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Virginia Family Law Quarterly

VFLQ

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

Message from the Chair

Daniel Gray, Chair
Family Law Section

At its last meeting, the Family Law Section Board had the pleasure of selecting its annual Betty A. Thompson Lifetime Achievement Award recipient, and its Family Law Service Award honoree. As in years past, the members of this Section were generous in nominating several worthy recipients, and I want to thank our members for the work put into the nominations. One of the benefits of this nominations process is learning how much the nominees contribute to the practice of law, and to their communities. It is inspiring.

The Family Law Service Award is designed to recognize and honor individuals or organizations who consistently give their time, talent, and energies to advance family, domestic relations or juvenile law in Virginia. The Board was so very pleased to name Cheshire I'Anson Eveleigh as this year's award winner. If you visit the Wolcott Rivers Gates website and click on Cheshire's biography, you can see the various professional and community organizations in which she participates, the articles she's written, the honors she's accumulated, and all the work she's done. I've been fortunate enough to work with her in leadership in the AAML Virginia Chapter, and in the Virginia Family Law Coalition, and know first-hand the time and effort she puts into these organizations. Her commitment to improving the practice of family law in the Commonwealth is unparalleled.

It was her work with the Family Law Coalition, in particular – meeting with the Coalition members, bridging gaps between different organizations, learning the byzantine legislative systems that govern rule-making in the Commonwealth, corralling Coalition members to testify before the General Assembly, testifying herself about pending legislation, and taking heat from legislators on behalf of family law practitioners (and vice versa) – that merited our enduring gratitude.

I'm also lucky enough to know Cheshire in her roles as friend and mother, and her devotion to her family and friends is remarkable. That she has managed to achieve so much professionally while raising two wonderful children with her husband Bob is a further source of inspiration. She does it all with unfailing grace and good humor, and the Board is proud to present the Service Award to her.

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Past recipients of the Betty A. Thompson Lifetime Achievement Award – Carl Witmeyer and Betty Sandler are the two most recent examples – were deemed by the Board to have made a substantial contribution to the practice and administration of family law in the Commonwealth. As with the Service Award, the Board considered many worthy nominees, and was pleased to present the award this year to Joseph A. Condo, of Offit Kurman. For as long as I have been a practicing lawyer, Joe Condo has exemplified the superlative practice of family law. Most of you know Joe as either an adversary, the former President of the Virginia State Bar, a familiar face in the Bar's Professionalism Course video, or in any number of other professional roles. His devotion to high ethical standards and the improvement of the practice is without equal.

He is also a decent man. More than 15 years ago, as a young associate, I worked a case against Joe, and I screwed something up. I'll spare my insurer the gory details, but it was a stupid rookie mistake, and it could have been expensive. I went to Joe hat in hand, and to his great credit, rather than serving up a "Sorry, Charlie, you should've thought about that earlier," he worked with me on it in the spirit of our clients' agreement. I never forgot that, and several attorneys on the other side of my cases have benefited from that seminal experience. I tell them all they have Joe Condo to thank for it.

That is but one of what I am sure are thousands of examples of Joe's professionalism, courtesy, and evident love of the practice of family law. I am pleased to add my personal congratulations to the congratulations of the Board and the practitioners of this Commonwealth in naming Joe Condo as the 2017 Betty A. Thompson Lifetime Achievement Award winner. ❖

UPCOMING FAMILY LAW EVENTS

April 20
VSB Family Law Section Seminar
(Richmond)

May 12 – 14
AAML Joint Spring Retreat
(Lansdowne Resort)

June 16
VSB Annual meeting and Joint Seminar w/ Criminal Law Section - "Access to Justice: Bonds & Bail Issues"
(Virginia Beach)

AAML Virginia Chapter Annual Meeting
(Virginia Beach)

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: **FL2016member**
They are case sensitive.

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

Editor's Note

Brian M. Hirsch

What fantastic articles we have for this issue of the Quarterly! Jennifer Langley's article is an excellent overview of bankruptcy for all of us faced with a debt-ridden divorce client. It is a complicated topic, which Jennifer explains in plain English. We also have a very technical and quite informative article from Mary Benzinger on the recent change to computing military pension benefits for ex-spouses. You practice in this area at your own risk if you fail to read it.

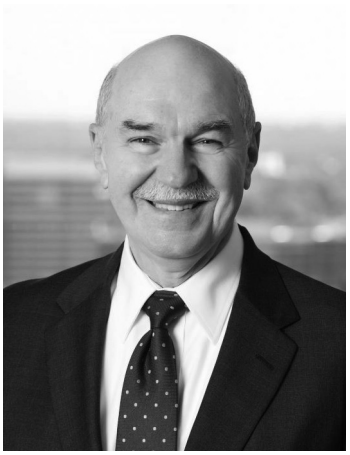
Jennifer Bradley's article questions the need for corroboration in a well-researched and practical manner. I started practice in the days of having to present corroborating evidence to a commissioner in chancery or in court ore tenus. So, the use of affidavits is fairly revolutionary. Mitch Broudy makes another valuable contribution to the Quarterly, this time regarding the tax dependency Exemption under 20-108.1(E), especially as it relates to the Affordable Care Act (which still appears alive despite much political clamor).

Articles for future issues are encouraged and welcome. 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

ANNOUNCEMENTS

The 2017 Betty A. Thompson Lifetime Achievement Award Winner is Joseph A. Condo



The Betty A. Thompson Lifetime Achievement Award was established by the Virginia State Bar Family Law Section to recognize and honor an individual who has made a substantial contribution to the practice and administration of family law in the Commonwealth of Virginia. The award will be given at the discretion of the VSB Family Law Section Board of Governors. The Betty A. Thompson Lifetime Achievement Award is presented at the Annual Family Law Seminar in April at The Jefferson Hotel in Richmond, Virginia. We are pleased to announce the 2017 winner is Joseph A. Condo of Offit Kurman in Tysons Corner.

The 2017 Family Law Service Award Winner is Cheshire Eveleigh of Wolcott Rivers Gates

The Family Law Service Award is given to an individual or organization who has consistently given freely of time, talent and energies to provide valuable services in advancing family, domestic relations or juvenile law in Virginia, whether such services are rendered to the Virginia legal community or directly to the citizens of Virginia. This award is given no more than one time per year. The recipient is determined by a majority vote of the Board of Governors of the Family Law Section from nominations made by the members of the Family Law Section. The Family Law Service Award is presented at the Annual Family Law Seminar in April at The Jefferson Hotel in Richmond, Virginia.

The Family Law Section, Board of Governors is proud to announce the 2017 Recipient is Cheshire Eveleigh of Wolcott Rivers Gates in Virginia Beach. Please join us in Richmond on April 20th at the Jefferson Hotel to see Colleen receive her award.

