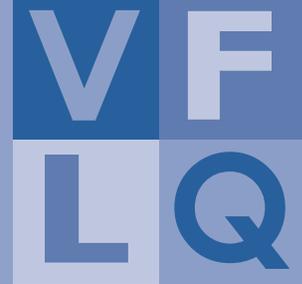


Virginia Family Law Quarterly



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

Message from the Chair

Mary G. Commander, Chair
Family Law Section

Greetings 2019! We commend and congratulate Peter Buchbauer on his selection as the 2019 winner of the Betty Thompson Lifetime Achievement Award. The award will be presented to Pete at the Annual Advanced Family Law Seminar in Richmond. Pete has been a real force in Virginia family law and we all appreciate his hard work over the years.

The Advanced Family Law Seminar will be held, as usual, at the Jefferson Hotel in Richmond. The date is Thursday, April 11, 2019. The program and venue are always crowd-pleasers. Please register immediately, as this event will sell out quickly. I look forward to seeing all of you there in April!

The Family Law Section currently is in third place in terms of membership, just behind Criminal Law and Litigation. While we may have gotten the “bronze,” we need to strive for the gold.

On a personal note, after 37 years of practice, other than observing my own waning patience and stamina, I also have observed many changes in the legal practice. Some changes have been for the better, but, unfortunately, others have not. My biggest concern (which will be addressed during one of the lectures at the seminar in April) is the changes in collegiality, candor and civility in the practice of family law. When I began the practice of law, a lawyer’s word was their bond; deals were made with a handshake and nothing more; there was no need for a “CYA” letter; responses were timely; and arguments in court were based on the law and facts (for the most part). This is not merely nostalgia, memories improved by the passage of time or a fail-

ing memory. While, unquestionably, there are young lawyers who possess the traits of the past, the Bar has become a more confrontational and precarious place. The question is whether there are people in sufficient numbers who will seek to both change and improve the Bar. I certainly hope so.

Finally, we thank Brian Hirsch on completing his fifth year as editor of the *Virginia Family Law Quarterly*. The *Quarterly* is one of the premier publications of the Virginia State Bar. He always appreciates receiving scholarly and informative articles for publication. I encourage you to exercise your writing talents and forward an article for consideration.

Mary Commander, Chair ❖

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Editor's Note

Brian M. Hirsch

Another solid issue for your edification. Thanks to Michael Oberschneider, Psy.D for his article on the pitfalls for lawyers when interacting with mental health professionals in high-conflict divorces. This has always been a tricky relationship for both professions. Nicole Burns explores the court's powers to limit the access of parties and lawyers to the courthouse when appropriate. This topic is especially important given the abuses in family law litigation. Finally, thanks to Larry Diehl for summing up the new legislation that the General Assembly recently passed.

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

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.

UPCOMING FAMILY LAW EVENTS

April 11, 2019

Annual Advanced Family Law seminar
(Richmond)

June 14, 2019

81st VSB Annual Meeting
*True Collegiality: A Study of
How Young Family Lawyers Can Reverse the
Trend of Hostility and Return to
The True Calling of Service*
(Virginia Beach) co - sponsored by the
Family Law Section and the
Young Lawyers Conference.

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.



FAMILY LAW SECTION MEMBER RESOURCES WEBSITE LOGIN:

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Password: **FL2018member**

They are case sensitive.

<http://www.vsb.org/site/sections/family>

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

Legislative Update: 2019 General Assembly Session

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The 2019 session of the General Assembly was very successful for family law practitioners. Once again special thanks to Cheshire Eveleigh and Dan Gray and the members of the Virginia Family Law 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?191+sbj+020>.

The following is a summary of the legislation enacted in 2019 which has an impact on family law. All legislation is effective July 1, 2019.

(1) Military Retirement Benefits. As we all should know, there were significant amendments to the division of military retirement benefits such as the “Frozen Benefit” Rule and new TSP options based on “The Former Spouse’s Protection Act,” Title 10 USC §1408 and the National Defense Authorization Act (NADA) of 2017, effective December 23, 2016 and subsequent regulations. Virginia’s statute on the “marital share” under Va. Code §20-107.3 (G) (1) is inconsistent with the current military requirements of when the share calculation is computed – the date of the final decree. HB 1988 was enacted to amend this statute to authorize trial courts to enter proper military retirement division orders consistent with federal laws. Specifically, added to this section is the following: “*Any determination of military retirement benefits shall be in accordance with the federal Uniformed Former Spouses’ Protection Act (10 U.S.C. 1408 et seq.)*.” The Coalition supported this bill.

(2) Determination of Indigency for Filing Fees and Costs of Divorce. SB1542 was enacted and provides that in the case of a no-fault divorce

proceeding under §20-91A(9), a person who is a current recipient of state or federally funded public assistance for the indigent shall not be subject to the fees and costs for filing the divorce. In a no-fault proceeding, such person shall certify the receipt of such benefits under oath. This bill was proposed by the Virginia Poverty Law Center.

(3) Waiver of Service of Process. HB1945 and SB1541 state that, in cases of no-fault divorces, waiver of service of process may occur within a reasonable time prior to or after the suit is filed, so long as a copy of the complaint is attached to the waiver or otherwise given to the defendant. It also provides that, where a defendant has waived service of process (and, where applicable, notice), the affidavits or depositions and all papers to the divorce can be filed contemporaneously. Divorce may be granted solely on those documents where the defendant has waived service and where applicable notice is given. This amends Va. Code §20-99.1:1 and §20-106. The Coalition supported this bill.

(4) Jurisdiction for Findings of Fact for Child to Apply for Benefits. HB2679 and SB1758 amend Va. Code §16.1-241 by adding a new subsection “A1” which permits a juvenile district court judge to make specific findings of fact required by state or federal law to enable a child to apply for or receive a state or federal benefit. The Coalition took no position on this bill.

