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Message from the Chair

Larry Vance, Chair
Family Law Section

It has been a very active season in the Virginia General Assembly and in the United States Congress. The net result are changes coming to laws that we use every day in our practice that will dramatically affect the way that we try and/or settle cases. I encourage everybody to take the opportunity to join the Family Law Section at our Advanced Family Law CLE in April in Richmond to learn more about these changes.

Thank you to the various guardians *ad litem* who have reached out to me over the last few months concerning the role of the Board and its cooperative effort with the Virginia Supreme Court to improve performance and compliance with the standards. We recognize that many of our Section members serve as both counsel for parents and as Guardian ad litem. Your voice is important and I encourage you to become actively involved in the conversation about how the Court can make improvements to the GAL system prior to the next legislative session.

Finally, I would like to remind the Section members of the role of the Section's Board of Governors. As a part of the Virginia Supreme Court, this Board does not lobby for statutory changes or proposed legislation. It is also not the role of this organization to comment upon any pending legislation before the legislature. Less apparent, but just as true, is that the Board is not permitted to comment or make specific recommendations to the Supreme Court despite the impact that any of this may have on our members.

What the Board does do is publish the *Virginia Family Law Quarterly*, put together our continuing legal education programs, develop publications for the general public, and present awards to deserving members of the Bar for their works to improve the quality of family law practice in Virginia. Speaking of which, our two award honorees this year have definitely left their mark on Virginia family law and I congratulate and thank both the Betty A. Thomson Lifetime Achievement award winner, J. Patrick McConnell, and the Family Law Service Award Winner, Mitch Broudy, for their service.

Larry Vance, Chair ❖

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Editor's Note

Brian M. Hirsch

This issue of the *Quarterly* is packed with some great articles. Larry Diehl does his annual legislative update, tracking the new laws from the 2018 session of the General Assembly. Dale Margolin Cecka, a law professor at University of Richmond, sounds the alarm on delegation of the court's decision-making authority in custody cases. Judge Winship Tower gets us prepared for a more successful mediation, making her article required reading before mediating.

Finally, many thanks to Mark Vogel, Richard Wolf and Carol Ehlenberger for taking on the important work of explaining the new tax law to us and its implication to our law practices. While there is no guarantee how the details of this new law will play out, their article gives a cogent analysis of the implications for family law practitioners.

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

The Betty A. Thompson Lifetime Achievement Award given to J. Patrick McConnell

The Betty A. Thompson Lifetime Achievement Award was established by the Virginia State Bar Family Law Section to recognize and honor an individual who has made a substantial contribution to the practice and administration of family law in the Commonwealth of Virginia. The award will be given at the discretion of the VSB Family Law Section Board of Governors. The Betty A. Thompson Lifetime Achievement Award is presented at the Annual Family Law Seminar on April 19th at The Jefferson Hotel in Richmond, Virginia. We are pleased to announce the 2018 winner is **J. Patrick McConnell** of Reston.

UPCOMING FAMILY LAW EVENTS

April 19, 2018
VSB Family Law Section Advanced Family Law Seminar (Richmond)

June 14-16, 2018
VSB Annual meeting and Family Law Seminar (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.

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Legislative Update: 2018 General Assembly Session

By Lawrence D. Diehl
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The 2018 session of the General Assembly was a very successful for family law practitioners. Special thanks to Cheshire Eveleigh and the members of the Virginia Family Law Coalition ("Coalition") for their tireless efforts in promoting and monitoring the legislation. For a history of any bill or to view the amendments made to the language of a bill, go to http://leg1.state.va.us/cgi-bin/legp504.exe?181+sbj+020.

(1) Jurisdiction and Remand to Juvenile Court. HB289 was enacted to clarify the issue of concurrent jurisdiction under *Crabtree* and amends Va. Code §20-79(C). The new amendment clarifies that the circuit court may **not** transfer the matters to the juvenile court for modification in the absence of a motion by "either party" or require the transfer of such matter to the juvenile court as a condition of the entry of a final decree of divorce.

(2) Filing of Child Support Guideline Worksheets. HB1360 and SB982 provide that the guideline worksheets relied upon by a court or by the DCSE to compute a child support obligation for a support order issued by the court or DCSE shall be placed in the court's file or DCSE file and a copy "shall" be provided to the parties.

(3) Mixed Custody Guidelines. The determination of child support where there are mixed custody arrangements such as: (i) different shared custody days for different children of the parties, (ii) sole and shared arrangement, or (iii) a split and shared arrangement has been a source of uncertainty. No statute or case law addresses these situations. The issue for mixed custody guidelines was raised in the most recent Child Support Quadrennial Review Panel which requested the Coalition to study the issue and make recommendations. A committee comprised of Coalition members, members of the Department of Child Support Enforcement and the child support agents took on the task of formulating these guidelines. There are now presumptive guidelines for mixed custody cases that will improve consistency of awards, lead to settlement and provide courts with necessary information to decide these. Appendix 1 at the end of this article explains how to calculate support for each of the above situations.

(4) Modification of Spousal Support where Written Agreement is Silent as to Modification. Current law provides that if there is a provision for the award of spousal support in a stipulation or written agreement, but there is no provision that the award is modifiable, the award is non-modifiable. SB614 amends Va. Code §20-109(C) so that no request for a modification of spousal support shall be denied based on a material change of circumstances or based on a written contract that is executed on or after July 1, 2018 unless the stipulation of contract contains the following language: *"The amount or duration of spousal support contained in this [AGREEMENT] is not modifiable except as specifically set forth in this [AGREEMENT]."* Now, you must affirmatively state support is non-modifiable to make it non-modifiable. This section only applies to agreements or stipulations executed on or after July 1, 2018. If the post July 1, 2018 agreement *is silent* on the issue of modifiability based on a material change of circumstances, it will be modifiable.

(5) Retirement and Modification of Spousal Support. After extensive study, SB540 was passed dealing with the issues of retirement and modification of spousal support generally. The revision to §20-107.1(F) states that "[a]ny order granting or reserving any request for spousal support shall state whether the retirement of either party was contemplated by the court and specifically considered by the court in making its award, and, if so, the order shall state the facts the court contemplated and specifically considered as to the retirement of the party." This resolves conflicting results from cases that have held that the retirement was considered by the court in its initial decision and therefore the act of retirement did not constitute a material change of circumstances.

Virginia Code §20-109 enacts new subdivisions (E), (F) and (G). Subsection (E) provides that

"[f]or purposes of the modification of an

award of spousal support, and without precluding the ability of a party to otherwise file for a modification of spousal support based upon any other material change in circumstances, the payor spouse's attainment of full retirement age shall be considered a material change in circumstances. For the purposes of this subsection, 'full retirement age' means the normal retirement age at which a person is eligible to receive full retirement benefits under the federal Social Security Act, but 'full retirement age' does not mean 'early retirement age' as defined under the federal Social Security Act (42 U.S.C. § 416, as amended)."

One problem under prior law was that trial courts found that retirement was a voluntary act and therefore not a material change of circumstances. Thus, no hearing on the issue was held, therefore denying the retiree his day in court. This section does not prevent a party from filing a modification petition earlier than age 67 for modification of support upon an earlier retirement, but the finding of a material change of circumstances at such earlier date would be a case-by-case analysis by the court.

