don't get from a traditionally negotiated settlement? We only go to court after we have tried to settle the case." So, how is collaborative divorce different from mediation and attorney-attorney negotiation? How can the outcome be different or impact relationships over time?

At the outset of a case, the emphasis is on the client's concerns and questions. The collaborative team collectively develops goals and interests that the parties want to achieve in their divorce settlement. These goals often include items that the court may not have the authority to address, but the parties want to resolve.

When considering settlement options, the parties are encouraged to consider a variety of reference points, including legal rights to determine what a "fair" settlement would be. Attorneys help their clients create options that accomplish their goals rather than locking into positions. As the parties create options and explain the rationale behind them, they get the opportunity to express their feelings to their spouse. Not only does the process provide the parties with a safe environment to share these feelings, but it also allows them to do so without the limitations of evidentiary rules and a question-answer format. Rarely does a party leave the collaborative process feeling the result would have been better if only the judge/spouse/opposing attorney had only heard the full story.

When clients express themselves they reach an agreement based on all relevant information. They understand why and how the agreement's terms were reached, and they tend to be much happier with the outcome. When clients accept how they reached the agreement, understand why, and are pleased with the outcome, they are much more willing to comply with its terms.

How can the process be customized for parties and how does this add value? One requirement of collaborative cases is that both parties have an attorney. The parties and attorneys jointly determine who else should be on the team. Other team members, such as mental health specialists and financial specialists, function as neutrals. As neutrals, these specialists help everyone, and avoid situations where experts are competing with one another. In addition, neutrals act as facilitators and are invaluable in moving discussions forward when they might otherwise get bogged down with the parties or attorneys locking into positions.

Attorneys still provide legal advice to clients, but they also help the clients negotiate issues that arise in the real world, not just issues over which the court has authority. Mental health specialists serve as divorce coaches and child specialists. Coaches and child specialists help clients develop parenting plans designed to meet the child's needs and interests, and to establish communication protocols for the parents and children. Coaches are invaluable in helping clients manage emotions, expectations, and communication in a productive manner, thereby enabling attorneys to focus on the legal and negotiating aspects of the case.

Financial specialists are always neutral (instead of an expert on each side). They frequently are responsible for gathering financial information, performing tax calculations, preparing financial projections, and assisting parties with developing and evaluating settlement options. The financial specialist helps the par-

ties understand their finances, discuss money in a constructive manner, and enables them to see what their financial projections are before signing an agreement.

How does the team function? Like all teams, collaborative teams require coordination to operate efficiently, but the sum of their parts is greater than the individual. By focusing on the parties' goals, the team members fulfill their roles in a manner designed to keep moving the case forward. While each professional focuses on his or her specialty, it is done within the team process and an understanding of what the ultimate objective is.

Is all this teamwork helpful? The focus on communication (especially listening), and use of terminology that is respectful makes a huge difference. Not only does this language enable parties to explore a variety of creative options, but the free flowing conversation makes it much easier to reach a settlement. The advantages of open and improved communication, rather than the acrimony arising from traditional negotiation tactics, benefits the parties well after the divorce process is complete, especially when children are involved.

Furthermore, the collaborative process creates an opportunity for transformative experiences through apology, trust building, improved relationships, and happier independent lives. Although not every collaborative case leads to a transformative experience, many create healthier long term environments.

What are some examples of how the collaborative process enables the parties and their families to meet their goals/interests?

(1) When one parent is a recovering alcoholic or suffering from mental health issues, the children and parents benefit if both parents are healthy. Adversarial negotiation may be too stressful or difficult for such a parent, and could cause the parent to regress. A supportive team, whose collective goal is to create an environment in which both parents can have positive influences on the children, will give that parent the best chance of overcoming his or her challenges and being a good parent. Coaches and child specialists can have difficult conversations, create manageable and effective restrictions in a parenting plan, address safety issues, and help develop a plan that both parties embrace. The collaborative process gives the recovering spouse the best chance to succeed as a parent, family member and employee, and enables both parents to improve trust while protecting their children from risks and conflicts.