(5) Child Support-Suspension of Driver’s License. HB2059 amends Va. Code §46.2-320.1 by extending the time period a party can request a judicial hearing based on a driver’s license suspen-

sion for child support arrearages from 10 days to 30 days if the request is made in writing to the DCSE. It also provides that the DCSE may enter into an agreement with the obligor to reinstate the license if the delinquency can be paid back within 10 years and the obligor pays at least 5% of the delinquency or \$600.00, whichever is “less,” rather than the prior requirement of whichever is greater. If there is a default on the payment pursuant to the agreement with the DCSE, then the license may be suspended unless the arrearage has been paid in full or unless there is a subsequent agreement with the DCSE to satisfy the delinquency within 7 years and the obligor has made at least one payment of \$1,200.00 or 7% of the total delinquency, whichever is “less,” rather than the prior requirement of “greater.” If a party thereafter fails to comply with the second agreement, then the license shall be suspended unless there is a new agreement with the DCSE to repay the arrearage within 7 years and the obligor has made at least one payment of \$1,800.00 or 10% of the arrearage, whichever is “less,” changing this from the prior 5% requirement and whichever is greater.

(6) Temporary Delegation of Parental or Legal Custodial Powers; Child-Placing Agency.

HB2542 enacts new comprehensive statutes, Va. Code §20-166 and §20-167. This statute basically permits a parent or legal custodian of a child by a proper power of attorney pursuant to Va. Code §20-167 to delegate to another person for a period not to exceed 180 days any powers regarding the custody, care, and property of the child. Excepted from these delegated powers are the power to consent to marriage or adoption of the child, the performance of an abortion on or for the child, or the termination of parental rights of the child. In the case of a service member, the powers may be delegated for over 180 days while on active duty if such active duty is over 180 days. The definition of service member includes a member of the Armed Forces of the Unit-

ed States Armed Forces Reserves, National Guard, and other federal agencies listed.

A delegation of these powers shall not operate to change or modify any parental legal rights or obligations established by a court order or to deprive a parent of any parental rights or obligations or authority regarding custody, visitation or support under Title 20. In the event both parents of a child are exercising joint custody, both parents shall be required to execute the power of attorney.

Any party who has signed the power of attorney shall have the authority to withdraw the power of attorney at any time. If the power of attorney lasts longer than 180 days, a new power of attorney shall be executed. For service members, if the delegation is longer than 180 days while on active duty service and exceeds the time of active service plus 30 days, a new power of attorney shall be executed.

A licensed child-placing agency that assists parents and legal guardians with the process of delegating parental and legal custodial powers of their children shall comply with background check requirements established by the Department of Social Services, develop and implement written policies and procedures for closed cases or admissions, prohibit corporal punishment, monitor the administration of medications, ensure the children are not subject to abuse or neglect, implement back-up plans for the children and other administrative duties set forth in subsection (G) of the statute.

Except as permitted by the “No Child Left Behind Act” requirements of federal law, a power of attorney executed pursuant to this section shall be invalid if executed for the primary purpose of enrolling the child in a school for the primary purpose of participating in academic or interscholastic athletic programs provided by that school. Violation of this section shall be a crime in violation of the laws of the Commonwealth.

A thorough reading of these new statutes is advised since it is fairly detailed. The Coalition had input into some of the protections afforded by this

legislation such as the notice of the arrangement to the DSS, the background checks and other administrative policy protections by the child-placing agency, the 180-day limit and the priority of existing court orders.

(7) Authority to Order Exchange of Child at Meeting Place. HB2317 amended Va. Code §20-124.3 by adding to the last sentence: “At the request of either party, the court may order that the exchange of a child shall take place at an appropriate meeting place.” As originally drafted and proposed, this gave the court the authority to order that law enforcement officials be present at a custody or visitation exchange. However, this was opposed by various law enforcement agencies, so the statute deleted that earlier condition. This probably merely restates what courts generally did anyway, but clarifies their authority on the issue.

(8) Protective Orders-Medical Evidence SB1429 amended Va. Code §16.1-245.1 by adding the admissibility of a medical report to a preliminary protective order hearing under §16.1-253 or 16.1-253.1 if notice is given to the opposing party at least 24 hours before the hearing. This expands the use of a medical report from the final protective order hearing requiring a 10-day advance notice or for a preliminary removal hearing. The Coalition supported the bill.

(9) Protective Orders- Contents of Preliminary Protective Orders; Docketing of Appeal. SB1540 amends Va. Code §16.1-112, 16.1-253.1, 16.1-296 and 19.2-152.9. It adds to §16.-112 that an appeal from a protective order issued pursuant to §19.2-152.10 shall be assigned a case number within two business days upon receipt of such appeal. §16.1-296(F) also requires that, in appeals to the circuit court, the case shall be assigned a case number within two business days of the receipt of such appeal.

Virginia Code §16.1-253.1 was amended as to preliminary protective order matters by adding the following: “If an *ex parte* order is issued without an affidavit or a completed form as prescribed by subsection D of §16.1-253.4 being presented, the court, in its order, shall state the basis upon which the order was entered, including a summary of the allegations made and the court’s findings.” Virginia Code §19.2-152.9 was also amended by stating that the preliminary protective order, if entered *ex parte*, shall state the same language and findings as set forth above, with reference to subsection D of §19.2-152.8.

(10) Adoptions- Post-Adoption Contact and Communication Agreements. HB1728 amends Va. Code §16.1-283.1 and §63.2-1220.2 relating to voluntary post-adoption contact and communication agreements. This states in both statutes that, unless the parental rights of the parents have been terminated pursuant to subsection §16.1-283(E), a local board of social services or child welfare agency required to file a petition for a permanency planning hearing pursuant to §16.1-282.1, “may” inform the birth parent or parents and “shall” inform the adoptive parent or parents that they may enter into a written post-adoptive contact and communication agreement with the pre-adoptive parents. They shall also inform a child if the child is 14 years old or older that he may consent to such an agreement.

