Volume 38, No. 3 Fall 2018

Virginia Family Law Quarterly

VFLQ

Published by the Family Law Section of the Virginia State Bar for its Members

Message from the Chair

Mary G. Commander, Chair
Family Law Section

As Summer ends and Fall begins, we, as Family Lawyers, can expect to enjoy the annual bickering over who gets which holidays, when does the holiday start and end, and whether the child even wants to see the parent at all. Also, is Halloween a holiday? This is such a relief from the Summer bickering about who gets the Summer, when does the Summer parenting time start and end, and whether the child even wants to see the parent.

Family Law is a tough field. It requires the patience of Job, the wisdom of Solomon, the tenacity of Elephant Glue and the self-preservation and fighting skills of Army Rangers. Fortunately, the Family Law Section is here to assist you. We have marvelous seminars and useful publications for lawyers and the public. Please make sure to use these resources and plan to attend the annual statewide seminar in October.

Remember that we are all in this together. It is imperative that the lawyers not add to the problems that we encounter in this practice. We need to be understanding of the difficulties, cooperative when it does not damage our client's interest, responsive, and above all, honest with the client, court and other counsel.

We are pleased to welcome Besianne Tavss Maiden of Norfolk as a new member of the Board. Bes is a veteran attorney and Collaborative Divorce practitioner. Great things are expected of her! All who are interested in joining the Board, please let us know. We always are looking for bright, new faces.

Mary Commander, Chair ❖

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Editor's Note *Brian M. Hirsch*

Quite a few times each year I get a call or email from a fellow family law attorney asking me if I know of a case that might be on point for a legal issue they are researching. While I am always happy to help a colleague, it is amazing how often there has been an article on that issue or a related issue that came out in the past year in the *Quarterly*. I highly recommend saving back issues of the *Quarterly* for ready reference. I find myself going to my collection of back issues each month for a case or article. For those of you not inclined to do this, I am still happy to take your calls or answer your emails.

We are again truly fortunate to have some timely and well-written articles. My thanks to Sally Campbell for letting us know about the new appellate mediation project; Mitch Broudy and Steve Raynor for explaining the new mixed custody child support guidelines; Scott Weinbaum for letting us know about tax implications of certain retirement issues; and Jennifer Bradley and Phyllis Palombi for explaining the mental health professional's role in a collaborative divorce.

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

Happy reading – Brian M. Hirsch, Editor

UPCOMING FAMILY LAW EVENTS

October 3, 2018
Annual Family Law Seminar 2018 (Fairfax)

October 5, 2018
Annual Family Law Seminar 2018 (Richmond)

October 9, 2018
Annual Family Law Seminar 2018 (Norfolk)

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.

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.

FAMILY LAW SECTION MEMBER RESOURCES WEBSITE LOGIN:

User name: **familylawmember**
Password: **FL2018member**
They are case sensitive.

http://www.vsb.org/site/sections/family
https://www.facebook.com/groups/vsbfamilylaw/

Using the VSB Family Law Section "Multiple Custody" Online Worksheets
§ 20-108.2 G. 4., G. 5. and G. 6. in Action

Mitchell Broudy, Esquire
Mitchell.Broudy@dss.virginia.gov

Steven L. Raynor, Esquire
Steve@Raynorlaw.com

The Family Law Section has available Excel spread sheets for the multiple or mixed custody arrangement guidelines that do the heavy lifting in calculating child support. In-depth instructions can now be downloaded from the Virginia State Bar Family Law Section's public website by accessing "Resource and Links" and under the Child Support heading. There are links to both the spreadsheets and the instructions for multiple custody arrangement worksheets. The direct links are:

http://www.vsb.org/docs/sections/family/instructions_multiple_custody_Arrangement_worksheets.pdf

http://www.vsb.org/site/sections/family/resources-and-links

The worksheets perform the major calculations and tabulate the results at the bottom of each worksheet in a section entitled, "Support to be paid." Here are some helpful pointers:

- Open the workbook file. (If a protected view message appears, click "Enable Editing".) Select from "Sole Shared," "Multiple Shared" or "Split Shared" worksheet tabs at the bottom left side of the workbook.
- Use the Tab key to maneuver between cells.
- Enter the parties' first and last names on the top of the worksheet.
- At the label selection, click on the drop down list and choose the column headings from the list: parties' names, Mother/Father, Party A/Party B, or Husband/Wife.
- If printing becomes a problem or other issues arise, follow the detailed instructions or contact Mitch Broudy at Mitchell.Broudy@dss.virginia.gov.

Below are examples of the worksheets based on the following hypothetical. Mr. and Ms. Wilson have three children – Billy, Bob and Barbara. Mr. Wilson makes $8,333.33 per month and Ms. Wilson makes $12,500 per month. Ms. Wilson has a child residing with her from another marriage. Mr. Wilson pays $450 per month for the children's health insurance and Ms. Wilson pays $950 in work-related day care costs for the three children.

Multiple Shared Arrangement (Example 1) – Ms. Wilson has Billy 135 days out of the year, Bob 195.5 days of the year and Barbara 91.5 days of the year. Mr. Wilson has the children the rest of the year.

- There are five sections in this worksheet labelled A through E (A - income; B - shared support need; C- health care and work-related day care; D – support to be paid; and E – Adjustments including SSDI derivative payments).
- Section A (income) – The income line items follow § 20-108.2(C). For Ms. Wilson's other child, input the one additional child in line A5 next to her label and the worksheet automatically calculates the deduction.

- Section B (shared support need) – Input the day count for each child for the party in the first column and the worksheet calculates each child's day count for the party in the second column. Line B9 provides the average number of days for each parent by dividing the total day count for each parent by the number of children. Ms. Wilson's average number of days is 140.67 and Mr. Wilson's average number of days is 224.33. Line B10 provides the custody share by taking the average number of days each parent has with the children and dividing by 365. Ms. Wilson's custody share is 38.54% and Mr. Wilson's custody share is 61.46%. The spread sheet completes the remaining calculations for the shared child support section. To apply the minimum standards test (§ 20-108.2 (G)(3)(d)), input the number of members of each household in line B14.
- Section C (health care and work-related day care) – Line C4 takes the day care costs ($950) that Ms. Wilson's pays and multiplies it by Mr. Wilson's income share (42.51%) to arrive at the amount he owes Ms. Wilson ($403.85). On the same line it takes Mr. Wilson's health care cost for the children ($450) and multiplies it by Ms. Wilson's income share (57.49%) to arrive at the amount she owes Mr. Wilson ($258.71). The spreadsheet calculates the difference between the two amounts. Thus, Mr. Wilson owes Ms. Wilson a net amount of $145.14 for this section. Line C6 provides guidance for the reasonable cost for health care as set forth in § 20-108.2 (E) and § 63.2-1900.
- Section D (support to be paid) – This section automatically tabulates the other sections and calculates the support owed and to whom it is owed. In this case, Ms. Wilson owes Mr. Wilson $578.93 which is rounded up to $579 at the bottom of the worksheet.

Sole-Shared Arrangement (Example 2) – Mr. Wilson has sole custody of Barbara and Ms. Wilson has Billy and Bob 166.5 days of the year with Mr. Wilson having the two children the rest of the year.

- There are six sections in this worksheet labelled A through F (A – income; B – sole child support needs; C – shared child support needs; D – health care and work-related day care; E – support to be paid; and F – Adjustments including SSDI derivative payments).
- Section A (income) – Line A11 provides the per child amount ($909.75) for the three children by dividing the basic support amount by the number of parties' children.
- Section B (sole child support need) – On line B1 click the drop down menu and select the custodial parent, and on line B2 input the number of children in the sole custody arrangement. Once that selection is made, the worksheet will do the calculations including calculating the pro-rata share in line B3 and the sole custody support amount in line B5.
- Section C (shared support need) – From previous data provided, the worksheet calculates the pro-rata share on line C2 and the shared support need on line C3. Input the day count for the parties' children in line C4 and the worksheet will calculate the custody share and the remaining calculations. To apply the minimum standards test (§ 20-108.2 (G)(3)(d)) input the number of members of each household in line C9.
- Section D (health care and work-related day care) – This operates similarly as section C in the multiple shared custody worksheet reimbursing the party for costs for health care and work-related day care based on the other party's income share and providing guidance as to the reasonable cost test for health care.
- Section E (Support paid out) - tabulates the amounts from the sole custody, shared custody and the health care/work-related

daycare sections and adds and subtracts as necessary. Ms. Wilson owes Mr. Wilson $687.38 which is rounded down to $687 at the bottom of the worksheet.

Split-Shared (Example 3) – Mr. Wilson has sole custody of Barbara and Ms. Wilson has sole custody of Billy. They share Bob 50/50.

