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CHAIRMAN’S MESSAGE

It is with a sense of pride that I begin my year as the Chair of this Section. We are blessed to have among the best and the brightest attorneys in the Commonwealth serving on our Board of Governors. A word of gratitude is due to those who have preceded me as Chair, especially Andrea Stiles, Craig White, Cheshire Eveleigh and Brian Hirsch. I have learned much from them and am grateful for their friendship and continued counsel.

This year presents many opportunities. A subcommittee continues the work on the new and improved “Spare the Child” DVD. With a grant from the Virginia Law Foundation, the subcommittee, chaired by Lynne Kohm, is working to produce a quality product to replace the well-received and oft-used video. The new DVD will present information in a manner that will be meaningful and useful to a large and demographically diverse audience. We hope to take advantage of the many technological advances since the original production to make this DVD an even greater resource for the Courts and the public.

As part of the State Bar’s Five Year Plan, the Board of Governors will begin the implementation of our Section’s part of that Plan. A new implementation committee, chaired by Cassandra Chin, will help the Section develop the strategies to meet our objectives under the plan.

Our CLE Committee, chaired by Frank Rogers, has already put into place a plan for the various CLEs to be presented this year. The Annual Family Law Seminar will be presented throughout the State in October. Be on the lookout for the dates and times at a location near you.
Our Website committee, chaired by Jenny David and David Clarke, continues to work with the Bar’s webmaster to make our website as useful to our members and the public as the Bar will permit.

Funding for the work of the Section is largely a function of membership. A simple strategy to expand membership and enhance the opportunities of this Section is for “each one to reach one.” Ask your colleagues if they are members of the Section, and if not, encourage them to join. Expansion of our membership is everyone’s job.

I look forward to the year ahead and, with our Board of Governors, seek to serve the needs of the family lawyers of this Commonwealth. Your assistance and suggestions are always welcome.

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

EDITOR’S MESSAGE

Ah, Fall: season of mists and mellow fruitfulness indeed. Season too of kids not returning from summer visitation and the litigation that ensues. And also of little tots approaching the big yellow school bus for the first time, struggling under such overstuffed little backpacks that it looks as though they are assaulting a kiddie version of Mt. Everest rather than their local public kindergartens. But in the spirit of this fruitful season your reliable old Section newsletter brings you a bountiful harvest of useful articles along with the vividly varied and ever-unpredictable rulings of the appellate courts. This time too, we have the inaugural message of your new Section Chairman, Peter Buchbauer, who clearly begins a Section year with a commendable burst of enthusiasm and deserves all of our good wishes and good will.

And in the articles department, there is Grant Moher’s new look at the always-intriguing subject of adultery and the Fifth Amendment, with the added variable of “crimes against nature” (Don’t look for clip art here) thrown in. There is also another discussion of borderline personalities, which this time concentrates on how they affect the attorney-client relationship and how to manage these difficult client types — whose antics begin to sound more and more like what you encounter as your everyday normal client. But Los Angeles psychologist Daniel Kupper manages to describe the problems very helpfully, focusing on the lawyer’s needs as well as the client’s, and in terms relevant to those of us who practice law on supposedly the more staid and stodgy East Coast. Finally, law student Eve Epstein complains against the tendency of Virginia courts these days to feel that Troxell v. Granville forces them to exclude from the class of “legitimate interests” contestants even the most appealing sorts of adults in the child’s environment — those who would seem to be, if anyone ever could be, genuine “psychological parents.” She argues for adoption of “de facto parent status” and
ADULTERY, “CRIMES AGAINST NATURE,” AND THE FIFTH AMENDMENT IN VIRGINIA

By Grant T. Moher, Fairfax

As long as marriage has existed, so too has adultery. So too, have the acts known as “crimes against nature”, still generally referred to by the more specific legal terms “sodomy and buggery.” All are currently illegal in Virginia, pursuant to §§18.2-365 and 18.2-361 of the Virginia Code. Although enforcement has been virtually non-existent during the recent past, it has not disappeared entirely.

The practical effect of adultery, sodomy, and buggery being illegal has been to allow the accused to assert his or her right under the Fifth Amendment of the United States Constitution, and refuse to answer any questions regarding the alleged acts. Often this comes up in a divorce action. The Fifth can be invoked by the offending party and/or his or her alleged paramour, depending on the circumstances.
The current state of the law regarding the relationship of the Fifth Amendment to adultery, sodomy and buggery in a divorce action is deceptively complex. This is especially the case in light of the U.S. Supreme Court’s decision in *Lawrence v. Texas*, and subsequent Virginia decisions interpreting its effect.

I. Adultery.

A. What it is: Only male/female sexual intercourse when at least one of the parties is married to someone else. Only the married party or parties can commit adultery. Pursuant to §18.2-365, adultery is a class 4 misdemeanor, meaning the maximum penalty is a $250 fine. It has a one year statute of limitations.

B. What it can do:

1. Can be used as a fault ground to obtain a divorce (§20-91);
2. Can cut off spousal support to an offending party (§20-107.1B) unless doing so would constitute manifest injustice;
4. Can be considered in division of property (§20-107.3).

C. What it cannot do:

1. Cannot be considered in determining the *amount* or *duration* of a spousal support award (generally §20-107.1) *See Nass v. Nass*, 2001 Va. App. LEXIS 187;
2. Cannot be used as a fault ground for divorce if it happened more than five years before institution of the suit (§20-94);
3. Cannot be used as a fault ground for divorce if plaintiff “condones”: voluntarily cohabits with the adulterous spouse after having knowledge of the adultery (§20-94);
4. Cannot be used as a fault ground for divorce if it was done with the plaintiff’s “procurement or connivance.” (§20-94).
5. Cannot be used as a fault ground for divorce if defendant proves that plaintiff committed adultery or another fault ground of divorce — a.k.a. “recrimination.”

II. Sodomy or Buggery.

A. What it is: Sodomy and buggery are overlapping terms for the several forms of sexual contact outlawed by §18.2-361, in which “any person carnally knows in any manner any brute animal, or carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge.” (§18.2-361). This encompasses virtually all
forms of heterosexual and homosexual sexual contact that is not intercourse. It applies to both married and unmarried individuals. It is a Class 6 felony, and has no statute of limitations.

B. **What it can do:** Pretty much the same as what adultery can do.

C. **What it can’t do:** Pretty much the same as what adultery can’t do, *plus:* May not permit the offending party to plead the Fifth Amendment (as discussed below in the Constitutional section).

**III. The Fifth Amendment: Generally.**


B. **What it does:** Provides that no one can be compelled to give evidence against him or herself in a criminal prosecution. This privilege applies to both criminal and civil proceedings. *See Husske v. Commonwealth,* 282 Va. 203 (1996).

C. **How it should be claimed:** The proper method for invoking the privilege is to state that the accused “refuses to answer the question and asserts his/her privilege pursuant to the Fifth Amendment of the U.S. Constitution,” or something similar. An attorney can make this claim on behalf of his or her client.

D. **When it should be claimed:** One may not make a blanket claim of the Fifth Amendment privilege. It must be made question by question. *See Domestici v. Domestici,* 62 Va. Cir. 13 (2003). However, the Fifth Amendment privilege is not limited to the direct question of whether or not a party engaged in particular behavior. It extends to any question which may furnish a “link in the chain of evidence” which could lead to prosecution. *See Edgar v. Edgar,* 44 Va. Cir. 191 (1997) (holding that adulterous activity that occurred more than one year ago may be used as evidence of adultery occurring within the one-year limitations period, and therefore the Fifth Amendment extended to acts taking place over a year prior).

**IV. The Fifth Amendment: Restrictions.**

Outside of constitutional challenges to adultery and sodomy laws themselves (discussed herein shortly), the following are the main devices used to prevent a party or witness from invoking his or her Fifth Amendment rights regarding adultery or sodomy.

A. **Waiver:** Waiver of one’s Fifth Amendment privilege is often misunderstood. It is not easy to waive one’s right to plead the Fifth Amendment. Courts are to “indulge every reasonable presumption against a waiver of fundamental constitutional rights.” *Church v. Commonwealth,* 230 Va. 208 (1985).
1. **Definition:** Waiver is the “intentional relinquishment or abandonment of a known right or privilege.” *Megel v. Commonwealth*, 31 Va. App. 414 (2000);

2. **Elements:** Essential elements of the waiver are knowledge of the facts basic to the exercise of the right and intent to relinquish that right. *Weidman v. Babcock*, 241 Va. 40 (1991);

3. **Level of Proof:** “Waiver of a legal right will be implied only upon clear and unmistakable proof of the intention to waive such right for the essence of waiver is voluntary choice.” *Weidman*, 241 Va. at 45;

4. **Must be personal:** Constitutional rights can only be waived by a person, not his or her attorney. A letter from mother’s counsel indicating discovery answers would be forthcoming is not a waiver of mother’s privilege against self-incrimination. *Travis v. Finley*, 36 Va. App. 189, 548 S.E. 2d 906 (2001);

5. **Objection to relevance is not Waiver:** An objection to the relevance of something is not a waiver of one’s right to later assert a Fifth Amendment privilege. *Travis*, 36 Va. App. at 200-201;

6. **Denial in pleadings is not necessarily a waiver:** An initial denial of allegations regarding adultery is likely not a waiver. This precise issue has never been decided by a Virginia appellate level court, but several circuit decisions have addressed the issue. For example, in *Helmes v. Helmes*, 41 Va. Cir. 277 (1997), Wife accused Husband in a Complaint for Divorce of sexually abusing their daughter. Husband denied the abuse in his Answer. At his deposition, he sought to invoke the Fifth Amendment when questioned about the alleged abuse. The trial court held that his Fifth Amendment exercise was proper. The trial court found that although there was no Virginia appellate case law on the subject, several other states have held in a similar manner in reported decisions. *See also Goodrich v. Goodrich*, 1994 WL 1031011 (Va. Cir. 1994).

   Similarly, in *Pelliccia v. McKeithen*, 59 Va. Cir. 483 (2002), a partition case, a trial court held that a denial of criminal activity in an Answer did not waive one’s right to assert the Fifth Amendment for the same activity in later discovery.

   On the other side of this argument is *Leitner v. Leitner*, 11 Va. Cir. 281 (1988). In *Leitner*, Wife filed for divorce, alleging adultery. Husband denied the allegations, and affirmatively alleged that he had been a “faithful and dutiful” husband. The trial court held that husband had waived his 5th Amendment right — and in fact that he had waived it twice -- once for alleging faithfulness (which “opened the door” to questions regarding adultery), and a second time by denying the adultery in his initial pleadings.

   Although the more prudent course of action is to assert one’s Fifth Amendment privilege in the initial pleading, in the event one fails to, or inherits a case from someone who failed to, the decisions in *Helmes* and *Pelliccia* suggest that all should not be lost.

B. **Sword and Shield:** As discussed below, sword and shield should not apply anymore in light of section 8.01-223.1 of the Virginia Code, as interpreted in *Travis v. Finley*, 36 Va. App. 189, 548 S.E. 2d 906 (2001).
1. **Common law**: At common law, if one asserted his or her privilege against self-incrimination (i.e. using it as a “shield”), he could not also use the claim as a “sword” to obtain information relevant to the claim. The underlying rationale for this was that it would be unjust to permit parties to use the court to seek affirmative relief while at the same time deflecting relevant questions which may constitute defenses to those claims for relief.