The New Definition of "Disposable Retired Pay" In the Division of Military Retirement for Military on Active Duty

By Mary M. Benzinger, Esquire[1]
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The 2017 National Defense Authorization Act (NDAA) amends 10 USC §1408 changing the calculation of disposable retired pay for division of retired pay for Servicemembers on active duty on the date of divorce. Defense Finance and Accounting Service (DFAS) now must calculate retired pay as if the Servicemember retired on the date of divorce. The amendment applies to any "*division of property as part of a final decree of divorce, dissolution, annulment, or legal separation involving a member of the Armed Forces to which section 1408 of title 10, United States Code, applies that becomes final after the date of the enactment of this Act*."[2]

As amended, 10 USC §1408(a)(4) now reads:

> (4) (A) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled *(as determined pursuant to subparagraph (B)* less amounts which—
>
> (i) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;
>
> (ii) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;
>
> (iii) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or
>
> (iv) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.
>
> *(B) For purposes of subparagraph (A) the total monthly retired pay to which a member is entitled shall be -*
>
> *(i) The amount of basic pay payable*[3] *to the member for the member's pay grade and years of service at the time of the court order, as increased by*
>
> *(ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member's retirement using the adjustment provisions under that section applicable to the member upon retirement.*

Calculation Before the Amendment: DFAS calculates "total monthly retired pay" (also known as gross retired pay) as .025 (retired pay multiplier)[4] x retired base pay (average "high-3" pay)[5] x total years of service.[6] From that gross pay DFAS then subtracts Survivor Benefit Plan (SBP) premiums, Veterans Administration disability offsets, etc. to reach "disposable retired pay."[7]

Disposable retired pay is then subjected to a formula (e.g. total years of service during marriage/ total years of service x 50%) to achieve the former spouse's share.[8]

For example, Lieutenant Colonel Smith (O-5) has 12 years of service during marriage and 18 years and 3 months of total service at date of separation

of January 10, 2016. He plans to retire at 30 years. Assume he retires as a Colonel (O-6) with a high-3 average pay of $14,500.00. Colonel Smith's gross monthly retired pay would be .025(retired pay multiplier) x 30 years x $14,500 (high-3) = $1,0875.00. The parties signed a PSA in August 2016 defining the former spouse's marital share as .50 x 12 years of service during marriage divided by total years of service. Former spouse's would share would be $1,0875.00 x .20 = $2,175.00

Acceptable Formulae and Requirements After the Amendment:

DFAS has issued guidance for acceptable formulae under the amendment.[9]

DFAS will recognize four possible formulae:[10]

1. Fixed award: "The former spouse is awarded $ _____ (dollar amount) of the member's disposable military retirement pay."

2. Percentage award: "The former spouse is awarded ____ percentage of the member's disposable military retirement pay."

3. Formula award: "The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying ____% times a fraction, the numerator of which is _____ months of marriage during the member's creditable military service, divided by the member's total number of months of creditable military service."

4. Active duty hypothetical calculated as of time of division, for members who entered AFTER 9/1/80: "The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member retired with a retired pay base (High-3) of _____ and with _____ years of creditable service on _____."

In addition to one of the above formulae, every retired pay division order must now provide DFAS with the following information: [11]

- The member's high-3 amount at the time of divorce (the actual dollar figure);[12]
- The member's years of creditable service at the time of divorce; or in the case of reservist, the member's creditable reserve points at the time of divorce.

Calculating the "High-3":

As stated, DFAS needs the "high-3," the average of the highest 36 months of base pay, to calculate gross retired pay. To calculate this yourself, you'll need the last three years of the Servicember's Leave and Earnings Statements (LES). If you can't obtain the LES's, you'll need the current and historic military pay charts,[13] the Servicemember's current years and months of service for pay, and the date the Servicemember attained the current rank.

To do it yourself, keep in mind length of service and dates of promotion change the pay. If LTC Smith's last date of promotion is April 1, 2015 and as of the date of divorce on May 15, 2017 he has 19 years and 7 months of service, his high-3 on the date of divorce is calculated as follows:

June 1, 2014 to December 31, 2014 = $7,280.70 x 7 = $50,964.90 (O-4 with over 16 years)
January 1, 2015 to March 30, 2015 = $7,353.60 x 2 =$22,060.80 (O-4 with over 16 years)
April 1, 2015 to September 30, 2105 = $8,053.80 x 6 = $48,322.80 (promoted to O-5 with over 16 years)
October 1, 2015 to December 31, 2015 = $8,281.20 x 3 = $24,843.60 (O-5 with over 18 years)
January 1, 2016 to December 1, 2016 = $8,388.90 x 12 = $100,666.80 (O-5 with over 18 years)
January 1, 2017 to May 15, 2017 = $8,565.00 x 5 mos. = $42,825.00 (O-5 with over 18 years)
Total pay for 36 months = $289,683.90
Average high-3 = $289,683.90/36 = $8,046.78/month

In our Lieutenant Colonel Smith example, the high-3 of an O-5 with 19 years, 7 months of service on the date of divorce of May 15, 2017 is $8,046.78. DFAS will calculate the gross retired pay as if he retired on the date of divorce as $8,046.78 x .025 (retired pay multiplier) x 19.5833 years of the creditable service = $3,939.56.[14] Then DFAS will apply the former spouse's marital share of 12/30 (.20) as set forth in the agreement or court order. The former spouse's share will now be $3,939.56 x .2 = $787.91 (plus COLAs) – a big difference from the $2,175.00 she would have gotten prior to this amendment. As you can see there is an issue for agreements drafted

under the belief that the pre-amendment calculation would apply but where the divorce is entered after December 23, 2016.

Under the amendment, the former spouse does not get the benefit of future promotions and years of service. Because the amendment forces the calculation of the retirement as of the date of divorce, going forward, practitioners should consider modifying the marital share formula from "years of service during marriage divided by total years of service at actual retirement" to "years of service during marriage divided by total years of service at date of divorce." Applying that concept to this example yields a former spouse share of $8,046.78 x .025 (retired pay multiplier) x 19.5833 years of the creditable service = $3,939.56 x .3064 (former spouse percentage 12/19.5833) = $1,207.08 (plus COLAs to date of actually retirement). ❖

Endnotes

1. This article is written in Ms. Benzinger's private capacity and does not represent the opinions or position of the U.S. Department of Defense or the U.S. Army.

2. 2017 NDAA Sec. 641, Pub Law 114-328. Enacted December 23, 2016.

(a) IN GENERAL.—Section 1408(a)(4) of title 10, United States Code, is amended—

(1) by redesignating subparagraphs (A), (B), (C), (D) as clauses (i), (ii), (iii), (iv), respectively;

(2) by inserting ''(A)'' after ''(4)'';

(3) in subparagraph (A), as designated by paragraph (2), by inserting ''(as determined pursuant to subparagraph (B)'' after ''member is entitled''; and

(4) by adding at the end the following new subparagraph: the following: ''(B) For purposes of subparagraph (A) the total monthly retired pay to which a member is entitled shall be -

''(i) The amount of basic pay payable to the member for the member's pay grade and years of service at the time of the court order, as increased by

''(ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member's retirement using the adjustment provisions under that section applicable to the member upon retirement."

(b) APPLICATION OF AMENDMENTS.—The amendments made by subsection (a) shall apply with respect to any division of property as part of a final decree of divorce, dissolution, annulment, or legal separation involving a member of the Armed Forces to which section 1408 of title 10, United States Code, applies that becomes final after the date of the enactment of this Act.

3. It appears DFAS interprets this is to also mean "high-3."

4. Financial Management Regulation, DoD 7000.14R, Vol. 7B, Ch. 1, Section 010103.

5. DFAS uses "high-3" – the average of the highest 36 months of base pay for Servicemembers entering service after September 8, 1980. See Financial Management Regulation, DoD 7000.14R, Vol. 7B, Ch. 1, Section 010102.A.2.

