Message from the Chair

Carl J. Witmeyer, II, Chair
Family Law Section

I am excited to announce the first edition of the Virginia Family Law Quarterly. With the retirement of Dick Crouch, our dedicated editor for over 23 years, the new editor is Brian Hirsch. Brian is hard working and dedicated, and the changes he has made will make your membership with The Family Law Section of the Virginia State Bar more valuable. Please feel free to communicate with me or with Brian directly in reference to any suggestions that you may have about this new endeavor.

With the release of the documentary film Divorce Corp in local theaters and the outpouring of negative exchanges by attorneys about problems that also exist in the Commonwealth, I realize how important it is for all of us to be active participants and members of The Family Law Section. The Board of Governors and The State Bar are actively making changes and recommendations in numerous endeavors every year. Your Board of Governors is the hardest-working Board that I have ever been a member of and we again solicit articles and comments, to include suggestions for future CLEs on a regular basis.

Finally, I am proud to announce the April 24, 2014 Advanced Family Law CLE, presented by The Virginia CLE and The Board of Governors, as a joint enterprise to be held at The Jefferson Hotel in Richmond. The efforts of the CLE Committee, chaired by Rich Garriott, Pete Chiusano and Chris Malinowski, along with Virginia CLE’s program attorney, Blair Lonergan, are well worth your attendance. Please register and attend this wonderful event, which includes lunch. Your attendance will help recognize the winners presented at the CLE luncheon for the Lifetime Achievement Award and Family Law Service Award. The emphasis of the Advanced Family Law 30th semi-

 TABLE OF CONTENTS

Editor’s Note, Brian M. Hirsch ......................... 2
Mark Your Calendars, 2014 Events .................... 2

Articles
Legislative Update: 2014 General Assembly Session, Lawrence D. Diehl ......................... 3

Advising Clients Under the New Virginia Child Support Guidelines, Daniel L. Gray .................. 7

Collaborative Law: What Every Practitioner Should Know, David L. Ginsberg ...................... 10

How to Submit an Article .................................. 12

Using the Appropriate Psychologist in Divorce Litigation, Edward Farber ......................... 13

New Relief from Rental Agreements for Victims of Domestic Violence, Craig W. Sampson ...... 16

What’s Wrong with Wright, Ronald R. Tweel ... 17

Cases of the Quarter ......................................... 20

Lifetime Achievement Award ............................ 23

The Family Law Service Award ......................... 23

Board of Governors ......................................... 24
Editor’s Note
Brian M. Hirsch

Welcome to the first edition of the Virginia Family Law Quarterly, the relaunch of the Family Law News. For over 20 years, Dick Crouch spent countless hours putting out the predecessor of this publication like clockwork, and we all owe him a debt of gratitude. I hope to build on his hard work. I realize that relaunching a successful publication can be risky, but it is also necessary for its long-term survival. In preparing the first version of “The Quarterly,” I have three main goals.

The Quarterly will keep the features everyone wants. Peer-written publications and case highlights will continue. The case highlights are written more concisely. They have the main components of the case (i.e., citation, facts, issue, ruling and rationale) to familiarize you with the case. You can then decide if you want to read the entire case online.

The Quarterly will reflect the modern practice of Family Law. There will be a strong focus on alternative dispute resolution and interdisciplinary developments. Law school trained us for the courtroom, but most of our cases are resolved in the conference room. We have incorporated mediation, arbitration and collaborative law into our practices, and need to continue to sharpen these skills. Family law is constantly affected by changes in technology, mental health and other areas of law (e.g., bankruptcy, business, real estate, etc.). The Quarterly will expand and share our knowledge in these areas.

The Quarterly needs to include all Virginia family law organizations. The Quarterly includes upcoming events for the Virginia Chapter of the American Academy of Matrimonial Lawyers, the VBA Family Law Coalition, VBA Domestic Relations Section, and the VTLA Family Law Section. The Quarterly will announce upcoming seminars, meetings and other events hosted by these organizations in its “Family Law Events” section.

I want to know what you think of this first edition – what you like, what you don’t and what you’d like to see in the future. Email your comments to me at BHirsch@NOVAFamilylaw.com.

Happy reading – Brian M. Hirsch.
General Overview of 2014 Session.
The 2014 session of the General Assembly was once again a very active one for family law practitioners. Special thanks goes to Cheshire Eveleigh of Virginia Beach and the members of the Virginia Family Law Coalition (“Coalition”) for their tireless efforts in promoting and monitoring legislation affecting family law. While the volume of acts that passed this year was less than in past years, the areas they affect are significant. To obtain a complete history of the development of any bill contained herein, or to view the amendments made to the language of any such bills, please visit: http://leg1.state.va.us/cgi-bin/legp504.exe?131+sbj+020.

Bills Introduced But Not Passed.
There are always bills that are introduced but not passed that deserve comment since they may be re-introduced in the future or are of interest to family law practitioners.

There were a number of bills that would have significantly impacted same sex marriages. With the ever-expanding national trend toward the approval of same sex marriages, both legislatively and by case law, it is an area that likely will continue to be the target of future legislative initiatives. Numerous bills were introduced this session that would have set up the process to repeal the current constitutional amendment defining marriage in Virginia as being between “one man and one woman.” See HJ 3, 67 and 77 (2014). Similarly, HB 939 (2014) would have repealed the statutory prohibitions against same sex marriage and permitted the recognition of civil unions from other jurisdictions as now prohibited by §20-45.2 and §20-45.3 All of these bills were left in committee, but with the recent rulings on the issue declaring our state statute on the issue as unconstitutional, similar attempts for a legislative repeal of the prohibitions against same sex marriages will likely be the subject of much debate and future legislative actions.

A bill that would have repealed the criminality of the current adultery statute and replaced it with a civil penalty sanction was introduced. See HB 940 (2014). This bill was supported by the Coalition. The impact of this bill would have been to de-criminalize adultery so that claiming a privilege under the Fifth Amendment in divorce actions would be a thing of the past. Its impact would have promoted the ability to introduce such evidence without the current Constitutional bar, even though such evidence is material to the statutory factors in the spousal support and equitable distribution statutes. See §20-107.1 and §20-107.3 (1) and (5). This bill was left in the Court of justice committee.

Once again, bills were introduced to permit the filing of a single petition for custody, visitation and child support when there are multiple children in a Juvenile and Domestic Relations District Court case. HB 250, HB 438 (2014). These bills were also supported by the Coalition, but were left in the Appropriations Committee. Issues such as costs, record keeping for each child, and other procedural issues raised by the clerk’s offices were the primary reason for the bill’s failure to pass.

Bills Passed In The 2014 General Assembly Session.

Divorce Procedures Generally:
Two bills were introduced to clarify and amend the affidavits requirements of §20-106 which are now authorized to be used to obtain a final order of divorce. HB 1019 (2014) changes and replaces the language formerly requiring factual support to the “allegations” to the “grounds for divorce.” It further clarifies that if either party is incarcerated, leave of
court is required to submit the evidence by affidavit or the written consent of the guardian ad litem for the incarcerated person is required to be filed. Prior language requiring an affidavit to “[A]ffirm the allegations” has been changed to “[G]ive factual support to the grounds of divorce stated” and to “[V]erify whether either” party is incarcerated. These changes apply to the affidavits of both the party and corroborating witness.

A second bill, SB 94 (2014) clarifies subsection 4 of the affidavit requirement by adding that a party must have been a bona fide resident of the Commonwealth for the six-month period “immediately preceding the commencement of the suit.” This clarifies the apparent ambiguity to some courts that if a party had met the residency requirement, but had left the Commonwealth after suit was filed but before the affidavits were filed, that it would be interpreted that the six months was prior to the date of the filing of the affidavits which would not comply with the residency requirement. Clearly, that was not the intent of the original statute, but the previous language lead to that interpretation by some courts. The new amendment resolves that problem.

As a PRACTICE HINT- make sure you review and update your affidavit forms to conform to these new requirements effective July 1, 2014.