(11) Assisted Conception- Gender Neutral Terminology. HB1979 amends Va. Code §§ 20-156 through 158, 20-163 and 20-165. This amendment basically provides for gender neutral terminology and allows an unmarried individual to be an intended parent, paralleling the ability of an unmarried individual to adopt under the adoption statutes. The bill further allows for the use of an embryo subject to legal or contractual custody of an intended parent in a surrogacy arrangement. ❖



ASK THE EXPERT

Mental Health Professionals and High Conflict Divorce: 7 Pitfalls to Avoid

Michael Oberschneider, Psy.D., NCCE, NCPC

In the ideal divorce situation, family law attorneys are able to mitigate or circumvent problems for the involved parties without the need for adversarial negotiations and/or aggressive litigation. But when it comes to high-conflict divorces, things like mediation, collaboration and cooperative negotiations are often not an option, especially when the matter of custody is at hand.

Mental health professionals can be helpful to family law attorneys during high-conflict divorces, but unfortunately, it is not uncommon for some attorneys to attempt to blur a clinician's boundaries in order to buttress their negotiations and litigation. Certainly, it is one thing to use mental health professionals cleverly during a high conflict case, but it is an entirely different thing to do so in unethical ways or at any cost. When a mental health professional's work is misrepresented or distorted – intentionally or unintentionally – by family law attorneys, the possibility for emotional and relational harm increases, as does the potential for a poor final ruling or outcome for a family.

Successfully navigating one's way through a high-conflict divorce case is a difficult undertaking, especially when mental health concerns for either the involved adults and/or minor children may be present. While each family presents its own unique dynamic and set of problems, and while there is not a one-size-fits-all way to manage mental health issues and professionals during high-conflict divorce cases, it is important for family law attorneys to be mindful of the following pitfalls.

1. Don't use therapy as a litigation tactic.

Some family law attorneys will encourage their client to either get themselves or their children "treatment" or "therapy" with the intention of compelling that therapist to court as a legal tactic all along. These attorneys might even suggest to their client that they do not need to include or inform their spouse of the treatment of the children, only for that parent to later learn of his or her child's treatment at a later time. This sort of scenario often backfires and the therapy process is compromised or terminated prematurely when the neutrality and ethics of the therapist are challenged by the uninvolved parent. If the therapy does continue, the child's therapy is usually still damaged by the surrounding parental distrust and disagreement, and this is unfortunate should the child or children truly need to be in therapy.

It is also inappropriate for family law attorneys to attempt to influence the therapist in any way or to communicate exclusively with their client's therapist or their child's therapist. While I suppose there are times and circumstances when attorneys could and maybe should communicate with involved mental health professionals, attorneys in those instances should strive to keep all information and communication even when working with mental health professionals. For instance, the involved attorneys could schedule phone or in-person meetings with a therapist to discuss things (once client and/or parental consent is granted) to avoid the appearance of improper communication or the aligning of one attorney with the clinician.

When these sorts of moments are not managed even-handedly by the attorneys, a perception of bias could form for one side or the other. I have too often seen a good therapist's credibility challenged by an attorney in court via impeaching their testimony for not behaving equitably in treatment or with attorneys.

Some family law attorneys will go so far as to ask a client's therapist or a child's therapist to opine on the divorcing spouse's mental health functioning without their having formally assessed or treated the divorcing spouse. Professional guidelines preclude therapists from offering armchair diagnoses like this in court, but unfortunately, it occurs more than it should in high-conflict divorce cases and litigation. Just because someone has arguably behaved very poorly, does not mean that the person in question has a personality disorder or some other type of serious mental illness. Arriving at a correct diagnosis requires a clinical interview and formal evaluation, and anything less is not acceptable.

If you learn that a child requires a mental health consultation or treatment during a high-conflict divorce case, encouraging that treatment with respectful tact and care is advised. If the conflict is so high between the parents that they cannot agree on a treating mental health professional for their child, the involved attorneys could work together on this and even involve the court if necessary.

2. Don't blur the line between a treating clinician (*i.e.*, a therapist) and a forensic expert.

Some family law attorneys will attempt to turn a client's therapist or a child's treating clinician into a forensic expert. This occurs, for instance, when a therapist is subpoenaed to court to offer formal recommendations regarding visitation and/or custody. A therapist is a treatment provider and as such can be both an advocate and fact witness for a client in court. In contrast, a forensic expert is not a treater, but rather as an evaluator he or she is appropriately expected to offer formal recommendations in court.

When a client or a child's individual therapist attempts, per the direction of a family law attorney (or at their own discretion), to offer formal recommendations for family members or the family as a whole (*e.g.*, a custody arrangement), that therapist has violated his or her professional guidelines and ethics.

3. Don't ask a mental health professional to opine on an individual's mental health without an evaluation or treatment.

It is not uncommon for divorcing parents to accuse one another of very serious wrongdoings involving their minor children – from neglect and abuse to drunk driving and exposure to inappropriate material (*e.g.*, sex, pornography, *etc.*), family law attorneys are often perforce placed in the role of flushing out the truth. The same is true for accusations involving possible mental health conditions for divorcing parents. But again, just because a husband is behaving cruelly or narcissistically, doesn't mean he meets criteria for Antisocial Personality Disorder or Narcissistic Personality Disorder. Similarly, one's wife could rage and present herself as overly emotional and erratic without having Borderline Personality Disorder.

Thus, while some family law attorneys will ask a therapist to opine on a parent or child's mental health struggles or offer up an armchair diagnosis without having evaluated or treated them, again, doing so would be a violation of the clinician's professional guidelines and ethics. The court is the more appropriate venue to directly argue for an evaluation or treatment when mental health struggles may be present in either a parent or child.

4. Don't try to turn a psychological evaluation and/or parenting capacity evaluation into a custody evaluation.

While necessary at times, a Custody Evaluation can be a financially and emotionally draining, time-consuming, and unpredictable undertaking for all

involved. Even when the expert is mutually agreed upon, parents relinquish much of their control to the expert when they consent to a Custody Evaluation. This can become problematic should the evaluator get things wrong for a family regarding custody and related matters.