(2) One or both parents may be concerned about a child's (even an adult child's) reaction to his or her parents' divorce. This concern may derive from religious beliefs, a party's identity as a parent, or a fear that he or she will be blamed for the divorce. The team can develop a strategy for the parents to employ when talking with their children about the separation, and also create a settlement that incorporates religious holidays, family vacations, special traditions, etc. with the children to minimize the impact on the children. Child specialists/coaches talk with the parents and children to ensure that the settlement is designed to meet everyone's needs to the extent possible.

(3) One party wants to avoid sorting through everything that happened in a long-term marriage, particularly when the other spouse has a history of depression, and a primary goal is to keep that spouse healthy. By emphasizing the importance of calm, respectful, and supportive conversations, the parties can honor a lengthy marriage and generate forward-focused solutions. The parties can adopt a narrative with mutual responsibility for their separation and agreements reached.

(4) The parties are not communicating; they have a child with special needs; and their finances are strained. A coach can help the parties move from no communications to using dialogue, email, text etc. without involving the child in the conflict. A financial specialist can work with the team to create a child support arrangement that does not interfere with government benefits available to the special needs child.

(5) The father has a complex compensation package. The mother focused on parenting and knows little about the family finances. Now that the parties are separating, they need two homes and the mother is scared about her financial future and how she will afford hous-

ing. A financial specialist can help the parties prepare current and projected budgets together. This enables them to reach a settlement the mother understands, and feeling that she can make ends meet.

Conclusion

A collaborative settlement is often better than a traditionally negotiated settlement since the result may be more than what is "on paper." The experts that form the collaborative team approach a case with the goal of finding solutions that work for the entire family. These experts are looking to find a "win" for everyone, not one client over the other. Although this approach pays huge dividends in every case, it is especially important when children are involved and parents gain the tools to create a positive emotional and financial environment for their children, both during the divorce process and afterward. It is not merely a settlement but an opportunity to help change lives. ❖

Should Virginia Adopt the Uniform Premarital and Marital Agreements Act
Continued from page 5

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Linda J. Ravdin was the ABA Family Law Section Co-Advisor to the Uniform Law Commission, Drafting Committee on Premarital and Marital Agreements. She is a member of the bars of Virginia, Maryland, and the District of Columbia. She practices family law exclusively with the Bethesda, Maryland, law firm, Pasternak & Fidis, P.C. She is the author of ***Premarital Agreements: Drafting and Negotiation, 2d ed.*** *(ABA 2017) and* ***849-2nd T.M., Marital Agreements*** *(Bloomberg BNA 2012).*

Endnotes

1. Code of Va. Ann. 20-147, *et seq*. There minor differences between the UPAA and the VMAA.

2. Also known as the National Conference of Commissioners on Uniform State Laws.

3. Available at www.uniformlaws.org

4. UCC § 2-302(1); *Restatement (Second) of Contracts* § 208 (1981).

5. UPMAA § 9(a)(2).

6. UPMAA § 9(b).

7. *Galloway v. Galloway*, 47 Va. App. 83, 92, 622 S.E. 2d 267, 271 (2005) (agreement giving husband 94% of property was not unconscionable where no overreaching or oppressive behavior and he advised wife she could contact a lawyer).

8. UPMAA, Sec. 9, Comment.

9. UPMAA § 9(a)(2).

10. UPMAA § 9(a)(3), (c).

11. UPMAA §9(d). The VMAA deleted the constructive knowledge option. The Legislature could similarly delete the constructive knowledge option.

12. UPAA § 4(1).

13. *See Black v. Powers,* 48 Va. App. 113, 628 S.E. 2d 546 (2006), where two Virginia residents traveled to the Virgin Islands, signed a premarital agreement with no choice-of-law clause and got married. The appeal resolved the dispute about applicable law in favor of Virgin Islands law.

