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VFLQ

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Message from the Chair

Charles E. Powers, Chair
Family Law Section

Having practiced family law in the Richmond area my entire career, it has been fairly insular. Although I have worked with some of Virginia's best family lawyers by trying cases throughout the state and participating in state-wide bar activities, my practice is still fairly localized. The Richmond family lawyers may fight like cats and dogs in court on behalf of our clients, but we tend to get along well outside of court and work well together. Much of this, I think, has to do with the Metro Richmond Family Law Bar Association which has been around for the past 20 years.

The brainchild of one of my partners, Terry Batzli, it was started in the mid-1990's as one of the first localized stand-alone specialized bar associations (as opposed to a section within a local bar association) in the state. Terry's thought at that time was that not only were the cases emotional minefields, the practice of family law was becoming more specialized and complex. There was little opportunity for collegiality or the chance to discuss the practice and local trends with fellow practitioners.

Starting with cheese trays from Ukrop's and a couple of bottles of wine at meetings held in the conference rooms of local law offices, the Association now sponsors several CLE's throughout the year, an annual reception allowing the bar to interact directly with local judges and other social functions. The opportunity to interact with fellow practitioners away from the drama and stress of our cases has allowed us to get to know each other better which, in turn, helps us work better together when the going gets tough. The Association has long had an active membership with successive practitioners taking on leading roles over the years.

For some reason, I thought this was standard throughout the state. Granted, I may be looking at an outdated list of local bar associations in Virginia, but of the more than 100 such associations, there appears to be only one local family law bar association. Just as I believe the VSB Family Law Section has a lot to offer family law practitioners throughout the state, the history of the Metro Richmond Family Law Bar Association shows that a local group also has much to offer through localized education or mentorships. **(Cont. on pg 2)**

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Editor's Note

Brian M. Hirsch

One of my goals for the Quarterly has been to make it an interdisciplinary resource. Knowing the law is essential. However, family law does not exist in isolation to the rest of the world. Alessandra Cuccia's article on the Access and Visitation Program gives ample support to the connection between a payor's relationship with his or her child, and compliance with a child support order. Putting someone in jail is one way to get compliance, but encouraging a relationship between the payor and the child gets the child both support and a more involved parent.

If you have an idea for another interdisciplinary article, please drop me an email at BHirsch@NOVAFamilylaw.com.

Happy reading – Brian M. Hirsch, Editor

Chair Message Cont.

While many local bar associations serve these purposes, one focused on family law may be quite beneficial, especially for such a difficult practice.

The VSB Family Law Section has several subcommittees, including a Local Bar Committee whose mission is as follows: *Working with local family law bars, this committee looks toward exchanging and disseminating information about local practices throughout the Commonwealth to assist in building the quality of professionalism and public service in family law representation and practice*. That remains one of the goals of this Section.

I look forward to serving as Chair of the Family Law Section for the next year and the development of a closer relationship between this Section and the local family law bars. ❖

2015 Mark Your Calendars

FAMILY LAW EVENTS

October 13, 2015
VSB Annual Family Law Seminar – *Hot Topics in Domestic Practice Today* (Glen Allen)

October 15, 2015
VSB Annual Family Law Seminar – *Hot Topics in Domestic Practice Today* (Fair Oaks)

October 16-17, 2015
AAML Virginia Chapter Fall Meeting (Homestead Resort)

October 16-18, 2015
Virginia Mediation Network Annual Fall Training Conference (Richmond)

October 20, 2015
VSB Annual Family Law Seminar – *Hot Topics in Domestic Practice Today* (Norfolk)

October 22-25, 2015
American Professional Family Mediators Annual Conference: *Selling Peace in an Adversarial World* (Washington, D.C.)

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

Modification of Spousal Support: How Low Must a Payor Go?

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A client calls and tells you that his income has fallen by 75% in the past year due to circumstances beyond his control, and asks if he can reduce his spousal support obligation. You assure him that this will not be a problem—a 75% reduction in income is undoubtedly a material change that would justify a modification of spousal support. Right?

Not necessarily. Several recent Court of Appeals opinions have made it clear that, regardless of the severity of a decrease in a spousal support payor's income, if there is any indication that he retains the ability to pay the existing support obligation, there will be no reduction in spousal support under Virginia Code § 20-109—regardless of the recipient's comparative need for spousal support, and regardless of whether the payor spouse must invade his assets in order to meet his obligation.

In 2011, the Court of Appeals arguably raised the bar on the burden of proof required to modify spousal support in *Driscoll v. Hunter*, where it held:

> The crucial question, once a material change in circumstances has been shown, is the ability of the supporting spouse to pay…The fact that the payor husband may have to draw from other sources, such as the principal of investment or savings accounts, in order to make his spousal support payment does not by itself require the trial court to suspend or reduce his spousal support obligation. 59 Va. App. 22, 33-34 (2011).

The Court upheld the trial court's refusal to reduce the husband's spousal support obligation where he was unable to work due to numerous medical problems, but "readily and admittedly can afford to continue paying spousal support from other sources." *Id.*

As the husband in *Driscoll* argued, the Court's reasoning seemed to be at odds with its ruling in *Zipf v. Zipf*, where it held that a spouse seeking an award of support is not required "to exhaust his or her own estate in order to qualify, relieving the other spouse of all obligation of support until that estate is depleted." 8 Va. App. 387, 398-99 (1989). Why must a payor spouse invade his assets in order to support the payee spouse, while the payee spouse has no obligation to contribute to her own support by doing the same?