Subsection (F) deals with modification petitions filed based on a party's retirement. This new subsection states that:

"In an action for the increase, decrease, or termination of spousal support based on the retirement of the payor spouse pursuant to subsection E, where the court finds that there has been a material change in circumstances, the court shall determine whether any modification or termination of such spousal support should be granted. In making such determination, the court may consider the factors set forth in subsection E of § 20-107.1 and shall consider the following factors:

1. Whether retirement was contemplated by the court and specifically considered by the court when the spousal support was awarded;
2. Whether the retirement is mandatory or voluntary, and the terms and conditions related to such retirement;
3. Whether the retirement would result in a change in the income of either the payor or the payee spouse;
4. The age and health of the parties;
5. The duration and amount of spousal support already paid; and
6. The assets or property interest of each of the parties during the period from the date of the support order and up to the date of the hearing on modification or termination;

The provisions of this subsection (i) shall be subject to the provisions regarding stipulations or contracts as set forth in subsection C, and (ii) shall not apply to a contract or stipulation that is non-modifiable.

The provisions of this subsection and subsection E shall apply to suits for modification or termination of spousal support orders regardless of the date of the suit for initial setting of support or the date of entry of any such order or decree."

What this section does is, first, state the court "may" consider the factors set forth in Va. Code §20-107.1. This clarifies the uncertainty of the case law whether the court must consider these factors not only at the time of the initial award, but in a modification proceeding. This subsection then adds additional factors for consideration of the court that are specifically related to retirement issues. Factor number 6 is critical since it requires the court to consider the assets or property interest of *each party* during the date of the initial order to the date of the modification hearing, and essentially reverses *Driscoll v. Hunter* which held that a court could only consider the assets of the payor spouse when modifying support. The Coalition supported this bill since assets of both parties had to be considered in fashioning an initial award under the 20-107.1(E) factors, and there should not be a different standard for modification.

(6) Joint and Sole Custody Options. HB1351 amends Va. Code §20-124.2(B) and requires a court to "consider" whether to award joint or sole custody and that there shall be no presumption of either. This law was in response to a more detailed bill requiring a court to consider joint legal custody as a custody factor which was opposed by the Coalition. In the form passed, it was supported by the Coalition.

(7) Protective Orders - Cell Phones. HB262

amended Va. Code §16.1-253.1 and 16.1-279.1 relating to preliminary and final protective orders. This adds a new section to both statutes which provides that the trial court can grant the petitioner or any other family or household member exclusive use and possession of a cellular telephone or other electronic device. It may enjoin the respondent from terminating a cell phone number or electronic device before the expiration of the contract term with a third-party provider and may enjoin the respondent from using the cell phone or other electronic device to locate the petitioner.

There were a number of bills that were introduced but not passed, some of these are listed below.

- Two bills were introduced to repeal Va Code §§20-45.2 (prohibition against same sex marriages) and 20-45.3 (prohibition against recognizing civil unions).
- SB64 was introduced requiring all custody decisions and the basis of the decisions to be in writing only, rather than just written or orally.
- SB43, SB70, HB491 and HB515 each tried to enact specific definitions of a "disabled child" for custody purposes and contained very specific findings that the trial court would have to make for any disability and accommodations that would be required to meet certain needs specific to a disability.
- SB745 would have changed the penalties for adultery from a class I misdemeanor to a civil fine, therefore preventing a party from taking the 5th Amendment as to such issues. The proposal was passed by indefinitely.

APPENDIX 1:
Mixed Custody Child Support Calculations

Multiple Shared Custody Situations - Va. Code §20-108.2(G)(4). This applies where the parties have two or more children who are subject to a shared custody arrangement, but there are different custody days of the children. Here is how to compute the presumptive guideline:

- Determine the number of children of the parties.
- Add the days for each child for the mother and father for a total number of days for each parent for all children.
- Divide the total number of days for each parent by the number of children of the parties.
- Use the shared custody guideline worksheet. Insert the incomes of each party, the total number of children, and the average number of days for each party as determined by (c) above.
- The result is the presumptive support. This reflects the reality of the costs for each child based on the time with each parent.

Sole and Shared Custody Situations - Va. Code §20-108.2(G)(5). This applies where the parties have two or more children, and one or more are subject to a sole guideline calculation with one parent and one or more is subject to a shared calculation. This is where the "support per child" method kicks in. It assumes that the total support for all children shown on the chart is the total economic needs of the children and that each child's need would be the child's pro-rated fraction of that total amount. That number is then used as the starting point for the respective sole and separate children based on the number of children who are subject to either sole or shared. Here is how to compute the presumptive guideline:

- Determine the number of children of the parties.
- Determine the total gross income of both parties.
- Use the Guideline Chart to determine the total amount of child support shown for the total number of children involved.
- Divide the total support by the total number of children to calculate the per child amount of support.
- For the child(ren) subject to a sole calculation, use the per child amount – not the total chart amount – to be inserted in the sole guideline sheet. If there is more than one child subject to the sole guideline – then multiply the per child amount by the number of children subject to the sole guideline.
- Use the Sole Custody Guideline Sheet and insert the incomes of each party. Then insert as the number of children only the number of children subject to the sole custody guidelines and for the total support, instead of the total amount normally used for that number of children. UNPROTECT YOUR SHEET and insert the total per child amount pursuant to (d) above. Then insert your other adjustments for day care and health care attributable to those children. The amount shown is the part of the support attributable to the child or children subject to the sole custody guideline calculation.

- Use the Shared Guideline sheet and insert the parties' incomes and days for each party per standard day calculations. Rather than using the total chart income, use as the starting amount for guideline income the per child share for those children subject to the shared guideline and insert only the number of children that are subject to the shared guideline. You may need to unprotect your sheet to insert this. The amount shown will be the shared custody element of the overall support.
- The total child support owed by one parent to the other will be the total combination of the Sole Custody Guideline Sheet plus the Shared Guideline Sheet where either one parent owes the other or both parents owe the other. In the event a parent owes support to the other party due to straight guideline support, but the other parent owes that parent support due to the Shared Guideline, then it is the difference between the two, and the party with the higher amount owed pays the other party the net difference.
- This will require two (2) Guideline Sheets, a Sole Custody Guideline Sheet and a Shared Guideline Sheet.