14. UPAA § 3(a)(7) (1983.

15. Cannon v. Cannon, 384 Md. 537, 57d, 865 A.2d 563, 582, n.18 (2005).

VFLQ CASES OF THE QUARTER

Custody – Special Immigrant Juvenile Status

Name: *Canales v. Orellana*, 67 Va. App. 759 (2017)

Facts: The mother petitioned the circuit court for custody of the parties' minor child and for findings of fact necessary to satisfy the requirements of the Immigration and Nationality Act ("INA") so the child could later be granted Special Immigrant Juvenile Status. The father was in Honduras and has served by publication. The trial court granted the mother custody, but did not make the predicate findings necessary for the child to obtain Special Immigrant Juvenile Status. The trial court stated that it did not have jurisdiction to make the predicate findings regarding Special Immigrant Juvenile Status since such authority is not set forth in the Code of Virginia.

Issue: Whether the trial court: (i) had jurisdiction to make the predicate findings of facts required for the child to acquire Special Immigrant Status for immigration purposes, and (ii) erred in declining to make the specific findings of fact the mother requested.

Ruling: The Court of Appeals, *en banc*, affirmed the trial court.

Rationale: The Virginia General Assembly has not enacted any statute specifically authorizing Virginia courts to make Special Immigrant Juvenile Status findings of facts described in the INA. Further, nothing in the relevant federal statutory scheme can fairly be read as an attempt by the U.S. Congress to convey jurisdiction to state courts to actively participate in immigration and naturalization decisions. Nothing in the INA directs a state court to do anything more than carry out its adjudicatory responsibilities under state law. Further, while there is much overlap between the required SIJ findings of fact and the factors under Virginia Code § 20-124.3, a state trial court is not required to make the SIJ findings of fact. It is only required to make such findings of fact as necessary under state law. In the present case, the trial court weighed the factors under Virginia Code § 20-124.3, and did not make the findings which the mother requested since, in the opinion of the trial court, there was insufficient evidence to support such findings. The Court of Appeals will not retry the facts, reweigh the preponderance of the evidence or make its own determinations of credibility.

Spousal Support – Income Averaging

Name: *Tidwell v. Late*, 67 Va. App. 668 (2017)

Facts: The father is an independent contractor, doing film and television production. His income was $63,000 in 2012, $48,500 in 2013, $40,000 in 2014, $42,000 in each of 2015 and 2016. The company the father works for is owned by his current wife, who determines the husband's income. The trial court found that the father's income was $4,314 per month less $301 for self-employment tax, which the trial court achieved by averaging the last four years of the father's income. The trial court then used this average amount for the father's income in determining the child support amount of $662. The father appealed.

Issue: Whether the court erred when it averaged the father's gross income for the past four years to calculate his income for child support purposes.

Ruling: The Court of Appeals reversed the trial court on this issue, and remanded the matter back to the trial court.

Rationale: A trial court's calculation of child support is a combination of mandatory steps and broad discretion. The starting point for a trial court in determining child support is to calculate the presumptive amount of child support according to the statutory guidelines using the parents' actual gross incomes. After determining this amount, the trial court may thereafter deviate from the presumptive guideline amount. For cases in which a party's income fluctuates, a trial court may average a party's income over a reasonable period of time in order to ascertain a party's true earning capacity. However, a court may only do this *after*

determining the presumptive amount of child support. Since the trial court in this case did not first determine the presumptive amount and then deviate, it erred.

Civil Procedure – Court's Refusal to Modify Pretrial Orders

Name: *Reaves v. Tucker*, 67 Va. App. 719 (2017)

Facts: The trial court entered two pretrial orders, establishing deadlines for exchanging appraisals of contested property as well as exhibit and witness lists, and setting a trial date. The wife subsequently asked for additional time to provide the appraisals, which the trial court denied since the wife had no reasonable prospect for getting the funds together to hire appraisers by the proposed extended deadline. The wife's counsel withdrew. The wife filed a motion for continuance, which the trial court denied. The wife appeared pro se at the trial and asked for a continuance (based in part on her filing an interlocutory appeal of the denial of the prior request for continuance), which the trial court again denied. At trial, the trial court granted the husband's motion *in limine* barring the wife from putting on any witnesses (except herself) and introducing any exhibits not previously provided per the pretrial order. The wife appealed.