Some family law attorneys will attempt to turn a Psychological Evaluation and/or Parenting Capacity Evaluation into a Custody Evaluation because to do so is less expensive and quicker. But arguing that a parent can or cannot adequately parent due to the results of their Psychological Evaluation (with or without a Parenting Capacity Evaluation) is an overreaching approach that could cause additional pain and harm to a parent and family and lead to a bad outcome. Psychologists who are trained to conduct Psychological Evaluations and Parenting Capacity Evaluations are precluded from offering formal recommendations regarding custody, for example, yet some family law attorneys will request a psychologist to do just that, and some psychologists will comply.

A Psychological Evaluation can be beneficial to the court in that it accurately identifies and/or rules out problems and mental health conditions or diagnoses for the individual being evaluated. While conducting a Psychological Evaluation and Parenting Capacity Evaluation together does not substitute for the more comprehensive Custody Evaluation, doing the two evaluations at the same time will offer the court additional information regarding one's functioning and ability to parent. Where the Psychological Evaluation assesses one's mental health functioning, a Parenting Capacity Evaluation assesses the important manifold aspects of parenting – the bond and attachment between a parent and child, a parent's risk for neglect or abuse, a parent's knowledge of their child's developmental needs, a parent's insight, impulsivity and flexibility, parenting style, *etc.*

5. Don't go on a fishing expedition with evaluations.

Some family law attorneys will also have their client participate in a private Psychological Evaluation prior to court in order to demonstrate that their client's mental health is intact. And while the results of a private Psychological Evaluation do not need to be disclosed or reported during the divorce process should the results prove to be unfavorable for the client, this approach can be risky. Although a non-court ordered Psychological Evaluation is private, I have seen this sort of information revealed when clients are queried firmly during depositions and contentious litigation.

Moreover, some family law attorneys will attempt to influence an individual's Psychological Evaluation by providing the psychologist with documents and/or communications that support their client's mental health and/or refute their divorcing spouse's mental health. It is also not uncommon for family law attorneys to attempt to have the divorcing spouse's voice and information in their spouse's individual and private Psychological Evaluation. These things should not occur, but rather, the involved attorneys (not infrequently with the court's assistance) should agree in advance on which collateral documents the evaluating psychologist will be allowed to review as part of the evaluation. If a client misrepresents information during their evaluation, that reporting or information can be challenged or countered at a later time.

6. Don't subpoena recklessly.

When people go to therapy, they assume that their personal information – their private thoughts and feelings – will remain in the therapy space. And while forcefully compelling a therapist's treatment records or his or her testimony could greatly help an attorney's case, there are some very real possible consequences to subpoenaing clinicians and/or a client's private treatment information.

In my experience, it is more common than

not for a therapy relationship to become damaged or for the therapy to terminate altogether after a therapist and/or his or her treatment information enters the adversarial court space. Attorneys might challenge or argue with a therapist about aspects of a treatment or an individual's needs or functioning to support a belief or position, but in doing so, information can be taken out of context and misrepresented. For example, I was once questioned repeatedly in court by an attorney about the word "confused" that I jotted in my treatment notes as the therapist for a client during a high-conflict divorce. While that attorney tried in earnest to demonstrate to the court that the parent's "confusion" in my session represented her "delusional thinking" it most certainly did not.

While subpoenaing information and therapists to court is oftentimes unavoidable, I think family law attorneys should take great care in how they obtain and rely on treatment information. Again, when a therapist is compelled to court to openly discuss a parent or child's therapy or to share the treatment chart, the therapy is usually compromised or it terminates altogether. I've unfortunately seen this occur hundreds of times in my career, and it is very sad to see important therapy relationships and treatments, especially for children, end in this way.

If at all possible, it is best for the involved attorneys to work together to obtain the information they need from a mental health clinician and to be mindful not to place undue strain on a parent or child's therapy. Having a therapist prepare a statement that is shared with both attorneys (and possibly the court), or having a therapist speak to both attorneys about the treatment in preparation for questioning and court, could serve to respectfully preserve the parent or child's therapy relationship. Of course, a document or phone call cannot be cross-examined in court, but approaching the therapist and their records in a stepwise manner and with respectful tact is good practice.

7. Don't hire a hired gun.

Some family law attorneys repeatedly turn to the same mental health professionals for high-conflict divorce cases because these clinicians will do what the attorneys want them to do without considering what is in the best interests of the child or family. Certainly, therapists and forensic experts who compromise their ethics in this way may please their attorney referral source, but at too great cost. It is only a matter of time before judges, attorney colleagues, and other mental health professionals learn who the hired gun mental health professionals are in their community, and associations like that can become problematic for one's reputation and career.

It is always best for family law attorneys to carefully select the best mental health professional for the specific case; you may not win every high-conflict divorce case by choosing therapists or forensic experts with solid reputations and with impressive experience, training, and credentials, but the results should be more accurate and reliable for the court, and thus, so too should the final ruling and outcome.

Michael Oberschneider, Psy.D, NCCE, NCPC, is a Nationally Certified Custody Evaluator and Parenting Coordinator in private practice in Northern Virginia. Much of Dr. Oberschneider's practice is dedicated to working with families who are going through high-conflict divorces.
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Gatekeeping to the Courthouse: *Pre-Filing Injunctions and Prohibitions to Practice before Courts*

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As lawyers, our primary goal is to protect our clients. But how do we protect them from abusive litigation? When a litigant has filed an action that is clearly meritless, the obvious response is to seek sanctions under Virginia Code § 8.01.271.1, which requires that any pleading filed is “ (ii) . . . well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” The remedies available under the sanctions statute, though, are not always adequate to prevent abusive litigation, whether from *pro se* litigants or even from attorneys acting unethically. While courts do have additional powers to prevent abuses of the system, they are used in rare cases and many family law practitioners are unfamiliar with them. Understanding these powers to limit such abuses can help protect our clients financially and emotionally.

