

Virginia Family Law Quarterly



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

Message from the Chair

Susan Butler, Chair Family Law Section

Welcome Spring! With the arrival of Spring comes the announcement of our two hallmark awards, the Betty A. Thompson Lifetime Achievement Award and the Family Law Service Award. The members of our section nominated several worthy recipients and I would like to extend my thanks for the time and work put into the nominations. Reading the nomination packets allowed us to learn more about the contributions our members make to the practice of law and the community on a daily basis and was truly inspiring.

The Board is pleased to announce that the Betty A. Thompson Lifetime Achievement Award will be given to David Masterman of Masterman Krogmann in McLean. David served on the Board of Governors for the Family Law Section for six years and on the Board of Governors of the General Practice Section for two years. David is a frequent CLE presenter and is always informative and entertaining. He is also a true pleasure to have on the opposite side of a case if you enjoy a good sense of humor, music and an intellectual challenge. He is no stranger to the Court of Appeals; hearing him argue a case is spellbinding for a law nerd like me.

The Family Law Service Award recognizes a person or organization who consistently gives their time, talent and energy to advance family, domestic relations or juvenile law in Virginia. This award will be given to Brian M. Hirsch of Hirsch & Ehlenberger in Reston. Normally Brian will not allow me to thank him for his efforts in this message, but this edition will have to be an exception. Aside from being a skilled trial attorney, mediator and frequent CLE presenter, Brian served as a member of the Board of

Governors of the Family Law Section for six years, and as an *ex officio* member for the past seven years in his capacity as the Editor of the *Virginia Family Law Quarterly*. The quality of this publication is remarkable and a gift that Brian has given to all of us for the past seven years.

Lastly, the Family Law Section Board has been hard at work on some exciting new programs. Rahee Jeon is our Board’s Young Lawyers’ Section liaison. For the past two years, she has worked on a new mentoring program. She drafted a proposal for a mentoring program that will pair experienced attorneys with newer attorneys on a variety of family law topics. The Board has worked with her to refine the proposal and Rahee has diligently researched avoiding potential conflicts and other ethical issues.

TABLE OF CONTENTS

Editor’s Note, Brian M. Hirsch	2
Upcoming Events	2
How to Submit an Article	2
Articles	
Legislative Update: 2020 General Assembly Session Lawrence D. Diehl	3
The UCCJEA in International Cases Melissa A. Kucinski	7
The Impact of Social Media on Family Law Jamel Rowe	11
Practicing Law So that Opposing Counsel Would Want to Share a Meal with You Afterwards Nanda Davis	14
Cases of the Quarter	16
The Betty Ann Thompson Lifetime Achievement Award Winner	19
The Family Law Service Award Winner	19
Board of Governors	20

Editor's Note

Brian M. Hirsch

There are lots of good articles in this issue. Larry Diehl has written his annual legislative update article. There were a number of statutory changes in this past session of the General Assembly, as you will see. Jamel Rowe's article about the implications of social media in family law cases is informative and very timely given today's "look at me" culture. Melissa A. Kucinski's article helps those navigating the uncertain waters of jurisdiction in international custody cases. Finally, Nanda Davis gives us some well-needed reminders of how to approach (and not approach) family law cases.

Thanks to all of these contributors for their thoughtful articles. I think you will enjoy them all.

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

Chair Message cont. from pg. 1

She has drafted an impact statement for the Bar, and the program is moving forward. We expect that it will go "live" in approximately six months. At that time, mentors will be able to sign up through the VSB website and mentees will be able to search by topic to find available mentors. This is bound to be a great resource for newer attorneys as well as those in smaller firms without a sounding board down the hall. Stay tuned for more details.

Susan Butler, Chair ❖

UPCOMING FAMILY LAW EVENTS

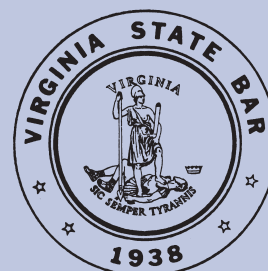
June 18-20, 2020

Annual Virginia State Bar Meeting
(Virginia Beach)

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

HOW TO SUBMIT AN ARTICLE

If you would like to submit an article for publication, please email it to Brian Hirsch at BHirsch@NOVAFamilyLaw.com. Most articles are between 1,000 and 2,000 words, but this should not limit you in submitting a shorter or longer article. Deadlines for submissions are February 21, May 21, August 21 and November 21.