- There are six sections in this worksheet labelled A through F (A – income; B – split custody support; C – shared child support needs; D – health care and work-related day care; E – support to be paid; and F – Adjustments including SSDI derivative payments).
- Section A (income) – Line A11 provides the per child amount ($909.75) for the three children by dividing the basic support amount by the number of parties' children.
- Section B (split custody support) – In line B1, input the number of children for which each parent has sole custody. The worksheet calculates each parent's non-custodial obligation and the difference- the net amount- owed by one parent to the other.
- Section C (shared support need) – From previous data provided, the worksheet calculates the pro-rata share on line C2 and the shared support need on line C3. Input the day count for the parties' children in line C4 and the worksheet will calculate the custody share and the remaining calculations. To apply the minimum standards test (§ 20-108.2 (G)(3)(d)) input the number of members of each household in line C9.
- Section D (health care and work-related day care) – This operates similarly as section C in the multiple shared custody worksheet reimbursing the party for costs for health care and work-related day care based on the other party's income share and providing guidance as to the reasonable cost test for health care.
- Section E (Support paid out) – This tabulates the amounts from the split custody, shared custody and the health care/work-related daycare sections and adds and subtracts as necessary. Ms. Wilson owes Mr. Wilson $86.54 which is rounded up to $87.00 at the bottom of the worksheet.

The sole guidelines, shared guidelines and split guidelines will continue to be used a vast majority of the time. These three new guidelines will only need to be utilized when these unusual custody case arrangements appear. However, we now have a uniform way of calculating support in these unusual situations. ❖

Multiple Shared Guideline Worksheet Example 1

Multiple shared custodies (all children shared but differing numbers of days)

Date: 8/4/2018 **Parties' Names:** Betty Wilson Brett Wilson
Docket# **DCSE #:**
Label Selection Parties' Names

Guideline Calculation	Betty W.		Brett W.	
Number of Children for whom parents share jt. legal resp. and support is being sought:		3		
A. **Income**				
A1 Parent's monthly gross income:	$12,500.00		$8,333.33	
A2 Adjustments for spousal support received:				
A3 Adjustments for spousal support paid out:				
A4 # of other biological or adopted children residing with each party:				
A5 **Betty W.** 1 **Brett W.**	$1,229.00			
A6 Other child support obligations actually paid out:				
A7 Credit for 1/2 of any self-employment tax paid out:				
A8 Available combined monthly gross income (GI):	$11,271.00	+	$8,333.33	$19,604.33 combined (GI)
A9 Parent's income share: divide each parent's GI (A8) by combined GI:	57.49%		42.51%	
A10 Scheduled monthly basic child support obligation:		$2,729.26		
B. **Shared Child Support Needs**	**Betty W.**		**Brett W.**	
B1 Shared support need: multiply sched. mnthly basic child support obl.(A10) by 1.4:		$3,820.96		
B2 Total # of days each year parent has custody of child 1:	135.0		230.0	
B3 Total # of days each year parent has custody of child 2:	195.5		169.5	
B4 Total # of days each year parent has custody of child 3:	91.5		273.5	
B5 Total # of days each year parent has custody of child 4:				
B6 Total # of days each year parent has custody of child 5:				
B7 Total # of days each year parent has custody of child 6:				
B8 Total # of days each year parent has with children:	422.0		673.0	
B9 Average # of days each year parent has custody of children:	140.67		224.33	
B10 Parent's custody share: divide avg. # of days child(ren) with parent (B9) by 365:	38.54%		61.46%	
B11 Basic support: multiply parent's shared support need by the other parent's custody share:	$2,348.36		$1,472.60	
B12 Basic monthly support: multiply parent's basic support amt. by his/her income share:	$1,350.07	-	$626.00	$724.07 Net Amount
B13 Payable to: **Brett W.**				
B14 Min. Std. Test § 20-108.2 (G)(3)(d): # members in household:	5		4	
B15 Monthly income test at 150% of fed. poverty level (household size):	$3,678.00		$3,138.00	
B16 Is either parent's gross income = or less than 150% of fed. poverty level?	No		No	
B17 Min. Std. Test § 20-108.2 (G)(3)(d) results: Presumption in place				
C. **Health Care/Work-Related (W-R) Daycare Calculation**	**Betty W.**		**Brett W.**	
C1 Parent's health care cost (HCC) for Health/Dental/Vision:			$450.00	
C2 Parent's W-R daycare cost:	$950.00			
C3 Combined HCC/W-R daycare costs:	$950.00		$450.00	
C4 Amt. parent owes other parent for HCC/W-R daycare cost based income share:	$258.71	-	$403.85	$145.14 Net Amount
C5 Payable to: **Betty W.**				
C6 Reas. HCC Test 5% combined Gross Inc.: **$980.22**				
D. **Support to be paid:**	**Betty W.**		**Brett W.**	
D1 Shared Custody: Parent owing net basic monthly child support amt:	**$724.07**		**$0.00**	
D2 HCC/W-R daycare cost: Parent owing net monthly amt:	**$0.00**		**$145.14**	
D3 Net monthly support amt. payable from one parent to the other parent:	**$724.07**	-	**$145.14**	**$578.93**
D4 Payable to: **Brett W.**	**Presumption in place**			
E. **Adjustment for SSDI Derivative Benefit Paid to Other Parent**	**Betty W.**		**Brett W.**	
E1 Total monthly support amt each parent owes the other parent:				
E2 Parent's SSDI derivative benefit paid to the other parent for the benefit of child(ren):				
E3 Adjustment				
E4 Adjustment				
E5 Adjustment: tot. mnthly support amt each parent pays to other:		-		
E6 Payable to:				

Betty W.'s monthly support obl. is: $579

Sole/Shared Guideline Worksheet Example 2

One parent has sole custody of one or more children and both parents share custody of one or more children (with same number of days for each child)

Date: 8/4/2018 **Parties' Names:** Betty Wilson / Brett Wilson

Docket#: **DCSE #:**

Label Selection Mother/Father

Guideline Calculation	**Mother**		**Father**	
Number of Children for whom parents share jt. legal resp. and support is being sought:		3		
A. Income				
A1 Parent's monthly gross income:	$12,500.00		$8,333.33	
A2 Adjustments for spousal support received:				
A3 Adjustments for spousal support paid out:				
A4 # of other biological or adopted children residing with each Parent:				
A5 **Mother** 1 **Father**	$1,229.00			
A6 Other child support obligations actually paid out:				
A7 Credit for 1/2 of any self-employment tax paid out:				
A8 Available combined monthly gross income (GI):	$11,271.00	+	$8,333.33	$19,604.33 combined (GI)
A9 Parent's income share: divide each parent's GI (A8) by combined GI:	57.49%		42.51%	
A10 Scheduled monthly basic child support obl.:		$2,729.26		
A11 Per child amt.: multiply sched. basic monthly support obl. by # of children (above):		$909.75		
B. Sole Child Support Needs	**Mother**		**Father**	
B1 Identify custodial parent: **Father**				
B2 Sole Custody: # of children:		1		
B3 Pro rata monthly basic child support: multiply per child amt. by # of child(ren) in (B2):		$909.75		
B4 Basic monthly obl.: multiply pro rata monthly basic child support by his/her income share:	$523.02		$386.73	
B5 Payable to: **Father**		$523.02		
C. Shared Child Support Needs	**Mother**		**Father**	
C1 Shared Custody: # of children:		2		
C2 Pro rata monthly basic child support: multiply per child amt. by # of child(ren) in (C1):		$1,819.50		
C3 Shared support need: multiply pro rata monthly basic child support obl. by 1.4:		$2,547.30		
C4 Total # of days each year parent has custody of child(ren):	165.5		199.5	
C5 Parent's custody share: divide # of days child(ren)with the parent (C4) by 365	45.34%		54.66%	
C6 Basic support: multiply shared support need by other parent's custody share:	$1,392.35		$1,154.95	
C7 Basic monthly support: multiply parent's basic support by his/her income share:	$800.46	-	$490.97	$309.50 Net Amount
C8 Payable to: **Father**				
C9 Min. Std. Test § 20-108.2 (G)(3)(d): # members in household:	4		4	
C10 Monthly income test at 150% of fed. poverty level (household size):	$3,138.00		$3,138.00	
C11 Is either parent's gross income = or less than 150% of fed. poverty level?	No		No	
C12 Min. Std. Test § 20-108.2 (G)(3)(d) results: Presumption in place				
D. Health Care/Work-Related (W-R) Daycare Calculation	**Mother**		**Father**	
D1 Parent's health care cost (HCC) - Health/Dental/Vision:			$450.00	
D2 Parent's W-R daycare cost:	$950.00			
D3 Combined HCC/W-R day care costs:	$950.00		$450.00	
D4 Amt. Parent owes other parent for HCC/W-R daycare cost based on income share:	$258.71	-	$403.85	$145.14 Net Amount
D5 Payable to: **Mother**				
D6 Reas. HCC Test 5% combined Gross Inc.: **$980.22**				
E. Support to be paid:	**Mother**		**Father**	
E1 Sole Custody: Parent owing basic monthly child support amt:	$523.02		$0.00	
E2 Shared Custody: Parent owing net basic monthly child support amt:	$309.50		$0.00	
E3 HCC/W-R daycare: Parent owing net monthly amt:	$0.00		$145.14	
E4 Net monthly support amt. payable from one parent to the other parent:	$832.52	-	$145.14	**$687.38**
E5 Payable to: **Father**	Presumption in place			
F. Adjustments, including SSDI derivative benefit paid to other parent	**Mother**		**Father**	
F1 Total monthly support amt each parent owes the other parent:				
F2 Parent's SSDI derivative benefit paid to the other parent for benefit of child(ren):				
F3 Adjustment				
F4 Adjustment				
F5 Adjustment: tot. mnthly support amt each parent pays to other:		-		
F6 Payable to:				