6. Financial Management Regulation, DoD 7000.14R, Vol. 7B, Ch. 1, Section 010102.A.2.

7. 10 USC 1408 (a)(4)

8. Financial Management Regulation, DoD 7000.14R, Vol. 7B, Ch. 1, Section 290211.

9. See https://www.dfas.mil/garnishment/usfspa/NDAA--17-Court-Order-Requirements.html (February 15, 2017)

10. See link to "Sample Order Language" for Reservists and Servicemembers who entered service before September 8, 1980. https://www.dfas.mil/garnishment/usfspa/NDAA--17-Court-Order-Requirements.html (February 15, 2017)

11. For Servicemembers entering service before September 8, 1980 see ID.

12. Yes! YOU must supply this number. DFAS will not calculate it for you.

13. https://www.dfas.mil/militarymembers/payentitlements/military-pay-charts.html (February 15, 2017).

14. DFAS will apply retiree cost of living increases (COLAs) on this amount to date of actual retirement.

VFLQ ASK THE EXPERT

Arguing Over Debt: A Family Law Practitioner's Guide to Preparing for an Unavoidable Bankruptcy

By Jennifer T. Langley, Esq.
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I. Introduction

Divorce is one of the leading causes of consumer bankruptcies. Once a divorcing couple makes the decision to maintain separate households, the increased living expenses, paired with old financial obligations can cause even the most financially shrewd couple to struggle to maintain their lifestyle. The reality of a client's financial future may not only be difficult for them to come to terms with, but may also require specialized legal knowledge to navigate. A knowledgeable family law practitioner can aid their client by not only being the voice of reason, but by also taking calculated steps to ensure that their client receives the best possible result; whether it is the client or the opposing spouse that requires bankruptcy relief.

The marriage of bankruptcy law and family law is usually harmonious; however, nuances in the Bankruptcy Code and Bankruptcy Rules may create confusion for all but a well-informed practitioner. Timing, careful wording, and control of the judicial record are often the essential elements required to protect both the future-debtor and the non-filing spouse.

II. Property of the Bankruptcy Estate—Everything You Own, Plus a Little More

One of the most unanticipated consequences of filing for a bankruptcy, before the finalization of a divorce, is the inclusion of any recovery under a property settlement agreement received after the filing of the bankruptcy petition, in the debtor's bankruptcy estate. Section 541 of the Bankruptcy Code defines property of the debtor's estate to be all legal or equitable interest of the debtor in property as of the commencement of the case wherever located and by whomever held.[1] When a debtor files a petition for relief under the Bankruptcy Code, a magical event occurs. Everything is frozen in time. Anything the debtor owns at that moment comprises his or her "estate" and is subject to the liquidation or reorganization requirements as set forth by the Bankruptcy Code. Any asset the debtor later acquires is not within that magical window and not subject to liquidation or reorganization. Unfortunately, as expected in a court of equity, there are exceptions.

Under section 541(a)(5)(B) of the Bankruptcy Code, when a debtor files for a Chapter 7 bankruptcy, any interest in property that would have been deemed property of the estate at the time of filing, may subsequently become property of the estate if the debtor acquires it *within 180 days after the petition date* as a result of a property settlement agreement or a divorce decree. Even if the debtor does not acquire the asset itself during the 180-day period, as long as the debtor obtains the right to the asset during the period, it may become property of the estate.

In a Chapter 13 case, assets acquired during the length of the case, typically 36 to 60 months, may also become property of the estate.[2]

One of the largest avoidable pitfalls divorcing debtors face is the transfer of real estate that is held jointly by husband and wife as tenants-by-the-entirety. If a divorce decree terminates the marriage, it also operates to change the nature of the ownership of the real estate from tenancy-by-the-entirety, to tenancy-in-common. If the decree awards the entire property interest to the debtor, the real estate becomes property of the bankruptcy estate and can lose the protection afforded to it by the tenancy-by-the-entirety status.

Another common avoidable pitfall occurs when a debtor receives a distribution from a non-filing spouse's retirement plan under a separation agreement or divorce decree. If the distribution is not di-

rectly rolled-over into a protected retirement account, it may be subject to liquidation.

This nuisance makes the timing of a bankruptcy exceptionally important if recovery under a property settlement agreement or a divorce decree is contemplated by the debtor in the future.

A. When to File—Success is all About Timing

If a divorcing client expects to take on responsibility for any marital or joint debts as a part of a divorce settlement, it could prove beneficial for them to file for bankruptcy relief *before* a determination is made as to the nature of the debt. Filing for a bankruptcy before the conclusion of a divorce may prevent issues of non-dischargeability from occurring, and, as discussed above, may be advantageous if a distribution of assets is contemplated in the distant future. Furthermore, before the dissolution of the marriage is final, divorcing spouses are still eligible to file a jointly administered bankruptcy case, which may simplify the issues surrounding the apportionment of debt between the spouses.

Conversely, in an acrimonious divorce, where marital obligations are a hotly debated issue, it may be advantageous for a spouse contemplating a bankruptcy to reach a final disposition in the divorce without making his or her intentions known. While the classification of marital obligations at a state court level may be economical, depending on the facts of the case, it may actually be more economically beneficial for a future-debtor to wait. In the Bankruptcy court, a debtor enjoys the benefit of a presumption of dischargeability that may not always be present at the state court level.[3]

III. Domestic Support Obligations vs. Martial Obligations—A Rose By Any Other Name May Not Smell as Sweet

It is relatively common knowledge that child and spousal support arrears are non-dischargeable in a bankruptcy. However, there is a distinction between a domestic support obligation that is "in the nature of alimony, maintenance, or support" and a marital obligation that is "incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record." The enactment of BAPCPA[4] in 2005 limited a debtor's ability to discharge marital obligations. Currently, a marital obligation is dischargeable only in a Chapter 13 bankruptcy, while a true domestic support obligation is non-dischargeable in both a Chapter 13 and a Chapter 7 bankruptcy.

A. Mastering the Fundamentals—Sections 523(a)(15) and 523(a)(5)

Section 523(a)(5) of the Bankruptcy Code excludes from discharge any debt that is classified as a "domestic support obligation," under section 101(14A) of the Bankruptcy Code. Section 101 defines the term "domestic support obligation" to be:

> (A) a debt owed to or recoverable by
>
> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
>
> (ii) a governmental unit;
>
> (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is so designated;
>
> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—
>
> (i) a separation agreement, divorce decree, or property settlement agreement;
>
> (ii) an order of a court of record; or
>
> (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
>
> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

Congress enacted section 523(a)(15) in 1994 to protect spouses who had agreed to reduced alimony or other domestic support payments in exchange for being held harmless on joint debts or for accepting a larger property settlements.[5]

Section 523 states:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-

. . .
(5) for a domestic support obligation;
. . .
(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit.[6]

In short, "the characterization of marital debt is critical to the determination of discharge: 'If the subject debt is a § 523(a)(15) debt, the debt is dischargeable in the [debtor's] Chapter 13 bankruptcy proceeding under § 1328(a). If the subject debt is a § 523(a)(5) debt, the debt is nondischargeable in the [debtor's] Chapter 13 [or Chapter 7] bankruptcy proceeding pursuant to §§ 523(a)(5) and 1328(a).'"[7] Therefore, "debts arising from, among other things, equitable distribution orders and property settlement agreements upon the dissolution of a marriage may be dischargeable if such debts do not constitute domestic support obligations."[8]

Congress's enactment of section 523(a)(15) demonstrated its recognition that the protection of dependent spouses and children under state law may no longer be accomplished through support payments alone. Unfortunately, state courts do not always draw a discernable distinction between true domestic support obligations and marital obligations.[9] To further the complications, "the analysis for determining whether an obligation is in the nature of alimony, maintenance, or support is fact-specific and dependent on federal bankruptcy law, not state law."[10] As a result, regardless of the careful planning of the parties at the state court level, a debt or obligation could still be deemed non-dischargeable by the bankruptcy court.