The Court in *Zipf* also specifically stated that "[t]he *income* of the party who is required to pay is the fund from which the allowance of spousal support is to be made." Id. at 399 (emphasis added). But the *Driscoll* Court dismissed any comparison to *Zipf* on the basis that the latter case involved an initial spousal support determination, rather than a modification.

Once a material change in circumstances has been established, shouldn't the remaining analysis for determining whether a modification is warranted be the same as the analysis in an initial spousal support determination?[1] One would think that in either circumstance, the Court should have to balance the needs of the dependent spouse against the supporting spouse's ability to pay, and that the principal of the parties' assets should not be part of the consideration. However, based on the ruling in *Driscoll*, the analysis in modification cases begins and ends with the ability to pay—and the ability to pay includes an obligation to invade the principal of any liquid assets.

Accordingly, numerous failed attempts at reducing spousal support have followed in the wake of *Driscoll*. For instance, in *Cid v. De Cid*, Record No. 1952-11-4 (Va. App., June 26, 2012), the husband's self-employment income fell by 73% three years after the initial spousal support award, from $159,000 to $43,000. However, the trial court declined to modify his $1,500 monthly spousal support obligation on the

basis that he had other sources of income and potential sources of income, "including a bank account with a balance of over $200,000." *Id*. "Husband did not dispute that he had the continued ability to pay his spousal support obligation despite the reduction in his salary income, and no evidence was presented that wife's need for spousal support had diminished." *Id*.

The wife was earning $106,000 annually when the husband requested a modification of support; while the Court found that her need for support had not changed since the initial support award, there was no *balancing* of her needs against the husband's ability to pay. It is well-established that in an initial support determination, "[s]pouses deemed entitled to support have the right to be maintained in the manner to which they were accustomed during the marriage, *but their needs must be balanced against the other spouse's financial ability to pay*." *Floyd v. Floyd*, 1 Va. App. 42, 45 (1985) (emphasis added). In an initial spousal support determination, the fact that a former spouse *can* pay a certain amount of spousal support does not lead to a default conclusion that he *should* pay that amount—why should this be the rule in a modification case?

The rule set in *Driscoll* was again underscored in the Court of Appeal's recent decision in *Lamb v. Lamb*, where the husband's income fell from $896,000 to $540,000 in one year. Record No. 2201-14-4 (Va. App., May 12, 2015). The Court declined to reduce his $8,500 monthly spousal support obligation, finding that he failed to prove that he no longer had the ability to pay it: "Husband testified that he had paid all of his expenses, including his spousal support obligation, without invading his assets or depleting his savings." *Id*.

The Court found that the wife's income, and therefore her need for spousal support, had not changed over the course of the year—but the wife's annual income exceeded $300,000. The result: after the transfer of spousal support, the parties' incomes were nearly identical. Had the initial determination been made when the husband was earning $540,000, it is likely that the wife would not have received any spousal support at all, so why should the outcome be different simply because of the fact that it was a modification case? Spousal support was certainly never intended to equalize the parties' incomes.

Similarly, in *Slye v. Slye*, Record No. 1312-13-4, Va. App. (Feb. 4, 2014), the court found a material change in circumstances due to the husband's reduced income, but denied his request to modify spousal support on the basis that he continued to travel extensively both domestically and internationally, made a $400,000 down payment on a house, and he increased his net monthly income by refinancing the mortgage on his existing home from a 15-year note to a 30-year note. The Court made no analysis of the wife's income or need for support at the time of the modification hearing—the finding that the husband had the continued ability to pay the previously awarded amount was the sole basis for the ruling.

So what are we to tell our clients when they ask whether they can reduce their spousal support obligations after suffering a material reduction in income? If we advise that they begin depleting their savings and investments to pay their ongoing living expenses and make their monthly spousal support payments, it won't necessarily be sufficient to demonstrate an "inability to pay" under *Driscoll*—particularly if they are continuing to take vacations or have purchased real property or automobiles, as the Court noted of the husbands in both the *Lamb* and *Slye* cases.

Reducing their monthly expenses doesn't give them a sure shot, either; again, in both *Lamb* and *Slye*, the husbands' efforts to refinance their mortgages were held against them, as they effectively created additional monthly cash flow from which spousal support could be paid.

So where is the line? Must support payors exhaust their liquid assets and begin accumulating debt in order to have a chance at modifying spousal support?

Driscoll and the subsequent case law regarding modification of spousal support are clear; the cards are stacked against any payor who intends to modify support. Even a deterioration in health that results in an inability to continue working will not guarantee a reduction in spousal support, so long as the payor has sufficient liquid assets to invade in order to con-

tinue making payments. Unless and until the General Assembly deems it necessary to amend Va. Code § 20-109, perhaps to require a *de novo* determination of spousal support upon proof a material change in circumstances, many spousal support payors will continue to face a nearly impossible burden of proof when attempting to modify their obligations to reflect their reduced income. ❖

(Endnotes)

1. Virginia Code § 20-109 requires reconsideration of the factors set forth in § 20-107.1 when modifying a defined-duration spousal award, but includes no such requirement for modification of support awards of unlimited duration. *See Slye v. Slye*, No. 1312-13-4 (Va. App., Feb. 4, 2014) (holding that while it is not error for trial courts to consider the factors listed in § 20-107.1(E) when modifying spousal support, § 20-109 does not require consideration of the factors).

FAMILY LAW SECTION MEMBER RESOURCES WEBSITE LOGIN:

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They are case sensitive.

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https://www.facebook.com/groups/vsbfamilylaw/

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.