Mother's monthly support obl. is: $687

Split/Shared Guideline Worksheet Example 3

Parents split custody of two or more children and share custody of one or more other children

Date: 8/4/2018 **Parties' Names:** Betty Wilson Brett Wilson
Docket# **DCSE #:**
Label Selection Husband/Wife

Guideline Calculation	Husband		Wife	
Number of Children for whom parents share jt. legal resp. and support is being sought:		3		
A. **Income**				
A1 Parent's monthly gross income:	$8,333.33		$12,500.00	
A2 Adjustments for spousal support received:				
A3 Adjustments for spousal support paid out:				
A4 # of other biological or adopted children residing with each party:				
A5 **Husband** **Wife** 1			$1,229.00	
A6 Other child support obligations actually paid out:				
A7 Credit for 1/2 of any self-employment tax paid out:				
A8 Available combined monthly gross income (GI):	$8,333.33	+	$11,271.00	$19,604.33 combined
A9 Parent's income share: divide each parent's GI (A8) by combined GI:	42.51%		57.49%	
A10 Sched. monthly basic child support obl.:		$2,729.26		
A11 Per child amt.: multiply sched. basic monthly support obl. by # of children (above):		$909.75		

B. **Split Custody Support**	Husband		Wife	
B1 # of children Parent has sole custody of & other parent owes support for:	1		1	
B2 Pro rata monthly basic child support: multiply per child amt. by each parent's # of child(ren):	$909.75		$909.75	
B3 Basic monthly obl.: multiply other parent's pro rata amt. by parent's income share:	$386.73	-	$523.02	$136.28 net amount
B4 Payable to: Husband				

C. **Shared Custody Support**	Husband		Wife	
C1 # of children in a shared custody arrangement:		1		
C2 Pro rata monthly basic child support: multiply per child amt. by # of child(ren) in (C1):		$909.75		
C3 Shared support need: pro rata monthly basic child support obl. multiplied by 1.4:		$1,273.65		
C4 Total # of days each year parent has custody of children:	182.5		182.5	
C5 Parent's custody share: divide # of days child(ren) with Parent (C4) by 365:	50.00%		50.00%	
C6 Basic support: multiply parent's shared support need by the other parent's custody share:	$636.83		$636.83	
C7 Basic monthly support: multiply parent's basic support amt. by his/her income share:	$270.71	-	$366.11	$95.40 net amount
C8 Payable to: Husband				
C9 Min. Std. Test § 20-108.2 (G)(3)(d): # members in household:	3		4	
C10 Monthly income test at 150% of fed. poverty level (household size):	$2,598.00		$3,138.00	
C11 Is either parent's gross income = or less than 150% of fed. poverty level?	No		No	
C12 Min. Std. Test § 20-108.2 (G)(3)(d) results: Presumption in place				

D. **Health Care/Work-Related (W-R) Daycare Calculation**	Husband		Wife	
D1 Parent's health care cost (HCC): Health/Dental/Vision:	$450.00			
D2 Parent's W-R daycare cost:			$950.00	
D3 Combined HCC/W-R daycare costs:	$450.00		$950.00	
D4 Amt. Parent owes other parent for HCC/W-R daycare cost based on his/her income share:	$403.85	-	$258.71	$145.14 net amount
D5 Payable to: Wife				
D6 Reas. HCC Test 5% combined Gross Inc.: **$980.22**				

E. **Support to be paid:**	Husband		Wife	
E1 Split Custody: Parent owing net basic monthly child support amt:	$0.00		$136.28	
E2 Shared Custody: Parent owing net basic monthly child support amt.:	$0.00		$95.40	
E3 HCC/W-R daycare costs: Parent owing net monthly amt:	$145.14		$0.00	
E4 Net monthly support amt. payable from one parent to the other parent:	$145.14	-	$231.68	$86.54
E5 Payable to: Husband	Presumption in place			

F. **Adjustment for SSDI Derivative Benefit Paid to Other Parent**	Husband		Wife	
F1 Total monthly support amt. each parent owes the other parent:				
F2 Parent's SSDI derivative benefit paid to the other parent for the benefit of child(ren):				
F3 Adjustment:				
F4 Adjustment:				
F5 Adjustment: tot. mnthly support amt each parent pays to other:		-		
F6 Payable to:				

Wife's monthly support obl. is: $87.00

Ready for Something New? Appellate Mediation Is on Its Way.

Sarah P. "Sally" Campbell, Esquire
spcampbell@vacourts.gov

The Supreme Court of Virginia (SCV) and the Court of Appeals of Virginia (CAV) recently announced appellate mediation pilot projects that will begin January 1, 2019 and run for two years. These mediation pilot projects offer significant new opportunities for lawyers and litigants alike.

For decades mediation has been available to help resolve legal disputes. The Virginia Code's "Court-Referred Dispute Resolution Proceedings" chapter, enacted in 1993, defines mediation (§8.01-576.4) and authorizes courts to refer any contested civil matter to a dispute resolution orientation session. The referral is intended to "encourage the early resolution of disputes through procedures that facilitate:

> (1) open communication between the parties about the issues in the dispute,
> (2) full exploration of the range of options to resolve the dispute,
> (3) improvement in the relationship between the parties, and
> (4) control by the parties over the outcome of the dispute." (§ 8.01-576.5).

Even in "court-referred" cases where the orientation is mandatory, mediation is voluntary. After the orientation session, any further participation in mediation or other form of dispute resolution "shall be by consent of all parties" (§ 8.01-576.5). A mediator who receives court referrals must be "certified pursuant to guidelines promulgated by the Judicial Council of Virginia" (§ 8.01-576.8).

The Code also has a "Mediation" chapter (Chapter 21.2 of Title 8.01) that was enacted in 1988, which contains provisions regarding confidentiality of mediation (and exceptions thereto), standards and duties of mediators, and the effect of written settlement agreements, among others. Its mediation definition (§ 8.01-581.21) and the "court-referred" definition are virtually the same: "a process in which a [mediator] facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and to reach a mutually agreeable resolution to their dispute."

We've always been able to send clients to private mediation, if not court-referred. So what's new? Are the appellate courts referring cases to mediation? No. The SCV and the CAV are initiating pilot mediation projects, but mediation will not be mandatory. Cases will not be referred to orientation sessions and will not be "court-referred" at all. Instead, in certain categories of cases, the courts are offering a 30-day "automatic stay" opportunity, so parties choosing to mediate can do so before incurring the costs of preparing the appellate record and filing briefs.

In the CAV, the project will be limited to equitable distribution cases and/or related attorneys' fees in which both sides are represented. In the SCV, cases within its original jurisdiction and appeals and petitions arising from criminal convictions will not be eligible. In most other cases, however, where both sides are represented and a petition for cert has been granted, the cases will be eligible for the pilot projects.

A June press release announcing the pilot projects offered some Court perspective. SCV Chief Justice Donald W. Lemons observed that "Mediation . . . gives citizens an alternative to traditional litigation with its attendant expenses and stress" and CAV Chief Judge Glen A. Huff stated, "Satisfaction of the parties is best accomplished through voluntary settlements rather than decisions imposed by the Court." Chief Justice Lemons further noted, "A successful mediation allows the parties to 'own' the outcome.

No case will be required to be mediated; rather, we are simply offering a creative alternative to those who want it."

For appellate litigation attorneys as well as trial attorneys who appeal the occasional case, the pilot projects' 30-day stay opportunity offers clients a fresh, well-timed option for settlement. Guided by their attorneys during mediation preparation, then with the assistance of the mediator, litigants can ask and answer, "How is this appeal process different from the trial we just had?" "What are my odds of prevailing?" "What do I need?" "If I prevail, do I get what I need?" and "Are there options to appellate litigation that might better serve my needs?"