Split and Shared Custody Situations - Va. Code §20-108.2(G)(6). This applies where the parties have three or more children, and at least two are subject to the sole guideline split custody calculation, and the other child or children are subject to the shared custody calculation. This is where the "support per child" method kicks in. It assumes that the total support for all children shown on the chart is the total economic need of the children and each child's need would be the child's pro-rated faction of that total amount. Here is how to compute the presumptive guideline:

- Determine the number of children of the parties.
- Determine the total gross income of both parties.
- Use the Guideline Chart and determine the total amount of child support shown for the total number of children involved.
- Divide the total support by the total number of children to calculate the per child amount of support.
- For the children subject to a split custody calculation, use the per child amount – not the total chart amount – to be inserted in the split guideline sheet.
- Use the Split Custody Guideline Sheet and insert the incomes of each party as normal. Insert only the number of children in the sole custody of each party that is subject to the split guidelines and for the total support, instead of the total amount normally used for that number of children. UNPROTECT YOUR SHEET, and insert the total per child amount per child pursuant to (d) above. Insert your other adjustments for day care and health care attributable to those children. The amount shown is the part of the support attributable to the child or children subject to the split guideline calculation.
- Use the Shared Guideline sheet and insert the parties' incomes and the days for each party per standard day calculations. Rather than use the total chart income, use as the starting amount for guideline income the per child share for those children subject to the shared guideline and insert only the number of children = that are subject to the shared guideline. You may need to unprotect your sheet to insert this. The amount shown will be the shared custody element of the overall support.
- The total child support owed by one parent to the other will be the total combination of the Split Custody Guideline Sheet plus the Shared Guideline Sheet where either one parent owes the other or both parents owe the other. In the event a parent owes support to the other party due to Split Custody guideline support, but the other parent owes that parent support due to the Shared Guideline, then it is the difference between the two and the party with the higher amount owed pays the other party the net difference.
- This will require two (2) Guideline Sheets – A Split Custody Guideline Sheet and a Shared Guideline Sheet. ❖

Delegation of Judicial Authority in Custody Cases: Finally Overturned

By Dale Margolin Cecka, Esq.

In November 2016, I read with delight in these pages about the case of *Bonhotel v. Watts*, 16 Vap UNP 0040163 (2016), in which the Virginia Court of Appeals held for the first time that judges cannot delegate judicial decision-making power in child custody cases to outside professionals. As domestic relations lawyers, we all know that in final orders, Virginia's trial court judges frequently give discretion to guardians *ad litem* as well as therapeutic counselors to determine issues such as the frequency, length, and substance of parenting time.

This practice, whereby the best of the interests of the child are decided outside of a courtroom by third parties, should have been dispensed with long ago. The Virginia Code makes this clear. Delegation orders also run afoul of the United States Constitution. Delegation violates the fundamental right to parent and can violate an individual's physical liberty when that individual is held in contempt of court orders made by a non-judicial decision maker. Other states have banned the practice for years. Delegation is simply a cultural relic of the Virginia trial courts that has never had any legal basis.

Bonhotel v. Watts

In *Bonhotel v. Watts*, the Circuit Court for the City of Roanoke ordered, in part, "[t]he 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." In an unusual move, the father appealed this ambiguous aspect of the order, arguing that the trial court erred in delegating to the child's counselor "unlimited, unfettered discretion over any and all parenting decisions to which both parents have to adhere or be subject to the contempt power of the court." The Virginia Court of Appeals agreed, making a profound statement about the father's constitutional rights: "the overly broad language…impinges upon parenting decisions protected by the Due Process Clause of the Fourteenth Amendment."

The reversal of the trial court was surprising because the reversal rate for the Court of Appeals of Virginia is only thirteen percent. In addition, traditionally, the United States Constitution is rarely cited in family law and custody cases in the states, even at the appellate level. But most importantly, the reversal in *Bonhotel* was notable because the Roanoke judge's order was actually quite standard for Virginia custody cases.

Reilly v. Reilly

A few days after *Bonhotel*, in *Reilly v. Reilly*, 16 Vap UNP 1369152 (2016), a mother made a similar claim regarding an a custody order which read: "Mother shall enjoy Supervised Visitation . . . . Supervision can be altered IN WRITING by the Guardian *ad Litem* based upon Mother's strict compliance with the conditions and other provisions set forth in this Order." The mother argued that the circuit court "gave the GAL 'sole discretion over determining visitation' between mother and the children." The Virginia Court of Appeals agreed with the mother; it was erroneous "for the circuit court to approve such language allowing a third party, even a guardian *ad litem*, total discretion to decide mother's visitation without providing judicial review because it is inconsistent with the language and purpose of Code § 20-124.2."

Other Examples of Delegation

The trial court orders in *Bonhotel* and *Reilly* are not unusual. These are just a few examples from my practice: (1) "visitation to [Aunt] . . . from Friday evening to Saturday afternoon at times governed by the GAL;" (2) "Christmas shall be split as decided by the GAL;" (3) "the court suggests that [the paternal grandmother] does not have to supervise [the mother's] visits if another supervisor can be agreed upon by the [Paternal Grandmother], [the mother], and GAL."

In addition to GALs, judges often order therapeutic counselors to make post-decretal decisions. Sometimes the "counselor" in the court order is not even a real person, but a provider to be identified at some time in the future. One final order from my caseload read: "The court orders mental health evaluation be performed on the parents either through Henrico Mental Health or a private provider, *and for parents to follow all recommendations*." Here, the identity and future duties of the counselor are vague, but *nonetheless binding on the parents*.

Statistics

According to the definitive language of *Bonhotel* and *Reilly*, many of these orders have never been lawful because they improperly delegate judicial authority. So how can these orders have continued unfettered for so long? The answer is simple – fewer than 0.004% of custody matters get appellate review in Virginia.

There are 124 Juvenile and Domestic Relations District Courts ("JDR") in Virginia. In 2016, these courts heard 287,024 matters of custody and visitation. There are 120 circuit courts in Virginia. Circuit courts hear all custody petitions filed concurrently with divorces. Circuit courts also hear appeals de novo from JDR courts on custody matters. In 2013, all of Virginia's circuit courts heard 7,045 appeals from JDR courts and 34,002 divorces. Conservatively, circuit and JDR courts in Virginia hear nearly 300,000 custody and visitation cases a year at the trial level. Of that 300,000, in 2016, only twelve custody cases reached the Virginia Court of Appeals.

Systemic Reason for Lack of Appeals

There is one obvious, but important, systemic reason for the lack of appellate case law in custody case: the *de novo* appeal. The vast majority of custody matters originate in JDR courts. This is particularly true for low and middle income litigants who cannot hire attorneys and do not know they can file in circuit court if they are married. And, of course, non-married litigants can never file initial custody petitions in circuit court.

The reality is that most custody cases begin and end in JDR, despite the existence of the appeal of right. Therefore, even fewer custody cases make it to a "real" appeal at the Virginia Court of Appeals. Every day across Virginia, JDR courts make rulings that are never reviewed at any level. Cultural practices can develop and continue in JDR courts for decades, even if they are not lawful. JDR judges should not be wholly blamed for this phenomenon because it is a product of Virginia's bizarre court system.

The GAL Effect

The delegation issue did not reach the Court of Appeals until 2016 for another very specific and important reason: most delegation orders mandate a GAL to take affirmative action. GALs can appeal cases, but GALs also rely on their courts for appointment. It is not in the GAL's interest to object to what a judge has ordered them to do because those judges determine how much work a GAL receives. This is not to lay blame on GALs for failing to bring appeals on delegation orders; it is simply reality. Judges do not want to be overturned and are less likely to appoint a GAL who notes an appeal or does not follow the post-decretal provision of an order.

Problems with Delegation

Due Process

In *Quillion v. Walcott,* 434 US 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978), where the United States Supreme Court held that the Due Process Clause "would be offended '[i] f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'" When non-judicial authorities, outside of the courtroom, make decisions regarding the fundamental rights of parents, there is, by definition, no due process.