SB 271 (2014) was enacted to provide that any person authorized to celebrate the rites of marriage may negotiate payment of any additional services agreed to by the celebrant and the parties getting married. This permits the possibility of payment in excess of the statutory fee not exceeding $50 for the ceremony itself if other services will be performed.

Life Insurance:
Currently the trial court has no jurisdiction to require the maintenance of life insurance for the benefit of a spouse pursuant to Lapidus v. Lapidus, 226 Va. 575, 311 S.E.2d 786 (1984). For many years, the Coalition has favored legislation that would permit such authority, but in the past, to the extent bills were introduced, they were not favored and generally never got out of the courts committees.

This year, however, HB 141 (2014) was enacted. The bill was proposed by the Coalition and the final language was the result of working with other bar groups and committees impacted by the bill, such as the life insurance lobby.

The bill permits the trial court to require a party to maintain an existing life insurance policy owned by that party insuring the life of either party or to require a party to name as beneficiary the other party or an “appropriate person” for the exclusive use and benefit of the parties’ minor children. The authority is limited to a pendente lite proceeding pursuant to §20-103. Thus, the authority of the court to make a final award of life insurance or require it to be maintained as part of a final divorce award is unchanged, and the court will still not have that authority. But the legislation is a good first step towards that goal and hopefully will result in a future legislative reversal of the Lapidus holding.

The bill further provides that the court can allocate the cost of such life insurance between the parties, provided that all premiums are billed to the policyholder. This later provision was in response to attorneys representing insurance companies who rely on the policy terms and records for billing purposes. The bill also provides that the legislation is not to be construed to create an independent cause of action by any beneficiary against the insurer or to require the insurer to provide policy information to any person other than the policyholder without the written consent of the policyholder. Again, a further protection for the insurance companies.

Child Custody/Visitation:
The provisions relating to who has standing with a “legitimate interest” regarding issues of custody, visitation and support were enacted, expanding the scope of such persons to include “step-grandparents.” HB 359 (2014). This bill amends both §16.1-241 and §20-124.1 which contain definitions of the term “legitimate interest.” The Coalition opposed this bill,
taking the general position that the broad definition of the term currently set forth in the statute, as well as developed case law providing guidance on the quality of the relationship between a third party and a child that must be met to permit such standing, was adequate to address the issue.

**Child Support:**
The most significant family law legislation enacted during the 2014 General Assembly session was a revision and update of the child support guideline statute in §20-108.2. HB 933 (2014). For a complete history of Virginia’s guidelines and the underlying policy reasons for the changes, as well as the economic data that formed the basis of the new guidelines, see “Report to the Governor and General Assembly of Virginia, Review of Virginia’s Child Support Guidelines, Virginia Child Support Guideline Review Panel.” As the report indicates, Virginia’s guidelines have not been updated since the late 1980’s. Despite past unsuccessful efforts to introduce new guidelines, due to federal pressures and the need for an updated guideline applying current economic data and cost-of-living adjustments, clearly it was now time for the passage of such legislation. Thanks should go out to the members of the panel who participated in the review process. Special thanks also goes to Craig M. Burshem, Esq., the current head of the Division of Child Support Enforcement, who chaired the panel committee and whose tireless efforts at the General Assembly played a large part in passing a very complex piece of legislation. Congratulations to Craig on his monumental efforts!

The substance of the new guidelines can be summarized as follows. Whereas the former statute had a guideline chart ending at $10,000 of combined monthly gross income, the new chart goes up to $35,000 of combined monthly gross income. The former three tiers of percentage guidelines over $10,000 of monthly income has now been replaced by one percentage over $35,000. There is a new minimum of child support for the lowest incomes of a party. Generally, the guidelines have a slight decrease of 1% to 11% for income levels of $650 to $1,700 per month. In the range of $5,050 to $10,000 of combined monthly income, there is a slight increase of the monthly child support number for 1 (5.1%) and 2 children (0.9%), and a slight decrease for 3 or more children. For income over $10,000, again there is an increase of the monthly base need ranging from 21.3% for 1 child to 3.4% for 6 children. Family law practitioners will need to review the new tables, which will be effective July 1, 2014.

The second major change in the guidelines is the elimination of the $250 threshold amount for the payment of unreimbursed health insurance costs for a child in any calendar year. The presumptive obligations of the parties for any unreimbursed health costs shall be based on the percentage of their respective monthly gross incomes.

No changes in the standards, definitions, deviation factors, methodology for split or shared support guidelines were made, so all of the current statutory and case law applicable to the guidelines will still be in effect. It is only the numbers that will be changed.

Based on prior case law that has been applied to previous changes in the guidelines, it is submitted that the guidelines themselves will form the basis to permit a review of the current support orders. Whether this will result in a floodgate of review petitions is unpredictable and will probably be monitored by the DCSE.

**Protective Orders:**
A number of bills expanding the authority of the trial court to enter protective orders were enacted. With the assistance of many individual family practitioners and the Coalition, an effort to amend one of the bills to include the authority of the court to also order temporary spousal support was successfully defeated. The proposed amendment would have permitted such an award and the award would have been mandated to continue until changed by any divorce action later filed. This attempted change was strongly opposed by the Coalition as going far beyond what should be the initial protective order authority and would permit support orders on limited notices, limited evidence and other procedural aspects applicable to such orders.
as compared to the broader general procedures applicable to independent petitions for such support.

HB 335 (2014) and SB 151 (2014) amends §16.1-241(5) by expanding the authority of the court over the use of motor vehicles. In addition to the general use and possession authority of the court over motor vehicles, the amended statute permits the court to enjoin the respondent from terminating insurance, registration or taxes and to require the payment of said items “as appropriate.” SB 151 (2014)

HB 972 (2014) further expands the statute by providing authority to grant the person on whose behalf the order is issued the possession of any “companion animal as defined in §3.2-6500 if such person meets the definition of an owner in §3.2-6500.”

Miscellaneous:
Although not solely applicable to family law matters, HB 269 addresses the problem we often encounter in trying to get a ruling on issues after the evidence has been presented to the trial court. The bill amends §17.1-107 by providing that in any civil action, “a judge of the circuit court who fails to act on any matter . . . that has been submitted to the court for a decision or render a final decision in the action, shall report, in writing, to the parties or their counsel on any such matter . . . held under advisement for more than 60 days after such submission, stating an expected time of a decision.” If the court does not so act, any party or their counsel can report to the Chief Justice of the Supreme Court to inquire as to the issues regarding the delay and if necessary “in order to expedite the administration of justice,” said Chief Justice can designate a judge or retired judge to assist the regular judge in the performance of his duties.

In the area of criminal law, HB 708 (2014) adds to §18.2-57.2 the crimes of unlawful wounding and strangulation to the list of offenses that, if a person has been convicted of two such offenses within a 20-year time period occurring on different dates against a family or household member, enhances the crime from a Class 1 misdemeanor to a Class 6 felony. And SB 476 (2014) clarifies that for purposes of the incest statute, §18.2-366, a parent who is subject to said incest felony includes “step-parent,” a grandparent includes a “step-grandparent,” a child includes “a step-child” and a grandchild includes a “step-grandchild.”
For the first time since the passage of the shared custody guidelines in 1995, child support recipients, payors, the courts, and family law practitioners are faced with a significant revision to our statutory scheme of child support. A major issue is how does this legislative change impact existing child support orders?

Mike and Carol Brady were divorced by the Fairfax County Circuit Court on January 21, 2014. During the support hearing, the Court found that Mike earned $150,000 per year as a government attorney, and that Carol earned $100,000 per year as a history professor. The Court earlier awarded primary physical custody of the parties’ two children, Bobby and Cindy, to Carol. Carol has the children in day care at the cost of $1,500 per month, and Mike provides health insurance for the children at the marginal cost of $125 per month. The Court awarded Carol guideline child support, payable by Mike, at the rate of $2,120 per month.

We are all familiar with the concept that child support may be modified based upon a material or substantial change in circumstances. However, does the passage of the new child support guidelines by the Virginia General Assembly allow support recipients and payors to seek a modification with no changes in the parties’ circumstances pleaded?