2. §8.01-223.1: This Code section provides that “in any civil action the exercise by a party of any constitutional protection shall not be used against him.” The Court of Appeals in *Travis v. Finley* held that this statute overrode the common law sword and shield doctrine.

3. *Travis v. Finley*: Mother was awarded custody of the parties’ children and stated an intention to relocate. The trial court enjoined her from doing so pending appeal, but she moved anyway. The trial court changed custody of the children and placed them with father. Mother then moved to modify this Order. Father issued interrogatories to Mother, to which she asserted a Fifth Amendment privilege and refused to answer. The trial court dismissed her Motion to Modify, presumably based on the sword and shield doctrine. The Court of Appeals reversed, stating that the trial court could not take adverse action against mother for her assertion of her Fifth Amendment right.

4. *Pelliccia v. McKeithen, 59 Va. Cir. (2002)*: Complainant filed for partition of jointly-held real property. Defendant filed an Answer and Cross-bill alleging Complainant forged a signature on a real estate document. In her Answer, Defendant denied the forgery and refused to answer questions related to the matter. During her deposition, when asked about the forgery, Defendant invoked her Fifth Amendment privilege not to respond. Plaintiff’s lawyer sought dismissal of her partition suit on the basis of sword and shield. The trial court denied the request, because per §8.01-223.1, the sword and shield doctrine could not be invoked.

C. **Statute of Limitations**: Adultery has a one year statute of limitations, so can one plead the Fifth with respect to encounters that happened over a year ago? There is no appellate case law on this subject, and circuit opinions are split. *Note*: this does not work with sodomy/buggery, which has no statute of limitations.

The rationale for allowing one to plead the Fifth, even for conduct which can’t be prosecuted because the limitations period has expired is as follows: if you require one to testify about adultery that happened outside the limitation period, that person’s testimony may be used as a “link in the chain of evidence” to convict him of adultery that took place within the limitation period. This rationale is more fully expressed in criminal opinions. However, it was noted in the *Edgar* and *Domestici* decisions, cited below.

1. **Cases upholding invocation of Fifth Amendment for adultery occurring over a year prior**: *Domestici v. Domestici*, 62 Va. Cir. 13 (Fairfax County, MacKay, J., 2003); *Edgar v. Edgar*, 44 Va. Cir. 191 (Fairfax County, Smith, J., 1997);

2. **Cases denying invocation of Fifth Amendment for adultery occurring over a year prior**: *Pierce v. Pierce*, 25 Va. Cir. 348 (Fairfax County, Annunziatta, J., 1991); *Messiah v. Messiah*, 17 Va. Cir. 365 (Fairfax County, McWeeney, J., 1989);
3. **Real-world practice:** Facts can drive the argument regarding testimony outside of the limitations period. For example, if the paramour died, relocated, or otherwise had no contact with the adulterous spouse subsequent to the adultery, one may be able to convince the trier of fact that adultery inside the limitations period could not have occurred;

D. **Different Jurisdictions:** If the adultery or sodomy/buggery happened in a jurisdiction where such conduct is not illegal, in theory one would not be able to plead the Fifth regarding it.

1. **How to find various state laws:** For sodomy, [www.sodomylaws.org](http://www.sodomylaws.org). The only corresponding site found for adultery laws was [christianparty.net/adulterylaws.htm](http://christianparty.net/adulterylaws.htm). However, your author does not put much stock in this site, given that a large additional section of it is devoted to holocaust denial;

2. **Defenses:** The main, and probably only, defense is the same as for statute of limitations, namely, that by admitting to the conduct in a foreign jurisdiction, one could provide a “link in the chain of evidence” to tie it to a criminal act that took place in Virginia. *See Helmes v. Helmes*, 41 Va. Cir. 277 (Fairfax County, Alden, J., 1997);

3. **Real world practice:** The arguments regarding different jurisdictions are largely fact-driven. For example, a Virginia resident carrying on an illicit affair with a Maryland resident, or two Virginia residents engaging in activity that took place on an out-of-state vacation, would likely have a pretty compelling “link in the chain” argument as they likely engaged in illicit activity in Virginia as well. A Virginia resident having a vacation fling with someone in a non-neighboring state would likely have a much tougher time making this argument.

E. **Immunity:** If one is immune from prosecution, the privilege against self-incrimination is unnecessary and cannot be invoked. Immunity is extremely difficult to get, however. Immunity must be “complete” and there can be “no possibility of prosecution.” (§18.2-361). A full discussion of immunity is beyond the scope of this article, but if you think it may apply to your situation, please see Edward Barnes’s article regarding the Fifth Amendment in the *Virginia Lawyer* magazine. (Online at [http://www.vsb.org/site/publications/valawyer/virginia-lawyer-magazine-february-2002/](http://www.vsb.org/site/publications/valawyer/virginia-lawyer-magazine-february-2002/))

F. **Possibility of prosecution is remote or speculative:** This argument can be effective, depending on the facts, jurisdiction, judge, phase of the moon, etc.

1. **Method:** Arguing that the threat of prosecution of adultery is only remote or speculative. At least one circuit court opinion has used this as a rationale for compelling testimony over a Fifth Amendment objection. *See Cornelison v. Cornelison*, Chancery no. 92718, Fairfax County, letter opinion by Annunziata, J., of November 27, 1990 (commenting that prosecution of adultery between private, consenting adults is, at best, “a matter of historical curiosity”). However, this case predates poor Mr. Bushey’s situation, explained below;
2. Contrary position: Courts are not in a position to speculate as to whether someone will be prosecuted. “[I]f incriminating potential is found to exist, courts should not engage in raw speculation as to whether the government will actually prosecute.” 

_U.S. v. Sharp, 920 F.2d 1167 (4th Cir. 1990)._ Also, John Bushey, an attorney in Luray County, was actually prosecuted for adultery in 2003. Also, at least one of the Armed Services is particularly interested in such prosecutions, under the Uniform Code of Military Justice, given the effect of adultery on morale. If sodomy or buggery is alleged, and it’s done in a public place, people are also still routinely being prosecuted. 


V. Fifth Amendment: Can One Draw a Negative Inference from its Invocation? 

Typically, one cannot draw a negative inference from a party’s invocation of the Fifth Amendment. _See Romero v. Colbow, 27 Va. App. 88 at 93, 497 S.E. 2d 516 (1998)._ However, the case of _Watts v. Watts, 40 Va. App. 685, 581 S.E. 2d 224 (2003),_ makes this seemingly sacrosanct principle seem substantially less so. 

In _Watts,_ wife alleged husband committed adultery. In support of her allegation, she had both private investigator testimony regarding husband’s meetings with his alleged paramour late at night, and her own testimony regarding husband’s behavior at home. He began coming home from work late and being secretive. She also overheard him profess his love to a third party via telephone. When deposed, husband invoked the Fifth Amendment and refused to answer any questions about his relationship with the alleged paramour. 

Addressing this issue, the Court of Appeals held that “[a]lthough husband invoked the Fifth Amendment when asked during deposition testimony whether he and [paramour] engaged in intercourse, we make no negative inference based on his exercise of the privilege...In doing so, however, husband failed to provide a reasonable explanation for his conduct, a matter about which we do take cognizance.” _Id._ at 696-697. 

This holding would seem very problematic for the spouse asserting the privilege who can been seen exhibiting “questionable” behavior. Isn’t “taking cognizance” of husband’s failure to explain himself (he obviously can’t explain himself after pleading the Fifth) in practice the same in practice as making a “negative inference?” 

VI. Effect of Constitutional Challenges to Adultery/Sodomy laws. 

Recent constitutional decisions from the U.S. Supreme Court and Virginia Supreme Court have had a significant impact on adultery and sodomy laws. 

A. _Lawrence v. Texas_ — In the landmark case of _Lawrence v. Texas, 539 U.S. 558 (2003),_ the United States Supreme Court held a Texas statute criminalizing sexual contact between members of the same sex to be unconstitutional. In so doing, the court reversed its holding in the earlier case of _Bowers v. Hardwick, 478 U.S. 186 (1986)._ It is important to note that the Court in _Lawrence_ only held a law criminalizing private sexual conduct between unmarried consenting adults unconstitutional. Its ruling did not extend beyond this specific fact scenario, either in dicta or otherwise.
B. Effect on adultery statute: The main effect *Lawrence* has had thus far is that its holding was extended in the Virginia case of *Martin v. Ziherl*, 269 Va. 35, 607 S.E. 2d 367 (2005), to hold Virginia’s statute prohibiting fornication (sexual intercourse committed by an unmarried person) unconstitutional. This means an unmarried third party accused of having an adulterous relationship with a married person should not be permitted to plead a Fifth Amendment defense, because adultery does not apply to an unmarried party and fornication is no longer a prosecutable offense.

The effect of *Lawrence* on Virginia’s adultery statute has not yet been tested. This means that for now, adultery is still a prosecutable offense in the Commonwealth, and a constitutional claim to defeat one’s pleading the Fifth Amendment should not succeed. It should take an appellate level decision to extend the *Lawrence* decision to cover adultery for the following reasons:

1. Adultery harms the institution of marriage, a legitimate state interest, whereas consensual sex between unmarried adults does not. In dicta, the *Lawrence* court seemed to suggest this, by stating “[the court’s holding], as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries *absent injury to a person or abuse of an institution the law protects.*” *Lawrence* at 567;

2. Consensual sodomy is victimless, but adultery is not. *Lawrence* involved two unmarried adults. Adultery involves at least one, and often two, married people. Victims can include children and extended families;

3. The state limits other aspects of marriage. State laws criminalizing married people are nothing new. Virginia law prohibits bigamy, same sex marriages, and marriage between relatives, to name some examples;

4. Sandra Day O’Connor’s concurring opinion in *Lawrence* specifically mentioned marriage as something deserving protection. *See Lawrence* at 585;

5. Several post-*Lawrence* cases from other districts have held that *Lawrence* does not protect one’s right to engage in adultery. *See Beecham v. Henderson County*, 422 F.3d 372 (6th Cir. 2005).

C. Effect on sodomy statute: *Lawrence’s* effect on Virginia’s sodomy statute (18.2-361) should be the same as its effect on Texas’s sodomy statute — namely, that it should be held unconstitutional. The exception to this rule is for sodomy that occurs in public, which is still being prosecuted, and has been held to survive the *Lawrence* decision. *See Singson v. Commonwealth*, 46 Va. App. 724, 621 S.E. 2d 682 (2005).

The public vs. private aspect of sodomy laws brings up a whole host of interesting issues. For example, if a party has engaged in an affair outside marriage, yet inside his or her gender, he or she should not be able to invoke the Fifth Amendment to refuse to answer questions regarding the affair *so long as the conduct alleged occurred in private*. If a party has
engaged in oral or anal sex — but not intercourse — with an opposite sex partner, they should likewise not be permitted to invoke the Fifth Amendment.

