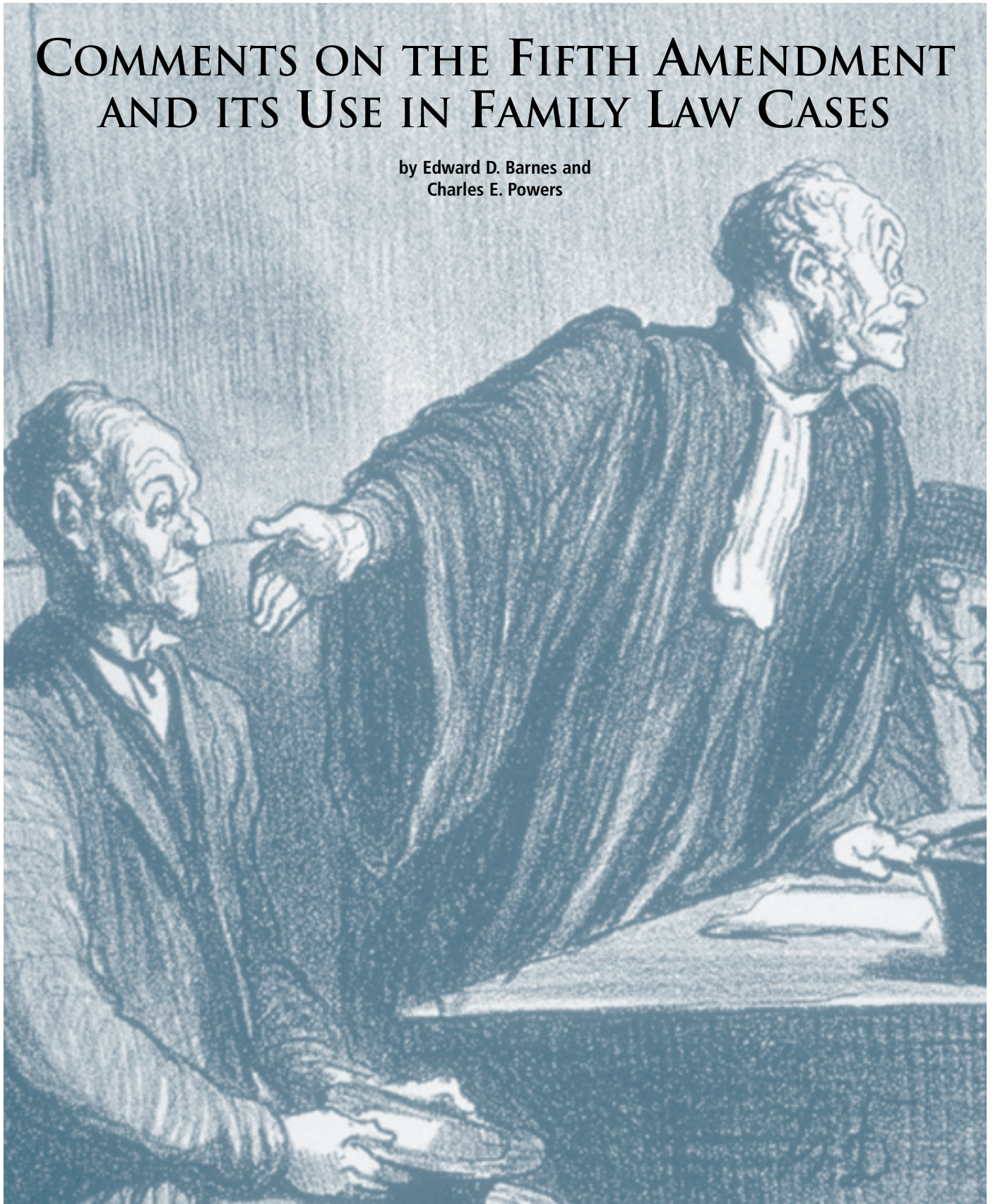


*Nemo Tenetur Seipsum Accusare*¹

COMMENTS ON THE FIFTH AMENDMENT AND ITS USE IN FAMILY LAW CASES

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The privilege of not having to incriminate oneself predates the founding of our country. Roots of the privilege lie in English common law and arose over a long period of time in response to England's systems of law enforcement which relied heavily upon the examination of alleged wrongdoers and the impression of an *ex officio* oath to compel an alleged wrongdoer to affirm his culpability. As objections to these tactics rose, the maxim of *nemo tenetur seipsum accusare* ("no man is bound to accuse himself") gradually entered the legal system. When Virginia ratified the Bill of Rights on December 15, 1791, the Fifth Amendment provided that no person "shall be compelled in any criminal case to be a witness against himself"¹ and became the law of the land. Long before the Founding Fathers included the benefits of the privilege in the nation's pre-eminent legal document, Virginia's Founding Fathers had included the privilege in its original constitution where it remains today, virtually unchanged over the last 225 years.² Though the privilege has had its critics, the Fifth Amendment and the states' counterparts are firmly entrenched in our understanding of our justice system. Most individuals recognize the privilege as a necessary protection against the abuse of power by the state.

Long before the concept of the privilege against self-incrimination entered the legal arena, adultery was considered a serious crime. Hammurabi deemed adultery a crime punishable by death.³ "The Capitall Lawes of New-England" dating from the seventeenth century were drawn by the Massachusetts Bay Colony and are the first written enumeration of offenses punishable by death known to exist in this country. They included adultery as a capital offense.⁴ Virginia, too, made adultery a capital offense,⁵ but today classifies it as a Class 4 misdemeanor punishable by a fine of up to \$250.⁶ Though rarely prosecuted as a crime, it still forms a large part of the legal system as it relates to divorce matters and criminal law.

Adultery In Divorce Proceedings