Courts Can Prevent a Litigant from Filing or Docketing Pleadings

With the proliferation of internet advice available to anybody with a smart phone or tablet, including websites designed to help *pro se* litigants learn how to bring a legal action, many parties initiate actions without the assistance of counsel, often doing so improperly. While there are few published studies on the exact percentage of cases with *pro se* litigants, states that have conducted such studies found that family law cases saw among the highest percentage of cases with at least one *pro se* litigant, and that the number of such cases has

increased over the past two decades.¹ Meanwhile, not surprisingly, judges have reported that *pro se* litigants are the most likely to make procedural mistakes that prejudice their cases.² In 2013, the Supreme Court of the United States updated its procedures to prohibit non-attorneys from arguing cases before that Court.³

In order to protect the courts from excessive and abusive litigation, some state and federal courts have prevented particularly abusive litigants, usually when they are *pro se*, from docketing any pleading unless it is approved in advance by the court. The purported authority for a court to do so is embedded in the court’s authority to manage their own docket. Part of the argument in favor of this judicial power is that the overuse of litigation by one party can strain finite judicial resources to the detriment of other parties with legitimate actions. The propriety of such restrictions had not been tested in any Virginia case until recently in the case of *Adkins v. CP/IPERS Arlington Hotel LLC*, 293 Va. 446, 799 S.E.2d 929 (2017), in which the Supreme Court of Virginia decided in favor of such restrictions in extreme cases of abusive litigation.

In *Adkins*, the Supreme Court found authority from the Fourth Circuit persuasive when determining whether a pre-filing injunction was appropriate. They applied the following test from *Cromer v. Kraft Foods N. Am, Inc.*, 390 F.3d 812, 818 (4th Cir. 2004):

In determining whether a pre-filing injunction is substantively warranted, a court must weigh all the relevant circumstances, including (1) the party’s history of litigation,

in particular whether he has filed vexatious, harassing, or duplicative lawsuits; (2) whether the party had a good faith basis for pursuing the litigation, or simply intended to harass; (3) the extent of the burden on the courts and other parties resulting from the party's filings; and (4) the adequacy of alternative sanctions.

This same reasoning was used in *Madison v. Board of Supervisors*, 296 Va. 73, 817 S.E.2d 818 (2018). In *Madison*, Ms. Madison filed 22 lawsuits in the Circuit Court of Loudoun County against the Board of Supervisors or other divisions or departments of the County. She has also filed four petitions for appeal in the Supreme Court of Virginia and two petitions invoking the Supreme Court's original jurisdiction. The *Madison* court ordered Ms. Madison to reimburse Loudoun County for its legal fees, but found the remedy inadequate to prevent Ms. Madison from filing similar suits. Accordingly, the Supreme Court ordered that "Madison shall be prohibited from filing in this Court any petition for appeal, motion, pleading, or other filing against the Board of Supervisors of Loudoun County or any of its divisions or departments without (1) obtaining the services of a practicing Virginia attorney, whose filings would be subject to Code § 8.01-271.1, or (2) obtaining leave of Court to file any *pro se* pleading.

While *Adkins* and *Madison* are not a family law cases, the availability and propriety of this remedy has clear applications in family law. In *Adkins* and *Madison*, the Court found that under the fourth prong of the test, alternative sanctions available under Virginia Code § 8.01-271.1 were inadequate to prevent abuses by a *pro se* litigant, when attorney's fees were not a viable deterrent. In family law cases, the *pro se* litigant is often without an attorney because he or she is unable to afford one, which makes collecting an attorney's fees award against the *pro se* litigant unlikely. Thus, it would not have the effect of deterring the *pro se* party from filing

future litigation.

In *Adkins*, the Court expressed concern with the number of affected defendants from Ms. Adkins's various lawsuits, but the same effect can exist if a *pro se* litigant is perpetually bringing motions before the court requiring the presence of the opposing party in court. If the opposing party does not have an attorney, the litigation is just as abusive and yet an award of attorneys' fees is an ineffective remedy. Further, it may be difficult for a court to determine that repeated motions for custody or visitation modifications are necessarily sanctionable if the party alleges a change in circumstances each time but the court finds that the change does not warrant a modification. The intent to harass another party through litigation may only be evident after multiple motions, and even then, the sanction of attorneys' fees may do little to address the root problem. Meanwhile, judicial resources are expended with each motion.

Obviously, it is an extreme remedy for a court to limit access to the judicial system for an individual litigant. However, in the rare case when it is the only option to prevent abusive litigation, it is clear based on the Virginia Supreme Court precedent in *Adkins* and *Madison* that such a remedy is permitted by the court's authority to manage its own docket.

Courts Can Prohibit Attorneys from Litigating in Their Forum

While *Adkins* is helpful to understand the availability and limitations of pre-filing injunctions against *pro se* litigants (although they are available in cases where the parties have counsel), what happens when the abusive litigation is being promulgated by an attorney? We are all required to take legal ethics credits to maintain our licenses, and local bars and CLE providers frequently offer courses that address civility in the law and appropriate behavior toward fellow members of the bar. Nevertheless, there are attorneys who too frequently cross the lines of civility and breathe toxicity into cases.

Our training tells us that when you believe another attorney has acted unethically, the issue is handled by the Bar. Therefore, it may come as a surprise to learn that a Virginia Court can prohibit an attorney from practicing within that jurisdiction based on the attorney's behavior, independent of any action taken by the Virginia State Bar. Such action was upheld in the case of *In Re JAM*, 273 Va. 688, 643 S.E.2d 190 (Va. 2007). In that case, prior to the prohibition being issued against the respondent attorney ("Respondent"), he had failed to concede the existence of an arbitration provision in a contract case before the Arlington Circuit Court in which he represented an individual suing The Christian Coalition of America. When the Court determined that the Respondent had a copy of the contract at issue containing an undisputable arbitration clause, the Respondent was sanctioned, together with his client, in the amount of \$83,141.24. The Respondent subsequently made inflammatory statements regarding the competency of the judge who ordered the sanctions and then refused to cease representation of his client in her subsequent suit against The Christian Coalition, despite his adverse interests to hers.