Virginia State Bar
Family Law Section member resources (*case sensitive*) website login:
User name: familylawmember
Password: FL2015member

Access and Visitation Program in Northern Virginia

By Alessandra Cuccia, Programs Manager
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In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act, which authorized grant funding for states to administer the Access and Visitation (AV) Program. Several states, including Virginia, have launched AV Programs with the goal to facilitate non-custodial parental visitation with their children. There is a growing body of evidence to support the premise that a non-custodial parent who has increased access to his or her children will be more likely to comply with a child support order. Specifically, in 2002, a study conducted by the Office of Inspector General (OIG) on the AV Program found "interesting patterns suggesting that increased visitation may be associated with an increase in payment compliance."[1]

Another recent analysis of the AV program found that, of the non-custodial parents who entered the program paying less child support than they owed, most ended up increasing the amount paid in the 12 months following program participation. Official reports show payment increases of 93% with parent education programs and 64% in mediation programs.[2]

One explanation for this increase is the reinforcement of the relationship between child support and visitation. Within the family court system, child financial support enforcement and child visitation are separate issues that do not influence one another. However, 52% of non-custodial parents interviewed for the OIG's 2002 study agreed with the statement, "If the other parent does not let me see my child, I should not have to pay child support."[3] In reality, while courts may see the two as separate issues, the majority of non-custodial parents view the issues of child support and visitation as closely linked.

Some examples of activities and services permitted through the AV Program grant funding include: mediation, developing parenting plans, counseling, parent education, establishing neutral drop off/pick up, coordinating supervised visitation, and visitation enforcement. Programs can include one of these approved services or a combination of them.

The Access and Visitation program administered by the Office of Child Support Enforcement annually provides $10 million in federal funding to all 54 states and territories. For fiscal year 2015, Virginia awarded AV grant funds to the Office of the Executive Secretary, Supreme Court of Virginia and five program centers: Northern Virginia Mediation Service (NVMS), the Up Center, CMG Foundation, Community Mediation Center, and Peaceful Alternatives.

In October 2014, NVMS was awarded the AV Program and has been providing co-parenting classes for clients in the Northern Virginia area. To create a successful program, NVMS built relationships with the Division of Child Support Enforcement (DCSE), Fairfax County Juvenile and Domestic Relations (J&DR) Courts and administration, local Family Law attorneys, and Fairfax County Judges.

Pam Feldmann, District Manager of the Northern Virginia Office of DCSE, states, "We are pleased to partner with Northern Virginia Mediation Service to offer this program to parents receiving child support services. Co-parenting can be tough in any family, but it is especially difficult for custodial and non-custodial parents when parenting styles differ, there is less day-to-day communication and the amount of time each parent spends with the child changes. Educating parents on the importance of co-parenting and providing them with core co-parenting skills are vital supports for children and families in our community."

With support from these stakeholders, NVMS holds a monthly parent education class, *Co-Parenting: Two Parents, Two Homes*, and provides participants with the option to continue into mediation to develop a co-parenting plan. Ann Warshauer, the parent education coordinator for Virginia, is the lead instructor for the classes. The class teaches the fundamentals of a traditional co-parenting class with a special focus

on topics of particular interest for DCSE parents, such as financial responsibilities and visitation. As of August 2015, NVMS has held six successful co-parenting classes and served over 30 parents. Breakfast is provided during each four-hour class and parents are given a certificate upon completion of the class. This certificate is recognized by Fairfax County, Arlington County, and the City of Alexandria Courts as fulfillment of their co-parenting class requirement for those with a court order.

For parents interested in developing co-parenting plans, NVMS offers the opportunity for parents to continue into mediation. A 2002 OIG study focused on 190 families in four states who received mediation services to deal with access problems. They found that 61% of non-custodial parents increased the percent they paid of their current child support obligation after entering mediation.[4]

Thirty-two percent of custodial parents and 63% of non-custodial parents who saw an increase in visits reported an improvement in their child's behavior after mediation.[5] This study further confirms that parenting classes, co-parenting mediation, and other services provided under the AV Program have a positive impact on the families they serve.

Following the parent education class, 19% of non-custodial parents perceived the time spent with child as "increasing a little," while 22% stated their time had "increased a lot."[6] This feedback suggests custodial and non-custodial parents have found the classes useful and increasingly impact the amount of time non-custodial parents spend with their child. Feedback from NVMS parenting class participants has closely reflected the program-wide feedback. Evaluations from participants have been overwhelmingly positive, with several co-parenting mediation inquiries. Feedback provided by the parents following the NVMS parenting class include statements such as, "I felt like you were speaking directly to me! Even some of the examples are the same exact things that are going on."

The AV Program at NVMS continues to grow with the support of DCSE, local Courts, and the Northern Virginia community. Program goals moving forward are increased court referrals, higher parent participation levels, and a greater scope of community outreach. The highly successful track record in other communities gives us high hopes for this program's growth. Please direct any inquires about the Access and Visitation Program within NVMS to Alessandra Cuccia at 703-865-7263 or clientservices@nvms.us.

References

Moran, W. and Coan, N. (2002) Effectiveness of Access and Visitation Grant Programs (OEI-05-02-00300) by the Department of Health and Human Services, Office of Inspector General. https://oig.hhs.gov/oei/reports/oei-05-02-00300.pdf

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Center for Policy Research for the Office of Child Support Enforcement, Administration for Children and Families. (2006) Child Access and Visitation Programs: Participant Outcomes Program Analysis (105-00-8300) by Department of Health and Human Services. http://permanent.access.gpo.gov/lps124387/dcl-07-15a.pdf ❖

(Endnotes)

1. William Moran and Natalie Coan. *Effectiveness of Access and Visitation Grant Programs* (2002), 15.

2. Center for Policy Research for the Office of Child Support Enforcement, *Child Access and Visitation Programs: Participant Outcomes Program Analysis*, ii.