FAMILY LAW SECTION MEMBER RESOURCES WEBSITE LOGIN:

User name: **familylawmember**

Password: **FL2019member**

They are case sensitive.

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

Legislative Update: 2020 General Assembly Session

Lawrence D. Diehl, Esquire

Barnes & Diehl, P.C.

ldiehl@barnesfamilylaw.com

The 2020 session of the General Assembly was very successful for family law practitioners. Special thanks go to Dan Gray and the members of the Virginia Family Law Coalition for their 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://lis.virginia.gov/cgi-bin/legp604.exe?201+sbj+020>.

The following is a summary of the legislation enacted in 2020 which has an impact on family law. All legislation is effective July 1, 2020.

(1) Gender Neutral Terms. HB623 was enacted in response to the ruling of the United States Supreme Court in *Orberfell v. Hodges* (U.S. Supreme Court 6/26/15) upholding same sex marriages. In order to have voluminous numbers of statutes clarify that certain marital and other rights applies to same sex couples, the terms “husband and wife” have been changed to gender neutral terms, such as “spouses” or “persons married to each other.” Some of the highlights of this statute include the provision that an annulment can be obtained when either “spouse” (as opposed to the current language of a “wife or husband”) is married to another “spouse” under Va. Code Ann. § 20-89.1. It also amends the military residency statute by referring to the “spouse” rather than husband or wife and confidentiality of communications between “spouses” (rather than between husbands and wives). Most significantly, it would repeal the prohibition against same sex marriages. SB247 was also enacted, which specifically amends Va. Code Ann. §20-91 regarding the grounds of divorce. It states that “the parties,” rather than “husband and wife,” can apply for a no-fault divorce.

(2) Marriage, Divorce and Annulment Records- Elimination of Racial ID. HB180 and SB62 were enacted, which basically delete the requirement that the identification of race be required in records of marriage, Va. Code Ann. § 32.1-267, or records and statistics reports of divorce and annulment, Va. Code Ann. § 32.1-268 and 268.1.

(3) Prohibition Against Same Sex Marriages. After a number of years attempting to repeal the statutory prohibitions against same sex marriages, HB1490 was enacted, officially repealing Va. Code Ann. §§ 20-45.2 and 20-45.3, the prior prohibitions against same sex marriages. Although the statutes were clearly unconstitutional, this makes it clear that such prohibitions are gone from Virginia’s statutes.

(4) Adverse Inference- Self Incrimination. SB433 is perhaps one of the most important amendments passed by the General Assembly in years. As originally proposed, this would have reduced the penalty for adultery as a civil penalty and repealed its status as a misdemeanor crime. That would have prevented the use of the assertion of the 5th Amendment as a shield by the adulterer. As a compromise to keep the criminality of the crime of adultery, Va. Code Ann. § 8.01-223.1 was amended by providing an exception to the statute that prevented any adverse inference to the assertion of a constitutional right against self-incrimination. As amended, there CAN be an adverse inference drawn from asserting the 5th Amendment in any case filed involving custody, visitation, support, divorce or a petition for separate maintenance filed pursuant to Title 20. This will certainly help in equitable distribution or support matters where the

5th Amendment has been asserted but there was a lack of sufficient proof of adultery. The original bill and amendments were supported by the Coalition.

(5) Minor's Child Day Care Records. SB430 provides for the access to records of a "*child day care center or family day home*" as an amendment to the health care and other records provided for in Va. Code Ann. § 20-124.6. The terms child day care center and family day home are as defined in Va. Code Ann. § 63.2-100. The records would be relevant to both financial costs for child support purposes and for information relating to custody and visitation issues. The Coalition supported this bill.