VII. Practice Pointers.

A. Applies only to married individuals — maybe. Fornication is no longer prosecutable as a crime in Virginia, so an unmarried party who “assisted” a married party in the commission of adultery has not committed a crime. However, the statute regarding sodomy and buggery applies to all, married and unmarried alike. Would evidence of a paramour’s adultery tend to furnish a link in the chain of evidence to prosecute the paramour under the crimes against nature statute for other forms of sexual contact with the same individual?

B. Plead with care: “Crimes against nature” that take place in public are still being prosecuted. Per § 18.2-361, the gender of the participants does not matter (although it appears the only folks ever actually prosecuted under this statute for public crimes against nature are homosexual). Often, private investigators and other witnesses see public displays of affection that stretch into the realm of a crime against nature. Pleading must be done carefully. If, for example, one is presented with five instances of sexual contact between individuals with two of those instances occurring in a public place (i.e. in a parked car, on the beach), one may only want to plead the three that took place in private. If one pleads all five, the other side may be able to plead the Fifth to everything, because evidence of the private acts may provide the dreaded “link in the chain of evidence” to prove the public ones.

C. Watch the waiver: Even though a denial probably should not act as a waiver, there is a split of opinion on the subject, as discussed earlier. No Virginia reported decision (or unreported appellate-level decision) has addressed this issue. The best course of action is to plead the Fifth from the start, and never, ever, include allegations of being a “good and faithful spouse.”

D. Is Adultery relevant if not pled?: A common tactic by domestic relations practitioners in cases they suspect involve adultery, but cannot allege same in a manner sufficient to survive demurrer, is to file based on some other ground, then include questions about adultery in discovery. Is this objectionable? One is only permitted discovery of relevant things in a divorce proceeding. Rule 4:1(b)(5). Is information about adultery relevant (and therefore discoverable), in a case in which it has not yet been pled? The answer has never been specifically addressed in a reported Virginia case, although an unreported decision of Hall v. Hall, 2005 Va. App. LEXIS 401 (2005), addresses a similar question.

E. Taking “cognizance of” failure to explain one’s suspicious conduct. As set forth in section V above, the Court can’t make a negative inference based on a party’s invocation of their Fifth Amendment right. But according to the Watts case, the Court can “take cognizance” of a party’s failure to explain their actions, even if the failure to explain is a necessary outgrowth of their pleading the Fifth.

F. What to object to?: One of the trickiest questions regarding adultery is what specific questions, most often those asked in a deposition, to object to. The conventional wisdom seems to be that if you’re the “third party” and you’re obviously being deposed only for
information regarding your relationship with another party, one gives one’s name and not much else. If you’re a party, one generally invokes the Fifth Amendment as to whether you’ve even heard of the paramour. Often the concern is that practitioners want to be overly cautious and not inadvertently waive one’s Fifth Amendment privilege. However, such a broad approach is perhaps not necessary or advisable.

There is no blanket right to invoke the Fifth Amendment. See, e.g., Goldmann v. Goldmann, 2002 Va. App. LEXIS 772 (2002). As set forth herein, waiver is pretty difficult to do. Questions admitting knowing the paramour, having lunch with him or her, etc., are likely proper and should be answered. Questions regarding spending the night, etc., should probably not. See Domestici v. Domestici, 62 Va. Cir. 13 (MacKay, J. 2003).

G. Tread lightly in the initial consultation: When a client affirmatively states that he or she has engaged in adultery, sodomy, buggery, etc., one’s ability to advance the opposite position to the Court is severely hampered. The rules of professional ethics prevent us from suborning perjury. Questions in the initial consultation must be framed carefully so as to preserve the client’s full range of options.

VII. Conclusion.

Unless and until the laws prohibiting adultery and “crimes against nature” are repealed, they will continue to present thorny legal (as well as emotional issues) for practitioners to deal with. There is no stock “adultery” case, or way of dealing with “adultery” cases. Each situation can pose different challenges and opportunities for both accuser and accused. Each situation is different, and should be dealt with as such.

Borderline Personality Disorder and the Attorney-Client Relationship: Managing the Difficult Legal Client

By Daniel Kupper, Ph.D., Los Angeles, California

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Personality Disorders in the General Population

Personality disorders are psychiatric conditions identified by specific criteria in the Diagnostic and Statistical Manual (DSM-IVR) of the American Psychiatric Association. All
ten personality disorders are characterized by rigid and inflexible patterns of thinking, emotional experience and behavior. By definition, personality disorders are chronic in nature, manifesting across a broad range of situations, and not the result of specific, stressful events (e.g., a disrupted business partnership). They usually have a marked, debilitating effect on interpersonal relationships and occupational and academic functioning, and can lead to problematic interactions in the legal setting. It is generally believed that each personality disorder is caused by a combination of genetic and environmental factors. Survey research indicates that at any one time, 10 to 13% of the population, and 20% to 30% of patients in primary care outpatient settings, may be afflicted with a personality disorder.

Borderline Personality Disorder (BPD)

A personality disorder that appears frequently in legal settings and tends to lead to difficult and potentially destructive interactions is Borderline Personality Disorder. For reasons delineated below, persons with BPD often feel compelled to seek legal redress and can be quite litigious. They are often the “difficult” clients who seduce, frustrate, or intimidate attorneys and their staff. Borderline clients are usually impulsive and evince instability across many areas of their life—relationships, self-esteem, affect and behavior. Abandonment and rejection by a needed or trusted other are feared above all things. Therefore, relationships, especially those characterized by a measure of dependency, for example the attorney/client relationship, trigger a kind of “hyper alertness” to betrayal. In the face of the experience — or, more likely, the perception of rejection — panic, rage, and retaliation are typical. Other common BPD symptoms include depression, anxiety, self-mutilation, suicide threats and attempts, substance abuse, eating disorders, gambling, and reckless spending and sexual behavior.

About 75% of those given the diagnosis of BPD are women. However, this may be because male borderlines are more likely to direct violence at others. They often get into fights and are frequently cyclical domestic abusers. Thus, they are more likely to be incarcerated and end up being diagnosed with Antisocial Personality Disorder. Inherited and environmental factors both seem to interact to lead to adult BPD. It may be that borderline adults are from birth temperamentally more prone to experiencing intense negative feelings when frustrated. Research indicates that BPD adults come from families where they experienced constant “invalidation;” that is, their emotional reactions and opinions were negated and considered wrong, crazy, or weak. There is evidence that borderlines had troubled interactions even in infancy with their primary caretakers, usually the mother. Their mothers have been characterized most frequently as “frightened and frightening.” It is also clear that a large percentage of borderline adults have experienced trauma in the form of chronic sexual, physical, or psychological abuse during childhood or adolescence.

Borderlines vary widely in overall functioning, but they are always significantly impaired in either intimate relationships or occupational functioning, or often both. However, it is important to remember that there are many “high-functioning” borderlines who can be very successful and accomplished. They may be highly respected and successful physicians, judges, attorneys, professors, business people, writers or actors. They can do very well as long as they can avoid intimacy, their work situation is “structured”, and they can identify and take refuge in their professional role while working with others.
BPD In the Legal Setting

In the legal setting, BPD can be immediately identifiable, or may only gradually become apparent over time and after multiple interactions. A client’s behavior may be highly inappropriate to the situation (e.g., hostile, seductive, anxious, needy) and may in turn elicit powerful and often irrational negative or positive emotional reactions from legal practitioners. For instance, their demands in terms of time and availability may be unreasonable and relentless, or they may constantly test or show open contempt for an attorney’s loyalty, competence, or motives. This is often due to an inability to reflect on their behavior or empathize with others. Their tendency is to misinterpret and distort the communications and intentions of others. At these times, it is important to realize that they may truly believe that they are in danger and might be destroyed, and that their behavior is the direct result of this certainty, however unreasonable that may seem to the casual observer.

As a result of early trauma, Borderlines tend not to think in terms of “states of mind” or to reflect on the intent behind actions. They tend to judge people purely on their behavior without considering the variety of possible motivations behind a certain behavior. Therefore, attitudes, beliefs or motivations behind certain behaviors can be grossly misidentified, especially if the BPD feels pushed away or neglected. Because of their history of trauma, they tend not to differentiate feeling from fact. They believe that their emotional reactions are equivalent to reality. Thus they may rapidly but incorrectly infer anger, lack of interest, control and rejection from another’s actions or even facial expressions, all of which for them imply inevitable abandonment. Acute feelings of panic then ensue. Finally, they attempt to protect themselves and regain some sense of power and dignity by retaliating with hostile verbal or sometimes physical threats (e.g., reports to the Bar Association, legal action), and self-righteous character assassination.

One day outside my office I ran into a patient with BPD. I was preoccupied and hurrying to a lunch appointment and out of context almost didn’t recognize her. When I did, I said hello politely and hurried on. When she next came in, her demeanor was noticeably cold. She announced that because of the “abusive” way I had treated her on the street, she finally realized “what I was up to,” and had decided to report me to my professional board for gross
negligence. Although eventually she was able to accept my candid and direct explanation for my behavior and understand that it might not have been indicative of my sadistic desire to degrade and humiliate her, this incident underscores the Borderlines’ exquisite sensitivity to perceived slights, their tendency, especially when hurt, to focus on behavior rather than on possible intentions, to assume that their emotional reaction is the truth and only truth, and their conviction that they have no other alternative but to defend themselves by counterattacking their perceived victimizer. Mental health professionals will tell you that when you feel like you are “walking on eggshells” with your client, you are most likely in the presence of borderline pathology.

This article is intended to provide the legal practitioner with effective strategies for managing difficult clients, who may or may not have Borderline Personality Disorder.

The BPD Client and Litigation

Borderlines are often drawn to conflict because they tend to see relationships as existing in dynamics of victim/persecutor, helpless/powerful, controlled/controlling. This is due to their tendency to rely on unconscious defense mechanisms called “splitting” and “projection.” Splitting is the tendency to see the self and others as either all good or all bad, and the tendency to oscillate rapidly between these two extreme positions. Projection, which occurs simultaneously, externalizes the borderline’s internal fears and self-hatred onto an interpersonal relationship. For instance, an attorney can be seen at one point as a brilliant, protective savior, but if there is even a small crack in the armor, the same person can be viewed as an incompetent or dishonest charlatan who is only interested in racking up fees. At times, they see themselves as all bad and worthless, and may become depressed and suicidal. When they attempt to relieve themselves of these painful feelings by projecting them outward, they can then see themselves as all good and others — possibly spouses, business partners, employers, and medical and legal professionals — as evil exploiters and victimizers.

This tendency to split is exacerbated when, in the context of a close or important relationship, they believe they have been hurt, neglected, or abandoned by someone they trusted often blindly. As mentioned above, this leads to an excruciating experience of intense shame and anxiety. As a way to relieve this intolerable state of mind, they tend to focus incredible energy on striking back at the perceived “perpetrator”, blaming that person as the cause of everything bad, without taking into consideration or taking responsibility for their own actions. Their world can rapidly transform into a self-contained, simplistic drama of the righteous versus the evil where they play the part of the hero fighting for justice and dignity. A significant appreciation of the nuance and complexity of most relationships is not possible.