Appellate Mediation: A Guidebook for Attorneys and Mediators[1] describes a client-centered appellate mediation process focused on a sound understanding of the dispute by the parties. The book, published by the ABA and authored by experienced appellate mediators Brendon Ishikawa and Dana Curtis, deserves praise for its emphasis on the needs and interests of the parties. The authors draw on extensive experience to promote a problem-solving and primarily facilitative approach to appellate mediation. "The art of appellate mediation is in helping parties successfully explore solutions that have previously eluded them because they have not been able to open channels of candid communication, uncover hidden or erroneous assumptions, or engage in constructive negotiations."[2] The book's second chapter delivers a detailed, step-by-step case evaluation process, "the purpose of which is to determine the odds and potential outcomes of pursuing an appeal, to examine alternatives to litigation, and to compare the *presently available* options to the option of pursuing the appeal,"[3] (emphasis in the original). The chapter also "explore[s] the implications of appellate rules and procedures on case evaluation for both appellants and respondents."[4] In total, Ishikawa and Curtis's mediation process:

> (1) is carefully structured as understanding-based, client-involved, problem-solving, collaborative, and primarily facilitative;
> (2) includes all necessary activities for achieving a successful outcome;
> (3) organizes the process into phases that build on one another and allow participants to anticipate the process and to focus their discussions on the topics at hand; and
> (4) discourages premature bargaining over money to the exclusion of more creative, interest-based discussions.[5]

So, why would litigants, so hardened in their positions by the time of an appeal, ever be convinced to mediate? **Appellate Mediation** lists the following incentives as some of the reasons for parties to seek settlement:

> (1) poor odds of prevailing on appeal,
> (2) the appellant's need to avoid further loss or the respondent's need to preserve a favorable judgment,
> (3) the goal to avoid additional legal fees,
> (4) the disruptive effect of litigation on personal and business relationships,
> (5) the potential to structure installment payments on the judgment,
> (6) avoidance of additional time delays due to further litigation in the appellate courts,
> (7) litigation fatigue,
> (8) the opportunity for parties to solve their own problems rather than having a result imposed by a court,
> (9) possible tax advantages,
> (10) a party's immediate financial need for money awarded in the judgment,
> (11) privacy that can be achieved with a confidential settlement agreement,
> (12) the potential for global settlement that resolves the controversy entirely, including issues that are not part of the single case being appealed or parties that are not involved in the appeal, and
> (13) peace of mind.[6]

For attorneys, the pilots offer an opportunity to develop or enhance appellate mediation advocacy skills and an opportunity to guide clients through a timely settlement, under the automatic stay endorsement of the courts. For attorneys who qualify, the

pilot projects also provide a novel opportunity to certify as a Virginia appellate mediator for the two-year period (subject to Judicial Council of Virginia approval of the certification at its October 2018 meeting).

Virginia mediator certification centers on "facilitative" mediation training, the model of mediation endorsed by the **Appellate Mediation** authors. Facilitative mediation focuses on the parties' interests and needs as opposed to the parties' legal positions and arguments (the focus of the "evaluative" mediation model). It is especially helpful in disputes where personal or business relationships exist. Facilitative mediation encourages recognition and understanding of all problems the parties need resolved, not just their legal issues. Facilitative mediation sessions usually involve more face-to-face time than evaluative mediation, which often offers little to no interaction between the parties.

Because the appellate cases that mediate will not be court-referred, litigants need not choose a Virginia certified mediator. By the start of the pilot projects, however, (subject to Judicial Council approval as already noted) appellate-trained mediators (attorneys and retired judges trained in the facilitative process advocated in **Appellate Mediation**) will be certified and available.

Two trainings will be held in November to facilitate timely appellate mediator certification. Sponsored by the Joint ADR Committee of the Virginia State Bar and the Virginia Bar Association (JADRC), whose Special Committee to Study Appellate Mediation in Virginia recommended the pilot projects to the SCV, trainings will take place in downtown Richmond. A 20-hour Basic Mediation Course for Appellate Mediators (content subject to the approval of the Judicial Council) will be held Wednesday, November 14 through Friday, November 16, 2018. A 2-hour Mediation Training Course for Appellate Mediators (content subject to the approval of the Judicial Council) will take place Friday afternoon, November 16, 2018. Further details are underway. For qualification details, see the Report of the Special Committee: https://cdn.ymaws.com/www.vba.org/resource/resmgr/adr/report-special_cmte_to_study.pdf. Mark your calendars now if you are interested in being trained.

For attorneys and mediators interested in learning more, **Appellate Mediation** is straightforward and accessible. Its design makes it easy to locate specific information. Tips and practice pointers are scattered throughout. Chapters with titles like "Case Evaluation for Civil Appeals" (How Does Case Evaluation Differ from Legal Assessment of the Appeal, Decision Tree Risk Analysis, and Negotiation? and How to Do Case Evaluation for Civil Appeals); and "Helping Parties on Appeal Answer the Question 'What's My Case Worth?'" (a vast, readable chapter including FAQs and decision tree analysis examples for numerous party points of view: plaintiff/appellant, plaintiff/respondent, defendant/appellant and defendant/respondent) aren't nearly as daunting as they sound. Sections III and IV cover "Practice Tips for Appellate Attorneys [in mediation]" and "Practice Tips for Appellate Mediators." An appendix offers sample documents and resources for attorneys and mediators and lists helpful books, articles and internet resources. This book truly astounds with its depth and breadth of "essential information about appellate law and the idiosyncrasies of appellate mediation."[7]

If you have questions, please feel free to contact me at Dispute Resolution Services, Department of Judicial Services, Office of the Executive Secretary, SCV (spcampbell@vacourts.gov). ❖

Endnotes

1. Ishikawa, Brendon, and Dana Curtis, *Appellate Mediation: A Guidebook for Attorneys and Mediators*, American Bar Association, 2016.
2. *Id.*, p. 24.
3. *Id.*, p. 23.
4. *Id.*
5. *Id.*, p. 24 – 27.
6. *Id.*, p. 28.
7. *Id.*, p. 20.

The Role of the Mental Health Professional in Collaborative Divorce

Jennifer A. Bradley, J.D., and Phyllis Miller Palombi, LMFT

Two divorce attorneys walk into a bar. They're given a set of facts relating to the dissolution of a marriage, without being assigned representation to either party, and they reach a fair, mutually agreed upon settlement in less than an hour.

If only our jobs were that simple. Instead, a couple's emotional and psychological vulnerabilities generally control the settlement negotiation process, in conjunction with the attorneys' egos, making it much less efficient than it otherwise could be.

The Collaborative Process was designed with the objective of creating an experience that is ultimately healthier for divorcing families. Recognizing that the parties are suffering from the pain and loss of ending the marital relationship, and their attorneys' advocacy often results in increased tension and animosity, the inclusion of a neutral mental health professional ("MHP") as part of the Collaborative team promotes an atmosphere where the parties are encouraged to communicate with each other in a more positive and respectful manner. MHPs are trained to analyze the parties' communication patterns and identify better ways for them to interact and come to joint decisions. They can instruct clients on effective, non-attacking, non-defensive modes of communication that can improve the parties' relationship both during and after the trauma of their separation and divorce.

MHPs are also able to offer empathy, normalize the clients' emotional experiences, and help each party recognize the humanity of the other. When the parties both feel that their feelings and concerns have been heard, and they have the respect and support of the neutral MHP, they are often able to communicate in a more civil manner.

MHPs can also help the attorneys understand their clients' emotional triggers, fears and concerns, and analyze how the marital dynamics are affecting the settlement process. They provide invaluable assistance in settlement negotiations by identifying emotional and psychological roadblocks to settlement, explaining how these feelings are inhibiting progress, and providing a suggested framework for change.

The divorce decision usually takes place over a series of years, during which one or both parties have developed deeply entrenched feelings of hurt and animosity that upset the roots of each one's normalcy. Having an MHP present on the Collaborative team shifts the burden of identifying and handling the resulting difficult client behaviors, and can diffuse the intensity of the clients' emotional and psychological obstructions when compared to attorneys working with clients in isolation. The ability of an attorney to acknowledge and navigate the intensity of their client's emotional trauma is not as effective as that of the MHP, who is specifically trained to hear and work with traumatic feelings.