The answer is yes, with just a few qualifiers. The Virginia Court of Appeals first addressed this issue in Milligan v. Milligan, 12 Va. App. 982 (1991). In that matter, Mr. Milligan agreed in a 1987 settlement agreement to pay Mrs. Milligan $200 per month in child support. Shortly thereafter, the legislature passed Virginia Code § 20-108.2, establishing support guidelines. Had § 20-108.2 been in effect at the time of the execution of the agreement, the presumptive amount of support would have roughly tripled the amount Mr. Milligan agreed to pay.

Consequently, Mrs. Milligan filed a petition to modify child support just over two years after entry of the final decree, alleging a change in the law, as well as other changes in circumstances. In denying her request for an increase, the trial court found that the alleged changes in circumstance did not support a modification. On appeal, the Court of Appeals ruled that no change in circumstance other than the legislative change was required to force the trial court to apply the new guideline. If the court declined to apply the presumptive guidelines, then it should have made written findings supporting that decision. 12 Va. App. at 988.

More importantly, the Milligan court seemed to establish a test for determining whether a legislative change alone would support a modification: “[W] here either can show a significant variance between the guidelines and the court’s prior decree . . . the Code itself supports the reasons to review the previous award and apply the guidelines.” Id (emphasis added).

After the passage of the new child support guidelines, Carol sought counsel from her attorney. How much more could she get under the new guidelines, and would the court award her the difference? Nothing else had changed in her case; the incomes, child care costs, and insurance costs remained the same.

Given Carol’s facts, her attorney consulted the new guidelines. Whereas the old guidelines chart “tops out” at a combined monthly gross income of $10,000, the new guidelines chart runs all the way up to a combined monthly gross income of $35,000.
Using the same facts, Mike’s monthly support obligation increased under the new guidelines to $2,292 per month, a $172 monthly increase. Does that constitute a “significant variance?”

In *Slonka v. Pennline*, 17 Va. App. 662 (1994), the parties entered an agreement stating that Mr. Slonka would pay his former wife $500 per month for child support, plus an additional amount for child and health care expenses. Together, his payments totaled $844 per month. The parties were divorced, and their agreement was incorporated into a final decree in January 1992. Six months later, in July 1992, the new “shared custody” guidelines went into effect. Because Mr. Slonka had joint physical custody of the parties’ two children, his support under the new guidelines would have decreased to a mere $54 per month – a difference of $790.

Mr. Slonka sought a reduction, and the trial court heard the matter in October 1992. The trial court judge denied Mr. Slonka’s request for a reduction, finding that there had been no material changes in circumstances proven. The trial court did not consider the July 1992 changes to the guidelines. This time, the Court of Appeals used some different language: “The trial judge erred in requiring an additional change in circumstances for a hearing other than the substantive guidelines amendment, which resulted in a significant disparity in the parties’ support obligations.” *Slonka*, 17 Va. App. at 665. This concept was reinforced in *Head v. Head*, 24 Va. App. 166, 176, 480 S.E.2d 780, (1997), where the Court of Appeals stated that:

This Court has extended the rationale of *Watkinson* and *Milligan* to create an exception to the material change of circumstances requirement where a legislative amendment to the child support guidelines “significantly changed the earlier guideline considerations and amounts.” *Slonka v. Pennline*, 17 Va. App. 662, 664, 440 S.E.2d 423, 425 (1994). We find the case at bar analogous to *Watkinson*, *Milligan*, and *Slonka*, because the 1995 amendment to Code § 20-108.2(B) significantly changed the presumptive support obligation for parents earning in the higher income brackets. (emphasis added)

Back to Carol’s situation: does a monthly variance of $172 constitute a significant disparity or a significant variance? *Milligan* and *Slonka* indicate that a difference of about $400 per month and $790 per month satisfy that standard. Would $172 per month satisfy the test?

Perhaps – the Court of Appeals has not offered a more specific direction on the amount of the variance. But note what happened in *Slonka* after the Court of Appeals sent it back to the trial court. The trial court again refused to change the monthly amount, making written findings that the presumptive amount of support under the new guidelines was unjust and inappropriate. In upholding the trial judge the second time around, the Court of Appeals agreed that “[t]he enactment of the guidelines, although a change in circumstances, was not a change requiring modification of the earlier award.” *Slonka v. Pennline*, 1995 Va. App. LEXIS 762 (1995).

So the advice to Carol might be that the $172 difference gets her foot in the door on a modification. Ultimately, though, she has to convince a trial court that the statutory change warrants an increase.

*Would it matter if Carol’s child support was awarded pendente lite, and no final order had yet been entered?*

There’s no direction from the Court of Appeals on this point, but in 1995, the Fairfax County Circuit Court refused to modify a pendente lite child support award of $1,739 per month, made prior to the passage of the 1995 shared custody guideline. Application of the shared guideline would have reduced the award to approximately $1,235. Distinguishing *Slonka*, the trial court found that the award in *Slonka* was permanent, whereas the payor in the case at bar had redress in a final hearing scheduled just a few months away. See, *Payne v. Payne*, 40 Va. Cir. 17 (1995).
If Carol does elect to file for a modification due to the legislative change, what months of support are potentially modifiable?

It would depend on when she files. From the facts recited above, we know that the child support agreement was incorporated on January 21, 2014, and we presume that the new guidelines would become effective July 1, 2014. Assume Carol files prior to July 1, 2014, and the case is heard before the new guidelines become effective. The old guidelines would control. Absent another change in circumstances, Carol is stuck with her old support amount. Trial courts may not retroactively apply amended guidelines to fix awards for periods governed by prior guidelines, absent written findings justifying a departure from the former statute. *Cooke v. Cooke*, 23 Va. App. 60, 65 (1996).

Suppose Carol files for a modification in March 2014, but the case is not heard until September 2014? Let’s ignore for a moment the possibility that Mike’s clever counsel files to dismiss based on a lack of changed circumstances prior to July 1, 2014. If the case is heard in September, *Cooke* would require that the new guidelines apply from July 1 forward, just as it dictates that the old guidelines would apply for months prior to July 1:

[T]he statutory scheme established by Code §§ 20-107.2, -108, -108.1, and -108.2, and related enactments, manifest a clear legislative intent that the courts of this Commonwealth determine the issue of child support with contemporaneity, in consideration of prevailing circumstances and consistent with existing guidelines. The application of a repealed guideline schedule to ascertain a current award would subvert this legislative design. 23 Va. App. at 65.

*Milligan* and *Slonka* give us some guidance as to the scale of the variance that would support a modification, at $400 and $790 per month, respectively. In *Cooke*, the Court of Appeals noted in dicta that a monthly variance of $1,425 was a “substantial reduction” and that the parties had agreed that it constituted a “significant variance.” Here, let’s assume Mike and Carol’s former counsel both run the new guidelines and discover a $172 monthly variance. While perhaps not as significant as the cited cases, this monthly difference adds up to an annual amount of $2,064 – certainly not insignificant. Wise counsel might find it prudent to alert former child support clients to the legislative change, especially if they have not formally withdrawn as counsel. Whether such a notice is *required* is beyond the scope of this article, but the idea is worthy of serious consideration.

The pending changes to the child support guidelines by themselves would grant a party the right to petition for a modification under settled law, without the necessity of a change in circumstances. Whether it makes sense to seek a modification depends on the scale of the change to guideline support, because thus far, the cases out of the Court of Appeals have dealt with variances of several hundred dollars per month. Even with variances of that magnitude, the Court of Appeals has upheld trial court findings that the application of new or changed guidelines did not warrant a modification.

As for the Bradys, both lawyers wrote their clients to advise about the pending legislative change. Neither has heard back.

---

Because they are so exhausted and financially depleted from the divorce, neither Mike nor Carol has talked to his or her attorney since the divorce became final in January 2014. Neither is aware of this pending legislative change to child support.
Collaborative Law: What Every Practitioner Should Know

By David L. Ginsberg, Esquire
Cooper Ginsberg Gray, PLLC
DGinsberg@cgglawyers.com

The Collaborative Process is a relatively new alternative dispute resolution process. In certain areas of Virginia, divorcing parties routinely consider the Collaborative Process along side negotiation, mediation, and litigation as potential ways to resolve their case. Attorneys throughout the Commonwealth are becoming trained in the Collaborative Process in increasing numbers, and clients are becoming more aware of the process.