The use of splitting and projection leads to a set of predictable behaviors and attitudes on the part of a BPD client. First, they can have total certainty and a passionate belief in their skewed view of reality. Also, instead of facts and logic, they tend to use intense emotion to convince others of their point of view. Research has shown consistently that humans can be very susceptible to a passionately-held point of view; clinical reports attest to the fact that individuals with BPD are uncannily adept at inducing others to experience certain feelings and attitudes toward them. Furthermore, many borderlines can also be quite adept at presenting a
calm, reasonable public persona, while they are violent, abusive and irrational in private with those they know well.

Often attorneys, juries, and judges are won over. At least at first, they want to help them and become angry with those accused of victimization. The borderline tendency to negatively stereotype, hurl allegations, and recruit others in the character assassination of their adversary can become convincing, no matter how exaggerated.

With its adversarial assumptions, the legal setting can reinforce the tendency to split and underscores the appeal of the concrete over the abstract. In terms of their battle against a perceived victimizer, only winning in a palpable (i.e., through a monetary settlement or award, or judicial order) manner relieves them of their shame and anger. They also tend to seek out those whom they can idealize and consider powerful enough to protect them. Attorneys are such professionals: it is their role to advocate for others. Some attorneys will not be concerned about this; others, for personal reasons, may be flattered and buy into it. This can lead to uncritical acceptance of their BPD clients or increasing emotional involvement. In some cases, attorneys, like other professionals who enter a professional relationship with a borderline client, will lose their sense of professional boundaries and become intimately involved with their borderline clients.

The BPD Client and His or Her Attorney

Legal professionals must not be in denial about the fact that, no matter how positive your relationship with your client or how wonderful you seem to be in their eyes, the BPD client remains chronically suspicious and highly alert to minute signs of betrayal, lack of interest, control, or obfuscation, particularly on the part of those on whom they depend. Along with their chronic tendency to see danger where it doesn’t exist, their seeming inability to reflect on the variety of mental intentions that might motivate a particular behavior, and their need to constantly test the loyalty of others, it is likely that disappointment, hurt, and rage will be inevitable. At that point, the attorney and the firm, once seen in a totally positive, idealized light, will be perceived in highly negative terms and condemned as evil for any number of reasons. Under these circumstances, the attorney client relationship can become chaotic and hostile. In extreme but not necessarily rare cases, a new attorney will be hired, and the erstwhile attorney and his office will be reported to the Bar for incompetence or negligence, or threatened with legal action.

Strategies

In order to lower the probability of this reaction or to modulate it when it occurs, it is first and foremost essential for the attorney and anyone else in the firm who has contact with this client to honestly monitor their own feelings about the client and to take them into careful consideration when dealing directly with him or her. When attorneys don’t do this they run the risk of engaging in behavior that ultimately sabotages their relationship with their borderline clients.

Also, be cognizant of the impact of your demeanor, tone, and behavior on this particular client. Try to approach things in a direct, but calm and neutral manner. Individuals
with BPD scan facial expressions and nonverbal behavior but tend to misinterpret it. Try not to flood these clients with your opinions or to overwhelm them with potential scenarios that might be negative. The BPD client is easily overwhelmed and may feel endangered either by the information you present or the way in which you present it. At this point, rather than taking in or thinking about what you are presenting, the BPD client will tend to shift to a fight or flight position, and become vigilant, anxious and emotional.

However, it is equally important not to give in to the tendency to avoid negative information or to tiptoe around your BPD clients. In reaction they are almost certain to believe they are again being invalidated. Instead, try to make every communication with a client whom you suspect has BPD as transparent as possible, particularly when a disagreement arises or seems likely. The following specific approaches can help if used persistently:

1. Elicit and solicit your client’s point of view. Don’t refute it immediately, no matter what your opinion. Instead, treat the clients respectfully and especially non-judgmentally by asking them questions about why they believe certain things to be true or how they came to that opinion.

2. When you present your own point of view, take care to mention that you are aware that other points of view exist and that your point of view is one alternative and could be fully or partially mistaken. An attorney might begin by saying, “I appreciate your views on this matter and your certainty about them, but I wouldn’t be doing my job if I didn’t tell you that there are certain alternative ways of looking at this that come to my mind. Can I go ahead and share them with you?”

3. Always check in with the borderline in a nonchalant, non-patronizing way to make sure you have been understood in the way you intended, by asking, for example, “Does what I said make sense to you?” Borderlines believe their view of reality is the only correct one, but it is important that you come away from significant discussions with the sense that the client understands your stance and/or evaluation, and that it differs from his or hers.

4. Don’t try to avoid conflict with the BPD client. The typical way in which professionals avoid conflict with their borderline clients is to hide information that might cause an emotional reaction, especially if it is bad news — or to avoid contact entirely. Do your best to fight against this tendency; it is almost always a mistake. Borderline clients hate “not knowing” and tend to look for evidence that they are being deceived. If they find out that information is being kept from them, trust in you will be instantly damaged and possibly destroyed, and you will be considered dangerous or worthless to them.

**Conclusion**

In addition to having his own extremely rigid notion about why and how things happen, the BPD client can quickly become suspicious of even the “all good” attorney’s motivations. When you turn your thought processes inside out for the
client, explaining clearly and undefensively why you reached the conclusion you reached, you reassure the client that you are not hiding anything or keeping anything secret, even if you are inevitably challenging the accuracy of his own rigid, distorted views. If you do this in a collaborative, non-confrontational way, instead of lecturing or becoming impatient, you are less likely to trigger the sense of threat, which will undermine your attempts to work successfully with this client. In all, clinical experience indicates that borderlines are reassured and calmed by direct, clear communication, even if it contains unpleasant information.

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De Facto Parent Status

By Eve Epstein, Law Student at University of California, Davis, and Summer Associate with Legal Services of Northern Virginia, Arlington

On January 10, 2003, Christine M. Stadter’s partner gave birth to their daughter. Throughout the pregnancy, she and her partner shared prenatal expenses and responsibilities. Their child was given both their last names, they mutually shared caretaking responsibilities, and Stadter provided significant financial support. After their five-year relationship ended, Stadter sought visitation. Unfortunately, having not adopted the child nor entered into a written agreement concerning her parental rights, Stadter was unsuccessful.

In 1999, Elbert Griffin found himself in a very similar situation. Based upon his wife’s statements, he believed that he was the biological father of their child. However, about a year after his son’s birth the parties separated, and a court-ordered paternity test revealed that he was not the biological father.

In both of these cases the petitioners argued that they were a de facto parent or psychological parent, contending that they performed the functions of a parent with the consent of the biological parent. The Virginia Court of Appeals in each case declined to adopt the de facto parent doctrine that at least twenty-six sister states, including the District of Columbia, use. In Stadter, the court found that “the de facto parent doctrine is simply the means by which the judiciaries of some of our sister states give effect to the general principle that actual psychological harm to the child will overcome the Troxel presumption in favor of a biological parent in visitation cases.” In both cases the court found that § 20-124.2(B)’s provision, which permits persons with a “legitimate interest” to have standing and be granted visitation if they can show by clear and convincing evidence that the child will suffer actual harm if the non-biological parent is not granted visitation, sufficiently protects the best interests of

2 Id.
3 Id.
4 Id.
children and the interests of third parties. It is my contention that the Virginia court’s rejection of the de facto parent doctrine sets the bar too high for a functional parent to assert their parental rights and to sufficiently protect the child’s best interests.

The primary concern for any state that seeks to adopt a de facto parent doctrine, or similar statute, is the United States Supreme Court’s holding in Troxel v. Granville. In Troxel, the Court found Washington state’s statute unconstitutional. The statute provided that “[a]ny person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.” The Court held that this statute unconstitutionally infringed upon the substantive due process rights of parents to rear their children. Since that holding in 2000, numerous state courts have declined to extend Troxel. Many of those that distinguished Troxel did so by broadening the definition of “parent” to include de facto and psychological parents. States which decline to extend the Troxel holding are often those which seek to recognize the existence of non-nuclear families, but are constitutionally restricted in the visitation and custodial rights they can provide to those persons.

Virginia is not unique in this respect. Virginia’s statute, § 20-124.1, states: “‘Person with a legitimate interest’ shall be broadly construed and includes but is not limited to

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8 Id.; See also Griffin v. Griffin, 41 Va. App. 77, 83 (2003).
11 See generally Gestl v. Fredrick, 133 Md. App. 216 (2000) (holding that Troxel does not prevent giving custody to a non-parent upon a showing of exceptional circumstances); Fitzpatrick v. Youngs, No. V-166-00, slip. op. (N.Y. Fam. Ct. Nov. 2, 2000) (holding that Troxel should be limited to its facts, and the Washington statute involved was overbroad); Central Texas Nudists v. County of Travis, No. 03-00-00024-CV, 2000 WL 1784344, (Tex. App. Dec. 7, 2000) (holding that Troxel simply affirms a parent’s right to direct the upbringing of a child); Galjour v. Haris, 795 So. 2d 350, 356 (La. App. 1st Cir. March 28, 2001) (holding that Troxel is only applicable in states with a “breathtakingly broad” visitation statute); Webster v. Ryan, No. 1448D, slip. op. (N.Y. Fam. Ct. Jun. 21, 2001) overruled by Harriet II v. Alex LL., No. 89998, slip. op. (N.Y.A.D. 3 Dept. Apr. 11, 2002) (holding that Troxel involved an unconstitutional statute as applied); In re Paternity of Roger D.H., 641 N.W.2d 440, 443 (2002) (holding that there is “no suggestion in Troxel that a court may only interfere with a parent’s decision regarding visitation if the parent is shown to be unfit”); Jesuit College Preparatory School v. Judy, 231 F.2d 520 (N.D. Tex. 2002) vacated, Jesuit College Preparatory School v. Buter, No. 02-10174, 2003 WL 23323003, (5th Cir. Feb. 26, 2003) (holding that Troxel merely reaffirms parents’ fundamental right to control the upbringing of their child, but it does not define the limits of that right); In re Shelby R. 804 A.2d 435 (2002) (holding that Troxel does not prohibit a state from appointing counsel to stepparents, like natural or adoptive parents, for charges of abuse or neglect); Kneefel v. McLaughlin, 67 P.3d 947 (2003) (holding that Troxel does not automatically terminate the visitation rights of a former domestic partner after the child was formally adopted by his father); Winfield v. Winfield, No. 2002-L-010, 2003 WL 22952773, (Ohio App. 11 Dist. Dec. 12, 2003) (holding that Troxel does not mandate that a court enter into suitability or unfitness analysis in determining that a child’s best interest would be served by a modification of custody); In re H.B.N.S., No. 14-05-00410-CV, 14-06-00102-CV, 2007 WL 2034913, (Tex. Ct. App. 14th Dist.) (holding that Troxel does not extend constitutional protection to a birth parent who relinquishes her parental rights); Enrique M. v. Angelina V., 94 Cal. Rptr. 883 (Cal. Ct. App. 4th Dist. 2009) (holding that Troxel does not expressly require a strict scrutiny standard).
grandparents, stepparent, former stepparents, blood relatives and family members.”13 In drafting this statute the Virginia legislature acknowledged the broadening definition of family. Further, the statute provides that the definition must be construed “broadly to accommodate the best interest of the child.”14 Thus, the Virginia legislature sought to enable a diverse group of people with legitimate interests to assert their custodial and visitation rights so to promote and protect the best interests of children. Nevertheless, the standard of proof imposed upon such persons is clear and convincing evidence that it is in the best interest of the child to award custody or visitation.15

After the Troxel decision, the Virginia Court of Appeals felt compelled to require the petitioning third party to demonstrate that there will be actual harm to the child, under the clear and convincing standard, if custody or visitation is not granted. In contrast, the courts apply a best interest analysis in a dispute between biological parents, which presumes that it is in the best interest of the child to provide custody or visitation to the petitioner.16 In my opinion, it is inconsistent to recognize the rights of persons with legitimate interests to petition for custody, but then impose a standard of proof that is virtually impossible to meet, as if they are not full members of the family. Contrary to the Stadter court’s findings that Virginia does not need to adopt the de facto parent status doctrine because §§ 20-124.1 and 20-124.2(B) protect the rights of third parties with a legitimate interest,17 the statutes only permit standing for these persons, they do not in fact protect functional parents’ interests without they having to overcome a very heavy burden of proof which is not commensurate with the burden imposed on de facto parents in many other states.