3. Moran and Coan. *Effectiveness of Access and Visitation Grant Programs*, 14.

4. Moran and Coan. *Effectiveness of Access and Visitation Grant Programs*, 14.

5. *Ibid*, 16.

6. Center for Policy Research *Child Access and Visitation Programs*, 54.

VFLQ ASK THE EXPERT

Income Tax Basis Considerations in Equitable Distribution

By Hal L. Young, CPA/ABV
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A divorce may be the single most significant financial event in an individual's life. And while money and property often pass between the parties in settling marital estates, the former spouses are not engaged in a transaction. Instead, they are executing a series of asset transfers intended to result in equitable distribution.

From a financial perspective, there are several tasks necessary before a settlement proposal is ready to be addressed with anyone other than your client. The financial assets accumulated by the parties must be identified, classified, and valued, whether the requisite standard of value is fair market value or intrinsic value.

Once valuations are completed, agreement must be reached on which assets and liabilities are Separate, or non-marital, and which arose out of the marriage, or Marital assets. Classification of the assets by ownership typically takes the following format:

TOTAL	MARITAL ASSETS		SEPARATE ASSETS		TO INVESTIGATE	
	HUSBAND	WIFE	HUSBAND	WIFE	HUSBAND	WIFE
Assets						
Liabilities						
Net assets						

Not all assets are the same. Even similar assets (e.g., 100 shares of the same company's stock) can and often do have differing acquisition or subsequently adjusted basis (the tax cost equivalent used to determine gain or loss on a transaction). Assets such as cash, marketable securities, real estate and retirement plans are common. Such assets may (or may not) have the same fair market or intrinsic value, but two similar assets with similar value do not necessarily have the same tax basis. Such status can give rise to very different, and possibly unintended, tax consequences to either spouse, if not carefully analyzed.

The Internal Revenue Code provides that transfers of property incident to divorce are not taxable, since no gain or loss is recognized as a direct result of the property settlement. The *future* tax consequences for the parties, however, are an important consideration in structuring the settlement. A settlement agreement or directed division, completed or ordered as "equitable distribution," may be far from the intent of the parties or the third party directing the transfers of the assets and any associated liabilities, unless basis is considered in the settlement development stage. And while an argument can be asserted that an asset's sale is uncertain as to its timing and future tax impact, a reasoned approach can be made using current tax rates and law. Many of these rules differ for nonresident aliens. If either spouse is a nonresident alien, additional basis considerations apply.

Basis and taxes

The taxpayer's basis (after certain adjustments, "adjusted basis") in property is used to determine taxable gain or loss upon the sale of the property. In most

cases, the difference between the sales proceeds realized and the adjusted basis is taxable. Although capital gains are taxed at lower rates, the amount of the tax may still be substantial, leaving the realizable value of the transferred property proportionately reduced.

Basis is most commonly determined as follows, and as always with restrictions:

- By purchase or addition
  - Basis is historic cost plus additions reduced by any depreciation or amortization allowed or allowable
- By gift or by bequest
  - Basis in gift is pre-gift basis in the hands of the grantor
  - Basis in bequest is fair market value at decedent's date of death (or alternative date within six months of death)

With respect to the distribution of nonmarital assets, there really are no strategic basis issues to consider. These assets are generally distributed to the spouse associated with and keeping the specific assets; the assets' basis is unchanged as a result of the marriage and divorce. As with both marital and nonmarital assets, basis is said to "travel with the asset."

Basis in specific assets can be addressed with the following in mind:

Cash: Cash is easy. The value of $1 is always $1, thus the basis of cash in a settlement is its cost.

Stocks: Basis in stock varies with the owner's method of acquisition.

An example of how basis affects stock distribution outcomes follows: The couple owns two 1,000-share blocks of stock, each worth $60/share or $60,000 per block. The first 1,000 shares are "founder shares" with a $.01 basis reflecting one spouse's role in the company's fledgling start. The second 1,000 shares were bought 10 years later (or were received as a gift with $15 being the donor's basis, or were received by bequest at a time when the share value was $15), five years before dissolution of the marriage, when the shares sold for $15 each.

By dividing each of the 1,000-share blocks into 2 500-share units and by then distributing 500 shares from each of the two blocks of stock to each spouse, a different result is achieved than by distributing the two 1,000-share blocks intact, one to each spouse. If they each receive 500 shares from each block, each will pay $10,499 (20% of $60,000 less $7,505 basis). If each receives a block of stock intact, one spouse will pay $11,998 in tax (on a $60,000 sale less $10 total basis) and the other spouse will pay $9,000 (on a $60,000 sale less $15,000 basis).

Bonds: Bonds follow generally the same pattern as stocks except for the possible accretion resulting from the amortization of premiums or discounts. While the premiums and discounts achieved can be small, there can be basis issues when bonds include inherited bonds.

Tangible Personal Property: Generally there is no gain or loss recognized on the disposition of tangible personal property. In a domestic relations matter, the settlement of household goods creates no change to basis. Collectibles are not household goods.

Collectibles (Art, artifacts, collections): Gain on the sale of "collectibles" is taxed at 28%. Assets of this type include gems and jewelry, historical artifacts, books, antiques, stamp and coin collections, and art of many forms. This component of the settlement consultation can be far-ranging, rife with opportunities for unintended valuation, basis, and tax outcomes.