(6) Child Tax Exemptions and Child Tax Credits. SB434 amends Va. Code Ann. § 20-108.1 (E) by adding that the court can apportion the child tax exemption "*or any credits resulting from such exemption*" for any tax year. This is needed due to the impact of the TCJA tax changes which abolished child tax exemptions from the tax benefits of federal income tax filings effective January 1, 2018. However, the child tax credit was increased for each child from \$1,000 to \$2,000 per child. This is a significant benefit since this is an adjustment to the actual tax owed and not an adjustment to gross income. However, in order to have the IRS accept any agreement or order on the issue, it appears from IRS publications that the child tax credit is attached to the child tax exemption and therefore the same IRS Form 8332 still needs to be filed to obtain the eligibility to claim the credit if you are not the primary physical custodian. Although there is no financial impact or benefit at all of the tax exemption itself resulting from the filing, this will confirm to the IRS who gets the child tax credit. This amendment therefore is meant to make it clear the trial court has the authority to make this apportionment relevant to the credit related to the exemption since the exemption itself has been abolished.

(7) Initial Orders- Unreimbursed Pregnancy and Birth Expenses. SB428 amends Va. Code Ann. § 20-108.2 by adding subsection D1, which

provides that for any child support proceeding "commenced" within six months of the date of the birth of a child, except for good cause shown or the agreement of the parties, in addition to the other child support obligations, the child support order shall provide that the parents pay in proportion to their gross incomes as used for calculating the basic child support obligations, the payment of any "*reasonable and necessary unpaid expenses of the mother's pregnancy and delivery of the child.*" This amount shall not be added to or adjusted by the basic child support obligation under subsection G of the guideline statute.

(8) Costs of Health Insurance Coverage. HB637 amends Va. Code Ann. §63.2-1900 by revising the definition of the "reasonable cost" for health care coverage for dependent children. It now may not exceed five percent (5%) of the payor's gross income, rather than the previous five percent (5%) of both parties' combined gross income. This threshold can be exceeded by the court for "good cause," which would include a situation where the only health insurance available exceeds the five percent cap.

(9) Garnishment of Independent Contractors. SB429 amended various provisions of § 16.1, 20-79.1, -.2, -.3 and 63.2-1903, and others by providing for the garnishment of those who are independent contractors as defined by Va. Code Ann. § 63.2-1900. The notice requirements of Va. Code Ann. § 20-79.3(B)(2) necessitates that if the employee is an independent contractor, the employer shall withhold and pay out the obligor's income in a "*single monetary amount or the maximum amount permitted under § 34-29, whichever is less*" for each instance of compensation of the obligor, once the aggregate amount of payments reaches \$600 or more in a calendar year, the amount may be paid by check. This closes the previous gap which had excluded independent contractors from child support withholding procedures.

(10) Modification of Support in Agreements.

HB1501 amends Va. Code Ann. § 20-109(C), which previously required specific language in an agreement if the parties wanted to make a spousal support award non-modifiable. Out of a concern that some courts might require the exact language to make sure that the award is not modifiable, the statute was amended to liberalize the language that can be used. The required language is now deleted and provides that any award of spousal support in an agreement is modifiable “*unless such stipulation or contract expressly states that the amount or duration of spousal support is non-modifiable.*” The Coalition supported this bill.

(11) Burden of Proof for an Award of Spousal Support Pursuant to a Reservation. SB432 was enacted to clarify the burden of proof needed where a party requests an award of spousal support when the right to support had been previously reserved. In order to resolve what were apparently conflicting rulings on the issue, Va. Code Ann. § 20-107.1(D) was amended and provides that, unless otherwise provided by a stipulation or contract executed on or after July 1, 2020, or unless ordered by a court on or after July 1, 2020, a party seeking an award of support so reserved “*shall be required to prove a material change of circumstances as a prerequisite for the court to consider the exercise of such reservation.*” Note that a court might “order otherwise” which means a court could order the reservation without the material change requirement based on the facts or reason for its reservation. If you represent the party asking for the reservation and you want it clear that you should not have to meet the material change standard, then you need to get the court, based on the evidence relevant to the issue, to make that clear in any order entered at the time of the award of the reservation.