Adultery is the first listed ground for a final divorce in Virginia⁷ and is the subject of some of the most hotly contested divorce cases. Not only do emotions run high but entire legal and negotiation strategies are developed based on the allegation of adultery as they may affect spouse support or other matters. The focus of this article is not on the ground of adultery itself. Rather, the focus of this article is on the effect adultery has on some of the attendant issues in a divorce matter such as spouse support, equitable distribution and custody of minor children and how these are affected by the invocation of the privilege against self-incrimination.

First, in a divorce proceeding, statutory law specifically states that the trial court may not award spouse support if adultery is proved:

[N]o permanent maintenance and support shall be awarded from a spouse if there exists in such spouse's favor a ground of divorce under the provisions of subdivision (1) of § 20-91. However, the court may make such an award notwithstanding the existence of such ground if the court determines from

clear and convincing evidence, that a denial of support and maintenance would constitute a manifest injustice, based upon the respective degrees of fault during the marriage and the relative economic circumstances of the parties.⁸

The consequences of proving adultery, therefore, may be quite serious, since a spouse may be denied any support if the allegations are proved. Also, the spouse who has committed adultery may counter by attempting to prove his or her spouse also committed adultery. This recrimination may deny each a ground for divorce barring neither party from seeking spouse support. Thus, the stakes for proving adultery increase. Either party may consider the invocation of his or her privilege against self-incrimination or both may use it in the same case.

Second, in determining the equitable division of marital property, adultery may be relevant under at least two of the required statutory factors:

The amount of any division or transfer of jointly owned marital property, and the amount of any monetary award, the apportionment of marital debts, and the method of payment shall be determined by the court after a consideration of the following factors:

- The contributions, monetary and non-monetary of each party to the well being of the family;
- The circumstances and factors which contributed to the dissolution of the marriage, specifically including any ground for divorce under the provisions of subdivisions (1), (3) or (6) of § 20-91 or § 20-95.9

The most common uses of adultery in the context of equitable distribution are to show that the conduct had a "direct economic impact" on the parties' finances¹⁰ or to show a "negative" non-monetary contribution which "affected the marital estate or the well being of the family."¹¹