There are a host of emotions and resulting behaviors that may influence a client's approach to the divorce process, including denial, distrust, distance, fear, anxiety, guilt, love, anger, depression, and grief. Some behaviors may be longstanding and form the basis for the desire for separation, and others may have only resulted from the other party's desire to leave the marriage. Very often, both parties will feel victimized by the behaviors exhibited by the other party, creating additional anxiety, resentment, impatience, sadness, and dependency. While MHPs do not treat or diagnose clients in the Collaborative Process, they are nonetheless able to assess the mental health capacity and symptoms of the clients and how their behaviors have been pathological to the couple, and can share this information with the attorneys in order to increase the team's understanding of the relationship dynamic. This lifts the burden from the attorneys, working in isolation with their clients, to the team as a whole, which can be tremendously helpful to the attorneys.

The MHP can also help the attorneys understand how their own reactions and behaviors may be causing anger or annoyance in one or both parties, and suggest that the attorneys approach problems in different ways that will be better received by the clients.

The MHP can help guide the Collaborative team to assess whether couples who have struggled with intimate partner violence, coercive control, or substance abuse behaviors will be able to work in the Collaborative Process by evaluating the level of severity and the difference between pathological issues and workable behaviors. The MHP not only brings expertise in identifying these sorts of problematic behaviors, but can also aid the Collaborative team by providing suggestions for how to address behaviors that may interfere with a fair and durable settlement.

Another function of the MHP is to work separately with the parties to develop a "shared narrative" for how and when their children will be informed about their separation and divorce, and to create a comprehensive Parenting Plan. Unlike attorneys, MHPs can provide expertise in child development and the psychological impact of divorce on the family. They are able to help the parties establish parameters of their co-parenting relationship going forward, recognizing that a positive vision of the future requires moving past all of the hurt, fear and angry feelings that result from the divorce process.

An MHP may also be included on a Collaborative team in a "Child Specialist" capacity, which brings the voice and needs of a child into the process. A Child Specialist does not provide therapy for children, but will meet with them independently to allow them an opportunity to talk about the family's changes and their feelings with a neutral adult.

Child Specialists will then give the parties feedback on their children's experiences, which helps the parents understand what the children are thinking and feeling and can improve their ability to talk to the children about these difficult issues, ultimately paving the way for less conflict. The Child Specialist can also educate and guide children to speak up and share their feelings with their parents, while also preparing parents on how to identify and understand what their children may be experiencing as a result of their divorce. Older children in particular will often find difficulty in communicating with their parents about the divorce and repress their feelings or lash out at one or both parents; the Child Specialist can help them cope with their feelings and can also act as an intermediary with the parents.

The divorce process is one of the most difficult experiences one can go through in life—it is often a slow and painful death of a family. One of the most compelling advantages of the Collaborative Process is the focus on changing the perception that divorce must constitute an end to the family, and promoting the understanding that it can instead be viewed as establishing a new family relationship. ❖

Retirement Assets: What's Mine and What's Uncle Sam's?

Scott M. Weinbaum, Esq.
Maddox & Gerock, PC
sweinbaum@maddoxandgerock.com

We all know the importance of planning for retirement. We scrimp. We save. We cut back. Then, when it is time to retire, when we are finally ready to reap the rewards of all of the planning and contributions that we have made throughout the course of our working lives, that money is all ours, right? Not so fast; Uncle Sam has other plans.

As you might imagine, retirement money is taxable. Retirement money may be taxed up front (*i.e.*, a Roth contribution) or upon distribution, but regardless, retirement assets will be taxed. You might not be aware that so-called "premature" distributions are subject to a hefty penalty. Whether from a retirement annuity[1], a qualified plan[2], a modified endowment contract[3] or even an Individual Retirement Account (IRA)[4], withdrawals from retirement assets prior to age 59 ½ are taxable at an additional 10% penalty.

Under the Internal Revenue Code, "the taxpayer's tax under this chapter for the taxable year in which such amount is received shall be increased by an amount equal to 10 percent of the portion of such amount which is includible in gross income"[5]. To avoid getting wrapped up in the Internal Revenue Service's overly technical language, here's a (relatively) simple demonstrative example:

> John is single and 50 years old. John earned $100,000 in wages in 2018. John has no other investment income, capital gains, *etc*. However, John took a $50,000 withdrawal from his 401(k). For simplicity's sake, all $50,000 is includable in his gross income. Therefore, John's gross income is $150,000 for 2018. This level of income should place John in the 24% tax bracket (as he will be filing separately) for 2018. Under normal circumstances, John would owe $36,000 in taxes (24% of $150,000). However, due to John's "premature" withdrawal from his qualified retirement plan, John's taxes attributable to the $50,000 will be increased by 10% in 2018. This complicates his tax filing and decreases the net funds John will have in his pocket.

It is at this point that the author feels compelled to inform his readers that he is not a tax attorney, nor a tax professional. This article is intended to provide an educated layperson's overview of the 10% penalty as well as ways in which those seeking to withdraw retirement funds can get around this rule, including when transferring retirement funds upon divorce. Thankfully, although this 10% penalty is the rule, there are a number of exceptions which allow us to retain just a bit more of our hard-earned retirement money. Although the penalties on premature withdrawals from retirement annuities and modified endowment contracts are also subject to a number of exceptions, the remainder of this piece will focus on withdrawals from "qualified" plans as well as IRAs. As a side note, qualified plans under the Employee Retirement Income Security Act (ERISA) are those described in 26 U.S.C. §401(a) and are retirement assets received as the exclusive benefit of employment. They may include 401(k)s, stock bonus plans, profit-sharing plans, pensions, *etc*.

There are a number of itemized exceptions listed in Section 72(t) of the Internal Revenue Code where this 10% penalty does not apply. For example, there is no 10% penalty if the withdrawal is made after the asset holder attains the age of 59 ½ as this would not be considered to be a premature withdrawal.[6] The penalty also does not apply if the withdrawal is made after the death of the asset holder.[7] Further, the 10% penalty does not apply if the distribution is incident to the asset holder becoming disabled (as defined under

26 U.S.C. §72(m)(7))[8] or to withdrawals which are periodic payments (made at least annually) made for the life or life expectancy of the holder and/or the joint lives of the holder and his/her beneficiary[9]. In addition, the 10% penalty does not apply to withdrawals under certain specific plans, annuities, contracts and trusts under the Code[10] nor in other specific instances described in U.S.C. §72, part of the Internal Revenue Code.

Similarly, exempted withdrawals from such plans may be made in furtherance of the purchase of a first home (in an amount up to $10,000)[11], to pay medical expenses (in an amount not to exceed 10% of one's adjusted gross income)[12], to pay for certain "qualified" post-secondary education expenses[13], to those individuals called to active duty (though those withdrawals must be repaid)[14], and to those separating from their service (employment) after attaining the age of 55[15].

In the context of family law, however, the most relevant of these remaining exceptions, for qualified plans, are "[p]ayments to alternate payees pursuant to qualified domestic relations orders. Any distribution to an alternate payee pursuant to a qualified domestic relations order (within the meaning of [26 U.S.C. §414(p)(1)])"[16]. In other words, transfers from a 401(k) or other qualified plan (as described above), pursuant to divorce, are exempt from the 10% penalty rule. Further, thankfully, these transfers are not even considered to be taxable events and no taxes must be paid when such a transfer is made[17].

Curiously, it appears from the Internal Revenue Code that there is a specific limitation on the above exception: it does not apply to transfers from IRAs[18]. Does this mean then that IRA transfers pursuant to divorce are subject to this harsh penalty? Are we to lose a substantial amount of money in each post-separation IRA transaction? Thankfully, the answer is no.

According to the Internal Revenue Code:

> The transfer of an individual's interest in an individual retirement account or an individual retirement annuity to his spouse or former spouse under a divorce or separation instrument described in subparagraph (A) of section 71(b)(2) is not to be considered a taxable transfer made by such individual notwithstanding any other provision of this subtitle, and such interest at the time of the transfer is to be treated as an individual retirement account of such spouse, and not of such individual. Thereafter such account or annuity for purposes of this subtitle is to be treated as maintained for the benefit of such spouse.[19]

Broken down again for those of us who are not fluent in the Internal Revenue Code's complex language, this provision states that, pursuant to divorce, a transfer of funds from an IRA to another retirement savings vehicle is not taxed. Once the transfer is completed, the funds are treated as an IRA for the recipient spouse, for the benefit of the recipient spouse. Why then, is there a limitation on the exception cited above? The reason is that transfers from an IRA, unlike transfers from a 401(k) or other "qualified" plan under ERISA, are not subject to the requirement that such transfer be pursuant to a Qualified Domestic Relations Order, Qualified Court Order (used for the division of military retirement), Retirement Benefits Court Order (used for the division of government Thrift Savings Plans), or other similar court order.

In fact, in the case of IRAs, most companies will accept a signed letter from both parties confirming the transfer (along with copies of the Final Order of Divorce, Marital Settlement Agreement and any other related documents or orders). Some companies, such as Fidelity and John Hancock, even have forms they allow parties to fill out in order to effectuate the transfer without the need for any further formalities.