Physical Liberty

The U.S. Supreme Court did not imagine that actual physical liberty would be implicated when it invoked the due process analysis for parental rights, but in the implementation of private custody orders in Virginia, physical liberty is also at stake. Private custody orders are only enforceable by one party filing a civil show cause motion for contempt of court against the other party. Civil show causes in Virginia custody cases do carry a potential penalty of incarceration. As domestic relations lawyers know, parties (usually *pro se*) file show cause motions every day in JDR courts.

Statutory

Virginia's custody statute is clear that only judges have the authority to make a best interest determination. Therefore, when a judge delegates any decision regarding best interests, it violates the strict letter of the law.

Therapist Perspective

Lastly, it is important to note that court-involved therapists universally agree that they should *not* be making judicial decisions. Doing otherwise can actually run afoul of professional guidelines and get the therapist into trouble.

Other States

In addition to Virginia, appellate courts in New York, Vermont, North Dakota, Florida, Georgia, Maryland, California, Nebraska, North Carolina, South Carolina, and Colorado have said that delegation of judicial authority in custody cases is unlawful. There are at least twenty-five appellate cases that recognize that delegation of judicial authority is either unconstitutional, contrary to state law, or both.

Conclusion

We are at a watershed moment for custody law in Virginia. We can go in the direction of other states and begin chipping away at the inveterate, but unlawful, practice of delegating judicial authority in private child custody cases; or not. Delegation orders will most certainly continue unless family lawyers in Virginia make a concerted effort to educate trial level judges. We must also be mindful of the concept of delegation when arguing for clients and reviewing orders. Even if litigants are rarely able to file appeals at the appellate or even de novo level, the number of delegation orders issued by the trial courts can gradually decrease. This process is in the hands of a relatively small community of domestic relations lawyers and GALs who toil in the JDR and circuit courthouses of Virginia every day. ❖

VFLQ ASK THE EXPERT

How the Tax Cuts and Jobs Act will Affect Family Law Cases

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Public Law No. 115-97, informally called the Tax Cuts and Jobs Act (TCJA), was signed into law on December 22, 2017. This legislation has some changes that will significantly affect how family law cases are handled. The major changes include the elimination of the tax deductibility of spousal support, the suspension of the dependency exemptions, the increased child tax credit and changes to the standard deduction.

Spousal Support

Section 11051 of TCJA repealed the deduction for spousal support payments. Under current tax law, spousal support is deductible by the payor and included as taxable income to the recipient spouse. Given that the payor is typically in a higher tax bracket than the recipient, the current law presents an overall benefit to both spouses in many divorces. Under TCJA, spousal support payments are not deductible by the paying spouse and are not included in income of the receiving spouse. The repeal, however, is only effective for divorce or separation instruments executed or modified after December 31, 2018.

What does this mean?

For an initial determination or modification of spousal support, if finalized by a court order or "separation instrument" before December 31, 2018, the spousal support will remain tax deductible to the payor and taxable to the payee. But, what about a settlement agreement that provides for spousal support but is not incorporated into a court order before December 31, 2018? We believe this agreement can qualify if it is a "separation instrument."

What is a separation instrument?

Internal Revenue Code Section 71(b)(2) defines a "divorce or separation instrument" as "(a) a decree of divorce or separate maintenance or a written instrument incident to such a decree, (b) a written separation agreement, or (c) a decree (not described in subparagraph (a)) requiring a spouse to make payments for the support or maintenance of the other spouse." Therefore, if there is a settlement agreement addressing spousal support executed before December 31, 2018, spousal support will continue to be tax deductible to the payor and taxable to the payee.

PRACTICE POINTER
When negotiating spousal support in 2018, if a settlement agreement is not signed or court order is not entered by December 31, 2018, you should account for the fact that the spousal support will not be tax deductible to the payor when finalizing the settlement agreement or court order. Also, be careful if one party executes the settlement agreement before the end of the year that the other party executes the agreement as well. If a court order is submitted before the end of the year make sure it is entered before the end of the year. It will be helpful in negotiations to clearly state whether the amount of spousal support offered is based upon the support being tax deductible to the payor. Since TCJA is so new, none of this has been tested yet.

What about modifications after December 31, 2018?

For any modification of spousal support after December 31, 2018, TCJA applies only if the modification expressly provides that the amendments made by TCJA apply to such modification (*i.e.*, support will remain tax deductible to the payor unless the modification affirmatively states that the repeal applies).

Other considerations ensue, such as:

- If the modification is done by the court order, does the court have the authority to order that the repeal applies?
- Does it matter if it is a modification of an original spousal support agreement (that gave authority to modify) or whether the spousal support was originally ordered by the court?

PRACTICE POINTER
For negotiated agreements executed prior to December 31, 2018, you may want to state that spousal support will be taxable to the payee and tax deductible to the payor and in connection with any modification.

Other Implications:

- *IRA Contributions*. Since spousal support will not be taxable to the payee, it is not considered income to the payee. This becomes important when considering a party's income for contributions to an IRA. If the party's sole source of income is from spousal support, the current thinking is that person will no longer be able to make IRA contributions. However, the IRS may clarify this issue in the future as it is important to many taxpayers.
- *Existing Prenuptial and Postnuptial Agreements*. Many existing prenuptial and postnuptial agreements contain terms governing spousal support in the event of divorce and mirror the current law that spousal support is deductible to the payor and included as income to the recipient. If the parties divorce in 2019 (or after) and the payments are no longer deductible by the payor, the economic impact on the couple will be very different from what was assumed when the prenuptial or postnuptial agreements were originally drafted.
- *Child Tax Credits*. Child tax credits are phased out at different income levels. Since payment of spousal support will not reduce the payor's income threshold, the payors are going to meet the phase-outs sooner. Changes to the deductibility of spousal support under TCJA are permanent, and there is no sunset provision. Of course, this could be changed by a future act of Congress.

Dependency Exemption and Child Tax Credits

Section 11041 of TCJA suspends dependency exemptions beginning in 2018 and ending in 2025. In tax year 2026, these exemptions will return unless the suspension is further extended. In many divorces, this dependency exemption was used in negotiations as a trade-off for other economic considerations. Agreements signed closer to 2026 should most likely include language to reflect the return of the exemption if the tax laws are not extended.

Current tax law allows for a child tax credit of up to $1,000 per child; however, the phase-out based on adjusted gross income was relatively low. Under Section 11022 of TCJA, the child tax credit will increase to $2,000 per child. In addition, the phase-out thresholds are much higher under TCJA, with phase-outs beginning at adjusted gross income levels of $200,000 for single filers and $400,000 for joint filers. Under TCJA, it will take $40,000 (a $50 reduction for each $1,000 over limit) of taxable income over the threshold to phase out the full child tax credit, $80,000 over the limit to phase out the second $2,000 credit and so on, compared to the current law, which sets the limit at $20,000. As the child tax credit represents a dollar for dollar decrease in tax, and TCJA includes provisions for a refundable portion of the credit, the credit might be more valuable to divorcing couples going forward than the previous dependency exemption, which reduced taxable income.