Finally, in the context of the determination of custody or visitation of minor children, courts are required to "give primary consideration to the best interests of the child."¹² A court must "look to and consider the qualifications and fitness of the parents, their adaptability to the task of caring for the child, their ability to control and direct it, the age, sex and health of the child, its temporal and moral well being, as well as the environment and circumstances of its proposed home and the influences likely to be exerted upon the child."¹³ These factors pre-dated by over 30 years the statutory considerations now set forth in Virginia Code § 20-124.3, but they are now codified therein.¹⁴ Adultery has always been singled out for special consideration:

In all custody cases the controlling consideration is always the child's welfare and, in determining the best interest of the child, the court must decide by considering all the facts,

When the issue of adultery is raised in a divorce proceeding, the party alleging the adultery invariably seeks to gain a confession or admission from the other party.

including what effect a nonmarital relationship by a parent has on the child. The moral climate in which children are to be raised is an important consideration for the court in determining custody, and adultery is a reflection of a mother's moral values. An illicit relationship to which minor children are exposed cannot be condoned. Such a relationship must necessarily be given the most careful consideration in a custody proceeding.¹⁵

Though adultery alone does not determine which parent is awarded custody, it can be used as one of the factors comprising the decision:

[E]vidence of adultery, without more, is an insufficient basis upon which to find that a parent is an unfit custodian of his or her child. However, as the *Brown* decision mandates, in determining a child's best interest, the extent to which the child is exposed to an illicit relationship must be given the "most careful consideration" in a custody proceeding. Furthermore, as *Brown* states, adultery is a reflection of a parent's moral values which should be considered in evaluating the moral climate in which a child is to be reared.¹⁶

Therefore, adultery or other criminal conduct may play a significant role in a divorce case on some issues. It should be noted that in many cases, adultery does not affect the outcome at all. This article deals with issues that may be considered when counsel deem that proof of adultery or lack thereof may affect an issue in their case.

Privilege Against Self-Incrimination

In the context of a criminal case, "a 'confession' is generally defined as a statement admitting or acknowledging all facts necessary for conviction of the crimes at issue."¹⁷ "An 'admission,' on the other hand, consists of an admission or acknowledgment of a fact or facts tending to prove guilt but which falls short of a confession of all essential elements of the crime."¹⁸ In either scenario, a confession or admission can be used as part of a criminal prosecution. Therefore, since adultery is a crime, any confession or admission of adultery could be used evidence in a criminal prosecution for that crime.

When the issue of adultery is raised in a divorce proceeding, the party alleging the adultery invariably seeks to gain a confession or admission from the other party. This may be done through pleadings, discovery, depositions or *ore tenus* testimony. The

accused party (if the allegations are true) can admit the allegation; admit the allegation and counter with an excuse or other defense, or refuse to answer the question and assert the protections provided by the Fifth Amendment of the United States Constitution or Article 8 of the Virginia Constitution.¹⁹ If the privilege is asserted the questioning party is presented with several options. It can ignore it and move on, ask the court to compel the other party to answer the question or ask the court to impose some form of sanction upon the refusing party for his or her refusal to answer.

The Motion to Compel

A Motion to Compel may be filed after the assertion of the privilege is made during depositions or in discovery. If the refusal to answer a specific question is made while in the presence of the court, the follow-up request to the court is to compel the witness to answer the question. The court must then decide on the validity of the assertion of the privilege.²⁰ The Fifth Amendment²¹ protects persons from being "compelled ... to be a witness against himself."²² The Virginia Constitution protects persons from being "compelled . . . to give evidence against himself."²³ Persons may be compelled to answer a specific question if there has been a waiver of the privilege or if the exposure to criminal prosecution has been eliminated because the statute of limitations has expired or there is immunity from prosecution.²⁴

Waiver of the Privilege

A waiver of a person's privilege against self-incrimination, however, is difficult to establish.

"Courts indulge every reasonable presumption against a waiver of fundamental constitutional rights." [citations omitted]. The Supreme Court "has always set high standards of proof for the waiver of constitutional rights" [citations omitted].