(12) Pendente Lite Spousal Support Guidelines. As a result of the TCJA, the tax impacts of the payment of alimony or spousal support were significantly changed. Effective January 1, 2019, spousal support paid by the payor was no longer deductible by the payor or included as taxable

income to the payee for all new orders or agreements entered into after that date. Voluminous requests were made by individuals, groups and attorneys to look at the impact of this tax act on the current *pendente lite* spousal support guidelines now in effect in the juvenile courts. In response to the need to address the issue, the Coalition studied the issue with a committee chaired by Lawrence Diehl. With the assistance of Robert Raymond and Bill Colesar, well-known CPAs in Richmond, Virginia, a study was made as to the after-tax impact of the prior law and the new laws. Many charts were made based on various income levels, even exceeding combined incomes of over \$10,000 per month, and at various proportions of incomes of both parties.

A summary of the new *pendente lite* guidelines are as follows:

- a. For cases where there are no children, the presumed guideline is **27%** of the payor’s gross income less **50%** of the payee’s gross income. This is a reduction from the prior 30% of the payor’s income.
- b. For cases where there are children, the presumed amount is **26%** of the payor’s gross income less **58%** of the payee’s gross income. This is a reduction of the prior 28% of the payor’s income.
- c. The guidelines only apply to cases with combined gross monthly incomes of up to \$10,000.00. No expansion of the amount was done. That reflects, in part, the difficulty in arriving at a number adjustment that is easily calculated at incomes over \$10,000.00.
- d. The guidelines now apply to circuit court cases in addition to juvenile and domestic relations district court cases.
- e. The guidelines only apply to suits commenced on or after July 1, 2020 and by themselves do not constitute a material

change in circumstances for purposes of modifying an existing support order.

- f. The court can deviate from the calculations for good cause shown, including the impact of any tax consideration or impact of tax exemptions.

These guidelines are only temporary, and to the extent any inequity is later determined when considering the final award of spousal support, they can be retroactively adjusted based on the recent ruling in the Virginia Supreme Court case of *Everett v. Tawes*. Usually when temporary guidelines are ordered, the parties are still married and in most cases (but not all of course), they file jointly as married so any tax impacts would be moot anyway. Also, since they should only apply to the cases with a \$10,000.00 income limit, the amounts of any payments that are not equitable under the guidelines would not be significant.

(13) UCCJEA Identifying Information. HB436 amended Va. Code Ann. § 20-146.20(E) dealing with the non-disclosure of identifying information of the location of the petitioner. The amendment now provides that any hearing or written finding on the issue of the disclosure of that identifying information shall be heard within 15 days of the filing of the pleading “or affidavit.”

(14) Guardians Ad Litem. HB137 was enacted which amends Va. Code Ann. §16.1-274 by adding a new section (D). In addressing some expressed concerns about the diligence of some GALs, this amendment requires GALs to comply with the GAL standards set by the Judicial Council of Virginia. Prior to the final hearing on a case, the GAL is required to file with the court, with copies to all attorneys or *pro se* parties, a certification of compliance with those standards and specifically a certification of compliance with the face-to-face contacts with the child. It also requires the GAL to document the hours spent satisfying such face-to-face contact requirements and such contacts shall be

compensated at the same rate as in-court service.

(15) Additional Abuse Factors for Custody. SB105 and HB861 amended Va. Code Ann. §20-124.3(9) by adding as a factor for custody or visitation, in addition to family abuse, (1) sexual abuse, (2) child abuse and (3) acts of violence or threats as defined by §19.2-152.7:1 that occurred no earlier than 10 years from the date of the filing of the petition.

(16) Adoption. HB94 was enacted to require that in any adoption proceeding, a legal custodian of a child or any other named party in a proceeding in which custody or visitation is at issue, shall be entitled to “proper notice of any adoption proceeding” and an “opportunity” to be heard. This amends Va. Code Ann. § 63.2-1202.

(17) Protective Orders- Motions to Dissolve. HB880 amends Va. Code Ann. §§16.1-253.1(B) and (G), 19.2-152.9 and 19.2-152.10 by adding to each section that upon a petitioner’s motion to dissolve a preliminary protective order or an issued protective order, a dissolution order may be issued ex parte by the court with or without a hearing. If the order is issued ex parte, it shall be served on the respondent by normal service processes.