In the Fourth Circuit, bankruptcy courts look first to the mutual intent of the parties to create a support obligation at the time of the divorce or separation.[11] Many times the bankruptcy court will go beyond the four corners of the document to glean this intent. As a result, "[t]he labels attached to certain provisions in a separation agreement are not dispositive of their 'nature,' but the labels are persuasive evidence of the parties' intent.[12] In the Fourth Circuit, courts have followed an "unofficial factors test" for determining the mutual intent of the parties:

(1) the actual substance and language of the agreement,
(2) the financial situation of the parties at the time of the agreement,
(3) the function served by the obligation at the time of the agreement (i.e. daily necessities), and
(4) whether there is any evidence of overbearing at the time of the agreement that should cause the court to question the intent of a spouse.[13]

Nevertheless, these factors are considered by the courts to be nonexclusive. The court will consider the totality of the circumstances and will review all relevant evidence.[14]

IV. The Tricky Task of Preparing for a Bankruptcy—No One Can Predict the Spanish Inquisition

As discussed above, the distinction between the two types of debt is critical in determining the dischargeability of a divorce-related debt. Careful crafting of provisions in the property settlement agreement and diligent management of the judicial record are imperative when protecting a client from the opposing spouse's potential bankruptcy. Clarifying the parties' mutual intention as to the disposition of debts and marital obligations in the separation agreement, or even obtaining a judicial determination from a state court judge as to the nature of the debts and marital obligations, may be necessary to protect a client's interests. However, even an experienced practitioner may cause subsequent unanticipated consequences. Constructing careful provisions in a settlement agreement, with the intention of protecting a client from the opposing spouse's bankruptcy, may be prudent in the present; however, if fortunes change and it is the client that is forced to seek bankruptcy relief in the future, they may suffer under the same strict provisions that were once intended to protect them.

A. The Hold Harmless Provision—A Double Edged Sword

Many family law practitioners look to a "hold harmless provision" as a standard provision in their marital agreements to clarify the parties' mutual intentions. Unfortunately, courts have come to varying results regarding the enforceability of the hold harmless provision. As outlined above, a Bankruptcy judge may look beyond the four corners of a separation agreement for the parties' mutual intention despite a carefully drafted indemnity clause.

Further complicating the matter, the typical indemnification provision in a marital agreement requires each spouse to hold the other harmless from the debts assigned to that spouse. The indemnity in itself becomes a contingent debt because it does not require the debtor to pay the debt directly, but instead requires that the debtor make the former spouse whole if the former spouse is pursued by the creditor. This obligation tends to be viewed as a debt in connection with a marital settlement under section 523(a)(15). Therefore, while a debtor can discharge their liability to third-party creditors on debts assigned per a divorce, their obligation to protect their former spouse from the creditor survives a Chapter 7 discharge.

V. The Bottom Line

Unfortunately, a complete resolution of all the mutual debt and marital obligations at the time of the divorce is the only sure way of protecting a client from future financial complications. If a client has been promised payment from the sale proceeds of an asset, or has required the opposing spouse to refinance a debt, it may be pertinent to wait until the sale or refinance is completed to finalize the divorce.

Further, debtors who have outstanding marital obligations as a result of a divorce may benefit from the more powerful discharge of a Chapter 13 bankruptcy.

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Jennifer T. Langley is an attorney with Wolcott Rivers Gate in Virginia Beach. She is in the firm's Business Bankruptcy and Restructuring practice group. ❖

Endnotes

1. 11 U.S.C. § 541(a)(1) (2016).

2. *In re Walley*, 525 B.R. 320, 323 (Bankr. E.D. Va. 2015); *citing Carroll v. Logan*, 735 F.3d 147 (4th Cir. 2013)("The Fourth Circuit . . . addressed the interplay of §§ 541 and 1306 with respect to property acquired postpetition . . . the issue was whether the definition of 'property of the estate' set forth in § 1306 overrides the 180-day temporal restriction of § 541(a)(5) for certain property acquired postpetition. In determining that it does, the Fourth Circuit concluded that property acquired by a chapter 13 debtor postpetition becomes property of the estate pursuant to § 1306, noting that '[i]n essence, Section 1306 is a straightforward formula for calculating Chapter 13 estates: A Chapter 13 Bankruptcy Estate = Property described in Section 541 + The Kind of Property . . . described in section 541 and acquired before the Chapter 13 case is closed, dismissed, or converted.'").

3. *Lawrence v. Combs (In re Combs)*, 543 B.R. 780, 793 (Bankr. E.D. Va. 2016)("The non-debtor spouse has the burden to demonstrate, by a preponderance of the evidence, that her claims are in the nature of alimony, maintenance, or support.")(*citing Grogan v. Garner*, 498 U.S. 279, 287, (1991)); *see also, Tilley v. Jessee*, 789 F.2d 1074, 1077 (4th Cir. 1986); *Beaton v. Zerbe (In re Zerbe)*, 161 B.R. 939, 940 (E.D. Va. 1994).

4. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) (Pub.L. 109–8, 119 Stat. 23, enacted April 20, 2005), is a legislative act that made several significant changes to the United States Bankruptcy Code. Most provisions of the Act apply to cases filed on or after October 17, 2005. As a general caution, the author encourages practitioners to rely cautiously on bankruptcy cases decided before that date.

5. Initially, 11 U.S.C. § 523(a)(15) included two subsections that placed the burden of proof on the debtor by making all debts arising from a divorce decree or separation agreement nondischargeable unless a debtor successfully demonstrated an inability to pay the debt or established that a discharge of that debt would benefit the debtor more than it would harm the non-debtor. The original intent for the enactment of the (a)(15) exception to discharge was to protect the non-debtor spouses who, for example, might have agreed to take lower child support payments in exchange for the assumption of marital debt by the debtor. See, H.R. Rep. No. 835, 103rd Cong., 2nd Sess. 54, reprinted in 1994 U.S.C.C.A. 3363.

6. 11 U.S.C. § 523(a)(15) (2016).

7. *In re Combs*, 543 B.R. at 793 (*citing* 11 U.S.C. § 1328(a) (2015)); *see also*, 11 U.S.C. § 523(a)(5) (2015).

8. *In re Combs*, 543 B.R. at 793 (*citing In re Pagels*, 2011 Bankr. LEXIS 560, 2011 WL 577337, at *6 (Bankr. E.D. Va. Feb. 9, 2011)); *see also, Brunson v. Austin (In re Austin)*, 271 B.R. 97 (Bankr. E.D. Va. 2001).

9. 4 Collier on Bankruptcy ¶ 523.23 at p. 523-127 (16th ed. rev. 2013) (internal quotations omitted).

10. *In re Combs*, 543 B.R. at 793-94(*citing In re Johnson*, 397 B.R. 289, 296 (Bankr. M.D.N.C. 2008)).

11. *Id., see also Tilley v. Jessee*, 789 F.2d 1074, 1078 (4th Cir. 1986) (stating that intent is the threshold that must be crossed before any other concerns become relevant); *Yeates v. Yeates (In re Yeates)*, 807 F.2d 874, 878 (10th Cir. 1986); *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103, 1109-10 (6th Cir. 1983) (showing that the initial inquiry is to determine whether there was intent to create support).