The Collaborative Process is designed to create an environment in which the parties have greater control over the resolution of their dispute. The primary goal of giving this power to the parties, as opposed to attorneys or the legal system, is to help them obtain a customized result for their family. Often, through the Collaborative Process, parties will find more imaginative solutions than they would through traditional legal methods, and certainly more creative than what a judge has the authority to order.

Although the Collaborative Process may have many different forms, all collaborative cases meet two requirements. First, the parties, attorneys, and other team members must agree that they will not litigate while the Collaborative Process is in effect. Second, if the Collaborative Process fails and no agreement is reached, the attorneys and other professional team members agree that they will not participate as attorneys, experts, etc. in the litigated portion of the case.

The parties and team members must agree to share any and all relevant information and documents with the other party and other team members. The parties cannot issue discovery or subpoenas, or use other methods that could be employed in a litigated case. Therefore, the only way to gather all of the relevant information and to ensure that both parties have all of the information necessary to make educated decisions is through the cooperation of the parties.

Without this cooperation, the Collaborative Process cannot be successful.

Every Collaborative case begins with the parties, attorneys, and any additional team members signing a Participation Agreement. The Participation Agreement governs the process by setting forth the obligations and responsibilities of each team member as well as the format, methods of communication, and other procedural issues that the team members deem important.

Each Collaborative team has an attorney for each party; other team members may or may not be added at the discretion of the parties.

One goal of the Collaborative Process is to equip the parties with tools to help them resolve the issues. Common additions to the Collaborative team include coaches, child specialists, and financial specialists. However, there is no reason that the parties could not add a different type of professional if there was an issue for which specialized education or guidance would be helpful.

Coaches promote communication and teamwork. They are typically mental health professionals, but they do not serve as a party’s therapist. Although the coach’s role may delve into issues that could arise in a therapy session, the coach’s role is to help improve their communication, and often to facilitate communication and teamwork with the entire team. A coach may help a party find a productive way to express his or her feelings, goals, or interests; or by assisting a party to better understand the other party’s goals. Unlike the other professionals, coaches may assist one or both parties.

Parties may choose to involve a child specialist in cases that involve children. Child specialists are typically mental health professionals. A child specialist may work with the parents to establish a parenting plan, educate parents about a child’s developing
needs, or help the parents understand what their child is experiencing as a result of the separation/divorce. Depending on the circumstances, a child specialist may meet with the child, and provide that child a voice in the team meetings.

The one true neutral in a Collaborative case is the financial specialist. There is only one financial specialist in a Collaborative team, and the financial specialist’s role is to educate the entire team about the financial issues in the case. They gather information from everyone so that they can present a complete picture of the parties’ financial circumstances, and they can help the team explore realistic options geared to meet the parties’ goals and interests.

Attorneys in the Collaborative Process educate their clients about the applicable law and protecting their client’s interests, but they may fulfill these responsibilities in different ways than in a traditional case. The attorneys agree that they will not take advantage of a mistake or inequality in information, but instead that they will work to ensure that both parties have complete information about the pertinent issues, and will help the clients work together to find the best solution for the family. Depending on how one views the case, the best solution for the family may or may not be the best possible result for an individual client. For example, one comparison is that an individual may receive a greater tax refund by filing separately than one-half of a joint tax return, but a joint return may result in a greater total tax refund.

In building a team, many factors may be considered. First and foremost, the parties and attorneys must determine if the issues in the case warrant additional team members. While, arguably, coaches and financial specialists add value to every team, and child specialists help in any cases involving minor children, the reality is that the cost of each professional must be weighed against their benefit. In the long run, a Collaborative case may not be any more expensive than a traditional case, but the upfront outlay of costs can be intimidating.

Virtually all of the Collaborative team work is done in group meetings. Therefore, each team member hears not only the thoughts and preferences of his or her client, but also those of the other party and the professionals. This ensures that all team members have an accurate understanding of everyone’s thoughts and goals, and, equally as important, everyone has an accurate understanding of the basis for those thoughts and goals. This format eliminates the situations in which something is lost when one person is relaying what was said to someone else later.

The traditional Collaborative Process encourages the parties and team members to focus on and consider each party’s goals. One of the first steps in a Collaborative case is for the parties to share their goals with the team. The parties are encouraged to list broad goals, such as financial security in retirement, funds for children to attend college, and quality time with children, as opposed to stating specific settlement terms, such as how much they might want in monthly support or specific visitation schedules. In many cases, the goals of a party may include something that a judge could never order, such as an apology, an acknowledgement of the role one parent played in a child’s life, college funds, or child support that extends beyond 18 years of age.

By sharing their overarching goals, the parties are better equipped to see the other party’s perspective. Once a party understands the underlying reason or big picture goal, the parties are less likely to focus on specifics such as how to obtain higher support payments, or how to avoid paying more support. Instead, the parties often start looking at ways that they can reach both their goal and the other’s party’s goal as well.

As the process evolves, in a brainstorming session, the parties will be required to list potential resolutions for each issue. At this stage, the parties are not permitted to comment on whether they like or dislike a proposed solution, but instead are encouraged to list as many potential solutions as possible. By requiring the parties to list potential solutions, it forces each party to get a sense of the other party’s goals, desires, and concerns.

After the parties and other team members have listed all of the potential solutions, only then do they begin to evaluate the options. Each party indicates whether he or she likes, dislikes, or is not sure about a potential solution. The options that neither party likes are crossed off, and the team focuses on the options that both parties liked or at least both parties indicated a willingness to explore.
Either when the parties request it or the attorneys believe it would be helpful, the attorneys will explain the law that governs the issues in the case. This explanation will include an outline of the law itself, and may also include advice or guidance from the attorneys as to what positions would be considered reasonable. The parties are encouraged to consider the law as just one reference point that should be considered in determining the best solution. Other reference points to consider include fairness, needs of the children, prior agreements, future relationships, economic realities, and other factors such as cultural or religious values.

It frequently takes attorneys some time to adjust to this format in which they are providing legal information and advice in a group setting that includes the opposing party and counsel. Although it may seem counterintuitive, providing legal advice to a client in the presence of the other team members can be a powerful tool in advancing the case toward settlement as it eliminates the feeling that the attorney or party is devising a scheme to take advantage of them.

The Collaborative Process can be effective in almost any case, but there are certain instances in which it probably is not the best approach. If a party cannot trust the other party, and is convinced that the other party will hide assets or withhold critical facts, the Collaborative Process will not work. Given that most of the work done in Collaborative cases is handled in a group setting, the Collaborative Process may not be effective in cases in which one spouse is abusive, or has mental health or substance abuse issues.

Although many Collaborative cases take less time than traditional litigation cases, the parties often feel that Collaborative cases get off to a slow start. It takes time to put together a Collaborative team, and to educate each professional about the case issues. Once the team is brought up to speed, Collaborative cases often move forward quickly. However, if one party does not want the case to move forward, he or she can use the Collaborative Process to slow down negotiations since the process relies on both parties being ready and willing to move forward, without looming deadlines or a trial date.

In an ideal case, the ultimate result is an agreement in which both parties are satisfied that they came as close as possible to their goals, and that their former spouse understood their perspective. Agreements created in this process often are more creative and customized than agreements formed in the typical litigation format. As a result, many parties in a Collaborative case are happier with the terms of their agreement, and the agreements remain in effect longer. An agreement that lasts longer will save the parties in terms of future legal costs as well as the emotional toll of arguing over custody or support issues with an ex-spouse.

**HOW TO SUBMIT AN ARTICLE**

If you would like to submit an article for publication, please email it to Brian Hirsch at BHirsch@NOVAFamilyLaw.com. Most articles are between 1,000 and 2,000 words, but this should not limit you in submitting a shorter or longer article. Deadlines for submissions are February 21, May 21, August 21 and November 21.
Lawyers and psychologists often meet in the courtroom on the same case with the same parties, but arrive from different professional orientations. The lawyer follows an advocacy-adversarial model. The psychologist takes an exploratory-healing role. However, there is much room for collaboration, especially with the variety of psychological specialties in divorce proceedings.