On the one hand, under the Constitution the fundamental right of parents to control the upbringing of their children — which includes determining who may have custody or visit their child — is a longstanding constitutional principle. On the other hand, if states believe they should keep up with an ever-changing definition of family, they should seek to redefine or broaden their definition of “parent” to protect the best interests of children. At least 26 states, including the District of Columbia, recognize the rights of de facto parents, psychological parents, or persons in loco parentis to have standing to seek visitation and custody.18 They vary in their definitions, the burden of proof they impose upon the petitioner, and for whom they

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14 Id.
15 VA. CODE ANN. § 20-124.2(B) (West 2009).
16 VA. CODE ANN. § 20-124.3 (West 2009).
would extend the definition of parent.

West Virginia, Pennsylvania, Wisconsin and Nebraska have fairly liberal *de facto* parent statutes or *in loco parentis* common-law statutes. The issue is not limited to same-sex parenthood, but pertains to any person who has assumed the role of a parent with the express consent of a biological parent.

In adopting a new statute, the Virginia legislature should first consider what the state interest is in establishing and protecting parentage. Rather than simply looking at this as an issue of parental rights, the legislature should also consider this to be an issue of juvenile rights. Under the Virginia parentage statute, once paternity has been established the father has a legal duty to support the child. This is so because child support is the right of a child, regardless of the marital status of its parents. Inherent in this concept is that it is in the best interest of all children to hold its parents responsible. The state also has an interest in ensuring that biological parents are financially responsible for their own children so that the state is not charged with the cost of supporting the child. However, in failing to acknowledge the parenthood of those who encouraged women to undergo artificial insemination, for example, because the encouraging party is either a member of the same sex or infertile, Virginia fails to impose the very same legal duty that protects the best interest of children and the interests of the state. By not recognizing these people as parents because of the state’s concern about legitimating non-normative family units, the state is discouraging the imposition of legal duties on a two-parent family; the consequence of which causes either the single parent to shoulder the entire cost or the state to assist a parent who could have sought child support. If Virginia believes that it is in the child’s best interest to have two parents, it should not permit functional parents to ignore their legal duties because of their biological relation to the child.

With parental duties come parental rights. Under § 20-124.2(B), “[t]he court shall assure minor children of frequent and continuing contact with both parents, when appropriate, and encourage parents to share in the responsibilities of rearing their children.” As discussed in *Troxel*, there is cause for concern when any person can assert rights to a child. However, the law can provide certain safeguards to protect against such an unconstitutional intrusion. Thus, Virginia could adopt a clear test for determining which persons can be considered *de facto* parents to ensure that the due process rights of biological parents are not infringed upon. In *In re Custody of H.S.H.-K.*, the Wisconsin court outlined a four-part test for determining whether a person can be deemed a psychological parent. First, the biological or adoptive parent must have both consented to and fostered the formation and establishment of a parent-like relationship between the child and petitioner. Within this prong, the court should estop a biological mother who has intentionally defrauded a person into believing that he is the biological father from later denying that he is also the parent. Second, the petitioner and child must have lived together in the same home. Third, “the petitioner [must have] assumed

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21 VA. CODE ANN. § 20-124.2(B) (West 2009).
24 There is no substantive difference between the concepts of *de facto* parent and psychological parent.
obligations of parenthood by taking significant responsibility for the child’s care, education and development, including contributing towards the child’s support, without expectation of financial compensation.” Finally, the petitioner must have assumed a parental role for a long enough period of time to establish a “bonded, dependent relationship” with the child. If Virginia adopted a similarly worded statute, then the rights of both biological and de facto parents could be protected.

In addition, a court should not punish the petitioner if the biological parent has unreasonably denied visitation following the separation if such denial has led to a diminished bonding with the child. To prevent an unreasonable denial, the court should mandate visitation prior to the adjudication of de facto parent status. Although biological parents have constitutional protections, Virginia Domestic Relations statutes permit the temporary suspension of one’s constitutional rights while some suits are pending. By analogy, the Juvenile and Domestic Relations court could temporarily suspend a biological parent’s due process rights by granting the petitioner visitation if there is cause for finding that the petitioner is potentially a de facto parent.

It is not irrational for the Stadter court to have reasoned that there should be a heavier burden imposed upon third parties in order to guard against the intrusion into a family. Thus, those who wish to be considered de facto parents should have to prove their parental role under a stringent test, such as the one adopted by Wisconsin, which should be undertaken prior to the court undergoing the best interest analysis. The standard currently imposed in Virginia does not have the effect of protecting the best interests of the child or determining whether one is a parent, because rather than focusing on whom the child believes to be its parent and whether the child will benefit from contact with that person, Virginia courts require a showing of actual harm to the child’s health or welfare. As the courts have subsequently held, this standard will not be met unless there is an expert who categorically asserts that the child will be actually harmed, not merely theoretically emotionally harmed, by a denial of visitation.

_Troxel_ is distinguishable from the de facto parent situation, however, because in the latter context the court is not required to weigh the competing interests of third parties and parents, but rather must weigh the competing interests of biological and functional parents. The constitutional concern is the interference with parents’ fundamental rights to rear their children. Once a court is satisfied that a person meets the definition of a de facto parent, the constitutional deficiency disappears, since a parent is not required to show evidence of actual harm to the child in order to gain visitation or custody. The court should thus impose a heavier burden of proof upon petitioners that requires them to establish de facto parent status, but once all four elements are satisfied the court should apply § 20-124.2(B) as it would to a biological

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25 Supra note 23, at 658.
26 Id.
27 For example, under § 16.1-253.1, a preliminary protective order can be entered in an ex parte hearing, and the alleged abuser will temporarily be prevented from returning to his home for up to 15 days before having the opportunity to testify.
29 Griffin v. Griffin, 41 Va. App. 77, 84 (2003) (“[T]he actual-harm standard must be understood as conceptually different from, and significantly weightier than, the best-interests test. …‘It is irrelevant, to this constitutional analysis, that it might, in many instances be ‘better’ or ‘desirable’ for a child’ to have visitation with a non-parent.’”).
If the legislature declines to codify *de facto* parent status, the courts should adopt the doctrine. However, the *Stadter* court expressed concern about adopting a common-law doctrine “by judicial fiat.”\(^{30}\) Despite their codification, the provisions within § 20-124 only provide factors and standards to apply in custody and visitation, but courts are given significant latitude in making custodial and visitation determinations. For example, the best interest factors outlined in § 20-124.3 enumerate nine concrete factors, but the tenth factor permits consideration of “other factors as the court deems necessary and proper to the determination.”\(^{31}\) The same flexibility is provided to courts with respect to a “person with a legitimate interest.” The legislature requires the court construe the term broadly. At this time, “person with a legitimate interest” can include persons who would be considered *de facto* parents in other states and third parties who have not served in a parental role. As discussed previously, the courts have construed the clear and convincing standard imposed in § 20-124.2(B) to also require a showing of actual harm.\(^{32}\) They do not do so as judicial activists, but rather out of an abundant caution to prevent § 20-124.2(B) from being overturned based upon the *Troxel* holding. Thus, if Virginia courts are given considerable leeway to interpret “person with a legitimate interest,” and have exercised that freedom, it is not a “judicial fiat” to distinguish between *de facto* parents and other third parties. *Troxel* stands for the proposition that it is unconstitutional to permit third parties to file a visitation petition that would allow the court to disregard any decision by a fit custodial parent so long as visitation is in the child’s best interest.\(^{33}\) It does not contemplate denying *de facto* parents the same rights as a fit custodial biological parent.

Despite the *Stadter* court’s constitutional concerns, it is consistent with the Virginia courts’ statutory construction and the state legislature’s intent to adopt the *de facto* parent status doctrine. The *Stadter* court defended its position by contending that § 20-124.2(B) essentially provides the same protections as other states’ *de facto* parent status. It is incorrect. Virginia is currently providing functional parents standing to sue, but virtually no chance of success. The US Supreme Court and Virginia courts have recognized that is not the place of the government to interfere into the family without cause. Yet it appears that Virginia recognizes that acknowledging a broadening definition of “family” is essential for protecting the best interests of children. In order to protect children’s best interests, Virginia should not strip away the rights of functional parents who do not fit the traditional definition of “parent.” Once

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**A CALL FOR NOMINATIONS**

- **THE 2010 FAMILY LAW LIFETIME ACHIEVEMENT AWARD**

31 VA. CODE ANN. § 20-124.3 (West 2009).
32 Supra note 28.
2010 FAMILY LAW SERVICE AWARD

The Lifetime Achievement Award was established by the Virginia State Bar Family Law Section to recognize and honor an individual who has made a substantial contribution to the practice and administration of family law in the Commonwealth of Virginia. The award will be given at the discretion of the VSB Family Law Section Board of Governors. The 2009 recipient was Peter Swisher. To learn about prior recipients and obtain more information go to http://www.vsb.org/site/sections/family/view/Lifetime-Achievement-Award/

The Family Law Service Award is given to an individual or organization who has consistently given freely of time, talent and energies to provide valuable services in advancing family, domestic relations or juvenile law in Virginia, whether such services are rendered to the Virginia legal community or directly to the citizens of Virginia. This award is given no more than one time per year. The 2009 recipient was the First Lady of Virginia, Anne Holton. To learn about prior recipients and obtain more information on this award go to http://www.vsb.org/site/sections/family/view/Family-Law-Service-Award/

The awards will be presented at the Advanced Family Law Seminar on April 30, 2010 at The Jefferson Hotel in Richmond, Virginia.

All nominations must be received by January 31, 2010

Download an application from the Family Law Section’s websites referenced above or request one by email at FamilyLaw@vsb.org or contacting Mitch Broudy at 757-408-9773. Completed applications must include a copy of the nominee’s CV and should include nominating letters about the nominee.

person satisfies the de facto parent test, the state no longer has an interest in elevating a biological parent’s rights, and should not intrude upon the fundamental right of the de facto parent to visit and have custody of their child.