Be careful though; just because the transfer from one spouse to the other is tax and penalty free does *not* mean that you can withdraw those funds free and clear. Here, it is important to note that there is a difference between a transfer and a withdrawal. A transfer is the transition of retirement funds from one retirement vehicle to another. A withdrawal is the cashing out of those funds. Unlike with transfers, withdrawing the funds, even upon divorce, *would* be subject to taxes and the 10% penalty. That is, of course, unless the withdrawal is subject to one of the exceptions discussed above (or those others listed in the Internal

Revenue Code).

What it boils down to is this: just because you have a certain balance in your retirement account does *not* mean all that money is yours. Not only are you on the hook for taxes (unless you paid those up front), but unless you fall within a specifically itemized exception, you will pay a significant penalty if you decide to withdraw any of those funds prior to turning 59 ½. Although all funds will be maintained and will not be taxed upon a transfer to a spouse or former spouse pursuant to divorce, that does not mean that either party can withdraw the funds penalty-free. If you do need (or want) to withdraw from your retirement assets, be sure to discuss the potential impact with a tax professional and financial planner. We would not want you to give Uncle Sam any more money than you have to. ❖

Endnotes

1. 26 U.S.C. §72(q)
2. 26 U.S.C. §72(t)
3. 26 U.S.C. §72(v)
4. T.C. Memo 2017- 125 (https://www.ustaxcourt.gov/UstcInOp/OpinionViewer.aspx?ID=11306). This Tax Court ruling confirms that the 10% penalty also applies to IRAs although not necessarily specifically articulated under the Internal Revenue Code. This Memo holds that the penalty imposed upon qualified plans also applies to non-qualified plans.
5. 26 U.S.C. §72(q)(1)
6. 26 U.S.C. §72(q)(2)(A)(i)
7. 26 U.S.C. §72(q)(2)(A)(ii)
8. 26 U.S.C. §72(q)(2)(A)(iii)
9. 26 U.S.C. §72(q)(2)(A)(iv)
10. 26 U.S.C. §72(q)(2)(A)(viii)
11. 26 U.S.C. §72(t)(2)(F)
12. 26 U.S.C. §72(t)(2)(B)
13. 26 U.S.C. §72(t)(2)(E)
14. 26 U.S.C. §72(t)(2)(G)
15. 26 U.S.C. §72(t)(2)(A)(v). Please note, however, that this exception specifically *does not* apply to withdrawals from Individual Retirement Accounts. See 26 U.S.C. §72(t)(3)(A).
16. 26 U.S.C. §72(t)(2)(C)
17. 26 U.S.C. §1041(a)(2)
18. 26 U.S.C. §72(t)(3)(A)
19. 26 U.S.C. §408(d)(6)

VFLQ CASES OF THE QUARTER

Equitable Distribution – Date of Valuation

Name: *Scheer v. Scheer, 18 Vap UNP 1145172 (2018)*

Facts: The parties married in 2006 and separated on July 1, 2011. At the time of the parties' marriage, the husband started a five-year clinical psychology program. He obtained numerous loans to pay for the program as well as family living expenses. During the marriage, the husband had 18 loans. The parties agreed to the outstanding loan balances as of early 2016, around the date of the hearing. In its ruling, the trial court allocated 25% of the student loan debt to the wife and 75% to the husband. The wife objected that the court had not determined the amounts of the loans as of the date of separation pursuant to Virginia Code § 20-107.3. The husband responded with a motion asking the court to make additional findings on the balances of the loans as of the date of separation. The court reopened the record and held a hearing to allow the husband to establish the amounts owed on the loans as of the date of separation. After the additional hearing, the court kept the original allocation of the student loan debt, but noted that the evidence was insufficient to determine the amounts of the loans owed on the date of separation. The wife appealed.

Issue: Whether the trial court erred in its equitable distribution ruling regarding the school loans since the husband did not provide sufficient evidence to permit valuation of the debts as of the date of the separation.

Ruling: The Court of Appeals reversed the trial court and remanded this issue for further adjudication.

Rationale: Virginia Code § 20-107.3(A) requires the trial court to determine the amount of any debt, separate and marital "as of the date of the last separation of the parties." The statute further directs the trial court to determine "the extent to which such debt has increased or decreased from the date of separation until the date of the evidentiary hearing." This provision is mandatory. As such, the trial court erred by not determining the amounts owed on the student loans as of the date of separation before distributing marital property to the parties.

Equitable Distribution – Deed of Gift

Name: *Oberlander v. Oberlander,* 18 Vap UNP 1817171 (2018)

Facts: The parties married in 1989 and had three children. The husband was in the United States Navy. In March 2007, the husband was arrested and thereafter pled guilty to violent sexual felonies against two of the parties' children. He had been incarcerated since his arrest and was sentenced to an active period of 35 years in prison. In 2008, the husband executed a deed of gift which transferred the marital home from the parties to the wife. At trial, the husband argued the marital home was still marital. The wife argued that the marital home was her separate property. The trial court found that the marital home was the wife's separate property. The husband appealed.

Issue: Whether the trial court erred in classifying the marital home as the wife's separate property.

Ruling: The Court of Appeals affirmed the trial court.

Rationale: Virginia Code § 20-107.3(A)(2) provides, in essence, that all property acquired by the parties during their marriage and prior to their separation is marital. The wife acquired the property in her sole name after the date of the parties' separation, and it was presumed to be her separate property. Furthermore, Virginia Code § 20-150(1) permits parties to enter into marital agreements with each other concerning "[t]he rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located." In this instance, the deed transferring the home from the parties to the wife was a marital agreement.

Equitable Distribution – Line-of-Duty Pay

Name: *Henderson v. Henderson,* 18 Vap UNP 1364172 (2018)

Facts: The husband was a professional football player who had retired and was receiving line-of-duty ("LOD" payments) under the Player Retirement Plan (the "Plan"). The Plan provides eligible employees with "pension and disability benefits," as well as "survivor protection" for the player's spouse and family. The monthly retirement benefit is based upon (1) the employee's benefit credits for credited seasons, (2) age upon beginning to receive benefits, and (3) the form chosen for those benefits. An employee who is not yet receiving ordinary retirement benefits may elect to receive disability benefits under the plan upon a showing of differing levels of disability. The husband was receiving LOD payments at the time of the hearing for a work-related disability. As a result, the husband argued that the LOD payments should be treated as a personal injury award, and not divisible by the court as the payments received by the husband were not for lost wages or medical expenses. However, the trial court characterized the LOD payments as pension payments under Virginia Code § 20-107.3(G)(1), which are subject to division. The husband appealed.

Issue: Whether the trial court erred in classifying the LOD payments as payments made under a pension (and thus divisible by the court), and not a personal injury award.

Ruling: The Court of Appeals affirmed the trial court.

Rationale: Classification of property is generally a question of fact and will not be disturbed unless plainly wrong or without evidence to support it. The Plan set out a number of different ways in which the husband was entitled to receive benefits, including through regular retirement and disability. The husband's eligibility to receive LOD payments, like the traditional benefits available under the plan, was based in part on credited seasons of service to his employer, and the method of determining LOD payments was similar to calculating the amount of the LOD payments. The Plan also did not allow the husband to receive both LOD and retirement payments for the same period of time. This supports the finding that the LOD payments functioned like a traditional retirement plan. The requirement that the husband prove a qualifying injury did not change the classification of the LOD benefits as a pension or retirement under Virginia Code § 20-107.3(G).

Equitable Distribution – Jurisdiction to Correct Retirement Order

Name: *Jackson v. Jackson,* 69 Va. App. ____ (1776174) (2018)

Facts: The trial court entered a final order of divorce on January 3, 2011 which affirmed and ratified the parties' agreement concerning property division. The order provided that the wife would receive 50% of the husband's military pension. On the same day, the court entered an Order Dividing Military Pension (the "Retirement Order") intended to give effect to the final order of divorce. The Retirement Order specified that the wife was "formally assigned an annuity in the monthly amount of $1,053.39." The wife thereafter began receiving $1,053.39 per month. In 2017, the wife obtained new counsel and filed a motion requesting the trial court to enter an amended order changing the amount she was receiving. Specifically, the wife argued that the Retirement Order failed to award annual cost of living increases. She also argued that the parties incorrectly calculated the payment amount of the wife's share of the husband's pension. The trial court refused to go "behind the scenes to determine the accuracy of the calculation," holding that the Retirement Order was enforceable. The wife appealed.

Issue: Whether the trial court erred in finding the Retirement Order did not improperly modify the final order of divorce when it changed the portion awarded to the wife from a percentage of the marital share to a fixed annuity payment.