Psychology is a diverse discipline, grounded in science but with practical applications. Basic psychological research involves experimentation and research technology. Clinical practice takes this psychological knowledge and applies it to help people and organizations.

Psychologists specialize within the discipline. Social psychologists explore aspects of interpersonal relationships. School psychologists provide comprehensive assessment and counseling services in the academic environment. Industrial/organizational psychologists apply psychological principles to the workplace. Developmental psychologists study the growth of humans throughout the lifespan. There are perceptual psychologists, community psychologists, experimental psychologists, rehabilitation psychologists and sports psychologists. Clinical psychologists specialize in diagnosing mental health, behavioral and personality disorders and provide treatment techniques to alleviate mental disorders. Psychologists are mandated to practice within their areas of training and expertise. Clinical psychologists in Virginia require additional internships, post-doctoral training, residency or fellowships.

Psychologists working with families of separation-divorce may engage in various roles. The psychologist will need to clarify who the client is, the limits of confidentiality, deal with ethical challenges and develop flexible expectations of outcome. The lawyer calling upon a psychologist to assist in divorce or custody litigation will need to specify the role of the psychologist and understand the limitations of possible recommendations.

**Custody Evaluations:**
A custody evaluation is an independent assessment of the divorcing family that generates a series of recommendations including legal and physical custodial arrangements for a child. The psychologist utilizes clinical diagnostic interviews and psychological tests to assess the psychological strengths and weaknesses of each of the parents and their personality, social, emotional and cognitive development. Parenting skills are assessed by clinical interviews, formal assessment tools and observations. The developmental needs of the children will be examined and multiple sources of information will be gathered. The custody evaluator must be absolutely independent and not serve or have served in any other role with members of the family. The evaluation process allows the psychologist free access to otherwise confidential information from physicians, therapists or educators who have worked with the family members.

**Parent Coordination:**
Parent coordination teaches conflict resolution, consensus building and compromise techniques to facilitate functional communication and decision-making.
making in post-separation divorce. Parent coordination assumes a co-parenting model that best meets the needs of the child and develops mechanisms for achieving effective co-parenting decisions. The parent coordinator assists in implementation of the existing custodial order. Where parents have joint legal custody and are mandated to reach agreement on educational, medical, social, religious or extra-curricular matters, the parent coordinator can also issue recommendations or directives, should parents fail to reach agreement or consensus. At times, the psychologist is given authority to render binding decisions pending judicial review. The parent coordinator is not a mediator and can be called upon to testify. Parent coordination can also develop an effective parenting plan prior to separation or divorce. There is limited confidentiality to parent coordination and the parent coordinator should be independent of other roles with members of the family. The parent coordinator facilitates parental decision making, but does not psychologically evaluate the parties and therefore should not make custodial recommendations.

Collaborative Process:

In a voluntary collaborative law process, the psychologist assists a divorcing couple to achieve custodial settlement outside of the court system as part of a legal team. The psychologist can bring a perspective of child developmental needs or can serve as a divorce coach. The collaborative team helps parents resolve differences and reach settlement terms that meet the needs of all parties. Should collaboration fail, the psychologist discontinues work with family members and does not participate in any future therapeutic work or litigation with the family.

Psychotherapy:

Psychologists have traditionally served as psychotherapists for individual children or adults during the divorce process. Using diagnostic and treatment skills to assess and deal with life changes, the psychologist may identify issues of stress, depression, anxiety or anger and help a patient develop appropriate coping skills or resolve the problem. In many states, the role of the treating psychologist is confidential and independent. Virginia Code § 20-124.3 requires a court to consider the mental condition of each parent in determining the best interests of the child. This judicial discretion exception allows judges to override doctor-patient privilege where the bench deems the admission of mental health information necessary for the proper administration of justice. The psychologist providing psychotherapy will not have the scope of information necessary for custodial recommendations and can only present psychological status and emotional strengths and weaknesses of the individual patient.

Expert Opinion:

The psychologist may be hired by one party in the litigation. As an expert for one litigant, the psychologist may be asked to critique the work product or opinion of another professional or bolster the legal case of one parent. Based on psychological testing and clinical interviews, the psychologist may opine within an area of professional expertise. The psychologist may also present a perspective on a specific matter relevant to a custodial issue, such as attachments of young children, needs of children with developmental disabilities or impacts of visitation transitions with youth with attention deficit disorders. The psychologist, hired by one party in the litigation, must be clear about biases in specific recommendations.

Independent Medical Examination:

Psychologists can be appointed to provide independent medical examinations. The court may request a complete psychological evaluation of the mental health of an individual for good cause. There may be interest as to whether a parent suffers from a diagnosable mental disorder, substance abuse or behavioral or personality dysfunction. The psychologist must be clear as to the lack of confidentiality of the relationship and the limits of the role.

Parental Fitness Evaluation:

Also known as a parenting capacity assessment, these ordered evaluations assess the parenting capacities or liabilities of one or both parents. They are oriented toward protecting the welfare of children and can be used to determine levels of appropriate access a parent should have to a child or whether supervised visitation should be mandated. A fitness evaluation
determines whether a parent is capable of meeting the emotional and physical needs of a child. Unlike a custody evaluation which recommends which parent is best suited to be a child’s primary custodian or a psychological evaluation which describes emotional strengths and weaknesses of an individual, a parental fitness evaluation identifies the needs of a parent in relation to parenting skills. In making recommendations, the psychologist may examine issues of domestic violence, substance abuse, child abuse and family conflict. Parenting assessments may include face to face interviews, psychological testing, direct observations of parent-child interactions and input from collateral sources.

Reconciliation Therapy:
Reconciliation therapy or reunification therapy re-estabishes healthy contact between a parent and a child when that relationship has been interrupted. For various reasons, a child may be limiting or refusing meaningful contact with a parent. Often a court order is necessary to allow a psychologist to identify the stressors negatively impacting the parent-child relationship and to develop strategic programs to rebuild communication and trust, and eliminate the estrangement. Reconciliation therapy is generally not confidential and the psychologist will work with various combinations of family members and other therapists. Dysfunctional family dynamics that support inappropriate parent-child relationships are identified and treated.

Family Therapy and Marital Therapy:
Family therapy explores a family’s unique social structure and accepts that the influences of beliefs, values and personalities of each family member affect all family members. Changes in one family member impact both the family structure and the individual. Mental health problems identified in one person may be symptoms of a larger family problem. Marital therapy, or couple’s counseling, seeks to change each partner’s view of a troubled relationship, improve communication and modify dysfunctional behaviors both for the individual as well as the couple. The psychologist sees the couple or family as a whole and cannot make specific recommendations about individual personality characteristics or custody planning.

Psychological Evaluation:
Psychological evaluations use a battery of scientifically based tests, observations and interview techniques to assess an individual’s behavior, style of thinking, personality or emotional capacity. Psychological testing may lead to mental health diagnosis and inform a plan for treatment. In custody matters, psychological testing can clarify the personality strengths and weaknesses of a parent or can identify particular needs of a child. The results can inform the court as to the presence of a diagnosed mental disorder and what treatments are available for remediation. A psychological assessment does not assess the individual in a parenting relationship or in comparison to another parent and does not yield recommendations for visitation or custody.

Forensic Team Consultant:
A forensic psychologist assists a legal team to gain insight into the human mind and utilize that insight to shape a legal proceeding. In custody situations, the forensic psychologist helps counsel understand family dynamics or the psychological status of an individual. This allows counsel to more effectively present appropriate plans for visitations and custody.

The clinical skills necessary for each of these varying roles may not be met by all psychologists. Each role has different limits of confidentiality. It is important for the attorney to understand the scope of information that can be gathered from the psychologist in each role and not to demand the psychologist go beyond the area of expertise or limitations of the role.