12. *In re Combs*, 543 B.R. at 793-94 (*citing Tilley*, 789 F.2d at 1077-78.).

13. *Id.* (*citing In re Johnson*, 397 B.R. 289, 297 (Bankr. M.D.N.C. 2008)); *see also, In re Cribb*, 34 B.R. 862, 864 (Bankr. D.S.C. 1983).

14. *In re Johnson*, 397 B.R. at 297.

The Corroboration Conundrum: Why Does Virginia Require Corroboration of Divorce Grounds?

By Jennifer Bradley, Esquire
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The vast majority of states do not require corroboration of divorce grounds under any circumstances, it being sufficient for one or both parties to testify in open court or submit affidavits in support of their grounds for divorce, whether based on fault or no-fault grounds. Only eight states[1] and the District of Columbia require some form of corroboration, but Virginia is the only state where corroboration is required without exception.

I. What is Corroboration?

Section 20-99 of the 1950 Code of Virginia, as amended, provides: "(1) No divorce, annulment, or affirmation of a marriage shall be granted on the uncorroborated testimony of the parties or either of them. (2) Whether the defendant answers or not, the cause shall be heard independently of the admissions of either party in the pleadings or otherwise." Corroboration is defined as "confirmation or support by additional evidence or authority."[2]

On its face, § 20-99 does not require witness testimony.[3] For example, in the 2015 case of *King v. King*, the Court of Appeals upheld the husband's use of a protective order, criminal conviction, and sentencing orders showing that the wife had been found guilty of malicious wounding and use of a firearm in the commission of a felony to corroborate his alleged grounds of cruelty (*i.e.*, that she shot him while he was sleeping).[4] However, there do not appear to be any other appellate cases where a party relied solely on non-witness corroboration to support their alleged *fault* grounds for divorce.[5]

Similarly, there is only one appellate case addressing a party's sole reliance on non-witness testimony for corroboration of *no-fault* grounds for divorce. In *Belle v. Belle*, the wife argued that the parties' separate tax filings and her pay stubs and medical bills showing the parties' separate addresses were sufficient corroboration of her no-fault grounds for divorce.[6] The trial court granted the divorce, but the Court of Appeals reversed, finding that there was insufficient corroboration that the parties had lived without cohabitation *continuously* for one year, and no corroboration that it was one party's *intent for the separation to be permanent* at the time of separation.[7] As a result, the trial court's equitable distribution, spousal support, and attorney's fee awards were vacated, and the parties were forced to start over from the beginning.[8]

Thus, notwithstanding that Va. Code § 20-99 does not expressly require corroboration to be via witness testimony, in practice it is a necessity, at least for no-fault grounds. There are no conceivable ways to successfully corroborate a party's intent for a separation to be permanent with any form of evidence other than witness testimony. For instance, a journal entry would not satisfy the § 20-99(2) requirement that "the cause shall be heard independently of the admissions of either party in the pleadings or otherwise." Even if one could conceive of such potential non-witness corroboration of intent, would you be willing to advise your client to test it at trial and risk the outcome in *Belle*? Probably not.

II. Requiring Corroboration of Divorce Grounds is Irrational.

The corroboration requirement was incorporated into the Virginia Code in 1849, when jurisdiction for divorce was first transferred from the legislature to the courts.[9] In the 1871 case of *Bailey v. Bailey*, the Supreme Court of Virginia explained:

> All that was intended by the statute was… to prevent parties who were weary of the bond of matrimony, and impatient of its restraints and obligations, from obtaining the aid of the court through their own collusion and default. It was a rule for the protection of public morals and the sanctity of the marriage relations.[10]

And in the 1952 case of *Graves v. Graves*, the

Court expounded: "The main object of the provision of the statute requiring corroboration is to prevent collusion. Where it is apparent that there is no collusion, the corroboration needs to be only slight."[11] In the context of divorce, collusion is "an agreement between a husband and wife to commit or to appear to commit an act that is grounds for divorce."[12]

For 111 years following the institution of the statutory corroboration requirement, Virginia residents could only obtain a divorce on fault grounds; but in 1960, the Virginia General Assembly enacted Va. Code § 20-91(9), allowing spouses to divorce after a period of separation without cohabitation.[13] This "no-fault" ground for divorce inherently permits spouses to "collude" in dissolving their marriage by agreeing to separate; therefore, the concern about collusion has been rendered immaterial.

However, Va. Code § 20-99 has never been amended to reflect this change in public policy – so courts abiding by the rule in *Graves* (which was cited just this year in the *Belle* case[14]) must require *more rigorous* corroboration in no-fault divorces, because those are the cases where collusion is most likely to occur.

In other words, the public policy rationale behind the corroboration requirement has become illogical. On the one hand, the common law prohibits collusion; but on the other hand, collusion is now endorsed in the form of no-fault divorce.

Virginia residents have no choice but to drag their reluctant family members, friends, and neighbors into the often embarrassing mess that is the dissolution of their marriage. The burden of corroboration is just as much on the innocent bystanders of the marriage—witnesses are being asked to take time off from work to attend *ore tenus* hearings or appear before a notary public to sign an affidavit with language they don't fully understand and sworn statements they often feel uncomfortable making. They worry about appearing biased toward one party and damaging their relationship with the other; they're nervous about testifying in Court; and they're afraid that swearing under oath to statements that they don't really know are true may result in a perjury charge or a warrant for their arrest.

Then, there are the parties who don't have any close friends or family members, or who have never had guests in their homes – how are they to find acceptable witnesses? Maybe they have adult children, but they understandably don't want to get them involved. We've all struggled with finding ways to get these clients divorced.

Further, corroborating witnesses in no-fault divorces are asked to provide "evidence" that would often be inadmissible in any other case. When submitting corroborating testimony via affidavit, the witness must verify 1) that the wife is not known to be pregnant from the marriage, 2) that the party is a "domiciliary"[15] of the Commonwealth, 3) that the parties have not cohabited since the date of separation, and 4) that it was the intention of at least one of the parties that the separation be permanent from the date of separation all the way through the date of the witness's testimony.[16] All of these statements would normally be excluded by reason of speculation and/or the witness' lack of personal knowledge (unless the witness lived with one of the parties for the duration of their separation and could personally attest that they had not cohabited during that time).

III. Corroboration in Other States.

Of the eight states that require some form of corroboration of divorce grounds, Virginia stands alone in requiring corroboration without exception. For example, Maryland recently amended its statute requiring corroboration to provide an exception for the ground of "voluntary separation."[17] While the exception is admittedly narrow, it does recognize a separation agreement as sufficient corroboration if the agreement states that the spouses voluntarily agreed to separate and is executed prior to either filing for divorce. Proponents of the new legislation argued that the rule requiring corroborating witnesses is archaic and a needless inconvenience, and that in practice, "it is a charade and everybody in court knows it."[18] There's no question that the same reasoning applies in Virginia.