The child tax credit applies to a "qualifying child" who must be under 17 years old as of the last day of the taxable year, and the child must have the same principal place of residence as the taxpayer for more than half the year. For children over 17, there is a reduced child tax credit of $500 available. To qualify, all "qualifying child" rules must be met except that the age requirement will be raised to under 19 years old (or 24 years old if the child is a full-time student). The question remains whether the IRS will allow a release of the child tax credit to the non-custodial parent, similar to the prior rules for dependency exemptions. We believe that the release, if it conforms to all current rules (which haven't changed under the new law), should still work, and the non-custodial parent should be able to take the child tax credit. Although the exemptions have been suspended, the definition of a dependent have not changed.

Even if the IRS allows a release of the child tax credit and parties can still negotiate who can claim the same, a court might not have the authority to allocate

the child tax credit. Virginia Code Section 20-108.1 states that the court can order one party to "execute appropriate tax forms or waivers to grant to the other party the right to take the income tax dependency exemption for any tax year or future years." Under the prior law, the party who claimed the income tax dependency exemption also was entitled to the child tax credit. However, that leaves the question: if there is only the child tax credit (at least until 2026), does the current code language allow the court to allocate it?

Standard Deduction vs. Itemized Deductions

If parties are married but filing separately, both parties have to itemize or both parties have to take the standard deduction – not one of each. This often poses a problem when one party has a mortgage and other deductions to claim and wants to itemize, but the other party would not have enough deductions to itemize, and therefore is penalized by not being able to claim the standard deduction. Now, under TCJA, the standard deduction has been increased to $12,000 for single filers, $12,000 for married filing separately, $18,000 for head of household, and $24,000 for married filing jointly. This may make it easier for the parties to file separately as the higher standard deduction, along with reductions in what qualifies as itemized deductions, might result in both parties taking the standard deduction.

Standard Deduction	**2017**	**2018**
Single	$6,350	$12,000
Married Filing Jointly	$12,700	$24,000
Married Filing Separately	$6,350	$12,000
Head of Household	$9,350	$18,000

If the parties are separated but still married at the end of any year, three options are available to them: married filing jointly, head of household or married filing separately. If there are at least two children and at least one child lives with each parent and all other requirements are met, the couple could theoretically file two returns, each claiming head of household status and claiming a total of $36,000 in standard deductions.

Other Provisions of TCJA

- Tax Rate Brackets: Generally, the rates have been reduced. For example, the top rate is now 37% as opposed to the prior top rate of 39.6%

2018 Tax Brackets and Rates

Rate For	Unmarried Individuals, Taxable Income Over	Married Individuals Filing Joint Returns, Taxable Income Over	Heads of Households, Taxable Income Over
10%	$0	$0	$0
12%	$9,525	$19,050	$13,600
22%	$38,700	$77,400	$51,800
24%	$82,500	$165,000	$82,500
32%	$157,500	$315,000	$157,500
35%	$200,000	$400,000	$200,000
37%	$500,000	$600,000	$500,000

- *Deduction for Qualified Business Income:* An owner of a pass-through entity, such as a partnership, S corporation or sole proprietor, can deduct 20% of qualified trade or business income.
- *State and Local Tax (Including Property Tax) Deduction:* On the itemized deduction schedule, TCJA limits the combined total for all state and local taxes to $10,000. For many taxpayers, this will be a big change.
- *Mortgage Interest Deduction:* This deduction is now limited to interest for mortgages up to $750,000. Existing mortgages are grandfathered in. Home equity loan interest is now no longer deductible, and the grandfathering exception does not apply. However, the deduction is scheduled to be available again in 2026. A second home mortgage, such as on a vacation home, still qualifies.
- *Miscellaneous Itemized Deductions:* Any miscellaneous itemized deductions are now <u>not</u> deductible. This group includes legal fees, unreimbursed business expenses, tax preparation fees and investment advice fees.
- *Head of Household Due Diligence Requirements:* Paid preparers now will have certain due diligence requirements (yet to be issued) in determining a taxpayer's eligibility for filing as head of household. Penalties will begin at $500.

• *Moving Expense Deductions:* Moving expenses are no longer deductible.

• *Use of Section 529 Plans:* Under the new law, up to $10,000 per student per year can be used from a 529 plan to pay for elementary or secondary school. This is an important point to consider in divorces that have agreements covering the use of 529 plans. The agreement should specifically address whether the funds can be used for pre-college schooling.

This article represents the best of the authors' understanding of the new tax law and its implications. It is not intended as legal advice. Hopefully, case law, IRS regulations and other legislation will come out over the coming months and years which will better clarify some of the murkier aspects of the new tax law.

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Effective Advocacy in Meditating Complex Equitable Distribution Divorce Cases

By Hon. Winship C. Tower (Ret.)
The McCammon Group

I have successfully mediated many complex equitable distribution ("ED") divorce cases and debriefed many outstanding family lawyers involved for their feedback on the process. This article contains a compilation of resulting observations and ideas to enhance effective advocacy in mediation of these challenging and interesting cases.

Preparation

Lawyers who elect to use mediation in a complex divorce case are motivated to achieve agreement on an equitable distribution plan to avoid a lengthy, expensive trial and an unpredictable determination by a court. To realize the benefits of mediation, thorough preparation is essential because the financial stakes are significant and the issues are multifarious.

Effective advocacy in mediation requires lawyers to be as well versed in the facts and law of their case as if they were in trial. Mediation, like litigation, mandates critical advance groundwork to identify, value, and classify each marital, separate and hybrid asset, as contemplated in VA Code Ann. § 20-107.3.

Equally crucial to a successful mediation is the lawyers' preparation of their clients for the actual day(s) of session. The long and tedious nature of the process should come as no surprise to the parties. They will want to bring something to occupy themselves during the mediator's often extensive caucuses with the other side. Counsel should strongly recommend that their clients pack patience and perseverance in their bags. Both the lawyers and their clients must bring to the session a positive attitude and a strong commitment to its success.

Counsel are responsible to ensure their clients enter into mediation with realistic expectations. Promising an improbable result is counterproductive. Promising a stake in the outcome of his future, however,

empowers the client and furthers his investment in the process.

Confidentiality is an extraordinary advantage to mediation; lawyers must emphasize this to their clients. Privacy is of great importance to clients, as is closure. Clients want to move on with their lives, their investments and their businesses.

Discovery

In my practice, a joint conference call with the lawyers starts the actual mediation process. One of the first orders of business is the status of discovery.

Informal or formal discovery to identify, value and classify the couple's assets is a pillar to a successful ED mediation. I have handled many complex cases before suit has been filed, but the feasibility of reliance on informal discovery turns on the level of trust between the parties and between counsel. More often, formal discovery will be necessary.

I follow up the joint call with *ex parte* pre-mediation calls with each lawyer during which I probe to ensure that each side is satisfied with the documentation exchanged. It is not productive to schedule the mediation prematurely before each side has adequate information.

The individual calls provide an opportunity for the lawyers to educate the mediator on case law to be relied upon, any expert's valuation methodology and any critical financial, emotional or personality issues likely to impact the process. At the conclusion of the call, the mediator should be able to articulate the positions of the client, and the particular areas in which the lawyer is looking for help from the mediator.