*Edward D. Farber, Ph.D. (restonpsych@comcast.net) is a clinical psychologist and partner with Reston Psychological Center. A Clinical Assistant Professor at George Washington University School of Medicine, Dr. Farber provides assessment and treatment to children, adolescents and families in matters of divorce and custody. Dr. Farber recently published Raising the Kid You Love with the Ex You Hate (Greenleaf Book Group, 2013). www.raisingthekidyoulove.com
New Relief from Rental Agreements for Victims of Domestic Violence

By Craig W. Sampson, Esquire
Barnes & Diehl, P.C.
CSampson@barnesfamilylaw.com

The remedies available to victims of domestic abuse have now been expanded to include the ability to terminate a rental lease. Virginia Code Sections 55-225.16 (which addresses Landlord and Tenant relations) and 55-248.21:2 (the Virginia Residential Landlord and Tenant Act) extend the right to early termination of rental agreements to victims of family abuse, sexual abuse, or criminal sexual assault.

Such relief may be obtained when a person is granted a final protective order pursuant to Virginia Code Section 16.1-279.1 and gives written notice of the termination to his or her landlord during the period of the protective order or any extensions thereof. Relief is not available to victims of domestic violence who have only obtained emergency protective orders or preliminary protective orders, nor is the relief available in the case of protective orders issued against non-domestic perpetrators pursuant to Virginia Code Section 19.2-152.7:1 et. seq. The statutes do not state any limit on the number of terminations that a victim may seek during the period that a protective order is in place.

Relief may also be obtained if a court has entered an order convicting a perpetrator of sexual assault, sexual abuse, or family abuse. In these instances, a victim may exercise a right of termination to terminate a rental agreement in effect when the conviction order is entered and one subsequent rental agreement based upon the same conviction.

There is no statutory requirement that a victim/tenant demonstrate any ongoing threat from the perpetrator or that the protective order or conviction does not by itself provide an adequate assurance of safety. In the case of criminal convictions, it appears that the termination of rental agreements is available even in cases where the perpetrator is incarcerated and thus not in a position to further threaten the victim directly. The only requirement is that a qualifying tenant serve the landlord with a written notice of termination to be effective on a date stated therein, such date to be not less than 30 days after the first date on which the next rental payment is due and payable after the date on which the written notice is given. The tenant must also provide the landlord with a copy of the order of protection or conviction order.

A landlord who is properly served with notice that a tenant is exercising his or her rights as a victim of abuse may not charge any liquidated damages. Any co-tenant on the lease with the victim shall remain responsible for the rent for the balance of the term of the rental agreement. If the perpetrator is the remaining sole tenant obligated on the rental agreement, the landlord may terminate the rental agreement and collect actual damages for such termination against the perpetrator.

Virginia Code Section 16.1-279.1 allows a court to grant exclusive use and possession of a residence to a victim of domestic violence and to order that the perpetrator not terminate any necessary utility services. The issuing court can also order that the respondent provide suitable alternative housing for the petitioner, and may even require the respondent to pay deposits or connect or restore necessary utility services in the alternative housing provided. Now, the victim also has a right to terminate a lease and walk away, in some instances leaving the perpetrator responsible for any actual damages. These new statutory provisions, however, only apply to renters, and do not address the situations in which the victim and/or perpetrator own the residence either separately or jointly.
What’s Wrong with Wright

By Ronald R. Tweel, Esquire
MichieHamlett
RTweel@michiehamlett.com

When I was asked to take the appeal on behalf of the wife in Wright v. Wright, 61Va. App. 432, 737 S.E. 2d 519 (2013), I jumped at the chance. I was specifically interested in the issue of the husband spending accumulated marital assets on certain post-separation expenses when his substantial income was sufficient to pay those expenses. Instead of paying the expenses from his income, he saved it, and amassed several million dollars of post-separation income. There were two basic reasons that I wanted to take the appeal. First, I thought that this issue needed to be heard. Second, I thought it was clear that marital assets should not be spent in such a fashion.

Brother was I wrong! I suggested to my client that she should appeal the Court of Appeal’s decision to the Virginia Supreme Court, but she declined. We are obligated to follow the dictates of our client, and I was sorely disappointed that I was unable to appeal this case further since I thought that the law and equity demanded a different result. I will attempt to state, in a neutral fashion, the salient facts as to the equitable distribution issue. I am certainly not making any promises since I am not unbiased on this issue.

What are the facts that led me to the conclusion that I should take this appeal? The husband had been employed as an attorney for decades by a large Virginia law firm beginning in 1987 and continuing until the date of the trial. As a senior partner in the firm, his annual gross wages were $1,436,648 in 2007, $1,631,235 in 2008, and $1,587,179 in 2009. This substantial income allowed him to save money post-separation.

On the other hand, the wife remained a stay-at-home mother after the birth of their three children. The youngest child was 15 years old at the time of the trial. The wife was 53 and the primary caregiver of the children. The wife was involved in community service work, raised her children and had very little employment during the term of the marriage. She did have an MBA, but had not utilized it in the latter years of the marriage. The husband had an Ameritrade account titled in his name. When the parties separated in 2008, it contained marital funds totaling $2,695,275. All of the deposits came from the husband’s earnings. Once the parties separated, the husband did not make any further deposits into that account. Instead, he deposited his earnings into a new separate account. At the time of the trial in 2010, the most recent balance of the marital Ameritrade account was $1,410,939.

Significantly, from the date of separation to almost the date of trial, the husband spent $1,268,496 from the marital account. Of this amount he paid $834,335 for joint state and federal income taxes associated with his income that he earned post-separation. In addition, he spent $434,161 towards his attorney’s fees, expert witness fees, spousal support, and private school tuition for the children.

The evidence at trial was that the marital Ameritrade account would have appreciated in value at the time of trial to $2,696,379, if the husband had not depleted it on the expenses noted above. Another major factor was that the husband had a second marital income checking account. On the day of the separation it had a balance of $105,610 and at the time of the trial it was down to $5,178. Once again, he spent $100,000 from a marital account. Most importantly, all the income earned by the husband after the date of the separation was deposited into his solely-titled Bank of America account. This new account was opened at the time of the separation, and increased in value with the husband’s post-separation income from $46,015 to $2,500,349. This, in my mind, was critical.
Although, there were other legal issues presented in this appeal, it was my belief that this was the most important one and the one that would establish new precedent in Virginia. Sadly, it did not. The fundamental issues boiled down to whether this was a case of first impression or controlled by existing case law. My review was that it was a case of first impression. The existing case law permitted the expenditure of marital funds for a variety of proper purposes. However, there had never been a case in Virginia holding that marital funds can be spent to pay a family’s expenses and spousal support where there is more than enough post-separation income from which the payor could satisfy these obligations.

In our appellate brief, I recognized that there were “proper purposes” for which to use the marital funds. The Court of Appeals, however, opined that if it were a proper purpose, then that was the end of the inquiry. It was my position that not only must it be a proper purpose, but it must be from a “proper source.” There are a number of Court of Appeals decisions that address the issue of what is a proper purpose for post-separation expenditures of marital funds. See, Booth v. Booth, 7 Va. App. 22, 371 S.E. 2d 569 (1988); Clements v. Clements, 10 Va. App. 580, 397 S.E. 2d 257 (1990); Amber v. Amber, 13 Va. App 661, 414 S.E. 2d 847 (1992); Alfin v. Alfin, 15 Va. App. 395, 424 S.E. 2d 572(1992); Thomas v. Thomas, 40 Va. Ap. 639, 580 S.E. 2d 503 (2003). I had no trouble with the rationale of these cases, but these cases were never analyzed in the context of the extraordinary circumstances of our case. None held that the expenditures from marital assets were permissible when the payor had sufficient post-separation earnings. My position in Wright was that such a holding would inappropriately condone the depletion of marital assets on the one hand, and permit the accumulation of post-separation income by the payor spouse, on the other hand.

The important point is the amount of post-separation income available to the payor. The holding in Virginia case law that spending a marital asset to pay a joint or personal obligation is a proper purpose is found in cases where the payor was not making the considerable income that the husband was in Wright. In Thomas, supra, the Court found that it was not waste for the husband to pay pedente lite spousal support from life insurance proceeds. The Thomas decision is distinguishable because the husband made only $70,000 a year and used a $54,000 asset to pay the expenses.