(18) Attorney Fees- Juvenile Court. SB451 amends Va. Code Ann. §16.1-278.19 by expanding the factors the juvenile court may use to determine an award of attorney fees. It adds “and any other relevant factors to attain equity” to the prior limit of an award based on their relative financial ability. It is submitted that the other relevant factors can now include those in Virginia’s well developed case law which outlines the types of factors a court can consider for a fee award, such as the merits of the case, the result of the case or the failure to comply or cooperate with discovery or pre-trial orders.

Given the numerous upcoming changes to many of our statutes, a thorough reading of each of the revised Code Sections is highly recommended. ❖

The UCCJEA in International Cases

By *Melissa A. Kucinski*¹
Melissa@MKFamilyLawFirm.com

1. What is the UCCJEA?

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), codified in Virginia Code §§ 20-146.1 through 20-146.38, was enacted in 2001 in the Commonwealth to replace its predecessor, the Uniform Child Custody Jurisdiction Act (UCCJA). The UCCJA was originally drafted by the Uniform Law Commission² to address the concern of conflicting custody orders among states, and the growing issue of litigants' forum shopping for a sympathetic court to resolve their custody dispute. In 1997, the Uniform Law Commission revised the UCCJA in light of conflicting provisions between it and the federally enacted Parental Kidnapping Prevention Act (PKPA), along with years of inconsistent case law.

2. Why would it apply to international cases?

Clearly, as families became more mobile, the need for clear guidelines on which jurisdiction has authority to issue an initial custody order, modify an existing order, and enforce existing orders, became ever more apparent. Va. Code §20-146.4 specifies that the UCCJEA applies in a near-equal way to foreign countries, as it would to sister states, so long as foreign custody orders were made "under factual circumstances in substantial conformity with the jurisdictional standards of [the UCCJEA]."³ The only real caveat where a court need not treat a foreign country as a sister state is if the "child custody law of a foreign country violates fundamental principles of human rights."⁴

3. Establishing Initial Child Custody Determinations

One of the most salient features of the UCCJEA is that it provides a prioritized means of determining

what jurisdiction has authority to issue an initial custody order. While the UCCJA provided for four independent and concurrent bases for jurisdiction, the UCCJEA prioritizes a child's home state⁵ as the means of determining which state or country may issue this initial child-custody order.

a. Foreign Child Custody Determinations & the Issue of Substantial Conformity

While the language of the UCCJEA may be somewhat clunky, the act is clearly written to ensure that a parent does not remove his or her child from the United States, land in a foreign country, utilize the foreign country's laws to immediately file suit for custody, and then be able to usurp the authority of a U.S. court to issue a custody order. In that regard, the UCCJEA applies to foreign countries that have issued their custody orders under facts that are in "substantial conformity" with the jurisdictional requirements of the UCCJEA. Where some countries may have domestic laws that permit custody suits on the basis of a child or parent's nationality, or mere physical presence for a brief timeframe, the UCCJEA creates a scheme whereby the child must have more connections (a six-month home state, or, if no home state, then some substantial connections beyond mere physical presence⁶). This provision permits a U.S. court to accept jurisdiction even if a foreign court may have already taken up the case under its own domestic law.

b. Domestic Child Custody Determinations and the Issue of Temporary Absence from the Home State

In perpetually mobile families, it may be difficult to determine a child's home state. While a several

month summer vacation to Europe may clearly be an absence from a child's home state of Virginia, is a 12-month residence in a foreign country with a parent who is serving a 12-month tour in the U.S. military a temporary absence? These types of situations are less clear cut. Would it be clearer if the entire family moved to Germany for a 3-year stint for the Father's military service? Would it also matter if the family sold their house in the United States before moving? These situations are very fact intensive, and practitioners should counsel clients accordingly.⁷

c. Six-Month Extended Home State Provision

The UCCJEA provides that home state jurisdiction continues for six months after a child has been removed from the jurisdiction, so long as a parent (or person acting as a parent) continues to live in the state (or country). This becomes particularly helpful if a parent absconds with a child to outside of the United States, but puts the onus on the parent that remains in the United States to act somewhat expeditiously in ensuring they meet the statutory timeframe, lest that parent possibly lose home state jurisdiction to a new country.

d. The Foreign Country Declining Jurisdiction

Recognizing that different countries have different jurisdictional bases for issuing an initial custody determination, we have to also recognize that some countries may have no legal basis for issuing a custody order, even if, under the UCCJEA, the United States would deem that country to be the child's home state. Va. Code §20-146.12(A)(3) allows for Virginia to otherwise take up the issue of custody jurisdiction if the foreign country that would otherwise have jurisdiction as the child's home state declines to exercise its jurisdiction on the basis that Virginia is a more appropriate forum.