Intangible Personal Property (Intellectual property, patents, royalty streams, etc.): Capital gains of these assets' basis will vary as well depending on the methods of acquisition and accounting for the asset's inherent decline in value (amortization). Generally, the basis of an intangible is its cost less amortization taken.

Businesses: If a closely held business is part of the marital estate, that business will be valued to deter-

mine the total dollar value of the marital estate for equitable distribution. In Virginia, *intrinsic* value (the value in the hands of the owner in the asset's current use, not necessarily the value if sold in the open market at fair market value) is the standard by which businesses are valued in domestic relations matters.

Irrespective of the requisite valuation premise, in the case of a business interest transfer, the basis in the hands of the receiving spouse will be the basis in the hands of the transferring spouse immediately before the transfer. The settlement is unlikely to consider any taxes that might become payable on the sale of the business unless it is actually being sold incident to the settlement.

Additionally, one party is often awarded the business intact while the other spouse receives the primary residence. Even if *valued* equally, without regard to basis, there may be no taxes payable by one spouse upon sale of the residence while the spouse keeping the business will likely generate significant tax consequences on sale.

The future tax burden to the spouse keeping the business may need to be increased in the settlement calculation even further if the fair market value or other determined value is greater than the intrinsic value used for equitable distribution. Tracking basis carefully in the transfer can avoid unnecessarily high tax payments when the business is finally sold.

Real Estate:

Primary Residence: When the marital residence is sold to a third party, taxable gain is computed (before IRC 121 exclusions are applied) using the original tax basis of the property plus additions. The basis of the acquiring spouse is the total basis of the house pre-agreement, without regard for the cash paid to settle the marital estate between the spouses.

If a spouse makes a cash payment at settlement believing s/he is acquiring basis in the acquired interest in the marital residence, then sells the residence later, s/he may find an unpleasant tax surprise. This is true even if the house was the only asset of the marital estate. The additional consideration may be substantial as there may have been appreciation in the property during the marital period.

Non-Primary residence: If the settlement involves a second residence, the spouses' determination of basis follows the rules presented above. A second residence, however, does not qualify for the exclusion of a portion of the gain (typically $250,000-$500,000) that the Internal Revenue Code provides for a principal residence.

In an obvious example, if the primary and secondary residences each cost $500,000 and are each worth $1,200,000 at the time of settlement, settling one residence to each spouse without consideration of basis would disadvantage one of the spouses with the other spouse's half of the tax on the gain.

Non-Residential Real Estate: If the equitable distribution of assets involves a rental or income producing property rather than the principal or second residence, the owning spouse may be faced with income tax consequences more severe than the owner of the principal or second residence. During the course of the spouses' ownership and renting of the real property, one or both of the spouses, before and during the marriage, have recognized depreciation expense in computing taxable rental income or deductible loss, even if suspended.

At the time of the sale of the rental property, all depreciation expense recognized, or which could have been recognized during the period of ownership, is "recaptured." Recapture reduces the adjusted basis in the property. The amount of the basis reduction resulting from the depreciation expense is recaptured at the time of sale at the owner's ordinary income tax rate (generally less favorable than the capital gains rate). Only gain in excess of the recapture amount is taxed as capital gain. Distributing rental real estate without considering recapture and capital gain can disadvantage one spouse over another.

Retirement Plans:

If a spouse participates in a qualified retirement plan (e.g., corporate profit sharing plan) that is bifurcated by a qualifying domestic relations order (a QDRO), the assets will transfer between spouses' plans on a trustee-to-trustee level, nontaxable at the time of transfer, and preserving existing basis. This is partic-

ularly true in non-employer plans such as nondeductible traditional IRAs and Roth IRAs.

Nonqualified retirement plans, by their design, vest no benefit to the participant or ultimate beneficiary, if different, until payments are made under the plan, at which time tax is paid on the income at the beneficiaries' respective ordinary tax rates.

Illustration and Conclusion:

The following table illustrates examples of the differences in after tax settlement amounts realized by former spouses receiving the same assets, based on a 50%-50% split, with and without basis considerations.

While the transfer of property between the spouses may have begun with equal current fair market or intrinsic values, the future, after-tax realized values of the properties can be different and the differences can be significant. Tax consequences arise from different levels of taxation for different types of assets, from the potentially different basis in assets depending on how they were acquired, and from consideration of recapture from depreciation allowed or allowable. Disregard for these factors can create wide variations in actual outcomes compared to intended outcomes.

Family law attorneys must remain aware of the different tax treatments of each the types of assets that comprise the marital estate. If spouses settle the marital estate without consideration of basis, it is likely that neither party will reap the full protections or benefits of equitable distribution. ❖

Illustration of Basis Considerations in Domestic Relations Settlements												
Asset	How acquired	Basis	Value	At 50%	At 50%	Gain	Taxable	Rate = Fed +3.75% VA net	Tax	Settlement Value=Value less tax)	At 50%	At 50%
-				Spouse 1	Spouse 2						Spouse 1	Spouse 2
Cash	Saved	1,000,000	1,000,000	725,000	275,000	-	-	-	-	1,000,000	806,886	193,114
Stocks	Purchase	300,000	1,000,000	1,000,000	-	700,000	700,000	23.75%	166,250	833,751	833,751	
Stocks	Gifts	100	1,000,000		1,000,000	999,900	999,900	23.75%	237,476	762,524		762,524
Closely Held Business	Built	10,000	800,000	800,000	-	790,000	790,000	23.75%	187,625	612,375	612,375	
Residence	Purchase	500,000	950,000	-	950,000	450,000	-	23.75%	-	950,000		950,000
Rental Real Estate	Purchase	250,000	500,000	250,000	250,000	250,000	250,000	23.75%	59,375	440,625	220,313	220,313
Qual Ret Plans	Saved	-	450,000	450,000	-	450,000	450,000	38.75%	174,375	275,625	275,625	
Antiques	Purchase	350,000	750,000	-	750,000	400,000	400,000	31.75%	127,000	623,000		623,000
Total marital estate		2,410,100	6,450,000	3,225,000	3,225,000	4,039,900			952,101	5,497,900	2,748,950	2,748,950
Without settling cash after basis considerations Spouse 1 gets $81,886 too little cash and Spouse 2 gets $81,886 too much.												