Ruling: The Court of Appeals affirmed the trial court.

Rationale: Pursuant to Rule 1:1 of the Rules of the Supreme Court of Virginia, "[a]ll final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer." Thus, the Retirement Order being entered more than 21 days after the wife's request,

deprived the court of jurisdiction to modify it under Rule 1:1. Furthermore, the trial court's power under Virginia Code § 20-107.3(K)(4) to modify a retirement order is limited to "establishing or maintaining the order as a qualified domestic relations order or to revise or conform its terms so as to effectuate the expressed intent of the order." However, here, the wife was seeking to change substantive terms of the order, which exceed the court's authority under § 20-107.3(K)(4).

Spousal Support – Manifest Injustice Finding

Name: *Pattillo v. Pattillo,* 18 Vap UNP 1334172 (2018)

Facts: The parties married in 1997 and separated in 2015. The husband filed a fault complaint for divorce based upon the wife's adultery. The wife conceded at trial that she had committed adultery during the marriage, which included two different men, both of whom were neighbors and friends of the parties. The adultery occurred over several years. In addition to exchanging sexual texts and photos with the two men, the wife had sex with them in cars around the parties' neighborhood and in the parking lot of the local Home Depot. In its letter opinion, the trial court found that the wife's "adulterous behavior led to the demise of the marriage." However, the trial court also found that it was also clear that the husband's "inattention to Wife and the amount of time he devoted to his career, which often took him away from home at least one week of every month, led to the gradual dissolution of the marriage before the Wife committed adultery." The husband would get up at 3:15 a.m. to get ready for work and would return home between 5:00 and 6:00 p.m. When the husband came home, he would acknowledge the family, but "would be glued to his computer once he sat down until he went to sleep." The parties enjoyed a relatively high standard of living. The husband had a master's degree and earned $260,000 per year. The wife had been a stay-at-home parent, who was earning $9.00 per hour. The trial court found that the marriage was "irretrievably lost due to gradual dissolution caused by *mutual* inattention and fault from both parties," and found that a denial of spousal support to the wife would constitute a manifest injustice. The trial court subsequently awarded the wife $3,000 per month in spousal support. The husband appealed.

Issue: Whether the trial court erred when it made a manifest injustice finding and awarded the wife spousal support despite her repeated and flagrant adulterous affairs.

Ruling: The Court of Appeals affirmed the trial court.

Rationale: Pursuant to Virginia Code § 20-107.1(B), a court may award spousal support to a party who has committed adultery if a denial of support and maintenance would constitute a manifest injustice, based upon the respective degrees of fault during the marriage and the relative economic circumstances." The respective degrees of fault are not limited to legal grounds for divorce. It encompasses all behavior, including the gradual breakdown of the marriage prior to a party's adultery. A court may consider such factor when assessing the parties' relative degrees of fault during the marriage and in making a manifest injustice finding.

Spousal Support – Material Change in Circumstances

Name: *Gadpaille v. Gadpaille,* 18 Vap UNP 1868173 (2018)

Facts: The parties were married for 30 years before separation. The parties were divorced in 2008 and the husband was ordered to pay the wife $8,035 per month in spousal support. The husband filed a motion to decrease or terminate his spousal support obligation to the wife in 2015 since he "is reaching retirement age" and his income will continue to decrease at a significant rate as he enters retirement and fully retires at the end of 2018. The husband testified that he was 66 years old and had been an anesthesiologist for 37 years. He testified that as a full-time anesthesiologist he was expected to work 60 to 70 hours per week, with at least one 24-hour shift. The husband stated that he could no longer do the job he used to do, especially the long shifts which typically occurred at night. He also testified that he was the oldest person in his practice to begin the retirement process. The wife testified about her numerous physical ailments and medications as well as her living expenses. The trial court found that the husband proved a material change in circumstances since he can no longer safely do what he could have done when he was younger and reduced monthly spousal support to $6,500 in light of the husband beginning the retirement

process.

Issue: Whether the trial court erred in finding sufficient evidence of a material change in circumstances to justify a reduction in spousal support caused by the husband's voluntary reduction in employment hours and income.

Ruling: The Court of Appeals affirmed the trial court.

Rationale: A trial court is vested with broad discretion in deciding whether a material change in circumstances warrants a modification in the amount of support. The husband proved his income decreased by 36% and his cash flow decreased by over 97% since the last order. He explained that his ability to perform his job has deteriorated and he could no longer handle the trauma at night, the long hours and some of the more complex cases. Also, no other anesthesiologists his age in his practice were still working. Considering the facts and circumstances of the case, the trial court did not abuse its discretion in finding that there was a material change in circumstances that warranted a reduction in spousal support based upon the husband's transition into retirement.

Spousal Support – Imputation of Income

Name: *Collins v. Leeds,* 68 Va. App. _____ (1770174) (2018)

Facts: The wife petitioned the court for an award of spousal support. At the time of the hearing, the husband was 62 years old and had been retired for four years. His last job, which he left voluntarily, paid $145,000 per year. His job required a security clearance, which was expired at the time of the hearing. At trial, the wife argued that the husband should have income of $145,000 imputed to him. The trial court refused to impute income to the husband since "the only evidence offered of the Husband's earning capacity was his salary as of 2013 when he voluntarily left his civilian employment with the Navy (after having retired from active duty in the Navy in 2004); there was no evidence of the Husband's post-earning capacity upon which to base an imputed income." The trial court awarded the wife $400 based upon her need and the husband's current ability to pay, which was far less than requested by the wife. The wife appealed.

Issue: Whether the trial court erred in refusing to impute income to the husband based upon the evidence presented at trial.

Ruling: The Court of Appeals affirmed the trial court.

Rationale: Under appropriate circumstances, a trial court may impute income to a spouse when calculating a support award. Whether to impute income to a party is within the sound discretion of the court and its refusal to impute income will not be reversed unless plainly wrong or unsupported by the evidence. In the present case, the wife was required to present evidence sufficient to enable the trial court to reasonably project what amount of income could be anticipated. The wife failed to present any evidence of employment currently available to the husband or what he could make in those positions. Since the time the husband held his last position, his security clearances had expired, he had not worked in four years and was approaching the age when many individuals retire. Accordingly, it was not error for the trial court to refuse to impute income to the husband.

Child/Spousal Support – Determination of Arrearages

Name: *Fernandez v. Fernandez,* Fairfax County Circuit Court, CL 2017-14055

Facts: The parties were married in 2001, had a child in 2002 and separated in 2004. On October 29, 2004, the Fairfax County Juvenile and Domestic Relations Court ordered the husband to pay the wife $737 per month in spousal support and $583 per month in child support. The parties reconciled in 2005 and resumed living together. The husband continued to pay the court-ordered payments until 2006 when the parties' second child was born. The parties had a third child in 2008. The parties took no action to modify or terminate the support order until 2017 when the husband filed a motion. The wife subsequently filed a divorce action in 2017. From approximately 2005 to 2017, the wife did not work outside of the home and the husband was the family's sole financial support. During this time the wife had use of the husband's debit card and access to funds solely held in the husband's name. The wife now seeks enforcement of arrearages under the 2005 support order since the parties did not agree to suspend

the husband's support payments during their period of cohabitation.

Issue: Whether, absent an express agreement, a payor may be given credit extinguishing support arrearages, having resumed full financial support for his spouse and child in reunification of the family unit.

Ruling: The husband satisfied his obligations under the support order and no arrearage was owed during the parties' cohabitation while the husband was providing for the family's needs.

Rationale: The husband resumed *de facto* custody over the child (albeit jointly with the wife) and there was a reconstitution of marital cohabitation. Citing to *Acree v. Acree*, the court stated that the purpose for the rule of exacting enforcement of support orders to their letter is to promote consistency in enforcement of orders and to avoid continuous trouble and turmoil. A relaxation of this rule might be warranted under certain circumstances to prevent unjust enrichment. Here, failing to credit the husband with fulfillment of his obligations under the temporary support order would unjustly enrich the wife since the husband provided the wife with resources in excess of the support called for in the order. Furthermore, the parties had an implied unequivocal agreement that the husband would provide full financial support for the family in lieu of what the support order required. In return, the wife resumed cohabitation, management of the household and maintained forbearance of the enforcement of the support order.

[Editor's Note: While this is a circuit court case which cannot be cited as precedent, the facts of the case are not uncommon and the court's rationale is thoughtful and compelling.]