Issue: Whether the trial court erred in: (a) denying the wife an extension to provide the appraisals, and (b) denying the wife's motion for continuance of the trial date while an interlocutory appeal was pending.

Ruling: The Court of Appeals affirmed the trial court's ruling.

Rationale: An interlocutory appeal does not automatically divest the trial court of jurisdiction. The Court of Appeals must first determine if the appeals falls within its subject matter jurisdiction. In this case, the appeal was ultimately dismissed for lack of jurisdiction. Thus, any decision the trial court made was within its jurisdiction since the Court of Appeals never assumed jurisdiction over the matter. The trial court's decision not to extend the deadlines in the pretrial order was within its discretion. The wife failed to show that the requested extension would likely have enabled her to obtain the appraisals, and therefore, did not meet her burden of proving good cause for the extension. The decision to grant a motion for a continuance of a trial date is likewise within the sound discretion of the trial court and the trial court's decision shall only be reversed upon a showing of abuse of discretion and resulting prejudice to the movant. The wife failed to provide the trial court with good cause for a continuance. The trial court also did not abuse its discretion in upholding the pretrial order and granting the husband's motion *in limine*.

Child Custody – Court's Ability to Amend Parties' Stipulation

Name: *Varma v. Bindal*, 17 Vap UNP 2100162 (2017)

Facts: The parties have a three year old daughter. The father, a physician, admitted to addiction and abuse of prescription drugs. He was required by the Board of Medicine to participate in the Physician's Assistance Program. The parties entered into a stipulation that the father would inform the mother if he violated any conditions of the program. At a hearing for entry of the final decree of divorce, the trial court was requested to incorporate the custody stipulation and hear arguments on the mother's motion to require the father to provide access to mother regarding the status of his participation in the program. The mother's counsel proffered that the father had relapsed into his drug abuse and that there should be a reliable method to determine the father's status within the program. The trial court incorporated the stipulation, and also granted the mother's motion for access to the requested information. Specifically, the trial court ordered the father to authorize the mother to be able to obtain information directly from the program and for him to sign documents and release forms to authorize the mother's access to such information. The father appealed.

Issue: Whether the court had the authority to enter a supplemental order to the parties' stipulation regarding custody of their minor child.

Ruling: The Court of Appeals affirmed the trial court.

Rationale: Virginia Code § 20-124.2(E) provides that the court shall have "continuing authority and jurisdiction to make any additional orders necessary to effectuate and enforce any order entered" regarding

the custody or visitation of a minor child. This power is unaffected by any contract entered into by the parties regarding the child. The court's supplemental order to the parties' stipulation did not impermissibly change the stipulation. The court is always required to consider the best interests of the child. Here, since the supplemental order allowed the mother to better monitor the father's drug addiction, it served the best interests of the child.

Child Custody – Incorporation of Parenting Agreement

Name: *Matthews v. Brinckhaus*, 17 Vap UNP 1915164 (2017)

Facts: The parties have one minor child. The court entered a custody order in 2007, granting the father primary physical custody. In 2014, the child was removed from the father's care and placed with the mother. The parties then entered into a written agreement with the mother having primary physical custody. The agreement provided that the father would have supervised visitation for 90 days and then unsupervised visitation thereafter. The agreement also provided for its incorporation into an order. Later in 2014, the father was convicted of second degree assault, placed on probation for five years, and ordered not to have contact with the child unless initiated by the child or through therapeutic counseling in which the child was involved. In 2016, the father requested that the trial court incorporate the parties' 2014 agreement into an order, which it did over the mother's objection. The mother appealed.

Issue: Whether the trial court erred by incorporating the parties' agreement into an order without considering the best interests of the child in light of the father's conviction and limitation of contact with the child.

Ruling: The Court of Appeals reversed the trial court, and remanded the matter.