In our brief, I argued that the husband’s explanation for using these funds was not satisfactory, as a matter of law. The expenditures may well have been for a proper purpose, but the source of funds to pay the expenses was not appropriate. The wife was seriously prejudiced by the husband’s unilateral actions in utilizing marital funds while saving post-separation income. Essentially, the wife was denied her equitable share of $1,400,000 in assets.

Although, there was no Court of Appeals decision on point, Judge Stanley Klein in the case of Holland v. Holland 53 Va. Cir. 512 40A131 (1999), squarely addressed this issue. In that case, Judge Klein recognized that the husband’s post-separation expenditures from a marital account did not qualify as waste under Virginia law. He reviewed the cases which held that similar payments from marital property were proper. He acknowledged that the general rule was that the use of marital funds for living expenses while the parties live separate and apart is not wasteful nor dissipation. Judge Klein, nonetheless, went on to hold:

Virginia’s waste jurisprudence preceding Luczkovich and Barker, required the finest and most ethical domestic relations attorneys to advise all of their clients to utilize marital property for all of their post-separation expenditures, while establishing new bank accounts into which they would deposit all of their post-separation earnings. As these non-commingled post-separation earnings would be separate property, they could not be reached or considered in any equitable distribution award. Indeed, an unqualified right to utilize marital funds for post-separation living expenses would allow an employed husband, who had access to the parties’ sole marital bank account containing $50,000, to spend all of those funds on his own attorney’s fees and living expenses while building up his own separate $50,000
account, which would not be subject to equitably distribution. He would therefore leave his unemployed wife without any marital property to be equitably distributed and without any means of paying her attorney’s fees. Such a result would be utterly inconsistent with the goals of the General Assembly in its enactment of Va. Code § 20-107.3.

At oral argument, one of the judges on the panel even mentioned Judge Klein’s opinion, but apparently was not persuaded by it. Finally, I cited in my brief cases from Missouri, Ohio, Wisconsin and Utah which were supportive of our position, which were equally unpersuasive.

What did the husband argue on this issue in his appellate brief? Perhaps wisely, the husband’s brief did not spend more than a page rebutting what we considered to be the most important issue of the entire appeal. His argument was simple: did the trial court determine whether the husband had dissipated marital assets? When marital funds are spent after the break down of the marriage, the burden is on the party who last had the funds to establish by a preponderance of the evidence that the funds were spent on living expenses or other proper purposes. Here, the Court of Appeals was persuaded by the “proper purpose” argument, and the husband’s reliance upon Clements.

The Wright opinion spends only one and one-half pages of a 30-page opinion addressing what I considered to be the most critical issue of the case. It did so because it devoted its opinion to the simple issue of “proper purpose” and not the issue of “proper source,” as we had requested. The Court of Appeals was persuaded by the “proper purpose” argument, and the husband’s reliance upon Clements.

The Wright opinion spends only one and one-half pages of a 30-page opinion addressing what I considered to be the most critical issue of the case. It did so because it devoted its opinion to the simple issue of “proper purpose” and not the issue of “proper source,” as we had requested. The Court of Appeals was persuaded by the “proper purpose” argument, and the husband’s reliance upon Clements.

Not to take of the first two steps could well be considered below the standard of care. This is an unfortunate result of the Wright opinion and regretfully our Supreme Court was not given the opportunity to address it. Hopefully, some time in the future another court will address this issue or we will get a legislative fix to this problem. ✤
Equitable Distribution: Burden of Proof of Personal Effort


Facts: Husband filed for divorce, seeking equitable distribution. The trial court granted husband a divorce and equitably distributed the parties’ property. Husband appealed the trial court’s award to the Court of Appeals since it classified the increase in value of his “Investment/Brokerage Account” (the “Account”) as marital, despite husband owning the Account prior to the parties’ marriage and the parties’ agreement that the Account was separate property. The Court of Appeals reversed the trial court since wife failed to carry her burden of proving that substantial appreciation in the value of the Account was proximately caused by husband’s significant personal efforts during the marriage. Wife appealed to the Supreme Court of Virginia.

Issue: Whether a non-owning spouse, who seeks to establish that an appreciation in value of separate property during marriage is marital property, has the burden of proving that significant personal effort during marriage or marital property proximately caused such appreciation.

Ruling: The Supreme Court reversed the Court of Appeals, holding that there is no statutory requirement for the non-owning spouse to prove that substantial appreciation in the value of the Account was proximately caused by husband’s significant personal efforts. To the contrary, the owning spouse has the burden of disproving causation once the non-owning spouse makes a prima facie showing of: (i) a spouse’s personal efforts during the marriage or contribution of marital property, and (ii) increase in value of the separate property.

Rationale: Burdens of proof created by statute are questions of law concerning statutory interpretation. Several Court of Appeals cases require the non-owning spouse to prove causation between: (i) a spouse’s personal efforts during the marriage or contribution of marital property, and (ii) increase in value of the separate property. However, VA Code § 20-107(A)(3)(a) only requires the non-owning spouse to prove personal effort/contribution and increase in value. The statute does not require causation. Thus, the burden of disproving causation shifts to the owning spouse once these two elements are proven by the non-owning spouse.

Child Support – Support for Emancipated Disabled Child


Facts: The parties married in 1981; had a daughter in 1994; and divorced in 2010. Thus, the child was a minor when the parties divorced. The father was ordered to pay child support of $900 per month to the mother. The child suffered from fibromyalgia, Tourette’s disorder, obsessive compulsive disorder, mood disorders and attention deficit hyperactivity disorder. The mother filed a petition in the trial court seeking payment of continuing child support by the father. The father alleged that the petition for child support should be dismissed as untimely, since the mother filed her petition on May 10, 2012, whereas the child turned 19 on January 8, 2012 and had earned her GED on April 19, 2012. The trial court determined that the child was unable to support herself.

Issues: Whether: (1) the trial court had subject matter jurisdiction to order continuing child support, (2) the mother had standing to petition for continuing child support, and (3) the evidence satisfied the elements for continuing child support.

Ruling: The court had subject matter jurisdiction to
order continuing child support. The mother had standing to petition for continuing child support. The evidence was sufficient to satisfy the elements for continuing child support.

**Rationale:** Virginia Code § 20-124.2(C) grants jurisdiction to the court to adjudicate the class of case at issue. Since Virginia Code § 20-124.2(C) also allows the court to order support for a “child” over 18 years of age, someone has to be the “conduit” of this money. The mother also had a “sufficient interest in the subject matter of the case” to confer standing upon her to pursue the petition. The trial court properly weighed the evidence and found that the evidence was sufficient to satisfy the requisite elements to award continuing child support.

---

**Equitable Distribution: Beneficiary Designation (children v. second wife)**

**Name:** *Griffin v. Griffin*, 62 Va. App. ___ 1177131, ___ S.E.2d ___ (2014)

**Facts:** Husband worked for Dominion Virginia Power and had a defined contribution plan known as a Salaried Savings Plan. Husband and first wife provided in their Property Settlement Agreement (“PSA”) to name their children as co-beneficiaries under all 401K plans and other such plans which would be distributed upon the death of either party. The parties divorced, but no qualified domestic relations or other retirement orders were entered. Husband remarried and named his second wife as beneficiary for most of his funds, including the Salaried Savings Plan. Husband subsequently died while a Dominion Virginia Power employee and married to his second wife. The first wife asked the trial court to enter a QDRO, naming the children as co-beneficiaries under the Salaried Savings Plan when the parties agreed to name them as co-beneficiaries. The trial court, therefore, should have entered the first wife’s QDRO naming the children as co-beneficiaries. There was a lengthy dissent, stating that ERISA pre-empts state law, and that the terms of the plan should have governed.

**Ruling:** The terms of the PSA govern and not the terms of the Salaried Savings Plan, and the ruling of the trial court was reversed and remanded.

**Rationale:** The terms of the PSA are not governed by ERISA since the Salaried Savings Plan fell under an exception in 29 USC § 1055(C). Therefore, the children’s rights as co-beneficiaries vested under the Salaried Savings Plan when the parties agreed to name them as co-beneficiaries. The trial court, therefore, should have entered the first wife’s QDRO naming the children as co-beneficiaries.