NOTES ON RECENT APPELLATE CASES
APPEALS — ORAL ARGUMENT — FAILURE TO SHOW UP — CONTEMPT — DISCIPLINARY MEASURES — ETHICS VIOLATIONS. When you get a notice from the Court of Appeals scheduling oral argument you had better show up, or at least contact the Court and try to beg off, the Court of Appeals makes totally clear in a case called In Re Davey, 54 Va. App. 228, 677 S.E.2d 66 (6/2/09). Davey is a lawyer who represented criminal defendants in each of two appeals which the Clerk set for oral argument on the same day at two different times, notifying Mr. Davey by mail a month ahead of time. When he failed to appear, the Court directed him to file a letter explaining himself, and Davey promptly replied by mail that he had anticipated arguing the cases by telephone and that the notification of the oral argument date was never transferred to his calendar. That inadequate explanation resulted in Rules to Show Cause, this time set for Richmond rather than Salem and Davey a month later was facing a three-judge panel. He there explained that “never transferred to calendar” meant that he failed to write down the date there, and he admitted that he was not showing good cause for his failure to appear. He admitted also that he had received two public reprimands and a public admonition from the Bar for failure to act with reasonable diligence and promptness under Rule 1.3. Each of these in fact involved appeals that he had taken to the Supreme Court and the Court of Appeals. One public reprimand required him to “create and implement a docket control system to ensure that he periodically tracks and reviews the status of all pending matters as an advance reminder of key deadlines … etc.” This time the Court of Appeals fined him $250 for each failure to appear and prohibited him from representing clients before the Court of Appeals for two years. After that time he can petition for reinstatement by showing satisfactory evidence that he is in good standing with the State Bar and the MCLE Board and has in fact complied with the aforementioned 2008 private reprimand.

APPEALS — FINALITY. A Fairfax divorce case in which a Judge Pro Tempore was employed supposedly decided the issue of wife’s relocation with the children when it denied husband’s motion for an injunction, but the Court of Appeals in this case held that that judge’s letter opinion was not a final order and therefore not appealable. The order was entered as “final order,” but the appellate court finds that it did not “adjudicate the principles of the cause.” The Court of Appeals says it does not have subject matter jurisdiction over interim orders, and that is exactly what this is because it did not grant or deny the parties’ pending divorce suit. The order neither granted the divorce, nor adjudged equitable distribution nor so disposed of the support questions that further action was not anticipated. After all, a final and appealable order has to dispose of the whole subject, give all the relief contemplated, provide for giving effect to the sentence adjudged, and leave nothing to be done except superintend ministerially the execution. This case, on the other hand, de Haan v. de Haan, 54 Va. App.
428, 680 S.E.2d 297 (8/4/09), clearly contemplated further action by the trial court, which would have been necessary to give the divorce, determine custody, decide child support and resolve property division. To let this be appealed would expose the parties and the court to the harassing effect of piecemeal appeals of individual rulings. This was clearly not one of those cases on which the issue the judicial officer ruled upon was the only issue in the litigation. The fact that somebody down at the trial level labels the order final does not dispose of the finality issue so as to bind the Court of Appeals. As this opinion explains, “the order must in fact be final.” Many cases are cited, including some taking us back as far as 1856, 1842 and 1797, and this opinion constitutes a full law review article on the subject. This digest would not be complete without noting that the opinion, overflowing with long footnotes, includes in its main text the observation that “these problems would particularly manifest themselves in cases arising from Fairfax County such as this one, for since the trial court in that jurisdiction apparently bifurcates every divorce case, every case could generate multiple appeals,” so that “the disruption of the trial process and expense to the parties would prove severe,” and the burden on the Court of Appeals would “exponentially increase....” When the father argued that the Fairfax judge declared in a “Calendar Control Form” that the custody decision in the letter opinion of the Judge Pro Tem was final rather than pendente lите, the Court of Appeals explained that “the Calendar Control Order’s statement that the father must appeal did not make final that which plainly lacked finality for purposes of appeal.” The Court of Appeals also rejects the argument that because an injunction was denied here the case falls under the appellate jurisdiction conferred in §17.1-405(4), permitting interlocutory appeals from orders denying injunctions. And “since the Judge Pro Tempore found mother residing in Virginia Beach should receive custody, a separate decision on relocation was unnecessary.” The courts have wide latitude to regulate the flow and volume of their calendars by rules, but “a Circuit Court may not designate the resolution of an issue within a pending cause of action as final.”
Just what it means to a trial court when the Court of Appeals remands a case is clarified helpfully by the Court of Appeals in a divorce case called *Robinson v. Robinson*, 54 Va. App. 87, 675 S.E.2d 873, 23 VLW 1335 (5/5/09). The Court of Appeals remanded an alimony case for the judge to reconsider the alimony award of $5,000 per month, and the trial judge promptly re-decreed the same $5,000 amount. The husband, appealing a second time, this time arguing that the judge improperly re-decreed support without holding an evidentiary hearing, but the Court of Appeals now says no hearing is required on such a remand and the trial court did in fact comply with the appellate court’s mandate. In fact, the court below had indeed given the parties a chance to submit proposed written findings of fact and conclusions of law before it re-decided, but the husband had submitted nothing. Second, nothing in this reversing mandate required the judge below to award a different amount the second time, and it cannot simply be inferred from the identical amount that there was in truth no reconsideration. Thirdly, the Court of Appeals rejected the appealing husband’s argument that the Record did not support a finding that the wife would not have enough money to maintain her pre-divorce standard of living for the rest of her expected lifetime if she got no alimony but lived on the income of the property she was awarded. The court below had apparently found that if she spent the income from these awarded assets before age 65, she would then lack sufficient funds to support herself in the style to which she had become accustomed. That finding was supported by the wife’s expert witness, a financial planner. This expert had testified that the only way the wife could avoid being unable to keep up her premarital living standard would be if she waited until after age 65 to start using that property-derived income. The wife had also proved, and the Record supported, that the rate of return she could reasonably expect on those assets was 4%.

The Court of Appeals makes some important and useful pronouncements on the Virginia law of alimony itself.

It explains to the appellent husband the fallacy of his argument that enough money to support an ex-wife in the style to which she has become accustomed is always enough alimony — i.e., that is the permissible maximum. No, the appellate court explains, premarital standard of living is only one of the many §20-107.1(E) factors. There could easily be, as there were here, other factors justifying a high award for the wife. Those factors were reviewed and good reason existed for rewarding her with more alimony as this rather traditional 37-year marriage came to an end. As one might expect, they included the wife having made substantial and significant non-monetary contributions, having been a full-time wife and mother, except for having worked full-time when husband was going through medical school, having sacrificed her nursing career, having managed the household and its budget very well, and now having no vocationally-useful education and now, at age 59, having not worked outside the home in 34 years. Thus the $5,000 per month alimony award was not an abuse of discretion, nor would it have been if she had needed only $3,871 per month to come up to her proved $6,224 marital standard of living. Thus the husband’s second appeal was denied and the wife was awarded attorneys fees on appeal.

**MARRIAGE VALIDITY — FRAUD — CLAIMS IN WORKMEN’S COMPENSATION CASE — STATUS AS EMPLOYEE’S WIDOW.** A marriage that is fraudulent as to the rest of the world, but presumably not to either one of the spouses, can be challenged in some
contexts, but not in others. In the workmen’s compensation death case of Marblex Design Int’l., Inc. v. Stevens, 54 Va. App. 299, 678 S.E.2d 276, 24 V.L.W. 169 (6/30/09), the employer of the deceased did not want to pay benefits to a widow who, it said, was part of an illegal “sham green-card marriage”. Since this marriage was against Virginia public policy, it argued, it should not have to. Assuming for the sake of argument that the marriage was indeed such a green-card sham, the Court of Appeals did not see how that applied in this kind of case. Yes, a federal statute does punish conspiracy to violate the immigration laws, including such use of fraudulent marriages, but neither one of these spouses was being tried in this forum for that crime. Moreover, the federal statutes do not have to do with the validity of the marriage, but address only the intent with which the parties enter into that marriage as part of a conspiracy to violate immigration laws. The marriage is not invalid or criminal; the conspiracy is criminal. If the Legislature had wished to deny workers’ comp benefits to surviving spouses in such marriages, they could have done so. If the Virginia General Assembly had wished to do so, it could have added such marriages to § 20-45.1 list of prohibited marriages. A green-card marriage may indeed be voidable by one of the parties if one guilty party committed fraud against the other, unknowing and sincere, party. But such a marriage is not void ab initio, and no one ever moved to invalidate this marriage during the deceased worker’s lifetime. The public policy of Virginia has been to uphold the validity of the marriage status as for the best interest of society, except where marriage is prohibited between certain persons. It is the responsibility of the legislature, not the judiciary, to formulate public policy, to strike the appropriate balance between competing interests, and to devise standards for implementation. If the General Assembly wishes to include “sham-green-card” marriages among those declared void and against public policy, as set forth in Va. Code §§ 20-45.1 and 20-45.2, they know how to do so. The Court of Appeals declined the invitation to enter upon a venture constitutionally reserved to the Legislature by seeking ways to prohibit green-card marriages for workmen’s comp purposes.

SEPARATION AGREEMENTS — REFUSAL TO INCORPORATE. Does § 20-109 mean that a judge must always incorporate, ratify and confirm a valid separation agreement when asked to? Of course not. If you examine the statute’s wording you see that the judge does have some discretion, and that discretion is not too restricted. The Court of Appeals found that a judge did not abuse that discretion in refusing to incorporate an alimony provision when the husband’s income had gone way down after the agreement was signed. This judge gave a reasonable explanation, citing the husband’s income loss, and apparently, the wife’s appetite for contempt enforcement litigation. But the judge did not stop there, but went on to modify the alimony provisions of the agreement by lowering the husband’s obligated amount. If it wasn’t incorporated, how could he do that? And wife contended on appeal that that was a “violation” of the agreement. But no, this was one of those agreements that allows a court to modify the amount of spousal support, and to resolve disputes over the owed support amount. So nothing this judge did with this agreement was wrong. The husband demonstrated to the court that this agreement authorized such court modifications for material change of circumstances — which change he showed. Doering v. Doering, 54 Va. App. 162, 676 S.E.2d 353, 23 V.L.W. 1387 (5/19/09).

SEPARATION AGREEMENTS — INCAPACITY — TOTALLY CRAZY, HOSPITALIZED AND INCOMPETENT. Yes, it is possible for the Virginia appellate courts to find a separation agreement invalid because one signer (even a signer of the male persuasion) was incompetent to manage his own affairs and lacked capacity to sign. We’ve all lived for years with the case
law about the lady who signed an agreement in the psycho ward and later saw it upheld on appeal. But the Court of Appeals in Bailey v. Bailey, 54 Va. App. 209, 677 S.E.2d 56, 23 VLW 1410 (5/28/09), affirming the trial court, found incompetence and incapacity beyond question. Yes, it is possible to get a court to refuse to enforce a separation agreement signed by a husband — who was at the time, and still is, plainly crazy and helpless. This husband was on weekend furlough from a psychiatric ward when the wife had him sign a contract which transferred all marital debt to him and all marital assets to her. He had already had ten years of “chronically severe psycho affective disorder” when he signed in 1995. Apparently there was still available at the time of this trial in the Portsmouth Circuit Court ample evidence from the treating psychiatrist and others that husband’s condition in 1995 was totally helpless and dependent, with hallucinations and homicidal and suicidal delusions.