Rationale: While Virginia Code § 20-109.1 permits a court to incorporate a child custody agreement into an order, the court must exercise discretion and is not required in all instances to incorporate the agreement. The court may incorporate all, some or none of the provisions of the agreement. The welfare of minor children is "the primary, paramount, and controlling consideration of the court in all controversies." Virginia Code § 20-124.3 lists the factors for a court to consider when determining a child's best interests for purposes of custody. In the present case, the trial court heard argument from the mother that the parties' agreement was no longer in the child's best interest due to the father's assault conviction and limitation of contact with the child. These facts relate to the father's ability to parent the child. Therefore, the trial court abused its discretion in incorporating the agreement into an order since it did not consider the child's best interests nor did it communicate any such findings as required by Virginia Code § 20-124.3.

Equitable Distribution – Parole Evidence

Name: *Frakes v. Frakes*, 17 Vap UNP 1951161 (2017)

Facts: The husband inherited property in Michigan in 2000 from his mother. The parties were subsequently married in 2010. At the wife's request in 2013, the husband retitled the property jointly to the parties. At trial, the husband testified that the wife had asked to be added to the deed so the property would pass to her if he died; he did not realize that he was conveying a present interest in the property to the wife. The trial court concluded that the Michigan property belonged to husband as his separate property since there was insufficient evidence of his intent to make an *inter vivos* gift of the property and only retitled the property for estate planning purposes. The wife appealed, stating that the trial court should not have considered the husband's testimony about his intent when retitling the Michigan home because the parol evidence rule bars such extrinsic evidence.

Issue: Whether the court erred in allowing extrinsic evidence when determining the classification of the Michigan property.

Ruling: The Court of Appeal affirmed the trial court.

Rationale: Under Virginia Code section 20-107.3(A)(2), property titled in the names of both parties is classified as marital property subject to equitable distribution, including a spouse's separate property retitled in the names of both parties jointly since it is deemed

transmuted to marital property. However, retitled separate property that is traceable by a preponderance of the evidence and was not a gift retains its original classification. The spouse who seeks to establish a gift bears the burden of proving each of the required elements – delivery, acceptance, and donative intent – by clear and convincing evidence. The deed itself may evidence these required elements if it is unambiguous on its face, both for the purpose of retitling and proof of donative intent. In such a case, parol evidence would be inadmissible. In the present case, however, the deed is not unambiguous and does not contain any evidence of donative intent, thus permitting the court to consider parol evidence.

Spousal Support - Abuse of Discretion

Name: *Gordon v. Gordon*, 17 Vap UNP 2038162 (2017)

Facts: The parties were married for 27 years. The husband's annual income in the six years prior to the hearing ranged from $366,431 to $898,549, with him earning $623,346 at the time of the hearing. The wife stopped working outside of the home in order to raise the parties' child. The husband's vocational expert testified the wife could earn between $24,000 and $29,000 per year. The husband's financial expert testified that, if the wife received $1,500,000 in an equitable distribution award and it was properly invested, she could withdraw $65,000 per year and the money would be depleted when the wife was 95 years old. The parties' estate was worth approximately $4,500,000. The trial court equally divided the estate between the parties and awarded the wife $12,000 per month in spousal support. The trial court did not impute income to the wife due to her long absence from the workforce and her unsuccessful efforts to find meaningful employment after the parties' separation. The trial court considered the parties' asset division as "a wash," and reasoned that forcing the wife to live off of her assets while the husband's assets were allowed to accumulate did not seem equitable. The husband appealed the spousal support award.

Issue: Whether the trial court erred by, among other things: (1) not considering the wife's equitable distribution award, (2) failing to impute income to the wife, (3) awarding the wife more support than what the husband had shown were her actual expenses.

Ruling: The Court of Appeals affirmed the trial court.