Among the other states requiring corroboration of divorce grounds in limited circumstances, there is no consistent policy or rationale behind the statutory requirements. For instance, in Tennessee and West Virginia, no corroboration is required where the ground for divorce is "irreconcilable differences."[19] In Arkansas, corroboration of the ground for divorce is not necessary where the suit is uncontested and there are *fault* grounds, and corroboration can be waived by the other party in contested suits where there are fault grounds. However, in no-fault cases, there must be corroboration of the parties' separation and continuity of separation without cohabitation.[20]

In South Carolina, there is no statute addressing

corroboration of divorce grounds, but case law has established a requirement. "There is no definite rule as to the degree of corroboration required, but each case must be decided according to its own facts and circumstances… Since the main reason for the rule is to prevent collusion between the parties, the rule is not generally deemed inflexible; and may be relaxed when it is evident that collusion does not exist."[21] Similar to Arkansas, corroboration in South Carolina has been dispensed with where a party admits the alleged fault grounds.[22]

In Ohio, corroboration of the grounds for divorce is required, but the other spouse may provide the corroboration.[23] In Washington, D.C., a corroborating witness is only required if the defendant is in default, having failed to file an answer to the complaint.[24]

In Rhode Island, the court has the discretion to dispose of the corroboration requirement "whenever the act or acts giving rise to the cause for divorce are of a nature that the complaining party could not ordinarily produce corroborating testimony."[25] Arguably, a party would not ordinarily be able to produce corroborating testimony of the fact that they have lived separately from their spouse continuously for the required three years (for a no-fault divorce in Arkansas), but the corroboration exception could also apply to the state's fault ground of impotency.[26]

When examining what constitutes acceptable "corroboration," there is likewise no consistency or identifiable common policy. In Ohio, the opposing party's testimony qualifies as corroboration;[27] in South Carolina, party admissions and documentary evidence can both satisfy the corroboration requirement.[28] In Arkansas, corroboration must be provided by a third party witness.[29] In West Virginia and Maryland, corroboration generally requires a third party witness, but the statutes don't strictly require it—much like in Virginia.[30]

IV. Conclusion.

Now that all states allow no-fault divorce,[31] the concern about collusion has no rational basis as part of family law policy. No-fault divorce by definition *sanctions* collusion – spouses can agree to live separately for the statutory period in order to obtain a divorce. Many states have recognized this contradiction and repealed their statutes defining collusion as a defense to divorce.[32]

Those in opposition to eliminating the requirement for corroboration will say that we shouldn't make it easier to obtain a divorce – that Virginia public policy favors marriage and we need to retain appropriate barriers to dissolution. But requiring estranged spouses to wait the statutorily required six to twelve months before they can be granted a divorce in almost all cases is itself a barrier, particularly in comparison to the "irreconcilable differences" grounds available in many other states.[33]

If we accept the premise that collusion is no longer a legitimate public policy concern, and hasn't been since the institution of no-fault divorce in 1960, then the requirement of third party corroboration is nothing more than an arbitrary inconvenience to litigants, and to their friends and family members.

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Endnotes

1. Arkansas, Maryland, Ohio, Rhode Island, South Carolina, Tennessee, Virginia, and West Virginia.

2. *Black's Law Dictionary*, 397 (9th ed. 2009).

3. *See also Forbes v. Forbes*, 182 Va. 636, 641 (1944) ("[corroboration] need not rest in the testimony of witnesses but may be furnished by surrounding circumstances adequately established").

4. Record No. 2066-14-4 (Va. App., Nov. 24, 2015).

5. *See, e.g., Venable v. Venable*, 2 Va. App. 178 (1986) (the wife's torn pants, in conjunction with the testimony of wife's mother regarding husband's violent temper, corroborated the husband's cruelty); *Ibrayeva v. Kublan*, Record No. 1120-12-4 (Va. App., Dec. 11, 2012) (photographs of the husband's injuries corroborated his allegation of the wife's cruelty when combined with testimony from husband's mother); *Dodge v. Dodge*, 2 Va. App. 239 (1986) (the husband's letter admitting to adultery and the testimony of his former coworker provided the requisite corroboration); *Collier v. Collier,* 2 Va. App. 125, 128 (1986) (the husband's note to his wife was considered corroboration of his desertion, together with the testimony of the wife's sister who "lived nearby and testified about [his] leaving the marital home").

6. Record No. 0540-15-2 (Va. App., Jan. 19, 2016).

7. *Id*. at 6.

8. *Id*.

9. *Bailey v. Bailey*, 21 Gratt. 43, 49 (1871).

10. 21 Gratt. at 50.

11. 193 Va. at 661-62 (1952).

12. *Black's Law Dictionary*, 300 (9th ed. 2009).

13. *See Todd v. Todd*, 202 Va. 133,141 (1960) ("Sec. 20-91, Code

1950, was amended by Acts 1960, ch. 108, p. 121, and now when spouses live separate and apart for three years 'without any cohabitation and without interruption,' that constitutes grounds for divorce").

14. *Supra* note 5.

15. A domiciliary has established a permanent abode in the Commonwealth and has the intent to remain here indefinitely. *See Hiles v. Hiles*, 164 Va. 131 (1935).

16. Va. Code § 20-106(B)(8).

17. *See* Md. Code, Fam. Law, § 8–104 (effective October 1, 2016).

18. *See Did they spend the night together? Bill would end need for divorce court witness*, The Baltimore Sun, February 17, 2016.

19. *See* W. Va. Code § 48-5-402 ("No judgment order shall be granted on the uncorroborated testimony of the parties or either of them, except for a proceeding in which the grounds for divorce are irreconcilable differences"); *and* Tenn. Code § 36-4-103 ("A bill of complaint for divorce…which includes the ground of irreconcilable differences, may be taken as confessed and a final decree entered thereon…without corroborative proof or testimony").

20. *See* Ark. Code § 9-12-306 ("In uncontested divorce suits, corroboration of the plaintiff's grounds for divorce shall not be necessary or required. In contested suits, corroboration of the injured party's grounds may be expressly waived in writing by the other spouse. This section…does not apply to proof of separation and continuity of separation without cohabitation, which must be corroborated. In uncontested cases…proof of separation and continuity of separation without cohabitation may be corroborated by either oral testimony or verified affidavit of persons other than the parties.")

21. *Brown v. Brown*, 56 S.E.2d 330, 335 (1949).

22. *See Harvley v. Harvley*, 310 S.E.2d 161 (S.C. App., 1983) (holding that "there is no need to corroborate the uncontradicted admission of [the husband] against his own interests" where he admitted the adultery on multiple occasions); and *McLaurin v. McLaurin*, 363 S.E.2d 110 (S.C. App., 1987) (holding that the husband's admission to adultery was sufficient corroboration where he contested the suit, which showed there was no collusion).

23. *See* Ohio Rules of Civil Procedure 75(M) ("Judgment for divorce, annulment, or legal separation shall not be granted upon the testimony or admission of a party not supported by other credible evidence…The parties, notwithstanding their marital relations, shall be competent to testify in the proceeding to the same extent as other witnesses"); and *Patel v. Patel*, 11 N.E.3d 800, 806 (Ohio App., 2014) (holding that the corroboration requirement imposed by the civil rule may be satisfied by the testimony of a defendant spouse).

24. *See* D.C. Code § 16-919 ("A decree for a divorce, or a decree annulling a marriage, may not be rendered on default, without proof; and an admission contained in the answer of the defendant may not be taken as proof of the facts charged as the ground of the application, but shall be proved by other evidence in all cases").

25. *See* R.I. Statutes § 15-5-5 ("Whenever the act or acts giving rise to the cause for divorce are of a nature that the complaining party could not ordinarily produce corroborating testimony, the court may, in its discretion, if it is satisfied of the existence of the cause in question, the proof in other respects being satisfactory, grant the divorce on the testimony of the complaining party alone.")

26. *See* R.I. Statutes § 15-5-2.

27. *See supra* note 23.

28. *See supra* note 22.

29. *See supra* note 20.