The Arlington Circuit Court ultimately found that the Respondent's behavior was so inflammatory and unethical that they revoked his privilege to practice in the Arlington Circuit Court. The Respondent appealed the decision, stating in part that an attorney's license to practice is governed by statute and cannot be revoked by a court. The Virginia Court of Appeals affirmed the Arlington Circuit Court's decision, distinguishing between the revocation of a license and the revocation of a privilege to practice in a particular court. The Court of Appeal found that "the authority of a court to regulate the conduct of attorneys practicing before that court by revoking or suspending that privilege is both an inherent and a constitutional power that is not dependent on its creation by legislative enactment and thus cannot be limited by statute." *Id* at

195. The impact to the Respondent's practice was not considered in light of the circuit court's discretion in this area.

The use of this extreme remedy was far more common prior to the statutory scheme for licensure of attorneys. However, it is not without precedent since the codification of attorney licensure, including cases such as *Nusbaum v. Berlin*, 273 Va. 385, 641 S.E.2d 494 (2007) and *Judicial Inquiry and Review Commission of Virginia v. Peatross*, 269 Va. 428, 611 S.E.2d 392 (2005). Much like the pre-filing injunctions discussed above, cases in which this remedy would be appropriate should be rare. However, attorneys should be aware that their behavior can have such results if they are acting inappropriately toward the bench where they practice. Meanwhile, the awareness of judges of the existence of this extreme remedy and its tempered application may help to curb inappropriate behavior when sanctions are insufficient.

While it is still clear that the first line of defense against abusive litigation and litigants is sanctions imposed pursuant to Virginia Code § 8.01-271.1, it is important to know there are other quite potent remedies in the rare cases when sanctions are inadequate. ❖

Endnotes

1. See e.g. *Challenge to Justice—A Report on Self-Represented Litigants in New Hampshire Courts—Findings and Recommendations of the New Hampshire Supreme Court Task Force on Self Representation*. State of New Hampshire Judicial Branch (January 2004), (Finding that in 2004 almost 70% of cases had one *pro se* party, and that specifically in domestic violence cases, 97% of the cases have one *pro se* party (p. 2)); Hough, Bonnie Rose. *Description of California Courts Programs on Self Represented Litigants* —Harvard (June 2003) (The occurrence of at least one party being *pro se* in family law cases in San Diego increased from 46% in 1992 to 77% in 2000); John Voelker. *Wisconsin Pro Se Task Force Report*. The Wisconsin Pro Se Working Group. A Committee of the Office of Chief Justice of the Wisconsin Supreme Court (December 2000) (finding an increase in family law cases of *pro se* litigants comparing 1995 to 1999).
2. Ryan Craig Munden. *Access to Justice: Pro Se Litigation in Indiana (Fall 2005)*
3. Rules of the Supreme Court of the United States § 28.8


 VF LQ CASES OF THE QUARTER

Jurisdiction – “Equitable Restitution”

Name: *McGinnis v. McGinnis*, 69 Va. App. 572 (2018)

Facts: The parties appeared in the circuit court for their final hearing. At the start of the hearing, the parties informed the court that they both filed bankruptcy. The wife’s counsel indicated that it was neither asking the court to hold an equitable distribution hearing or to reserve the issue. The wife did proceed on her request for spousal support. At trial, the wife testified that the husband had spent an exorbitant amount on jewelry and expenses for other women. In its ruling, the circuit court awarded the wife \$4,000 in monthly support plus \$150,000 in what it later termed as an “equitable restitution award.” The equitable restitution award was based upon the husband’s failure to pay *pendente lite* support and the wife’s immediate need for such an award in order to maintain herself. When pressed on whether the award was an award of spousal support, the circuit court indicated that it was not its intent to make the equitable restitution award in the nature of spousal support. The husband appealed.

Issue: Whether the circuit court had the jurisdiction to make an “equitable restitution award.”

Ruling: The Court of Appeals reversed the circuit court.

Rationale: The jurisdiction of a circuit court in divorce matters is entirely statutory and limited. The circuit court’s equitable restitution award was neither equitable distribution nor

spousal support. The parties indicated at the start of the trial that there was no need for equitable distribution based upon the parties’ bankruptcy filing. The circuit court itself indicated that the equitable restitution award was not in the nature of spousal support. Accordingly, as there is no statutory authority supporting the circuit court’s equitable restitution award, the circuit court erred in making such an award.

Equitable Distribution – Division of Pensions

Name: *Garza v. Garza*, 18 Vap UNP 1286184 (2018)

Facts: The parties were married in 1975. The husband earned a pension through the Federal Employees Retirement System (“FERS”) and was in pay status as of the date of the equitable distribution hearing. The wife was still contributing toward her Virginia Retirement System (“VRS”) pension and working as of the date of the equitable distribution hearing. The wife was 62 years old and in fairly good health. The husband was 64 years old and had several medical conditions, although he still maintained an active CPA license. The wife indicated that, while she was still working full time, she intended to retire in three years when she 65 years old. The trial court awarded each party 50% of the marital share of the other party’s pension. The husband appealed, stating that the trial court erred since the wife would receive her portion of the husband’s FERS pension now and that he would not receive his share of her VRS pension until she retires in three year. He argued that giving the wife her share of his FERS pension caused an undue

hardship and that the trial court should have deferred when the wife received her share of his FERS pension.

Issue: Whether the trial court erred by awarding the wife a share of the husband's FERS pension before the husband began receiving his share of the wife's VRS pension.

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

Rationale: The trial court considered the factors in Virginia Code § 20-107.3, including the parties' ages and physical and mental conditions. The trial court complied with the statute by ordering that the "payment be made as such benefits are payable" pursuant to Virginia Code § 20-107.3(G)(1). Virginia Code § 20-107.3 does not allow a court to defer such payments. Allowing the trial court to defer payments would allow it to re-write a statute. The manifest intention of the legislature, clearly disclosed by its language, must be applied.