A waiver of a constitutional right must be "an intentional relinquishment or abandonment of a known right or privilege." [citation omitted]. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." [citation omitted].²⁵

To establish a waiver of a constitutional right, a "knowledge of the facts basic to the exercise of the right" and the "intent to relinquish that right" must be shown by "clear and unmistakable proof."²⁶ Some basic guidelines for a waiver can be found in the recent case of *Travis v. Finley*²⁷ and are as follows:

- A waiver can only be made by the individual.²⁸
- Failure to make a timely defense or objection is a waiver.²⁹
- Initially objecting only to relevance is not a waiver in that it is not “inconsistent” with claiming the privilege because if the court agrees that the questions were irrelevant, the party would not have to assert the privilege.³⁰

However, care must be taken to assert the privilege at the earliest opportunity. Must it be asserted in the initial pleadings? No case from Virginia’s Court of Appeals or from the Supreme Court directly addresses that issue, though at least one circuit court expressly found a waiver of the privilege against self-incrimination when the privilege was not asserted in the initial pleadings.³¹ However, that same court ruled the opposite way in a case nine years later and ruled that a party did not waive his right to assert his privilege against self-incrimination by failing to raise it in the initial pleadings.³²

Statute of Limitations

Because adultery is a Class 4 misdemeanor in Virginia, any criminal prosecution must be brought within one year of the alleged offense.³³ Though it may be easy to show that the alleged adulterous acts which are sought to be proved cannot be prosecuted because they occurred more than one year in the past, it may not follow that the court will compel an answer. The limits of the privilege against self-incrimination do not necessarily coincide with those of the statute of limitations. First, the privilege “applies not only to evidence which may directly support a criminal conviction, but to ‘information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution.’”³⁴ Therefore, because an act which occurred outside of the statute of limitations could be “linked” to actions which occurred within the statute of limitations, the privilege should not be denied simply because the allegation relates to an event which occurred outside the period of the statute of limitations.

A Fairfax Circuit Court case (*Edgar v. Edgar*, 44 Va. Cir., 191, 192 (Fairfax Circuit Court, 1997)) has followed this rationale in upholding the exercise of the privilege regarding adultery alleged to have occurred more than one year prior, noting that it “could be used as evidence of adultery occurring within the one-year statute of limitations period and therefore may furnish a link in a chain of evidence that could lead to prosecution.”³⁵ It should also be remembered that even though adultery may be alleged in the divorce, there may have been other crimes for which that adultery could provide the “link.” For example, consensual sodomy is a Class 6 felony in Virginia for which no statute of limitations exists.³⁶

Immunity

If a party is immune from prosecution, the privilege against self-incrimination is not necessary. “Testimony may be compelled only ‘where immunity is complete and there is no possibility of

prosecution.’”³⁷ Though there does not have to be “absolute immunity”, “the witness must be provided nothing less than the protection guaranteed by the constitutional privilege.”³⁸

The three types of immunity are use immunity, derivative use immunity and transactional immunity.

“Use immunity protects a witness only from the ‘use of specific testimony compelled from him under the grant of immunity,’ but not from evidence obtained as a result of such testimony.”³⁹ Thus, a person’s testimony may provide a prosecutor with the “means and sources of information” to obtain other evidence upon which to base a prosecution.⁴⁰ Virginia Code § 19.2-270 provides “use immunity”:

In a criminal prosecution, other than for perjury, or in an action on a penal statute, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination in a criminal or civil action, unless such statement was made when examined as a witness in his own behalf.⁴¹

The argument would be that if you call the opposing party as a witness, they are not a “witness in his own behalf” and any testimony the party gives cannot be used against them in a criminal prosecution. However, because “use immunity” is not “co-extensive with the constitutional privilege”, it does not overcome the privilege against self-incrimination.⁴²

“Derivative use immunity prohibits use against the witness of evidence even indirectly obtained from his testimony.” “[T]ransactional immunity accords complete immunity from prosecution to the witness for the offense related to compelled testimony”. Both of these have been found “consonant and co-extensive with constitutional safeguards and, thus, sufficient to supplant the privilege [against self-incrimination].”⁴³ The exact mechanism for obtaining this type of immunity is not the subject of this article. However, the key is whether the “immunity granted” is “coextensive with the scope of the privilege” and ‘as comprehensive as the protection afforded’ by the privilege against self-incrimination.⁴⁴