Rationale: An appellate court reviews an award of spousal support for an abuse of discretion. Such an award will be reversed only upon a showing that exercise of such discretion was plainly wrong or without evidence to support it. A trial court must take into account the assets each party receives in equitable distribution, including both income and expenses generated by the assets. The trial court did consider the income which could be generated by the parties' assets and was not plainly wrong in awarding the wife $12,000 per month. While a court may impute income to a party, the decision to impute income will only be reversed unless plainly wrong or unsupported by the evidence. Here, the trial court considered evidence of the wife's earning capacity, but declined to impute income to her based on the difficulty it saw in her obtaining meaningful employment. The husband's argument that the court erred since it cannot award spousal support in excess of the wife's needs is misguided. Virginia law requires the court to consider the parties' savings plan during the marriage. The parties in the instant case lived under their means and had a history of saving during the marriage. Accordingly, the trial court could make an award of spousal support which exceeded the wife's actual expenses.

Stored Communications Act – Mother's Unauthorized Access of Father's Email

Name: *Hately v. Torrenzano*, Case No. 1:16-cv-01143 (E.D. Va. Apr. 20, 2017).

Facts: The father and mother were involved in a romantic relationship for five years and had two children together. They separated in 2015, and the mother filed a petition for custody and child support in a separate proceeding. The father alleges that, around the same time, the mother illegally accessed his email account. The father obtained documentation and the mother's deposition testimony from an unrelated civil proceeding in support of her unauthorized access. The father initially brought claims under the Computer Fraud and Abuse Act and the Virginia

Computer Crimes Act, which were dismissed due to the lack of the father alleging actual damages. The mother now moves for summary judgment of the father's claim under the Stored Communications Act for his failure to show that he has incurred actual damages.

Issue: Whether the father is required to show actual monetary damages under the Stored Communications Act in order to proceed with his claim against the mother.

Ruling: The trial court denied the mother's motion for summary judgment.

Rationale: Under 18 U.S.C. § 2707(c), a court may assess punitive damages against the mother if her violation of the Stored Communications Act was willful or intentional. Furthermore, if the father is successful in his claim, the court may award him "the costs of the action, together with reasonable attorney fees determined by the court." Since the father could recover punitive damages and an award of attorney's fees without the necessity of proving actual damages, his claim under the Stored Communications Act survives the mother's motion for summary judgment.

Editor's Note: While this is not a family law case, very often one spouse/parent improperly accesses the computer of the other spouse/parent. It is typically not for the purpose of stealing data or damaging the computer, but simply to spy on the other person. Under this decision, the Stored Communications Act provides a potential cause of action even when actual damages do not exist.

Attorney's Fees – Whether Action was for Enforcement

Name: *Jones v. Gates*, 68 Va. App. _____; 2069162 (2017)

Facts: The parties entered into a property settlement agreement ("PSA"), which provided, among other things, for the wife to receive half of the marital share of the husband's military retirement by a qualifying retirement order. The PSA also provided that a party would pay the prevailing party in the successful enforcement or defense of the terms of the PSA. The parties appeared before the trial court for entry of a Military Qualifying Court Order dividing the husband's retirement benefits. The husband objected to the terms of the wife's proposed order, and the court entered a modified version of the wife's order which was in conformity with the PSA. The court ultimately denied the husband's request for attorney's fees since the husband's objection to the wife's order as originally proposed did not amount to a successful defense to the enforcement of the PSA. The husband appealed, claiming he successfully defended against the wife's enforcement of the PSA.

Issue: Whether: (1) the wife's request for entry of a retirement order is an enforcement action, and (2) the trial court erred in denying the husband's request for attorney's fees relative to the entry of the retirement order.

Ruling: The Court of Appeals affirmed the trial court.

Rationale: Enforcement is defined as the act of "compelling compliance with a . . . decree or agreement," which often originates with a rule to show cause. Here, the parties agreed in their PSA that the division of the husband's military retirement would be achieved through a retirement order, to be drafted at a later date. The purpose of the hearing was to enter an order dividing the retirement. It was not a rule to show cause, and neither party was in default of the PSA. The husband's objection to the language in the wife's order did not equate to the defense of an enforcement action. Therefore, the trial court ruled correctly in denying the husband an award of attorney's fees for successfully "defending" against entry of the wife's proposed order. ❖

Virginia Family Law
VIRGINIA STATE BAR
1111 EAST MAIN STREET, SUITE 700
RICHMOND, VIRGINIA 23219-0026