If there was another side to the story, it isn’t obvious from the opinion, which recites the following gems: husband had been diagnosed as a “schizoaffective psychotic” for 10 years when during this weekend furlough the wife told him he could never return home unless he signed it, and that he would become homeless. This was the same day he returned to the hospital. This current hospitalization had been precipitated by the homicidal and suicidal voices he heard, his hallucinations, and his being totally “out of control.” The testimony of the treating psychiatrist that he did not have the “capacity to manage his own affairs and make decisions in his own best interests,” and was incompetent and helpless is pretty conclusive. A longtime friend described his 1995 condition as living in “an inward catatonic state,” not functional but helpless and totally dependent. The psychiatrist testified that the husband told him he signed the agreement because of the threat that he would end up divorced and thus homeless, but the Court of Appeals says that that does not detract from the same psychiatrist’s ultimate opinion of mental incompetency and incapacity. As the Court found the expert opinion of the treating psychiatrist conclusive, the Court of Appeals says it has neither authority nor the inclination to second-guess him.

ALIMONY — CUTOFF FOR COHABITATION — SEPARATION AGREEMENTS. The Virginia law of alimony cutoff by reason of recipient cohabitation is, in its 21st-Century incarnation, fearsomely abstract and complex. It’s a legal matter that used to be so simple, back when it was regarded as a matter of simple justice and simple common sense within a trial judge’s non-statutory discretion. A trial judge who felt like doing so could simply say “why that woman is unfairly trying to keep her alimony while de facto she has remarried — which everybody knows causes alimony automatically to terminate. But she’s so greedy she’s willing to do what no respectable woman does and forebear to marry and just live in sin so as to cheat her husband out of relief from his alimony debt. No judge has to let her have her cake and eat it too.” And if the judge was not so inclined, he would not say that, would grant the husband no relief, and would send him away. Now, however, the Legislature has been forced to get into the act, declaring that alimony ends upon cohabitation because the statute says it does. The Virginia appellate courts have reacted the way they usually do when the Legislature starts getting uppity and have coolly told the General Assembly that the statute it passed doesn’t effect its intended goals at all, but its unintended consequences will have to be slavishly followed because the statutory law is, after all, the law, so the Legislature reacts again, and so on. The intriguing questions posed by the attempt to statutorily regulate unmarried cohabitation by alimony recipients have produced a whole series of appellate opinions of absolutely mind-numbing abstractness. And when the added variable of the law of contracts is stirred in because of the involvement of separation agreements, it is easy to see
how legal analysis of enormous subtlety can be brought to bear. An opinion that will apparently become known as \textit{Stroud II}, found at 54 Va. App. 231, 677 S.E.2d 629, 24 VLW 77 (6/16/09), raised the question that has always dogged this field of intellectual endeavor and takes on added complexity when an agreement is involved. That is whether an aggrieved alimony payor can sue (under the agreement itself, let’s say, leaving aside the statute) to have the alimony stopped, or whether it’s up to him to just stop paying and up to her to sue him and allow the legal issues to be thrashed out. You might think that a lot of these questions would be determined by the wording of the agreement itself, since the whole theory of agreements is that they draw their own rules for resolving disputes (rather than analyzing it under the statutory law or the case law), but the Court of Appeals doesn’t see it quite that way. In this case, as the Court of Appeals patiently points out, the agreement used terms like “cohabitation,” and those terms, having become terms of art by being kicked around in innumerable Virginia appellate opinions now, have extremely complicated meanings. Which meanings pretty much have become the property of the appellate courts, and no judge, let alone layman, has any business construing and applying those words without employing the reams and reams of abstract interpretations the appellate courts have given them.

But apparently, this agreement used the statutory terminology anyway, so the statutory standard of “cohabitation analogous to marriage,” is to be used in construing the contract and thus it is the statutory meaning that the Court must address. Also, it needs to be pointed out that this is the fallout from the remand of the case now to be known as \textit{Stroud I}, 49 Va. App. 359, 641 S.E.2d 142 (2007), which corrected the reasoning of the trial judge (that homosexual cohabitation is not what the agreement language or the statutory language is talking about), and held that it would be discriminatory to deny lesbian cohabiters the right to be penalized for de facto remarriage schemes just like heterosexuals. The statutory law says they can’t marry one another, but they can still do something “analogous to marriage” by cohabiting.

The actual dispute as it reached the Court of Appeals concerned a fee award. After the remand in \textit{Stroud I}, 49 Va. App. 359, 641 S.E.2d 142 (2007), in which the Court of Appeals held it was wrong for the trial judge to hold that (for purposes of separation-agreement interpretation) you can’t consider homosexual couples to be “cohabiting” under the alimony laws, it was remanded, and the trial court’s original failure to award the wife attorneys’ fees was affirmed. In this new case the husband was seeking attorneys’ fees, upon the theory that the wife’s de facto remarriage had forced him to unilaterally cut off her alimony and get her to sue him. The Court of Appeals rejected that, and then it examined the wife’s claim that she should get attorneys’ fees because he took the law into his own hands, didn’t resort to the courts, etc., and forced her to litigate. In fact, the Court explains, no one can just stop paying alimony when one of these cohabitation/de facto remarriage issues arises, because the words “cohabitation” and “analogous to marriage” are now to be precisely prescinded and measured against the conduct by a judge, and only after adjudication thereof can a payor stop paying. So the wife’s litigation to enforce the agreement was not a default, but a proper resort to the courts.

In the remand litigation, the husband filed his own motion for attorneys’ fees under the separation agreement. He said that he had successfully enforced the agreement against an ex-spouse who was violating it by homosexual cohabitation. When the wife filed a plea in bar arguing law of the case, res judicata, collateral estoppel and can’t take inconsistent positions, the trial court sustained it. On this new appeal the wife argued that husband couldn’t
“unilaterally modify the agreement terms,” and that the anti-cohabitation clause could be enforced only by suing for an adjudication of cohabitation vel non. The Court of Appeals now agrees: husband couldn’t just stop paying, and wife didn’t violate the agreement by suing to enforce it. Agreement or no agreement, the Court of Appeals says, alimony termination, just as under the statute, is “not self-executing,” and has to be sued for. Only Virginia courts can interpret the words, now become such terms of legal art, “cohabitation” and “situation analogous to marriage,” and find whether legally, homosexual or heterosexual, there is alimony-terminating “cohabitation” or not. It says that these terms have a precise legal meaning now and courts have the lockhold on the interpretation thereof. Until a judicial determination, husband can’t quit making his payments. The judge has to evaluate the evidence and the legal arguments, judge witness credibility, etc. When husband did unilaterally withhold support payments, wife was forced to go to court and accordingly husband wasn’t entitled to any attorney fees, since he was the one who was in default. The trial court’s denial of a fee award to him was affirmed.

ALIMONY — MODIFICATION — PRIOR ORDERS AND AGREEMENTS. The tricky business of support modification and “existing prior orders,” and agreements, was revisited by the Court of Appeals in Brown v. Brown, 53 Va. App. 723, 674 S.E.2d 597 (2009). An ex-husband had come in petitioning to terminate his alimony obligation by reason of changed circumstances — i.e., his retirement. There was a prior consent decree in this case regarding alimony, but the Court of Appeals decided it was not an agreement such as would preclude modification. Rather, the Court explained, this particular consent decree incorporated an agreement settling the ex-wife’s claim against him in the form of a Show Cause Petition for being in arrears. That hardly makes it an agreement to modify spousal support or about modifying it. Therefore, the husband was not precluded from later seeking to end his alimony or change it on grounds of changed circumstances. The earlier decree did not concern the amount but only the way he would pay off the arrears he owed. Yes, consent decrees are contractual in nature, but that only means they should be construed as though they were contracts. Such a decree can constitute a §20-109(C) “stipulation or contract,” but this one wasn’t. The intent of the contract when it does not address the matter specifically can be construed from the circumstances in which it was created, and this time those circumstances are clear. Thus, the Court explains, “not every agreement that impacts or affects the payment of spousal support, particularly of a spousal support arrearage, is necessarily a contract subject to the limitations of §20-109(C).” In fact, the first sentence of that subsection states that it applies only in suits for divorce. Moreover, “a decree does not attain contractual character purely by virtue of its consensual entry. One can consent to the entry of an order without entering into a binding bilateral agreement.” Thus Newman v. Newman, 42 Va. App. 557, 593 S.E.2d 533 (2004), was distinguishable.

CUSTODY — THIRD-PARTY CASES — REBUTTAL OF NATURAL-PARENT PRESUMPTION. In Florio v. Clark, 227 Va. 566, 674 S.E.2d 845 (2009), the kind of evidence that will sufficiently rebut the presumption that children should live with their parents was showcased. When a single mother died, after having left much of the chore of child raising to her parents, brother and sister, the illegitimate father came to the juvenile court and got a temporary order giving him custody. The mother’s relatives filed their own custody petitions and the father actually had the child living with him while on his mother’s farm, for five months. In the final custody hearing, a JDR Court gave custody to the maternal aunt and uncle, apparently finding the father unfit. The circuit court on appeal reached the same result,
but the father’s appeal to the Court of Appeals resulted in a reversal and remand on evidentiary grounds. When the circuit court reheard the case on remand, it still decided against the father. That ruling was upheld by the Court of Appeals in a divided panel opinion, which got affirmed on rehearing en banc. The Virginia Supreme Court affirmed that. The fact that the father had been out of the picture so long, and that for a long time, the maternal relatives had visited the child frequently and regularly during the four years or so after the mother had moved and often lived with a new boy friend nearby, and the fact that the aunt and uncle had seen to most of this child’s basic needs for his entire life, and that the father rarely and unpredictably visited the child, were the main grounds on which the ruling against the father was sustained. The Supreme Court states again the law on third-party custody awards: that the parental presumption, which is a “strong one” can be rebutted by clear and convincing evidence of factors which include (1) unfitness, (2) a previous order against the parents having custody, (3) voluntary relinquishment of custody, (4) abandonment and (5) special circumstances.

CUSTODY — VISITATION — THIRD-PARTY CASES — “LEGITIMATE INTEREST” — APPEALS — STANDARD OF REVIEW — FOREIGN HOMOSEXUAL MARRIAGE PARTNER. The Court of Appeals actually decides a case against a homosexual marriage partner (without having to mention the federal DOMA). In Damon v. York, ___ Va. App. ___, ___ S.E.2d ___, 24 VLW 293 (8/11/09), the claim asserted was for third-party visitation by a woman who “married” the mother under Canadian law (making a brief trip there) and before and after the ceremony lived with the mother and child for 21 months. This mother’s wife was nevertheless not held to be a person with a legitimate interest allowed to seek visitation under §20-124.1. The relationship had ended by this time, needless to say (the opinion not revealing whether there was a divorce somewhere). At this point visitation was against the wishes of both mother and child. The “legitimate interest” provision actually says that although the category is to be broadly construed, it includes grandparents, stepparents, former stepparents, blood relatives and family members, but that party has to be properly before the court, and to be so one must have standing. Thus, the opinion by Judge Kelsey explains, a person not mentioned in any of the specific categories has to assert some persuasive reason that she is the “functional equivalent” of a member of one. Specific-category membership was not shown, since the Canadian “marriage” was one “void in all respects” under Virginia law (Const. Art. 1 § 15 A and Code § 20-45.3), and thus created neither a family nor a stepparent relationship. Nor was functional equivalency proved since this was nothing but a former girl friend who had lived with mother and child for 21 months and no more. The mother testified to the negligible quality of the relationship, characterizing it as anything but a unique relationship with the child. Not finding error as a matter of law, the Court of Appeals will not second guess on the facts, and affirms.