“Sword and Shield”

In the recent case of *Travis v. Finley*, 36 Va. App. 189, 548 S.E.2d 906 (2001), the Court of Appeals ruled that Virginia Code § 8.01-223.1 superseded the common law “sword and shield” doctrine:

We conclude that Code § 8.01-223.1 barred the trial court from dismissing mother’s petitions. We further conclude that, under the facts of this case, Code § 8.01-223.1 supersedes the “sword and shield” doctrine.⁴⁵

The trial court had dismissed the mother’s petition for custody on the ground that she asserted her privilege against self-incrimination and refused to answer certain questions. The court of appeals noted that “[w]hile the trial court did not articulate its reasons for dismissal, we necessarily conclude it was under the common law doctrine of ‘sword and shield’.”⁴⁶

At common law, if a party asserted the privilege against self-incrimination (i.e., using it as a “shield”), he or she could not also use that claim as a “sword” to “sabotage any attempt by the other party, either during pretrial discovery or at trial, to obtain information relevant to the cause of action alleged, and relevant to the possible defenses to the claim.”⁴⁷ The underlying rationale for this doctrine is that “it would be unjust to permit parties to use the court to seek affirmative relief while at the same time deflecting relevant questions, the answers to which may constitute a defense to the claims asserted.”⁴⁸ This common law doctrine has been codified in Virginia Code § 8.01-401(B):

If any party, required by another to testify on his behalf, refuses to testify, the court, officer, or person before whom the proceeding is pending, may, in addition to punishing said party as for contempt, dismiss the action, or other proceeding of the party so refusing, as to the whole or any part thereof, or may strike out and disregard the plea, answer, or other defense of such party, or any part thereof, as justice may require.⁴⁹

Thus, prior to *Travis v. Finley*, litigants could assert the “sword and shield” doctrine or Virginia Code § 8.01-401(B) to preclude a party from obtaining affirmative relief or from presenting a defense on certain matters.

However, the “sword and shield” doctrine and Virginia Code § 8.01-401(B) are in direct conflict with Virginia Code § 8.01-223.1 which provides as follows:

In any civil action the exercise by a party of any constitutional protection shall not be used against him.⁵⁰

Travis v. Finley has definitively held that this statute prevails over the common law “sword and shield” doctrine because it “cannot conceive of any graver consequence than dismissing the action.”⁵¹ The party’s exercise of her constitutional protection “was ‘used against’ her in the most absolute and final way.”⁵²

In *Travis v. Finley*, the Court specifically found that Virginia Code § 8.01-401(B) was not at issue because the refusing party “was not called upon by another to ‘testify on his behalf.’”⁵³ Though not decided by the Court, the clear conclusion is that the codification of the “sword and shield” doctrine is also in direct conflict with Virginia Code § 8.01-223.1. The use of the statutory provisions of Virginia Code § 8.01-401(B) could also be used “in the most absolute and final way” contrary to the constitutional protections available to litigants.

When Privilege Against Self-Incrimination May Be Used Against A Party

Though not the primary focus of this article, there is one statute which specifically permits the assertion of the privilege against self-incrimination to be used against a litigant. Virginia Code § 20-88.59(G) provides as follows:

If a party called to testify at a civil hearing refuses to answer on the ground that the testimony may be self-incriminating, the trier of fact may draw an adverse inference from the refusal.⁵⁴

This statute is found in Chapter 5.3 of Title 20 of the *Code of Virginia*. It is the Uniform Interstate Family Support Act (UIFSA). Thus, in the context of an action brought under that chapter, the assertion of this constitutional privilege can be used against the party asserting the privilege. The constitutionality of this statute has yet to be decided though it is likely that will occur at some point in the future.