Equitable Distribution – Omitted Property

Name: *Eberhardt v. Eberhardt*, 18 Vap UNP 0662181 (2018)

Facts: On the date of the parties' equitable distribution hearing, they reached an agreement, which was read into the record pursuant to Virginia Code § 20-155. The first line of the agreement stated that "[t]he parties by counsel have reached an agreement with regard to all issues in this matter." The parties' agreement encompassed spousal support and division of marital property. The parties' agreement did not contain a provision addressing any omitted or nondisclosed property. The trial court subsequently entered an order affirming the

entirety of the parties' agreement. After entry of the order, the wife requested the trial court to divide the husband's Fidelity Roth IRA which had been omitted from the parties' agreement since the husband failed to disclose the account during discovery. The husband claimed the Fidelity Roth IRA was not addressed in the parties' agreement, was in his sole name and was, therefore, his sole property. The trial court thereafter held a hearing and equally divided the Fidelity Roth IRA. The husband appealed.

Issue: Whether the trial court erred by distributing the husband's Fidelity Roth IRA.

Ruling: The Court of Appeals reversed the trial court.

Rationale: The parties specifically stated that their agreement was "with regard to all issues in the matter" and was comprehensive. Virginia Code § 20-109 prevents a trial court from decreeing an equitable distribution award that is inconsistent with a parties' agreement. Although the agreement did not distribute all of the parties' marital property, the trial court could not supplement the terms of their agreement by distributing property that the parties failed to address. Further, the parties' agreement did not include a term addressing omitted or nondisclosed property. Accordingly, the trial court erred by dividing the Fidelity Roth IRA between the parties.

[Editor's Note: This case should serve as a cautionary tale of the inherent dangers of reaching the proverbial agreement on the courthouse steps. While these agreements are sometimes unavoidable, they can be a real minefield.]

Equitable Distribution – Classification of Gift

Name: *Burgess v. Burgess*, 19 Vap UNP 0751182 (2019)

Facts: At an equitable distribution hearing, the wife contended that her parents provided her \$35,000.00 as a gift during the marriage as an advance on her inheritance and that she could trace the money to the parties' marital residence. The wife's father (Mr. Grant) testified that he and the wife's mother (Mrs. Grant) gave the wife \$25,000.00 in 1996 for the down payment on the husband and wife's first home since, in order for them to get a loan, "they had to make a substantial down payment. We provided that." Mr. Grant further testified that another \$10,000.00 was given to the parties "to make improvements on the house they purchased." He testified that both amounts were given to the wife alone and were not gifts to the husband. Mr. Grant stated that he and Mrs. Grant signed a letter in 2016 that the money they had given 20 years earlier was intended as an advance of the wife's inheritance. On cross-examination, Mr. Grant was asked, "You gave your daughter that money so she and her husband could buy a house together, right?" He responded, "I would say that is true, but it was a gift to my daughter, not to her husband." When Mrs. Grant was asked whether it was her intention to gift the money to the wife or both the husband and wife, she testified, "It was our intention to make a purchase of a house possible." Both Mr. and Mrs. Grant testified that they knew that the house was going to be purchased jointly. The trial court found that the money was a gift to both the husband and wife to purchase their first marital home and found that the \$35,000.00 was marital property. The wife appealed.

Issue: Whether the trial court properly classified the \$35,000.00 as a gift to both of the parties and not an advance on the wife's inheritance from her parents.

Ruling: The Court of Appeals affirmed the trial court.

Rationale: Where evidence is presented that property was acquired during the marriage, the trial court must conclude that it is marital property unless adequate evidence is produced to establish that it is separate property as defined in Virginia Code § 20-107.3(A) (1). The issue of whether the wife's parents intended to make a gift to just the wife or to both of the parties is a question of fact for the trial court. Although a different fact finder may have reached a different conclusion, credible evidence supports the trial court's finding of fact that the money was a gift to both parties.

Equitable Distribution – Failure to Trace Separate Interest

Name: *Jackson v. Jackson*, 18 Vap UNP 0734182 (2018)

Facts: Husband purchased a home on Windcroft Road (the "Windcroft Property") six years prior to the parties' marriage with a Veteran's Affairs ("VA") loan. The parties lived in the property for a few years after they married. The parties refinanced the VA loan on the Windcroft Property to use the VA loan on a new marital home. In doing so, the husband jointly titled the Windcroft Property into his and the wife's name. The parties rented out the Windcroft Property for the next 11 years. At trial, neither party testified about how the rental income was deposited, although the husband paid the mortgage on the Windcroft

Property from a separate account. The husband argued that the Windcroft Property, despite being jointly titled and presumptively marital property, was retraceable to its original classification and should be classified as his separate property. The trial court disagreed since it had no evidence as to what efforts the husband expended on the property. The husband appealed.

Issue: Whether the trial court erred in classifying the Windcroft Property as marital property and not the husband's separate property.

Ruling: The Court of Appeals affirmed the trial court.

Rationale: Pursuant to Virginia Code § 20-107.3(A)(1), marital property includes "all property titled in the names of both parties." Further, Virginia Code § 20-107.3(A)(3)(f) states that if "separate property is retitled in the joint names of the parties, the retitled property shall be deemed transmuted to marital property. However, to the extent the property is retraceable by a preponderance of the evidence and was not a gift, the retitled property shall retain its original classification." While the retitling was not a gift, there was insufficient evidence about the source of the funds in the account used to pay the mortgage and whether the funds were the husband's separate property. It was also unclear whether any rental income was used to fund the account. Finally, the husband did not provide any evidence of the purchase price of the house, his equity in the home at the time of the retitling as well as other relevant evidence to retrace his separate interest. As a result, the husband failed to meet his burden to prove retraceability and rebut the presumption that the retitled property was transmuted to marital property.