4. Modifying an Existing Child Custody Determination

a. The Problem with Continuing Exclusive Jurisdiction

As children age and their circumstances change, it may become necessary to modify an existing custody order. The UCCJEA provides a mechanism to ensure that mobile families do not take up further custody litigation in other jurisdictions, resulting in competing, and at times, conflicting custody orders. Va. Code §20-146.13 provides for the Commonwealth's continuing and exclusive authority to modify its initial custody order as long as a "child, a parent of the child, or any person acting as a parent of the child continue to live in the Commonwealth." This provision is helpful in cases of families moving from state to state, where each state has some version of the UCCJEA. It is less helpful with a family whose mobility spans international borders. For most countries, if a child moves, despite a parent remaining in the jurisdiction issuing the initial custody order, the authority to modify that custody order typically moves with the child. In the United States, after a child has been absent from the state that issued the initial custody order for some time, and that state deems itself to no longer be a convenient forum to litigate a custody modification, that state can decline jurisdiction, but this is different than custody jurisdiction following the minor child's residence. It is not uncommon for a U.S. state to deem itself to have the authority to modify its existing custody order simultaneous with a foreign country also determining it has the authority, under its domestic laws, to modify the same custody order, resulting in competing custody orders, yet again.

5. Registering and Enforcing a Foreign Child Custody Determination

One of the most helpful mechanisms in the UCCJEA for foreign parents is our streamlined registration and enforcement procedure. With minor exception, a U.S. court will register a final custody order from another jurisdiction that was issued in a manner in substantial conformity with the UCCJEA.⁸ Once registered and a quick turnaround, that foreign custody order can be enforced expeditiously, and with few grounds to contest it.

a. Our Registration Procedure

Under Va. Code §20-146.26, counsel can send the following items to its Juvenile and Domestic Relations District Court to register a foreign order: a document requesting that the foreign order be registered, two copies of the order (one copy being certified), a statement that this is a final (not modified) order, the name and address of the person seeking its registration, and the name and address of any person awarded custody under the order being registered. The court clerk should generate a notice and send it to the other person in the case, giving that person an opportunity to contest the registration in accordance with Va. Code §20-146.26.

i. Getting an Apostille

The UCCJEA requires a “certified copy” of the foreign court order be filed with the clerk’s office to register it. For many foreign courts, this “certified copy” will take the form of an authentication called an Apostille. While many lawyers reference the “Hague Convention,” referring to the 1980 Hague Child Abduction Convention, there are actually a great number of Hague Conventions. One is a Convention that provides for authentication of documents through an Apostille process.⁹

ii. How do we know the order is final? The issue with some countries requiring a judicial determination that it is final

The foreign order that you are registering needs to be a final order. In other words, you cannot register a prior order that has been modified or superseded. Furthermore, the order is not final if you are waiting on a resolution through the appellate process. In the United States, when you receive a court order, the order, on its face, may not state, “this is a final order.” Each jurisdiction will have its own rules on how to appeal, and the length of time that must pass before a litigant waives his or her right to appeal. In some countries, courts may require a formal request for a subsequent court ruling that clarifies its order is final. Counsel should be certain that any order is final, and all procedures

are followed in the other country before bringing that order to the U.S. court to be registered.

b. Enforcing the foreign order

A foreign court order that is properly registered can be enforced in our courts in a fairly expedited fashion¹⁰. Also, recognize that the power to enforce a foreign order does not necessarily give one the power to modify it in our courts. This is a contradictory concept to some foreign courts, where a request to enforce a foreign order is often met with a re-examination of the child’s best interests.