It is important to note that Virginia Code § 20-88.59(G) applies only to UIFSA actions. Virginia Code § 20-88.59(G) specifically states that this “article applies to all proceedings under this chapter.”⁵⁵ Therefore, it may have no application outside a UIFSA action. Though there are no reported cases addressing this statute by the Virginia Court of Appeals or Supreme Court in the context of a divorce action, an unpublished opinion of the Virginia Court of Appeals makes passing reference to it which is addressed in the endnote below.⁵⁶

Conclusion

Unless there has been a waiver of the right to exercise the privilege against self-incrimination, courts should uphold a litigant’s right to claim the privilege and should refrain from sanctioning parties for their action. Though it remains to be seen whether Virginia Code § 8.01-401(B) has any life left in it as applied to parties testifying on their own behalf, the common law “sword and shield” doctrine appears to have seen its demise in Virginia with *Travis v. Finley*. ☞

Endnotes are on the following page.



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ENDNOTES

- 1 “No man is bound to accuse himself.”
- 2 U.S. CONST. amend. V.
- 3 VA. CONST. of 1776, art. I, § 8; VA. CONST. of 1971, art. I, § 8.
- 4 HAMMURABI’S CODE OF LAWS, 129, 130
- 5 THE CAPITAL LAWS OF NEW ENGLAND (1641-1642) § 9
- 6 3 Hening, Statutes of Virginia (1823), 71.
- 7 VIRGINIA CODE § 18.2-365; VIRGINIA CODE § 18.2-11(d).
- 8 VIRGINIA CODE § 20-91(A)(1).
- 9 VIRGINIA CODE § 20-107.1(B).
- 10 VIRGINIA CODE § 20-107.3(E).
- 11 *Aster v. Gross*, 7 Va. App. 1, 5-6, 371 S.E.2d 833, 836 (1988).
- 12 *O’Loughlin v. O’Loughlin*, 20 Va. App. 522, 527, 458 S.E.2d 323, 325 (1995).
- 13 VIRGINIA CODE § 20-124.2(A).
- 14 *Campbell v. Campbell*, 203 Va. 61, 63, 122 S.E.2d 658, 661 (1961).
- 15 VIRGINIA CODE § 20-124.3.
- 16 *Brown v. Brown*, 218 Va. 196, 199, 237 S.E.2d 89, 91(1977).
- 17 *Brinkley v. Brinkley*, 1 Va. App. 222, 224, 336 S.E.2d 901, 902 (1992).
- 18 *Caminade v. Commonwealth*, 230 Va. 505, 510, 338 S.E.2d 846, 849 (1986).
- 19 *Id.*
- 20 The proper method of invoking the privilege is to state that the party “refuses to answer the question and asserts his [or her] privilege pursuant to the Fifth Amendment of the United States Constitution and Article One, Section 8 of the Virginia Constitution.”
- 21 *North American Mortg. Investors v. Pomponio*, 219 Va. 914, 918, 252 S.E.2d 345, 348 (1979).
- 22 The Fifth Amendment is applicable to state courts because it has been incorporated into the due process clause of the Fourteenth Amendment and, accordingly, applies to the states. *Malloy v. Hogan*, 378 U.S. 1, 6-11 (1964).
- 23 U.S. CONST. amend. V.
- 24 VA. CONST. of 1971, art. 8.
- 25 *Gosling v. Commonwealth*, 14 Va. App. 158, 163-64, 415 S.E.2d 870, 873 (1992). This case provides a good overview of the different types of immunity available to criminal defendants.
- 26 *Travis v. Finley*, 36 Va. App. 189, 198-199, 548 S.E.2d 906, 911 (2001), citing *White v. Commonwealth*, 214 Va. 559, 560, 203 S.E.2d 443, 444 (1974) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (citing *Zerbst*); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Brady v. United States*, 397 U.S. 742, 748 (1970) and *Hunter v. Commonwealth*, 13 Va. App. 187, 191 (1991).