The joint and individual calls will include a discussion of written submissions. The lawyers can best prepare the mediator by providing a written summary of the case as well as copies of settlement offers, key pleadings, documents and expert reports. A well-informed mediator will then have the means to keep the waters flowing towards resolution. The parties will have more confidence and feel they are getting their money's worth with a knowledgeable mediator.

Once the mediation commences, counsel and the mediator have to be equipped to address the various types of assets typically found in a complex ED case. Counsel will lose face with their clients if, in the midst of the mediation, it becomes apparent that neither counsel has sufficient information to address, for example, the vesting schedule of deferred compensation vehicles (incentive stock options, non-qualified stock options, restricted shares, performance units or the like).

Part of the mediation groundwork may be to hire an appropriate expert, whether an accountant, appraiser or forensic economist, to assist in analyzing the value, tax issues, applicable vesting schedules and/or transferability of diverse assets. Counsel may want to arrange for the Mediator to have a pre-mediation conference call with his expert(s).

All expert reports to be used in the mediation should be disclosed. Any plans to have an expert participate during the session should be revealed to opposing counsel and the mediator. If one side feels blindsided or embarrassed because his expert is not available, this may create a barrier to settlement. Collaborating to choose one or more "joint" experts is ideal but rare, in my experience.

Valuation

Once counsel is satisfied with the information exchanged, I suggest they develop a mutually agreed upon chart format that lists each identifiable asset, even if value, classification or division have not been agreed upon. Working from the same format will make deliberation more efficient, particularly if the mediator has it in advance. Any stipulated values, classifications and divisions of assets should be set forth in the chart ahead of the session. Without fail, the values of some assets will be in controversy.

Each side's valuation experts will likely approach differently the valuation of assets, such as second homes, commercial property, closely held businesses, professional practices, and deferred compensation. Even appraisals of the marital home will frequently be at odds.

In this regard, counsel should equip the mediator with a comprehensive explanation of his expert's methodology, so the mediator can effectively convey it to the other side during an individual caucus. The mediator can then work with counsel and the experts to effectuate compromise on valuations for purposes of settlement.

The mediator may need to employ evaluative techniques, pointing out strengths and weaknesses to each side from a judge's perspective. In a complex ED case, the mediator should have fluency in business valuation

issues, such as over-compensation factors, capitalization rates, depreciation schedules, and business expenses. The mediator should be conversant in income, market and asset valuation approaches, as well as the means of arriving at intrinsic value and discounts for marketability and lack of control. The mediator's input into discussions of personal goodwill vs. enterprise goodwill might induce concessions from one side or another.

Disputes over antique furniture and cars, art and jewelry can blow up a mediation as they present valuation challenges, exacerbated by sentimental value attachments. The parties and lawyers should be able to rely on the mediator to defuse the emotional component, but effective advocacy also requires that lawyers confront these explosive issues in advance.

Pre-mediation efforts, as well as reasonableness during the mediation, will help resolve valuation disagreements critical to settlement. Education of the mediator by counsel on their valuation positions is crucial to solid lawyering in ED mediations.

Classification

Not only must each asset be valued, it must be classified as marital, separate or hybrid. Property acquired during the marriage is presumed marital, but any claim by either side of separate or hybrid classification should be put on the table upfront in the first joint conference call. I use the *ex parte* calls to explore the evidentiary basis for any such, often querulous, claims.

I encourage counsel to exchange documentation that traces property alleged to be have been originally or transmuted into separate or hybrid classified property. Also, counsel should apply the Brandenburg formula and the Keeling analysis to any hybrid property, using their best and worst case application of the facts and the law. This can provide a range from which a compromise on classification might emerge.

The marital and separate share determination of pensions and retirement accounts usually involves a straightforward formula application. But the growth/loss on separate and marital shares of retirement accounts and any loans against them must be disclosed, creating trickier issues for classification purposes.

Classification can depend on whether certain property was a gift to one spouse or the other. What proof or indicia of gift exists? Gift issues are frequently hotly contested, and a court's ruling may not be predictable. Disagreements over an increase in value during the marriage of a gift (or other separate property), through active efforts of either spouse, lend themselves to compromise through mediation.

As with other ED issues, but particularly where classification is disputed, lawyers with persuasive arguments and the often voluminous tracing documents at the ready have an advantage. They are in a stronger position to convey effectively their positions to the mediator to use in negotiating with the other side during caucus.

Division

Virginia law requires an equitable, not equal, division of marital property, taking into consideration the eleven statutory factors enumerated in VA Code Ann. § 20-107.3 (E). Whereas courts are restricted by statute as to the means by which assets can be divided in ED, mediation can provide creative and flexible options to sell, offset, buy out or transfer certain property in the case.

A lawyer must come into mediation comprehending his client's range, high to low, for an all-inclusive acceptable division of the property, prepared to provide the mediator with an opening position on his preferred total asset division. How and when to modify the overall opening position or individual asset positions is a tactical decision the lawyer and his client have to make with each bargaining step in the mediation process. If the division of certain property is non-negotiable, he should advise the mediator early on. The mediator can help assess and craft allocation schemes agreeable to each party, as the case plays out.

The mediator must consider both the emotional and financial impact on the negotiations. When the parties do not agree to a third-party sale of certain property, the cost to buy out a spouse might require agreement not just on market value, but also on imputed costs of sale and hypothetical tax ramifications. On the emotional front, if one party entertained a paramour at the family ski chalet, the other spouse may be hell-bent on his not ending up with that chalet.

A party claiming more or less than a 50% division must have a compelling rationale for doing so. The mediator should facilitate the venting early on in private caucus of any emotionally charged arguments for an unequal split, such as marital misconduct, waste,

or monetary and non-monetary contributions. Some clients cannot proceed rationally on financial matters until they have unloaded their intense feelings and grievances. Counsel and the mediator ignore this at their peril.

A court will not have the authority to allow a party to recoup a premarital personal injury settlement that was spent on maintaining the parties' joint lavish lifestyle. However, motivated parties guided by astute counsel and the mediator might want to think outside the box and consider how to make the "victim" spouse feel whole, solely on the basis of fairness. Such a concession may then bolster resolution of more significant financial matters.

If one spouse owns high valued non-transferable assets, such as stock options or an interest in a professional practice, he will undoubtedly vehemently resist a large cash payout to compensate the non-owning spouse. This tough issue often keeps the mediator occupied for several rounds of caucusing before a scheme to address it emerges.

The nature of an asset may dictate its preferred division. Perhaps the developer husband should keep the commercial real estate that he has always managed and leave his wife the liquid investments. Joint debt often has to be paid off or refinanced. Counsel should have in his back pocket potential solutions to debt issues, as they often present barriers to settlement.

The unique features of qualified vs non-qualified deferred compensation, military, civil service and railroad pensions, and traditional IRAs vs Roth IRAs can all impact a fair division. If thorny tax issues are anticipated, tax advisors should be on call during the mediation process. Lawyers should have on hand model QDRO language, obtained in advance from plan administrator(s), to use subject to negotiation of the coverture fraction and percentage shares going to each party.

The issue of the waste of marital assets can absorb an entire day of mediation. (It is not likely that any court will afford counsel this kind of time.) Waste is a troublesome and sensitive issue, especially when huge sums have been spent on paramours, drug habits, and/or lavish selfish spending. If the waste is provable, a tactical play may be to concede it, rather than to ratchet up emotions in the mediation in tracing all the minutiae of expenditures on trips, jewelry, gifts, cars, boats, and a lover's plastic surgery.