Spousal Support – Cohabitation for 1 Year

Name: *Gobble v. Gobble*, 19 Vap UNP 0791183 (2019)

Facts: The parties' property settlement agreement provided that the husband would pay the wife \$4,500 per month in spousal support, which would, pursuant to VA Code § 20-109(A), terminate upon the wife's "habitual cohabitation with another person in a relationship analogous to marriage for one year or more." The wife began an exclusive relationship with Jeffrey Howard in 2006. The wife and Mr. Howard exchanged rings and held themselves out as engaged, but did not intend to marry. The wife purchased gifts for Mr. Howard, bought groceries for him and spent more money on joint trips than he did, but they kept their finances separate. Mr. Howard spent some evenings at the wife's residence, but they maintained separate residences. In 2013, Mr. Howard purchased a house next to the wife's and built a path between the properties. He stayed over at the wife's house on occasion, but she did not stay at Mr. Howard's residence. Neither had a key to the other's residence. In 2015, Mr. Howard stopped staying over at the wife's residence due to his use of a CPAP machine at night. The husband filed a motion to terminate the wife's spousal support claiming that she and Mr. Howard were habitually cohabiting in a relationship analogous to marriage for more than one year. The trial court found that the wife and Mr. Howard were not cohabiting as the husband claimed since they did not share a common residence. The trial court denied the husband's motion to terminate spousal support. The husband appealed.

Issue: Whether the trial court erred in finding that the wife and Mr. Howard were habitually cohabiting in a relationship analogous to marriage for more than one year.

Ruling: The Court of Appeals affirmed the trial court.

Rationale: The determination of whether parties are cohabiting is a finding of fact to be made by the trial court after considering all the evidence. Cohabitation has been defined as “living together continuously, or with some permanency, mutually assuming duties and obligations normally attendant with a marital relationship.” The Court of Appeals, in *Pellegrin v. Pellegrin*, articulated four factors for analyzing whether an ex-spouse has been habitually cohabiting with another person in a relationship analogous to marriage, including: (1) common residence, (2) intimate or romantic involvement, (3) provision of financial support, and (4) duration and continuity of the relationship and other indicia of permanency. Here, the trial court found that the wife and Mr. Howard did not share a common residence but had two separate residences. Accordingly, the husband did not meet his burden of proof.

Custody – Failure to Support Contact with Other Parent

Name: *Park v. Chong*, 19 Vap UNP 1134184 (2019)

Facts: The parties had two children from their marriage. The father is a naturalized U.S. citizen, allowing the mother to obtain a two-year green card. In 2016, the parties agreed the mother would take the children to South Korea for an extended visit with the mother’s family. The father was to join them one month later. The mother was expecting her permanent green card while on her trip as the parties had removed the conditions on her green card before her departure. Before the father was scheduled to travel to South Korea, he and the mother quarreled on the phone, causing the

father to cancel his plans to join the family. Three months later, the father texted the mother why she had not returned to Virginia. The mother stated she believed her green card was invalid. The father had received notice that the mother’s green card had been extended for another year, although he did not tell the mother this. The mother subsequently learned she had a valid green card. The father filed for divorce and obtained an expedited custody hearing date. The trial court found that the mother was aware her green card had been extended and did not return with the children to Virginia, nor did she bring the children with her when she returned for the custody hearing. As a result, the trial court held that, pursuant to Virginia Code § 20-124.3(6), the mother denied the father access to the children by keeping them in South Korea. The trial court awarded the parties joint legal custody and the father physical custody, with visitation by the mother. The mother appealed.

Issue: Whether the trial court erred by imposing an affirmative duty on her to return the children to Virginia.

Ruling: The Court of Appeals affirmed the trial court.

Rationale: The trial court must consider all of the factors in Virginia Code § 20-124.3 in order to determine a child’s best interest in deciding child custody. The trial court is not required to exhaustively explain its reasoning or what weight each factor was accorded. Here, the trial court considered all the factors and placed particular emphasis on the sixth factor of the propensity of each parent to actively support the child’s contact and relationship with the other parent. The mother’s refusal to bring the children with her to Virginia when she returned for the custody hearing was relevant and considered by the

trial court to highlight a pattern of denial of access. Furthermore, the trial court was not ordering the mother to rush home but did consider this fact in its decision. The trial court weighed facts; it did not impose a duty as the mother claims.

Child Custody – Presumption of Natural Parent as Custodian

Name: *Perry v. Snipes*, 19 Vap UNP 0856182 (2019)

Facts: Mother used heroin but stopped when she found out she was pregnant. When the child was born, he was exposed to Hepatitis C and displayed signs of opioid withdrawal. The child's paternal great aunt maintained a relationship with the child since he was born, often regularly watching the child when the mother was at work. The aunt filed a petition for custody of the child with the Juvenile and Domestic Relations District Court (JDR). This was, in part, based on the mother's poor parenting in 2015 and 2016, when she posted a photo of herself to social media showing her driving with the child on her lap and the aunt taking care of the child for up to two weeks with no contact from the mother. The JDR court, in noting the mother appeared impaired during visitation and recently testified positive for marijuana, found that the presumption favoring an award to a natural parent was rebutted and awarded the aunt sole legal and physical custody of the child. The mother appealed to the circuit court. In the intervening time, the mother maintained consistent contact with the child, had not testified positive for regularly-administered drug tests in the past year, had another child, married an honorably discharged military veteran and had a suitable place for the child. The circuit court

awarded the mother custody with visitation by the aunt. The aunt appealed.

Issue: Whether the circuit court erred in finding the mother fit and not finding that special facts and circumstances existed to rebut the presumption of awarding custody to the mother.

Ruling: The Court of Appeals affirmed the circuit court.

Rationale: In child custody cases, the best interests of the child are paramount. In a custody dispute between a parent and a non-parent, the law presumes that the child's best interests will be served when in the custody of his or her parent. That presumption can be overcome by a finding of clear and convincing evidence of certain factors, such as parental unfitness, voluntary relinquishment or abandonment of the child, or special facts or circumstances. The aunt argued that there was clear and convincing evidence establishing special facts and circumstances which justified rebutting the presumption. Absent clear evidence to the contrary in the record, the judgment of a circuit court comes to an appellate court with a presumption that the law was correctly applied to the facts. In the present case, the trial court made explicit factual findings in its letter opinion from which it concluded the presumption had not been rebutted. The trial court is best equipped in such cases to make judgments on credibility and weigh the evidence. Even though another fact finder may have arrived at a different conclusion, it is not the role of the appellate court to substitute its views for those of the trial court. ❖

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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 11th at The Jefferson Hotel in Richmond, Virginia. We are pleased to announce the 2019 winner is Peter W. Buchbauer of Winchester.



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