Standby Guardianship for Severely Ill Parents

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Purpose

Standby guardianships can assuage the most urgent concerns of someone facing the end of his or her life, including who should care for their children. It helps a parent facing the most sublime challenge, and his or her children, to have as much peace as may be had.

Pleading and Venue

A standby guardianship is filed by petition. The petition is filed in the juvenile court in which the child resides.[1]

Petitioner

Neither the parent nor the proposed standby guardian are required to be the petitioner, although either may be the petitioner.[2] However, the proposed standby guardian should be the proponent rather than the ill parent or anyone else because the parent might not be well enough to attend the hearing, if one is needed, and the standby guardian should be knowledgeable about the reason for the guardianship and have the trust of the parent.

Eligibility

The parent must be "eligible" to authorize the standby guardianship.[3] The parent is "qualified" if he has a written diagnosis of a progressive or chronic debilitating or fatal disease.[4] The attending physician must write a determination of debilitation or a determination of incompetence before the petition can be filed.

The parent's eligibility is proven by the parent's attending physician's unsworn "determination of debilitation" or "determination of incompetence." The determination of debilitation should state that the parent *is chronically and substantially unable to care for a minor child as a result of a debilitating illness, disease or injury*.[5]

This is distinct from the attending physician's "determination of incompetence" *when the parent is chronically and substantially unable to understand the nature and consequences of decisions concerning the care of a minor child as a result of a mental or organic impairment to a reasonable degree of medical probability*.[6] A determination of incompetence expedites the filing of a petition because the parent is incapable of signing the written designation of the standby guardian.[7]

A 'triggering event' must occur before the petition can be filed and the guardianship can be effective.[8] The expeditious 'triggering event' is a determination of incompetence or the death of the parent.[9] Otherwise, the parent should identify the triggering event in a written designation.[10] The triggering event should be something that affects the child's welfare, although this is not required by the statute. The parent's inability to obtain health insurance for the child should suffice, for example. The parent can request another person to sign the designation in his or her presence if he or she is unable to do so.[11]

The written designation and the petition should contain the names and addresses of the parent, child and standby guardian.[12]

When Does the Standby Guardianship Take Effect?

The standby guardianship takes effect after the written designation is signed and delivered to the standby guardian, and after the triggering event of the parent's death or a determination of incompetence.[13]

However, the parent must sign an additional written consent to the commencement of the guardianship if the attending physician wrote a determination of debilitation.[14] But this consent can only be signed and filed with the court after the court has approved the guardianship.[15] Consequently, the petition must be filed quickly if the parent is cognitive and communicative.

Nonetheless, the standby guardian must file a petition for approval of the guardianship within 30 days of the triggering event. If the petition is not filed within 30 days, the guardian's authority lapses until it is filed.[16]

The Petition

In addition to the content of the written designation, the petition should identify and explain the identities of the qualified parent and standby guardian and attending physician, including the doctor's address. The written designation and determination of debilitation or incompetence or death should be attached.[17] The attending physician's Virginia Board of Medicine's Physician Profile should be attached to show that the attending physician's specialty was appropriate to write the determination. The petition should also include whether the parent will imminently become physically or mentally incapable of caring for the child or die as a result of a progressive chronic condition or illness.[18]

What if the Qualified Parent does not want the Other Parent to be Guardian?

To approve the guardian, the court must consider the best interests of the child factors contained in Va. Code 20-124.3.[19] If this is contested, an exhibit discussing the factors should be attached to the petition and witnesses and exhibits should be at the hearing.

The child's parents shall be served with the petition if the parents' whereabouts are known.[20] However, the petition shall state why a parent does not want to be or should not be guardian.[21]

Any juvenile court custody, support or visitation orders, a Final Decree, power of attorney, medical power of attorney or advanced medical directive by the parent appointing the guardian should be exhibits to show the parent's trust in the guardian over the other parent. The Virginia Judicial System's case information should be checked for the other parent's criminal history, as well as the sexual offender's website. The relevant results should be exhibits.

A guardian ad litem will be appointed if the guardian is not a parent.[22] An order for the appointment of the guardian ad litem should be filed with the petition. The telephone and email contact info for the parent, guardian, attending physician and child should be sent to the guardian ad litem as soon as he or she is appointed.

Also, a hearing must be held if the other parent or relative requests it within ten days of the date of the notice of the filing of the petition, or if the child's custody is being litigated.[23] Be prepared to oppose the other parent's request for a continuance.

The Hearing

An updated determination of debilitation should be filed after the petition is filed if the parent's illness progresses. Also, the court should be contacted about an earlier hearing date if necessary. A judge must be available 24 hours a day.[24]

At the hearing, parent's consent should be signed and given to the judge immediately after the order is signed so that the guardianship can take effect immediately. The guardian should be advised that he or she must qualify with the reporting requirements of a guardian of the person and property of the child.[25]

Conclusion

Standby guardianship is an inestimable service to someone giving and someone receiving the last quantum of devotion. But it must be done quickly and thoroughly because the circumstances demand that.