CUSTODY JURISDICTION — UCCJEA REGISTRATION — PKPA EXCLUSIVE CONTINUING JURISDICTION — VIRGINIA PUBLIC POLICY AGAINST SAME-SEX MARRIAGES — REMEDIES — DECLARATORY JUDGMENT. The Miller-Jenkins saga continues. And if people had started using Roman Numerals, this would probably be about Miller-Jenkins XII or so. The child of this strange union is now seven years old, and the issue is still visitation. One of the things that Lisa Miller did when Janet Jenkins sought to use the UCCJEA and register her Vermont visitation Order in a Virginia court was to seek a declaratory judgment that Ms. Jenkins had no such right because that registration would violate Virginia’s public policy against same-sex marriages or civil unions. But the Court of Appeals has already ruled that the overriding federal statute that you hardly ever hear about any more,
the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. §1738A, unconditionally requires full faith and credit for the Vermont Orders, because Vermont had exclusive continuing jurisdiction over this child’s custody and visitation, and that ruling was not disturbed upon appeal to the Virginia Supreme Court. The Winchester Circuit Court had entertained Lisa Miller’s request for a declaratory judgment against registration of the Vermont Order, but the Court of Appeals held on June 23, 2009 in Miller v. Jenkins, 54 Va. App. 282, 678 S.E.2d 268, 24 VLW 111, that the circuit court has no jurisdiction to rule upon the request and declaratory judgment is not a proper remedy. Janet Jenkins had filed for enforcement of the Vermont visitation Order and all such issues as public policy have to be decided in that proceeding rather than in another lawsuit seeking to bypass or short-circuit it. Advisory opinions are, after all, discouraged. Lisa Miller can litigate the substance of this matter by defending against the motion of Ms. Jenkins to register the Orders.

CHILD NEGLECT — ELEMENT OF “RECKLESS DISREGARD”.  A grandmother who was prosecuted by the City of Hampton for felony child neglect was well advised to appeal. The Court of Appeals found in Shanklin v. Commonwealth, 53 Va. App. 683, 674 S.E.2d 577 (2009), that the babysitting grandmother’s failure to sound the alarm and get medical aid when she realized that her grandchild’s burns had been bound up with gauze and duct tape did not supply the crucial criminal element of reckless disregard of the child’s life. The fact that the child napped for four hours and had to be awakened several times and had to be carried did not put her on notice that this child necessarily needed medical attention. The child showed no signs of discomfort and there was no special reason to connect his lethargy to the burns under the duct tape. The Court of Appeals did not feel like making a rule that the use of that material in bandaging the child is that abnormal and alarming.

APPEALS — STANDARD OF REVIEW — NO BASIS IN RECORD EVIDENCE — JUDICIAL LOGIC NOT ADDING UP. We all know that appellate courts do not retry the case and second-guess a trial court’s findings (except when they do) and we’ve all heard appellate courts say that they don’t substitute their conclusions for those of the trial judge because he or she “saw and heard the witnesses,” etc. And thus there’s nothing easier for an appellate court to say, if it does not want to waste its time on a case, than that there is plenty of evidence in the Record on all the points in question, and no mistake of law, so don’t ask us to go behind the rulings of the trial judge and overturn them. Of course the Court of Appeals says it’s an abuse of discretion and thus reversible error if a conclusion is “utterly without evidence to support it,” and occasionally, when it gets interested, our Court will reverse a case and say just that. But what’s got to be the rarest and most difficult case to convince the Court is reversible is the
one in which an appellant has neither the facts nor the law, but only common sense and simple logic to argue. But the Court of Appeals recognized, and reversed, such a case in Attiliis v. Attiliis, unpublished, 24 VLW 46 (6/9/09). Though there was lots of evidence in the Record on each of about eight disputed points, the conclusions that the trial judge made, and the remedies he decreed, just did not logically follow from that evidence of record. Thus the rulings of the trial judge are not really “supported by” all that evidence at all, because the logic leading to those conclusions simply does not compute, and thus the rulings truly are “really without evidence to support them.” This surely happens in trial courts more often than we would like to think, and it is heartening to see appellate judges playing the logic card once in a while.

PROPERTY DIVISION — FORMER MARITAL HOME — FAILURE TO COOPERATE IN MARKETING AND SALE — DEPRECIATION BY NEGLECT — ONE PARTY’S CONTINUED OCCUPANCY — REMEDIES — PROPORTIONS AND PERCENTAGES. What’s the remedy when one party stays in possession of the former marital home after separation, and fails to cooperate in getting and keeping it ready for sale, as by failing to vacate the house, failing to maintain it and letting it fall into disrepair, and even defaulting on his obligation under the separation agreement to make the mortgage payments? In Tye v. Tye, unpublished, 24 VLW 344 (8/11/09), the divorce court gave the wife 65% of the net proceeds even though husband claimed that a separation agreement called for 50-50 division. The Court of Appeals affirmed. Husband had successfully objected to admission in evidence and incorporation of a purportedly contractual document that was clearly not a contract and not a valid separation agreement. Though he later sought to introduce it as evidence of agreement on a 50-50 division, this was less successful. The Court of Appeals points out that he cannot appeal a decision that he himself asked the trial court for, but later regretted. The appellate court’s recitation of facts of record shows husband to have been an all-around, judge-offending, bad litigant, disobeying the judge’s repeated orders, being jailed for contempt, stonewalling discovery, firing attorneys and proceeding pro se. The Court of Appeals remands for an assessment and award of fees to wife for her costs of this appeal.

PROPERTY DIVISION — MARITAL AND SEPARATE — DISSIPATION — DEBT APPORTIONMENT — MARITAL HOME LINE OF CREDIT USE. O.K., if you think you’ve heard them all, consider this one. Husband buys himself a wife for a $60,000 marriage settlement — something like a dowry but not quite — and, only after marriage and separation, pays her. That is, he pays off this debt that he incurred to her, withdrawing $60,000 from the home equity line of credit on the marital home. The trial judge held that this was use of marital money for a non-marital purpose, and the Court of Appeals agrees. Its reasoning: that such a marriage payment is like a dowry and a dowry is legally the separate property of the wife. (This is the conclusion of the trial judge and no other case law is cited to support it.) That debt, owed to her separately, was her separate-property debt (i.e., receivable), just as the payment when received by her was from marital property and should have been paid (as it would have been if timely paid, before marriage) from husband’s separate property. However, the trial court clearly erred in applying the same treatment to the entire line-of-credit debt, which included not only the $60,000 payment under the Iranian marriage contract, but also the husband’s legal fees and other unknown expenditures. There’s no way to tell whether the trial judge was right or wrong, the Court of Appeals says in Ovissi v. Salemi, 24 VLW 344, unpublished (8/25/09), since he failed to comply with §20-107.3(A) requirements and make a
finding on what was the legal fee and what was the other unknown expenditures. After all, judges are supposed to determine what is marital and what is separate, assign dollar values to every portion, and then set about the work of equitable division. Only after doing those necessary fact findings, and that math, will the judge on remand be able to tell if he needs to modify the wife’s lump sum award as a consequence. After all, the appellate court reminds us, attorney-fee payment is a valid marital purpose, and at the very least, that amount must be subtracted from the $96,000 line-of-credit withdrawal that got classified as husband’s separate debt.

LEGAL QUOTATION OF THE QUARTER

On 20 May 1773 Jefferson joined his General Court brethren John Randolph, Edmund Pendleton, James Mercer, Patrick Henry, and Gustavus Scott in placing this exasperated notice in Purdie and Dixon’s Virginia Gazette:

The fees allowed by law, if regularly paid, would barely compensate our incessant labors, reimburse our expenses, and the losses incurred by neglect of our private affairs; yet even these rewards, confessedly moderate, are withheld from us, in a great proportion, by the unworthy part of our clients. … After the 10th day of October next we will not give an opinion on any case stated to us but on payment of the whole fee, nor prosecute or defend any suit or motion unless the tax, and one half the fee, be previously advanced, except those cases only where we choose to act gratis.

— From Thomas Jefferson, Lawyer, by Frank L. Dewey.

Quilp’s Notes

Being A Selection Of Excerpts Intended to Bring the Perspective of Past Ages to Bear Upon Such Matters As Marriage, Divorce, Custody, Relations Between The Sexes Generally, The Courts And Law Practice

In dealing with the State, we ought to remember that its institutions are not aboriginal, though they existed before we were born: that they are not superior to the citizen: that every one of them was once the act of a single man: every law and usage was a man's expedient to meet a particular case: that they all are imitable, all alterable; we may make as good; we may make better. Society is an illusion to the young citizen. It lies before him in rigid repose, with
certain names, men, and institutions, rooted like oak-trees to the centre, round which all arrange themselves the best they can. But the old statesman knows that society is fluid; there are no such roots and centres; but any particle may suddenly become the centre of the movement, and compel the system to gyrate round it, as every man of strong will, like Pisistratus, or Cromwell, does for a time, and every man of truth, like Plato, or Paul, does forever. But politics rest on necessary foundations, and cannot be treated with levity. Republics abound in young civilians*, who believe that the laws make the city, that grave modifications of the policy and modes of living, and employments of the population, that commerce, education, and religion, may be voted in or out; and that any measure, though it were absurd, may be imposed on a people, if only you can get sufficient voices to make it a law. But the wise know that foolish legislation is a rope of sand, which perishes in the twisting; that the State must follow, and not lead the character and progress of the citizen; the strongest usurper is quickly got rid of; and they only who build on Ideas, build for eternity; and that the form of government which prevails, is the expression of what cultivation exists in the population which permits it. The law is only a memorandum. We are superstitious, and esteem the statute somewhat: so much life as it has in the character of living men, is its force. The statute stands there to say, yesterday we agreed so and so, but how feel ye this article today? Our statute is a currency, which we stamp with our own portrait: it soon becomes unrecognizable, and in process of time will return to the mint. Nature is not democratic, nor limited-monarchical, but despotic, and will not be fooled or abated of any jot of her authority, by the pertest of her sons: and as fast as the public mind is opened to more intelligence, the code is seen to be brute and stammering. It speaks not articulately, and must be made to. Meantime the education of the general mind never stops. The reveries of the true and simple are prophetic. What the tender poetic youth dreams, and prays, and paints today, but shuns the ridicule of saying aloud, shall presently be the resolutions of public bodies, then shall be carried as grievance and bill of rights through conflict and war, and then shall be triumphant law and establishment for a hundred years, until it gives place, in turn, to new prayers and pictures. The history of the State sketches in coarse outline the progress of thought, and follows at a distance the delicacy of culture and of aspiration.

— From Ralph Waldo Emerson’s Essay, “Politics”, 1844

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