In waste cases, it is prudent to prepare the client for the day of reckoning. In one case that I mediated the lawyer did just that. Once the amount of waste, over $1,000,000, had been negotiated, the client was persuaded to treat that amount as part of his share of the division of the marital estate, and the case settled to everyone's satisfaction.

In mediating high stakes financial matters, it is critical to maintain good will, trust and integrity. Therefore, counsel does not want to get bogged down in inflammatory issues such as waste that engender suspicion and lack of good faith.

Documentation of Agreement

Prior to the mediation, counsel can hopefully agree upon the template of a property settlement agreement containing all the usual boilerplate provisions, any stipulated matters, and blank paragraphs for each issue to be mediated in the case.

Sometimes mediation seems like magic. But in reality it works, in part, because the parties' and lawyers' hard work and singular focus on the case at hand, with the assistance of a skilled mediator, enable them to come to their own tailor-made resolution of the case.

But if everyone leaves the mediation without a signed agreement and returns to the fray of life and law practice, the written document may take weeks to be produced. Or worse, the settlement may fall apart as the good will and motivation engendered by the mediation itself diminish with time. Best practices dictate that, if at all possible, before adjourning, the mediation should conclude with execution by the parties and counsel of a comprehensive settlement agreement.

Good lawyering requires advising clients of the potential benefits that the mediation process affords any divorce case. This is decidedly important when satisfactory resolution of complex equitable distribution issues needs the flexibility and creativity available only in a negotiated settlement. Effective advocacy brought to bear throughout the mediation process is crucial to its success. ❖

VFLQ CASES OF THE QUARTER

Child Custody – Determination of Party as a "Parent"

Name: *Hawkins v. Grese, 68 Va. ____ 0841171 (2018)*

Facts: The parties were in a same-sex relationship, but were never married or formed a civil union. Grese became pregnant in 2007 and their son was raised by both women in the same household until 2014 when the women ended their relationship. The child was seeing both parties for two years until Grese terminated the child's contact with Hawkins. Hawkins filed a petition for custody and visitation in the City of Virginia Beach Juvenile and Domestic Relations District Court ("JDR"). The JDR court awarded the parties joint legal custody and made a shared physical custody determination. The JDR court found that the child was developing behavioral problems based on his separation from Hawkins. Grese appealed the matter to circuit court. The circuit court was concerned about the child'sseparation from Hawkins, but concluded that Hawkins could not be considered a parent, and that she did not rebut the parental presumption in favor of Grese's custody of the child. Hawkins appealed this matter.

Issue: Whether the circuit court erred when it concluded that Hawkins was not a parent to the child or violated her constitutional parental rights.

Ruling: The Court of Appeals affirmed the circuit court.

Rationale: Sexual orientation based on classifications are subject to a rational basis review. Virginia has held that a parent'sright to autonomy in child rearing is a fundamental right protected by the Fourteenth Amendment and that state interference with that right must be justified by a compelling state interest. Here, Hawkins is seeking an initial determination that she is a parent and has an equal right to custody of the child as does Grese, the biological parent. The Virginia Code defines a parent as someone contributing genetic material through biological insemination or other means or by legal adoption. Hawkins is not a parent since she did neither. Hawkins argues that *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) and its progeny have implicitly redefined "parent" or "family" in a manner that obviates the Commonwealth's definition and mandates a holding that, because her relationship with Grese was the functional equivalent of marriage, her relationship with the child was constitutionally a parent-child relationship. However, Virginia's definition of "parent" does not discriminate between same-sex and opposite-sex couples. If the couple is not married, the non-biological/non-adoptive partner is not a parent. The rational basis analysis applies and the relevant characteristics which classify in the present case are rational since people are either considered parents on either biological or adoptive grounds. Gender or sexual orientation is not a consideration. Therefore, the circuit court did not violate Hawkins' constitutional rights. The issue of whether Hawkins was a "person with a legitimate interest" was not before the court.

Spousal Support – Required Findings for Defined Duration

Name: *Ross v. Ross, 17 Vap UNP 0748174 (2017)*

Facts: The wife suffered from post-concussive syndrome, which was expected to resolve in the very near future. The trial court found that the wife should be able to find gainful employment, but that there was no evidence for the court to make a determination as to what employment the wife may be suited. The trial court initially awarded the wife $5,000 per month for four years with a 10-year reservation afterward. Upon a motion to reconsider, the trial court awarded the wife $5,000 per month spousal support for five years with an 11-year reservation afterward. While the trial court did explain its ruling, it did not state the basis for the nature, amount and duration of the award.

Issue: Whether the trial court made sufficient findings to support the amount and defined duration of its spousal support award to the wife.

Ruling: The Court of Appeals reversed the trial court on this issue.

Rationale: Virginia Code § 20-107.1(F) allows a trial court to make a defined duration of spousal support.

However, this Code section requires that "[i]f the court awards periodic support for a defined duration, such findings shall identify the basis for the nature, amount and duration of the award and, if appropriate, a specification of the events and circumstances reasonably contemplated by the court which support the award." The trial court erred since it failed to make the required statutory findings, including the basis for its assumption that spousal support would no longer be appropriate after five years.

Custody – Delegation of Court's Authority

Name: *Sims-Bernhard v. Bernhard,* 18 Vap UNP 0918172 (2018)

Facts: A 2012 order allowed the Department of Social Services ("DSS") to decide the mother's time with the children. The mother appealed the decision to the Court of Appeals, asserting error in the trial court's decision to allow DSS to set visitation parameters for the mother to see the children. However, the mother failed to present legal authority supporting her claim and the trial court's decision was affirmed. The mother subsequently filed a motion to amend custody. After the mother alienated a string of psychologists who were to perform her psychological evaluation, the trial court dismissed the mother's motion. The mother appealed based upon, among other things, the trial court's delegating its custody powers to DSS, stating that the 2012 order was void *ab initio*.

Issue: Whether the trial court erred in its 2012 order to allow DSS to set visitation parameters for the mother to see the children.

Ruling: The Court of Appeals affirmed the trial court.

Rationale: An order which improperly delegates judicial authority to a third party renders the order voidable and not void *ab initio*. An order which is void *ab initio* is void without effect the moment it came into existence and can be attacked by all persons, anywhere, at any time or in any manner. An order which is merely voidable, on the other hand, involves a court taking actions which are in error. Here, the court had the authority to rule on matters of custody and visitation pursuant to Virginia Code § 20-124.2, but erred in allowing DSS to dictate the parameters of visitation. Thus, the trial court's ruling was in error, and voidable. Since the 2012 order was not void *ab initio*, the doctrine of *res judicata* applies. The Court of Appeals declined to consider the mother's assignment of error relating to the trial court's delegation of authority to DSS in her previous appeal. The mother is barred under the principle of *res judicata* from relitigating against the same party the precise issue which was decided in a previous matter.