Robert Flax practices in Richmond, Virginia. He was Legal Information Network for Cancer (LINC)'s 2015 Pro Bono Attorney of the Year. ❖

(Endnotes)

1. Va. Code 16.1-350(A)
2. Va. Code 16.1-350(A) ('any person' can petition).
3. Va. Code 16.1-349 ("Parent" is biological or adoptive parent or legal custodian).
4. Va. Code 16.1-349
5. Va. Code 16.1-349
6. Va. Code 16.1-349
7. Va. Code 16.1-349
8. Va. Code 16.1-350(A)
9. Va. Code 16.1-349
10. Va. Code 16.1-349
11. Va. Code 16.1-352(A)
12. Va. Code 16.1-352 (A)
13. Va. Code 16.1-352(B)
14. Va. Code 16.1-352(B)
15. Va. Code 16.1-351, 16.1-352 (D)
16. Va. Code 16.1-352 (D)
17. Va. Code 16.1-350 (B)
18. Va. Code 16.1-350 (B) (5)
19. Va. Code 16.1-351
20. Va. Code 16.1-350(C)
21. Va. Code 16.1-350 (B) (7)
22. 18. Va. Code 16.1-350(C)
23. 19. Va. Code 16.1-350 (C)
24. 20. Va. Code 16.1-348.
25. 21. Va. Code 16, 1-351.

VFLQ CASES OF THE QUARTER

Adoption – Rights of Biological Grandparents Post-Adoption

Name: *Harvey v. Flockhart,* 65 Va. App. ___ 1694144 (2015)

Facts: In 2011 the Flockharts (the "Foster Parents") received custody of two foster children through the Department of Social Services. The Foster Parents properly cared for the children over the years, thereafter seeking to adopt the children. During this same time, the children's biological grandparents visited with the children, all the while being critical and unsupportive of the Foster Parents. The Foster Parents moved for adoption of the children, and the grandparents moved for visitation. The testimony was that the grandparents do not view the Foster Parents as the children's parents, and that the grandparents' visitation with the children was having an adverse impact on the children. The social worker overseeing the case testified that the children are "very bonded" with and love the Foster Parents "very much." The trial court granted the adoption, and denied the grandparents any visitation. The grandparents appealed.

Issue: Whether the trial court erred in granting the adoption and not allowing the grandparents any visitation.

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

Rationale: The trial court properly found that the children were in a loving and healthy environment, and that the adoption was in the children's best interests. The trial court also properly denied the grandparents any visitation with the children. Virginia Code § 63.2-1215 provides that an adoption divests "any person whose interest in the children derives from or through [the birth parent] . . ., including but not limited to grandparents, . . . of all legal rights and obligations in respect to the child including the right to petition any court for visitation with the child." While Virginia Code §§ 16.1-241(A) and 20-124.1 both allow a person with a legitimate interest to petition for custody or visitation of a child, both Code sections exclude from the definition of a person with a legitimate interest any person whose parental rights have been terminated "or any other person whose interest in the child derives from or through such person whose parental rights have been so terminated, including but not limited to grandparents . . . ."

Spousal Support – Termination Based on Cohabitation

Name: *Miller v. Green*, 15 Vap UNP 1993143 (2015)

Facts: The parties were divorced in 2011. The parties' entered into a Property Settlement Agreement ("PSA"), which was incorporated into their Final Decree of Divorce. The PSA provided, among other things, that the husband was to pay the wife monthly as well as quarterly spousal support. The PSA stated that spousal support would terminate upon the death of either party, the wife's remarriage or upon clear and convincing evidence of the wife's cohabitation with another person in a relationship analogous to marriage for one year or more. The husband filed a motion to terminate spousal support based upon the wife's cohabitation on July 29, 2014. The final payment of spousal support which the husband paid the wife was in June 2014. The wife admitted in response to the husband's request for admissions that

she began cohabiting with another person on March 29, 2012. In October 2014, the trial court terminated spousal support effective March 2013 and declared that no spousal support existed, commenting that the husband's unilateral decision to cease payment of support after June 2014 was permissible under the PSA. The wife appealed.

Issue: Whether the trial court erred by: (1) terminating the husband's spousal support obligation retroactively to March 2013, and (2) holding that the PSA allowed the husband to unilaterally cease paying spousal support prior to the date the trial court made a determination regarding cohabitation.

Ruling: The Court of Appeals reversed the trial court on both issues and remanded the case back to the trial court.

Rationale: Virginia Code § 20-112 provides that "no support order may be retroactively modified, but may be modified with respect to any period during which there is a pending petition for modification in any court, but only from the date that notice of such petition has been given to the responding party." Virginia Code § 20-109(A) provides that the divorce court may modify or terminate spousal support that "may thereafter accrue," but makes no provision for modifying an award for support previously accrued. The correct date of termination of spousal support is July 29, 2014. The provision in the PSA regarding termination of spousal support is not a self-executing provision, and first requires judicial resolution before it is effective. Therefore, the husband was not entitled to terminate spousal support payments until the court determined whether the wife was cohabiting with another person in a relationship analogous to marriage for one year or more.