30. *See supra* note 19 and Md. Code, Fam. Law § 7-101(b) ("A court may not enter a decree of divorce on the uncorroborated testimony of the party who is seeking the divorce").

31. New York was the final state to recognize no-fault divorce in 2010.

32. *See, e.g.,* N.D. Code § 14-05-12 (repealed, 2001); Colo. Rev. Stat. § 14-10-107(5); Fla. Stat. § 61.044; Mo. Rev. Stat. § 452.310.

33. *See, e.g.*, Cal. Fam. Code § 2310; 750 Ill. Comp. Stat. 5/306; Miss. Code § 93-5-2; N. H. Rev. Stat. § 458:7-a; N.D. Cent. Code § 14-05-03; S.D. Codified Laws § 25-4-2; Tenn. Code § 36-4-101; W.Va. Code § 48-5-201.

Factors to Consider Under VA. Code § 20-108.1 (E): Dependency Exemption

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When determining whether to allocate the dependency tax exemption to the noncustodial parent, consider the exemption's relationship with other tax benefits and with the Affordable Care Act ("ACA"). Ignoring these relationships might result in significant tax penalties and windfalls. While allocation would have no impact on the custodial parent's ability to file as Head of Household, or claim both the Earned Income Tax Credit ("EITC") and the Child and Dependent Care Credit, it would prohibit the custodial parent's claiming the Child Tax Credit.[1]

For 2016, the dependent exemption is $4,050 per child[2] and the Child Tax Credit is as high as $1,000 per child.[3] The child must be under 17 years old at the end of the calendar year for the taxpayer to qualify for the credit. For every $1,000 of a single parent's income over $75,000, $50 is deducted from the $1,000 credit. For a married parent filing separately, the reduction-income threshold is $55,000 and for married parents filing jointly the reduction-income threshold is $110,000. This credit is only refundable to the low-income wage earner.[4]

Having forgone the exemption and the tax credit, the custodial parent retains the authority to file as Head of Household and claim both the EITC and the Child and Dependent Care Credit. The EITC and child care credit assist taxpayers with low-to-moderate incomes while the Head of Household filing status is intended to assist single and divorced parents.

The benefits for filing as Head of Household are two-fold. First, the custodial parent receives a more favorable tax rate than a taxpayer filing "Single" would receive, and second, the standard deduction is considerably higher. For 2016, the Head of Household's standard deduction is $9,300 as opposed to $6,300 for filing Single.[5] Instead of a 15% tax bracket for the taxpayer, making $50,000 per year and filing Head of Household, the tax bracket would be 25% for filing Single.[6]

The EITC is a refundable tax credit for low-to-moderate income working individuals and couples. The amount of the credit depends on the recipient's income and number of children (see below for a snapshot.)

2016 Snapshot: EITC for the Custodial Parent filing Head of Household or "Single"[7]

Earned Income Amount	Credit Self	Credit One child	Credit Two Children	Credit 3 or More Children
$5000 - 5050	$384	$1709	$2010	$2261
$10,000 - 10,050	$371	$3,373	$4,010	$4,511
$20,000 - 20,050	0	$3,080	$5,186	$5,882
$30,000 - 30,050	0	$1,482	$3,080	$3,776
$40,000 - 40,050	0	0	$974	$1,670
$50,000 - 50,050	0	0	0	0

The maximum EITC for a "Single" custodial parent is given when the parent's annual income is between $13,900 and $18,200; the tax credit for one child is $3,733, for two children it is $5,572 and for three children or more it is $6,269.[8] Virginia offers its own version of the EITC, known as the Virginia Credit for Low-Income Individuals which provides a $300 nonrefundable state tax credit per person and dependent exemptions claimed on the Virginia Tax Return if income eligibility is met.[9]

With a similar purpose as the EITC, the Child and Dependent Day Care Credit assists taxpayers whose annual income is $43,000 or less. For 2016, a custodial parent who makes less than $15,000 per year is entitled to a 35% credit applied to a $3,000 maximum of annual day care cost paid for one child ($1,050 nonrefundable tax

credit) and to a $6,000 maximum of annual day care cost paid for two or more children ($2,100 nonrefundable tax credit). The credit is reduced by 1% for every additional $2,000 of income the custodial parent makes above $15,000.[10] Additionally, Virginia has its own substantial day care tax credit.[11] These day care credits may necessitate some financial relief to the noncustodial parent who pays a significant portion of the day care cost through child support but who is not entitled to receive any of the tax credit.

The dependency tax exemption and the ACA converge at two crossroads. First, the parent claiming the child dependency exemption is subject to a tax penalty, known as the "individual shared responsibility" payment if the child connected to the exemption is not provided the minimum essential health coverage. The penalty is significant.[12] The ACA provides some exemptions to this rule. The custodial parent who claims the child dependency exemption is assessed the individual shared responsibility penalty when the noncustodial parent fails to provide the court ordered health insurance. Second, only the parent claiming the child dependent tax exemption is authorized to receive the ACA's Premium Tax Credit, which is a monthly subsidy to the parent who purchases the child's health insurance through an exchange. Without the child dependent exemption, the tax payer has to refund the IRS the Premium Tax Credit subsidy.[13]

In conclusion, as long as the ACA is in existence, the courts and parties should consider awarding the dependency exemption to the parent ordered to provide the child(ren)'s health insurance. Additionally, when the custodial parent has low-to-moderate income and there is a significant work-related daycare cost that significantly increases the noncustodial parent's child support obligation, the court should also consider awarding the dependency exemption to the noncustodial parent. Consequently, the custodial parent would claim as Head of Household, the EITC and the Dependent Day Care Credit, while the noncustodial parent would claim the dependency exemption and the child tax credit. ❖

Endnotes

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12. Dept. of the Treasury, IRS. Affordable Care Act: What You and Your Family Need to Know: 2015: Publication 5187, 5. Retrieved November 11, 2016, from https://www.irs.gov/pub/irs-pdf/p5187.pdf.

13. *Id*. at 12.

VFLQ CASES OF THE QUARTER

Equitable Distribution – Waste

Name: *Wiley v. Wiley,* 17 Vap UNP 0844164 (2017)

Facts: The parties were married for 22 years when the husband left the wife for another woman. At the date of separation, the parties' two main accounts had over $312,000, but only had a total of about $46,000 at the time of trial. The parties' agreed that the husband could pay the mortgage, spousal support, private school tuition for the parties' son, and other support expenses from the accounts. However, the husband paid other expenses from these accounts, such as travel with the husband's girlfriend and her mother to foreign countries, couple's counseling between the husband and his girlfriend, and "spare-no-expenses" furnishing of the husband's and girlfriend's apartment. The husband also made a $21,000 transfer from this account to his separate account. The wife filed a motion for alternate valuation since the husband used marital funds for expenses incurred in the "furtherance of his adulterous affair." The husband argued that his expenditures were proper under *Wright v. Wright*. The trial court granted the wife's motion for alternate valuation and made a generous equitable distribution award to the wife, at the expense of the husband. The husband appealed.

Issue: Whether the trial court abused its discretion in granting the wife's motion for alternate valuation in finding the husband committed waste with the two marital accounts.

Ruling: The Court of Appeals affirmed the trial court.