[*This case does not decide the underlying issue of the extent to which a trial court can delegate its power to a third party to decide custody issues, but is noteworthy, especially in light of the Court of Appeals' recent decision in* Bonhotel v. Watts, 16 Vap UNP 0040163 (2016)]

Contempt – Violating Order to Comply with Therapist's Recommendation

Name: *Timmons v. Mutiso*, 18 Vap UNP 1158174 (2018)

Facts: Per court order, the father was granted primary physical custody of the parties' daughter, subject to the mother's parenting time with the child. Subsequently, the child's therapist recommended in a letter to the father that the mother have only supervised visitation with the child. The father thereafter refused to allow the mother to have her court-ordered time with the child on several occasions. The mother brought a contempt action against the father for violating the child custody order. The father sought to introduce the therapist's letter into evidence to justify his violation of the custody order. The therapist appeared at the hearing and was qualified as an expert as a "therapist and counselor for children." The trial court refused to admit the therapist's letter into evidence since the letter contained a custody recommendation, which was beyond the therapist's area of expertise. The trial court held the father in contempt for his willful violation of the custody order. The father appealed.

Issue: Whether the trial court properly refused the therapist's letter into evidence and whether the trial court properly held the father in contempt for his violation of the custody order.

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

Rationale: The trial court properly refused to allow the therapist's letter into evidence since he was not qualified to give an opinion on custody of the child. Furthermore, that the father's actions were, at least in part, based on the

improper recommendation from the child's therapist is of no moment to the analysis because the recommendation has no effect on the father's obligation to comply with the order. The therapist's recommendation did not give rise to anything approaching an inability of the father, without fault on his part, to comply with the court order, and was not a good defense to the contempt charge.

Spousal and Child Support – Imputation of Income

Name: *Montgomery v. Montgomery*, 17 Vap UNP 0014172 (2017)

Facts: At the final hearing in 2011, the trial court imputed income to the wife of $40,800 per year since she was foregoing gainful employment. The trial court went on to award the wife $4,100 per month in spousal support based upon the parties enjoying "a comfortable standard of living" during the marriage. The husband subsequently filed his motion to reduce spousal and child support based upon wife's inheritance of certain assets, including a vacation home, a home in Henrico County, and farm land owned by a revocable trust (the "Trust"). The wife is an equal beneficiary under the Trust, along with her brother. At the time of the hearing, however, the Trust had not distributed any of the assets to the wife. The husband's expert testified that, had the wife become employed at the time of the last hearing, she would be making an additional $25,000 in income. The trial court terminated spousal support, but granted the wife a reservation of support. In determining the new amount of child support, the trial court imputed income to the wife of the rental value of the properties held by the Trust as well as an additional $5,000 above the original imputed income which the wife could have earned had she been employed for the past five years. Both parties appealed.

Issue: Whether the trial court erred in: (i) imputing rental income to the wife for the real estate held in the Trust, and (ii) imputing income of an additional $5,000 above the prior imputed amount when the husband's expert testified that the wife should be making an additional $25,000.

Ruling: The Court of Appeals: (i) reversed the trial court on the issue of imputation of income to the wife from the rental properties held in the Trust, and (ii) affirmed the trial court's imputation of an additional $5,000 despite the husband's expert's testimony that the wife could be earning an additional $25,000.

Rationale: The trial court erred in imputing income from the real properties since the Trust had not yet distributed the real properties. While the wife has a future beneficial interest in the Trust, she had not yet "inherited" such properties. Thus, the trial court lacked the authority to reach into the Trust to force the wife to dispose of Trust property or to impute income to the wife based upon undistributed Trust assets. The trial court did not err in concluding the wife could be earning $5,000 more at the time of the modification hearing had she sought employment in 2011. While the husband contends that the trial court should have imputed an additional $25,000 to the wife, it is within the trial court's discretion to determine the additional imputed income.

Evidence – Spoliation Inference

Name: *Emerald Point, LLC v. Hawkins*, 294 Va. 544 (2017)

Facts: The defendant is the owner of an apartment and the plaintiffs were co-tenants of the apartment. The fact pattern is somewhat extensive, but essentially involves alleged injuries suffered by the plaintiffs due to carbon monoxide poisoning when they occupied the apartment. During this time, the defendant replaced the furnace, stored it for a year and then disposed of it before the complaint was filed. The plaintiffs asked the trial court to give the jury a spoliation inference, which allows the jury to make a negative inference against the defendant regarding the disposal of the furnace since it was not available to the plaintiffs for inspection. At trial, the court gave a jury instruction stating: "If a party has exclusive possession of evidence which a party knows, or reasonably should have known would be material to a potential civil action and the party disposes of that evidence, then you may infer, though you are not required to do so, that if that evidence had been available it would be detrimental to the case of the party that disposed of it. You may give such inference whatever force or effect you think is appropriate under all the facts and circumstances." The jury returned a verdict for the plaintiffs. The defendant appealed, stating the instruction was improper since the furnace was not intentionally disposed of to prevent its use in litigation.

Issue: Whether there must be a finding of intentional loss or destruction of evidence to prevent its use before a court may permit a spoliation inference.

Ruling: The Supreme Court of Virginia reversed the trial court.

Rationale: Spoliation of evidence occurs when a party is aware that there is pending or probable litigation involving evidence in the party's custody or under its control, and such evidence if destroyed or otherwise not preserved will interfere with the ability of the adverse party to establish some element of its claim. Before an adverse inference instruction may be given to the jury in federal court cases involving spoliation of electronically stored information, a finding is required that a party acted with the intent to deprive another party of the use of that information in the litigation. The resolution of a spoliation issue in the Commonwealth should be guided by the same standard and applicable to all forms of spoliation evidence. Accordingly, the evidence must support a finding of intentional loss or destruction of evidence in order to prevent its use in litigation before the court may permit the spoliation inference.

[Editor's Note: While this is not a family law case, spoliation of evidence – especially electronic evidence – is a recurring issue in family law cases.]

Appeal – Failure to Preserve Objection

Name: *Castillo v. Bell*, 17 Vap UNP 0859173 (2017)

Facts: The mother is the biological parent of two children, who were removed from her custody due to abuse or neglect. The children were placed with their paternal grandparents. The grandparents subsequently filed a petition for adoption of the children, and proceeded by order of publication. The final order of adoption was entered in 2010. The mother filed a petition to set aside the adoption in 2016, alleging she was never served with notice of the adoption proceeding and did not consent to the adoption. The trial court found that there was no evidence of fraud on the part of the adoptive parents, and the adoptive parents did nothing to prevent the mother from learning of the adoption. Accordingly, it was not appropriate to set aside the adoption that was granted more than six months ago and denied the mother's petition. The mother signed the final order "Seen and objected to" without further explanation, and appealed the matter.

Issue: Whether the mother's statement of "Seen and objected to" without further explanation preserved her appeal.

Ruling: The Court of Appeals affirmed the trial court.

Rationale: A statement of "seen and objected to" is insufficient to preserve an issue for appeal unless the ruling made by the trial court was narrow enough to make obvious the basis of the appellant's objection. In the present case, the trial court made several findings in its final order and was not narrow enough to fit this exception. ❖

The Family Law Service Award Winner given to Mitchell D. Broudy

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 2018 Recipient is Mitchell D. Broudy of the Office of the Attorney General, in Norfolk.

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