Spousal Support – Failure to Prove Cohabitation

Name: *Coalson v. Coalson*, 15 Vap UNP 2022142 (2015)

Facts: The parties were married 24 years at the time of divorce. The husband agreed to pay the wife $4,300 per month in spousal support. The wife agreed to the typical terminating factors, including upon clear and convincing evidence that she "has been habitually cohabiting with another person in a relationship analogous to marriage for one year or more." In 2010, the wife began dating a man. Among the evidence presented at trial was that: (i) the wife's boyfriend spent four to five nights per week with the wife, although he lived with his son and a roommate in another residence, (ii) the boyfriend kept clothing and personal hygiene products at the wife's house, (iii) the husband did chores around the house, such as vacuuming, cooking and cutting the lawn, (iv) the wife and her boyfriend went on vacation together several times per year, (v) the boyfriend stored boxes of his personal items in wife's garage, (vi) and the boyfriend celebrated Thanksgiving and Christmas with the wife and her children. At the end of the husband's case, the wife made a motion to strike. The trial court granted the motion to strike, finding that there was no evidence that that there was one residence that the wife and the boyfriend shared. The husband appealed.

Issue: Whether the trial court erred by granting the wife's motion to strike based upon the evidence presented and the standard applied by the trial court to prove cohabitation.

Ruling: The Court of Appeals affirmed the trial court's granting of the wife's motion to strike, and denied the wife's request for attorney's fees.

Rationale: When ruling on a motion to strike at the end of a plaintiff's case-in-chief, a trial court must evaluate whether the plaintiff has made a *prima facie* case. The motion to strike should be granted only in

those cases in which it is conclusively apparent that the plaintiff has proven no cause of action against the defendant. The Court of Appeals has interpreted "cohabitation" to mean a status in which a man and woman live together continuously, or with some permanency, mutually assuming duties and obligations normally attendant with a marital relationship. The Supreme Court of Virginia has held that "cohabit" means "to live together in the same house as married persons live together, or in a manner of husband and wife." Finally, the Court of Appeals cited to the *Pellegrin* case in which it noted that one of the four factors in determining cohabitation is a "common residence." In the present case, the evidence failed to establish that the wife and her boyfriend shared a common residence, especially in light of the fact that the boyfriend lives with his son and a roommate in a separate residence.

Spousal Support – Court's Broad Discretion

Name: *Eskridge v. Eskridge*, 15 Vap UNP 2321142 (2015)

Facts: The parties were married for 11 years at the time of divorce. When the parties married, their employer prohibited married couples from working together in the same department, so the parties decided the wife would resign. While the parties earned approximately the same amount at the time the wife resigned, the husband's income was $99,000 and the wife's income was $40,000 at the time of separation. The husband also obtained additional education during the marriage. The husband paid the wife $750 per month in *pendente lite* support, which was lowered to $500 per month by agreement. At the final hearing, the wife claimed that she could "hardly make ends meet" on that amount, and that she needed an increase in support. The trial court awarded the wife $1,200 per month in spousal support for five years, focusing on the foregoing facts as well as the fact that the parties' standard of living allowed for some leisure activities. The husband appealed.

Issue: Whether the trial court abused its discretion since (1) there was no evidence of the wife's expenses and obligations, (2) the evidence demonstrated that the husband's expenses exceeded his income, rendering the husband unable to pay the wife spousal support, and (3) the wife had employment income and could have supported herself.

Ruling: The Court of Appeals affirmed the trial court, holding that the trial court did not abuse its discretion.

Rationale: In determining spousal support, the trial court is required to consider all of the factors in Virginia Code § 20-107.1 and set forth its findings and conclusions. No one factor is dispositive and the trial court is not required to quantify or elaborate exactly what weight or consideration it has given to each of the statutory factors. Furthermore, the trial court's determination will not be disturbed on appeal except for clear abuse of discretion. In the present case, the trial court made numerous findings of fact relative to Virginia Code § 20-107.1(E). In particular, the trial court found that, after the parties married, the wife chose to resign from her job where the parties worked, thereby reducing her income and earning capacity while enabling the husband's income to increase. The wife also helped raise the husband's son, and the parties' standard of living during the marriage allowed for some leisure activities. Thus, the trial court did not abuse its discretion and the award is supported by the evidence.

Child Support – When Appeal Bond is Required

Name: *Forte v. Commonwealth*, 64 Va. App. ____ 1220141 (2015)

Facts: In 2001, the Hampton Juvenile and Domestic Relations District Court ordered the father to pay the mother $1,237 per month in child support, and established a child support arrearage of $18,873.50. Combined with a $200 per month payment toward the arrearage, the father was ordered to pay $1,437 per month. In 2013, the father filed a motion to reduce child support, which was denied by the juvenile court due to a finding of no change in circumstances. The father sought to appeal the juvenile court's ruling, and the juvenile court ordered an appeal bond for the arrearage amount. The father objected to the bond, arguing that an appeal from a denial of a motion to amend future support payments did not require a bond. The circuit court held that (1) a juvenile court's order cannot be separated by issue for appeal, (2) the father could not appeal his motion to amend child support without also appealing the order setting the arrearage, and (3) an appeal bond was necessary and jurisdictional. The circuit court remanded the case back to the juvenile court based on lack of jurisdiction since the father did not post an appeal bond. The father appealed the circuit court's ruling.

Issue: Whether the circuit court erred in dismissing the father's appeal for failure to post a bond.

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

Rationale: Virginia Code § 16.1-296(H) provides that no appeal bond shall be required "except for that portion of any order or judgment establishing a support arrearage or suspending payment of support during the pendency of an appeal. In cases involving support, no appeal shall be allowed until the party applying for the same or someone for him gives bond . . . ." The father claimed that he was appealing the amount of child support and not the arrearage. However, the issues of the amount of child support and the support arrearage are so intertwined that the father needed to post a bond to perfect his appeal. ❖

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