- 27 *Id.* at 200, 548 S.E.2d at 911, citing *Weldman v. Babcock*, 241 Va. 40, 45, 400 S.E.2d 164, 167 (1991); *Fox v. Deese*, 234 Va. 412, 425, 362 S.E.2d 699, 707 (1987); *May v. Martin*, 205 Va. 397, 404, 137 S.E.2d 860, 865 (1964) and *Chawla v. BurgerBusters, Inc.*, 255 Va. 616, 622-23, 499 S.E.2d 829, 833 (1998).
- 28 36 Va. App. 189, 548 S.E.2d 906 (2001).
- 29 *Id.* at 200, 548 S.E.2d at 911. A letter from counsel indicating that discovery responses would be forthcoming is not a waiver of the privilege.
- 30 *Id.* at 199, 548 S.E.2d at 911, citing numerous cases including *Evans v. Commonwealth*, 226 Va. 292, 298, 308 S.E.2d 126, 130 (1983) (claim of privilege against self-incrimination waived by failure to make timely objection).
- 31 *Id.* at 200-201, 548 S.E.2d at 911-12.
- 32 *Leitner v. Leitner*, 11 Va. Cir. 281, 282 (Fairfax Circuit Court, 1988).
- 33 *Helmes v. Helmes*, 41 Va. Cir. 277, 277-78 (Fairfax Circuit Court, 1997). In that case, the Fairfax Circuit Court noted that neither the Virginia Supreme Court nor Court of Appeals had addressed the issue but relied upon case law from other states to support its rationale. *Mabne v. Mabne*, 66 N.J. 53, 328 A.2d 225 (1974) and *In Re: Knapp*, 536 So.2d 1330 (Miss. 1988).
- 34 VIRGINIA CODE § 18.2-365 and VIRGINIA CODE § 19.2-8.
- 35 *United States v. Sharp*, 920 F.2d 1167 (4th Cir. 1990).
- 36 *Edgar v. Edgar*, 44 Va. Cir. 191, 192 (Fairfax Circuit Court 1997).
- 37 VIRGINIA CODE § 18.2-361.
- 38 *Gosling v. Commonwealth*, 14 Va. App. 158, 163, 415 S.E.2d 870, 873 (1992).
- 39 *Id.* at 164, 415 S.E.2d at 873.
- 40 *Id.*, citing *Kastigar v. United States*, 406 U.S. 441, 449-50 (1972).
- 41 *Id.* at 164-65, 415 S.E.2d at 873.
- 42 VIRGINIA CODE § 19.2-270.
- 43 *Gosling* at 165, 415 S.E.2d at 873.
- 44 *Gosling* at 164, 415 S.E.2d at 873, citing *Kastigar v. United States*, 406 U.S. 441, 453 (1972) and *Caldweall v. Commonwealth*, 8 Va. App. 86, 88- 89, 379 S.E.2d 368, 370 (1989).
- 45 *Id.*, citing *Kastigar v. United States*, 406 U.S. 441, 449 (1972).
- 46 *Travis v. Finley*, 36 Va. App. 189, 202, 548 S.E.2d 906, 912 (2001).
- 47 *Id.* at 197, 548 S.E.2d at 910.
- 48 *Davis v. Davis*, 233 Va. 452, 456-57, 357 S.E.2d 495, 498 (1987).
- 49 *Id.*
- 50 VIRGINIA CODE § 8.01-401(B).
- 51 VIRGINIA CODE § 8.01-223.1.
- 52 *Id.* at 201, 548 S.E.2d at 912.
- 53 *Id.* at 202, 548 S.E.2d at 912.
- 54 *Travis* at 197, 548 S.E.2d at 910.
- 55 VIRGINIA CODE § 20-88.59(G).
- 56 VIRGINIA CODE § 20-88.44.
- 57 *Helbert v. Helbert* (Record No. 0794-98-3) (Court of Appeals, August 25, 1998). In a divorce case, a party asked the court to draw a negative inference from the invocation of the privilege against self-incrimination by the alleged paramour. The Court of Appeals held that Virginia Code § 20-88.59(G) did not allow such an adverse inference because it did not apply when a “non-party witness asserts the right.” The Court did not specifically state that this statute was applicable in the context of a divorce case nor does it appear that it was an issue in the case. The Court, however, referenced this statute and stated that it is “true that Code § 20-88.59(G) allows the trier of fact to draw an adverse inference from the refusal of a ‘party’ to answer on the grounds of self-incrimination.” This is clearly in conflict with Virginia Code § 8.01-223.1 and it is likely that the rationale of *Travis v. Finley* will control regarding this statute also.