Rationale: There are only two categories of post-separation expenditures of marital assets: (1) expenditures for proper purposes and (2) waste. In *Wright v. Wright*, the pivotal case on the issue of marital waste, the wife argued that the husband diminished the marital accounts by spending marital money on proper expenditures such as mortgage and spousal support payments instead of using his separate funds. In the present case, the wife offered evidence that the husband used marital funds to pay for his girlfriend, her mother and other amounts related to the affair. While some of the funds were traced for a proper purpose, not all of the funds were used for such purpose. Therefore, the trial court did not abuse its discretion in considering whether any of the husband's expenditure of marital funds unfairly diminished marital assets.

Custody – Delegation of Power to Therapist

Name: *Bonhotel v. Watts,* 16 Vap UNP 0040163 (2016)

Facts: The parties had a daughter in 2005. A 2009 order granted the mother primary custody, but did not address parenting time. In 2012, the father petitioned the J&DR court to award him primary custody. The J&DR court ordered that the child was to live with the mother during the school year, with the father having parenting time every other weekend and every Wednesday. The father appealed to the circuit court. The circuit court made the same custody award as the J&DR. In its ruling, the court ordered that "The child shall continue in counseling with [the counselor] until he releases her or until he recommends some other course. The parents shall fully cooperate with the child's counselor *and shall follow his or her recommendations*." (emphasis added) The father appealed.

Issue: Whether the trial court erred in requiring the parties to follow the recommendations of the child's counselor as opposed to merely cooperating with the counselor.

Ruling: The Court of Appeals reversed the trial court's decision requiring the parents to follow the recommendations of the counselor.

Rationale: The relationship between a parent and child is constitutionally protected under the Due Process Clause of the Fourteenth Amendment. The

United States Supreme Court has characterized a parent's right to raise his or her child as "perhaps the oldest of the fundamental liberty interests." It is permissible to require cooperation with a counselor since such requirement implies a duty not to obstruct a counselor's work. A limited requirement to follow certain recommendations of a counselor would not automatically run afoul of the constitutional freedom parents enjoy to raise their child as they see fit. However, the trial court exceeded its authority by not placing a limitation on the requirement to follow the counselor's recommendations. Without imposing some parameters on a third party's powers, the trial court risks delegating its unique authority, abdicating its exclusive power to enforce requirements with the threat (and execution) of penal and monetary sanctions. Without any limitations under which a parent must follow a third party's recommendations, those recommendations become orders.

Engagement Ring – Ownership after Broken Engagement

Name: *McGrath v. Dockendorf,* ___ Va. ___ 160262 (2016)

Facts: Mr. Dockendorf proposed marriage to Ms. McGrath, who accepted his proposal. Mr. Dockendorf presented Ms. McGrath with a two carat diamond engagement ring worth approximately $26,000. The parties' relationship deteriorated; Mr. McGrath broke off the engagement and demanded back the ring. Ms. McGrath refused, and Mr. Dockendorf filed a detinue action in circuit court for either the return of the ring or judgment in the amount of its value. Ms. McGrath demurred to Mr. Dockendorf's claim as being barred by Virginia Code § 8.01-220, Virginia's statute banning "heart balm" remedies. The circuit court overruled the demurrer, and ordered Ms. McGrath to return the ring in 30 days or it would enter judgment against her for $26,000. Ms. McGrath appealed.

Issue: Whether: (1) Virginia Code § 8.01-220 barred Mr. Dockendorf's recovery of the engagement ring, and (2) Mr. Dockendorf otherwise had a viable claim for recovery of the ring.

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

Rationale: Detinue differs from an action for breach of a promise to marry since a breach of promise to marry suit is intended to compensate a plaintiff for the loss and humiliation of a broken engagement. In contrast, the object of a detinue action is to recover specific personal property and damages for its detention. Thus, Virginia Code § 8.01-220 does not foreclose a detinue action for return of a ring when an engagement is broken. An engagement ring is a gift conditioned on a subsequent marriage. When the condition upon which the gift was made did not occur, Mr. Dockendorf could institute an action in detinue to recover the ring or its value.

Contempt – Failure to Pay Monetary Award

Name: *Kahn v. McNicholas*, 67 Va. App. ___ (2017)

Facts: The husband, a lawyer, drafted a property settlement agreement which provided that (i) the parties mutually waived spousal support, and (ii) the husband is to pay the wife $40,000 in $2,500 installments. The husband also agreed to pay the wife's health and car insurance premiums through December 31, 2014. The husband drafted the final decree and described the $2,500 installments as periodic spousal support. The husband failed to pay the wife payments from July 2014 through December 2014 since he alleged that the wife's prior adultery invalidated the agreement. The wife's counsel proceeded with a rule to show cause against the husband, styling the matter as collection of unpaid spousal support. The husband admitted he failed to make the required payments, but stated that the circuit court could only use its contempt power to enforce support allegations. He claimed the subject payments were not in the nature of spousal support since the parties waived support. Thus, the amounts needed to be collected as any other money judgment, which did not include contempt. The wife conceded she was not entitled to spousal support, but stated characterizing the amount owed as spousal support was a scrivener's error based on the husband referring to the amount

owed as spousal support in the final order. The trial court gave the husband time to purge the contempt by paying the money and attorney's fees. The husband failed to purge and he was held in contempt, and given a 10-day sentence, which could be avoided if the husband paid the wife within 30 days. The husband appealed.

Issue: Whether the circuit court had the authority to enforce the payment of a monetary award through its contempt power.

Ruling: The Court of Appeals affirmed the trial court.

Rationale: Any act which is calculated to embarrass, hinder or obstruct the court in the administration of justice is contempt. The power for a court to punish for contempt is inherent in the court since it is essential to the proper administration of the law to enable courts to enforce their orders. Monetary awards that arise in the context of a divorce differ from other monetary judgments. VA Code §§ 20-109.1 and 20-107.3 provide circuit courts with the authority to enforce monetary awards through their contempt power. Since the agreement was incorporated into the final order, it was "for all purposes to be a term of the decree, and enforceable in the same manner as any provision of such decree," pursuant to VA Code § 20-109.1. Thus, the court's finding the husband in contempt for violating the final order and punishing him accordingly was proper.

Award of Attorney's Fees – Abuse of Discretion

Name: *Reilly v. Reilly*, 16 Vap UNP 1369152 (2016)

Facts: The mother, father and guardian *ad litem* came to an agreement regarding custody and visitation from a *de novo* appeal form the juvenile and domestic relations district court, and presented same to the court orally. However, when it was embodied in a "Consent Order," the mother did not sign since the order contained items the mother had not agreed to. The mother's counsel asked for the matter to proceed to trial. The trial court nonetheless entered the Consent Order. After various motions in which the mother petitioned the trial court to reconsider the matter, the trial court held a hearing to determine whether the mother had actually agreed to the terms in the Consent Order. At the hearing, the trial court stated, in part, that "[i]f we are going through this exercise, and it proves to be an exercise in futility that need not have been undertaken, Ms. Reilly's going to pay the attorney's fees . . . ." At the end of the hearing, the trial court found the parties had agreed to the terms in the Consent Order and awarded attorney's fees and costs to the father in the amount of $9,687.50 without explanation as to how and why the attorney's fees award was made. The mother appealed.

Issue: There were several issues raised on appeal, including, whether the trial court erred in awarding the father attorney's fees and costs.

Ruling: The Court of Appeals reversed the trial court's award of attorney's fees and costs to the mother, and remanded the matter to the trial court.

Rationale: The trial court is required to award attorney's fees and costs based upon the financial ability of the parties to pay and other relevant factors. However, the trial court imposed the award as a punitive measure as it announced it would do. The mother was entitled to dispute the Consent Order and fees should not be awarded to punish her for doing so. ❖

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