Civil Procedure – Pre-filing Injunction

Name: *Madison v. Board of Supervisors,* ___ Va. ___ 170934 (2018)

Facts: Milari Madison ("Petitioner") filed a Petition for Writs of Mandamus and Prohibition against the Loudoun County Board of Supervisors (the "Board"), invoking the Supreme Court of Virginia's original jurisdiction. Loudoun County (the "County") filed a motion to dismiss and award sanctions under Virginia Code § 8.01-271.1, arguing that the petition "is not founded in facts or law, lacks merit, is frivolous," and raised the same arguments that had been resolved against her in prior litigation. The underlying case is the latest in a string of 22 lawsuits in the Circuit Court of Loudoun County against the Board and other divisions and departments of the County. The suits all generally related to challenges to the County's authority over property of the former Town of Waterford, despite the enactment of a General Assembly bill in 2013 that title to the former town was transferred to the County and that the Board had the power to alter or vacate the streets, alleys and other rights-of-way of the former town. Despite this legislation, Petitioner continues to assert that Waterford is still an incorporated municipal entity and challenge the County's authority over this property.

Issue: What sanctions are appropriate to prevent Petitioner from continuing to file frivolous lawsuits against the County?

Ruling: The Supreme Court of Virginia required Petitioner to pay the County's legal fees of $4,377.35 and imposed a pre-filing injunction whereby Petitioner is prohibited from filing in that Court any petition for appeal, motion, pleading, or other filing against the Board or any of its divisions or departments without (1) obtaining the services of a practicing Virginia attorney, whose filings would be subject to § 8.01-271.1, or (2) obtaining leave of Court to file any *pro se* pleading. The Circuit Court may impose its own pre-filing injunction if it deems it appropriate.

Rationale: In *Cromer v. Kraft Foods N. Am., Inc.*, 390 F.3d 812, 817 (4th Cir. 2004), the United States Court of Appeals for the Fourth Circuit set forth four factors that courts should consider prior to issuing a pre-filing injunction. In determining whether a pre-filing injunction is substantively warranted, a court must weigh all the relevant circumstances, including (1) the party's history of litigation, in particular whether he has filed vexatious, harassing, or duplicative lawsuits; (2) whether the party had a good faith basis for pursuing the litigation or simply intended to harass; (3) the extent of the burden on the courts and other parties resulting from the party's filings; and (4) the adequacy of alternative sanctions. Although not binding, the Supreme Court adopted this rationale and found that Petitioner has a history of (1) filing duplicative, vexatious lawsuits,

(2) without any objective good faith basis, and (3) at the expense of the court system and opposing parties. With respect to the fourth factor, although the Supreme Court ordered monetary sanctions pursuant to § 8.01-271.1 to compensate the County for expenses incurred in this case, those sanctions will not necessarily prevent Petitioner from filing future pleadings.

[Editor's Note: Family law is rife with the filing of vexatious and baseless complaints, defenses and motions. This case should hopefully serve as firm footing for family lawyers asking for and the trial courts imposing pre-filing injunctions to protect innocent parties as well as relieve the trial courts from wasting valuable time with these issues.]

Validity of Marriage – Foreign Common Law Marriage

Name: *Porter v. Porter,* 69 Va. App. ____ (1872174) (2018)

Facts: Bartholomew D.S. Porter ("Bartholomew"), a Washington, D.C. resident, and Eileen Porter ("Eileen"), a Virginia resident, scheduled a wedding for February 25, 2006 in Washington, D.C. ("D.C."). On February 24, 2006, the parties obtained a marriage license from Virginia, but not one from D.C. The officiant indicated that the marriage ceremony took place in Arlington, Virginia on February 25, 2006, but no ceremony actually occurred in Virginia. Instead, the ceremony occurred in D.C. on such date. The parties exchanged vows in front of 30 to 40 people and stated their intentions to be married to one another. After the reception, the parties stayed in a D.C. hotel for one night, but did not have sexual intercourse since they were too tired and Eileen was five months pregnant. The parties lived in their separate residences until May 2006 when they started living together in Virginia. From February 25, 2006 until their separation in 2015, the parties considered themselves married, held themselves out as a married couple, filed joint tax returns and purchased a home together, which was titled as tenants by the entirety. Bartholomew filed for divorce and Eileen filed a motion for declaration of marriage status. After a hearing on the merits, the trial court held there was no valid marriage in Virginia since the ceremony occurred outside of Virginia. The trial court also held that the parties did not enter into a valid common law marriage in D.C. because the parties' one-night stay in a D.C. hotel did not meet the cohabitation requirements according to D.C. law to establish a common law marriage in D.C. Bartholomew appealed.

Issue: Whether the trial court erred when it found that the parties failed to meet the cohabitation requirements to establish a common law marriage in D.C.

Ruling: The Court of Appeals affirmed the trial court.

Rationale: While Virginia does not recognize common law marriages where the relationship is created in Virginia, it does recognize a common law marriage that is valid under the laws of the jurisdiction where the common law marriage was created. The elements of common law marriage in D.C. are cohabitation as husband and wife, following an express mutual agreement, which must be in words of the present tense. A one-night stay in a hotel in D.C. is too short of a time to constitute cohabitation in D.C., and, thus, the parties do not meet the cohabitation requirement under D.C. law.

Evidence – Authentication of Foreign Order

Name: *Pourbabai v. Pourbabai,* 18 Vap UNP 1532174 (2018)

Facts: During the parties' equitable distribution trial, the husband sought to have the proceeding dismissed since a prior Iranian court order deciding equitable distribution had been entered. Thus, the husband argued, the equitable distribution aspect of the case was barred by *res judicata*. In support of his position, the husband sought to introduce a document purporting to be an Iranian court order resolving equitable distribution issues between the parties. Attached to the Iranian order were certifications of translations from the Pakistani Embassy. The certifications were not from the court from which the order came and did not have any certification regarding the accuracy or authenticity of the documents. The circuit court sustained the wife's objection to the admission of the document. Since no evidence was presented relating to property in Iran and orders regarding Iranian property had been made in the court of the proceedings, the trial court denied the husband's motion to dismiss.

Issue: Whether the trial court erred in sustaining the wife's objection to the introduction of the document purporting to be an Iranian order deciding equitable distribution.

Ruling: The Court of Appeals affirmed the trial court.

Rationale: Virginia Code § 8.01-389(A1) provides that the "records of any judicial proceeding and any other official record of any court of another . . . country . . . , shall be received as *prima facie* evidence provided that such records are certified by the clerk of the court where preserved to be a true record." Furthermore, Virginia Code § 8.01-391(B) provides that if "any department, division, institution, agency, board, or commission of . . . another . . . country . . . acting pursuant to the law of the respective jurisdiction or other proper authority, has copied any record made in the performance of its official duties, such copy shall be as admissible into evidence as the original . . . provided that such copy is authenticated as a true copy either by the custodian of said record . . . ." Since the document the husband sought to enter did not meet these conditions, the trial court properly sustained the wife's objection.

Contempt – Expressed vs. Implied Duty

Name: *Aviles v. Lewis,* 18 Vap UNP 1780174 (2018)

Facts: The parties' Final Decree of Divorce (the "Decree") provided that the parents "will consult each other before making any major decisions regarding the child's health, education, religion or well-being." The father is a practicing Catholic and the mother is of another faith. The mother knew the father was taking the child to religious instruction to prepare for his first communion and did not object. The child was to take his first communion on May 7, 2016 and the father sent an email to the mother requesting the child that day although it was her custodial weekend. The email stated that if the father could not have custody of the child on such weekend, he would have the child take his first communion on his own the next time he went to church. The mother stated that she had plans with the child on May 7th, but did not say she objected to the child taking communion nor did she ask to be informed of any alternative date. The mother knew the father went to church on Sundays. The father subsequently took the child to church on May 15, 2016 for his first communion. The mother learned of this the day after the communion. A year later, the mother filed a rule to show cause for the father failing to communicate the new date for the child's first communion in contravention to the requirements of the Decree. The trial court held the father in contempt since he had a duty under the Decree to consult with the mother about the new date for the child's first communion. The father appealed.

Issue: Whether the father violated the terms of the Decree by not informing the mother of the new date for the child's first communion.

Ruling: The Court of Appeals reversed the trial court.

Rationale: Before a person may be held in contempt for violating a court order, the order must be in definite terms as to the duties imposed upon such person and the command must be expressed rather implied. In the present case, the Decree provided that the father would consult with the mother regarding the child's religion, which he had done by discussing with her that the child would be enrolled in classes to prepare for his first communion. The father told the mother a month in advance of his first communion and that he would take the child the next time he went to church. The mother never objected to the child taking communion on the father's time. The father's duty to inform the mother of the new date may have been *implied* under his duty to consult with her regarding the child's religion, but it was not *expressly* stated in the Decree. If the parties intended that each party give the other notice of the child's religious activities so they could attend, they could have stated that specifically in the Decree. Since the father's duty to inform the mother was implied rather than expressed, the trial court abused its discretion in finding the father in contempt. ❖

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