---

**Bankruptcy: Attorney has Standing to Pursue Fee Award Against Debtor Spouse**

**Name:** *In Re Michael Joseph Collins*, USDC (Eastern District of Virginia, Alexandria Division, Case No. 12-14664)

**Facts:** Wife was awarded $39,500 in attorney’s fees in the parties’ Final Decree of Divorce. The fee award resulted from the husband’s noncompliance during discovery, obfuscation of his business records, and understating his income. The husband subsequently filed a Chapter 13 bankruptcy petition, listing the attorney’s fees as a non-priority debt and naming the wife’s attorney as the creditor. The wife and her attorney filed a Complaint to Determine Priority Status. The wife then filed her own Chapter 7 bankruptcy petition. The husband and wife entered into a settlement agreement, addressing the equitable distribution award from the circuit court and resolving the issue of attorney’s fees by each paying his or her own fees. The parties’ agreement was never incorporated into the Final Decree of Divorce or otherwise brought to the bankruptcy court’s attention. The husband argued that the wife’s attorney had no standing to assert a claim for attorney’s fees in the bankruptcy court since the wife was no longer asserting a claim on her own behalf. The bankruptcy court found that the debt was non-dischargeable since it was for a domestic support obligation, and that the wife’s attorney had standing to pursue the debt against the husband. The husband appealed.
**Issue:** Whether the wife’s attorney was a proper party to bring a cause of action in the husband’s bankruptcy proceeding to collect a fees award from the circuit court to the attorney.

**Ruling:** The wife’s attorney has standing as a creditor to bring a cause of action to collect the fees awarded to her by the circuit court.

**Rationale:** Under Fed. R. Bankr. P. 4007(a), “[a]n action to determine whether a particular debt is excepted from a debtor’s discharge – i.e., a ‘dischargeability determination’ – may be instituted either by the debtor or by any creditor.” The wife’s attorney is a creditor against the husband in his bankruptcy and has standing to assert a claim for the attorney’s fees award in an adversary proceeding before the bankruptcy court.

---

**Support: Voluntary Job Loss**

**Name:** Strack v. Strack, 13 Vap UNP 0822131 (2013)

**Facts:** Parties agreed to a set amount of spousal support. Their PSA allowed husband to request a reduction in support if he lost his employment “due to no fault of his own.” Husband was president of a company, which was growing dissatisfied with his treatment of the employees. His behavior persisted despite repeated warnings, and the company terminated him, with the official reason that it was “not comfortable with the direction that the company was headed.”

**Issue:** Whether husband was terminated due to no fault of his own.

**Ruling:** Husband did not lose his job due to no fault of his own.

**Rationale:** The Court concluded that the fact that husband was either terminated due to his continued failure to comply with the company’s requests to change his leadership style or left on his own accord to pursue another business venture evidenced that he lost his job due to his own fault.

---

**Child Support: Court Allowed to Include Additional Expenses in Award**

**Name:** Saxon v. LeSueur, 13 Vap UNP 0516132 (2013)

**Facts:** Father appealed trial court’s upward deviation from the presumptive amount of child support based upon the inclusion of the son’s attendance at student organization conventions, a trip to Texas with a student organization, extra clothing and footwear, school supplies, lunch money, meals following weekly football games, senior graduation announcements, standardized test registration fees, college application fees and gas money for his use of the mother’s vehicle. The father argued that these “voluntary expenditures” should not serve as a basis for a deviation from the presumptive amount of child support.

**Issue:** Whether the trial court improperly deviated from the presumptive amount of child support based upon the child’s voluntary expenditures by the mother.

**Ruling:** The trial court’s deviation from the presumptive amount of child support based upon these voluntary expenditures was proper.

**Rationale:** The Court of Appeals allowed the child support award to stand for two reasons. First, if the voluntary expenditures by the mother for the son merely provided for the standard of living the child was accustomed to during the marriage, the trial court should consider them when determining an award. There was no evidence that these expenses would not have been provided to the child if the marriage remained intact. Second, the Court of Appeals went through a lengthy analysis of the child support guidelines, showing that, at some time during the child’s life, the presumptive amount of child support was higher or lower than what was actually needed for the child, but that it averaged out over time. Here, the child was 17 years old and the guideline amount of support for the child was lower than necessary for the child at that point in his life, given the needs of a high school senior.
Announcement: The Betty A. Thompson Lifetime Achievement Award Winner is James W. Korman, of Bean Kinney & Korman.

The Betty A. Thompson 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 Betty A. Thompson Lifetime Achievement Award is presented at the Annual Family Law Seminar on April 24, 2014 at The Jefferson Hotel in Richmond, Virginia.

The award will recognize an individual who meets the following criteria:

- A singular and unique contribution to the practice of family law in Virginia;
- Dedication to excellence in the practice of family law;
- Performance in the field of family law with competence and integrity; and
- Commitment to the abiding importance of service to families through the legal system.

The Family Law Section, Board of Governors is proud to announce that the 2014 Recipient is James W. Korman, of Bean, Kinney & Korman, PC in Arlington, VA. Please join us in Richmond on April 24th at the Jefferson Hotel to see Jim receive his award.

Announcement: The Family Law Service Award Winner is The Honorable A. Ellen White, Campbell County, J&DR Court

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 recipient is determined by a majority vote of the Board of Governors of the Family Law Section from nominations made by the members of the Family Law Section. The Family Law Service Award is presented at the Annual Family Law Seminar in April at The Jefferson Hotel in Richmond, Virginia.

The Family Law Section, Board of Governors is proud to announce the 2014 Recipient is The Honorable A. Ellen White of the Campbell County, Juvenile and Domestic Relations District Court. Please join us in Richmond on April 24th at the Jefferson Hotel to see Judge White receive her award.
<table>
<thead>
<tr>
<th>Position</th>
<th>Name</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chair</td>
<td>Carl J. Witmeyer, II</td>
<td>Ashland</td>
</tr>
<tr>
<td>Vice Chair</td>
<td>Richard E. Garriott, Jr.</td>
<td>Virginia Beach</td>
</tr>
<tr>
<td>Secretary</td>
<td>Charles E. Powers</td>
<td>Richmond</td>
</tr>
<tr>
<td>Immediate Past Chair</td>
<td>Cassandra M.H. Chin</td>
<td>Woodbridge</td>
</tr>
<tr>
<td>Editor</td>
<td>Brian M. Hirsch</td>
<td>Reston</td>
</tr>
<tr>
<td></td>
<td>Peter V. Chiusano</td>
<td>Virginia Beach</td>
</tr>
<tr>
<td></td>
<td>Nan M. Joseph</td>
<td>Leesburg</td>
</tr>
<tr>
<td></td>
<td>Lawrence P. Vance</td>
<td>Winchester</td>
</tr>
<tr>
<td></td>
<td>Hon. Leisa K. Ciaffone</td>
<td>Salem</td>
</tr>
<tr>
<td></td>
<td>Daniel L. Gray</td>
<td>Fairfax</td>
</tr>
<tr>
<td></td>
<td>Mary G. Commander</td>
<td>Norfolk</td>
</tr>
<tr>
<td></td>
<td>Christopher F. Malinowski</td>
<td>Fairfax</td>
</tr>
<tr>
<td></td>
<td>Hon. Glen A. Huff</td>
<td>Virginia Beach</td>
</tr>
<tr>
<td></td>
<td>Hon. Deborah V. Bryan</td>
<td>Virginia Beach</td>
</tr>
<tr>
<td></td>
<td>Hon. Richard S. Wallerstein, Jr.</td>
<td>Henrico</td>
</tr>
<tr>
<td></td>
<td>Hon. Deborah V. Bryan</td>
<td>Virginia Beach</td>
</tr>
<tr>
<td></td>
<td>Prof. Lynne Marie Kohm</td>
<td>Virginia Beach</td>
</tr>
<tr>
<td>Liaison</td>
<td>Ms. Dolly Shaffner</td>
<td>Richmond</td>
</tr>
</tbody>
</table>