i. Human Rights Issues

The language in the UCCJEA permits our state to refuse recognition of a foreign custody order because that country’s custody laws violate human rights. The comments in the UCCJEA further focus a court on scrutinizing the other country’s child custody laws, not other aspects of the foreign legal system, and stresses that this provision is invoked in only the “most egregious cases.”¹¹

ii. Due Process Issues

In that due process is an undeniable requirement in recognizing and enforcing a foreign custody order, practitioners should become familiar with the Hague Service Convention. The United States Supreme Court held that courts must apply the Hague Service Convention where service must occur abroad.¹²

c. Problems with foreign jurisdictions that won’t issue orders (if the parents reach an agreement)

Finally, as mediation and other forms of alternative dispute resolution take hold, causing more parents to enter into voluntary agreements (as opposed to judicially mandated custody arrangements), practitioners should be wary. The UCCJEA allows for registration and enforcement of “child custody determinations.” This term of art, as defined in the UCCJEA, equates to a custody order. In some countries, custody orders are a thing of the past when two willing parents

reach an amicable settlement agreement. This will negate the ability to use the UCCJEA's registration process when there is no court order forthcoming from that foreign country.

6. Understanding the UCCJEA and the Hague Convention

a. The UCCJEA Has Nothing To Do With The 1980 Hague Convention

In referencing a variety of "Hague Conventions," note that the UCCJEA has nothing to do with the 1980 Hague Child Abduction Convention. Lawyers may frequently misconstrue the 1980 Hague Child Abduction Convention as deciding which country has custody jurisdiction. It does not. Some may believe that a country's failure to be a State Party to the 1980 Hague Child Abduction Convention means that the United States will not recognize that foreign country's custody orders. That is, for the most part, wrong. The 1980 Hague Child Abduction Convention only serves to return (or not) a child to his or her habitual residence¹³. It is a one-trick pony and does not determine jurisdiction.

b. But The UCCJEA May Eventually Have Something To Do With The 1996 Hague Convention

There is, however, a "Hague Convention" that addresses custody jurisdiction – this is the 1996 Hague Child Protection Convention. Unfortunately, while the United States signed this treaty in 2010, it is not yet law in the United States. The United States has not finalized the ratification process for this treaty, and as of this article, it is unclear as to when, if ever, it will be ratified.

c. Using the Easy Enforcement Procedure to Return Abducted Children

While many practitioners see the 1980 Hague Abduction Convention as the primary mechanism for returning a child abducted from that child's usual place of abode, you should not overlook using the easy enforcement mechanisms available under the UCCJEA to secure the same relief. If the 1980 Hague Abduction Convention does not fully

apply¹⁴ or when the UCCJEA process is a more efficient option,¹⁵ you should consider using the UCCJEA either exclusively to secure the child's return, or in tandem with a 1980 Convention proceeding if it is available to you. ❖

Endnotes

1. Melissa Kucinski is a private practice family lawyer in Washington, D.C. She routinely consults with local counsel throughout the United States and overseas on complex multi-jurisdictional family law cases, and provides case strategy, research, and litigation support. In 2013, Melissa consulted for The Hague Conference on Private International Law on The Hague Child Abduction and Hague Child Protection treaties. You can learn more by going to www.mkfamilylawfirm.com.

2. See www.uniformlaws.org.

3. Va. Code §20-146.4(b).

4. Va. Code §20-146.4(c).

5. Va. Code §20-146.1 defines home state as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period."

6. See Va. Code Sec. 20-146.12.

7. See Maryland Court Case of *Garba v. Ndiaye*, 277 Md. App. 162 (2016) where a parent who moved routinely with the child for one year job postings for a job with the United Nations was only temporarily absent from the home state of Maryland with each posting.

8. See Va. Code §20-146.24.

9. See <https://www.hcch.net/en/states/authorities/details3/?aid=353> for information on the US Competent Authority under the Hague Apostille Convention.

10. See Va. Code 20-146.29.

11. See Comment to Section 105 of the UCCJEA (1997) at www.uniformlaws.org.

12. *Volkswagenwerk v. Schlunk*, 486 US 694 (1988).

13. See <https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction> to learn more about the 1980 Hague Child Abduction Convention.

14. The 1980 Convention may not fully apply if the United States is not a treaty partner with the other country, or if the parent left behind obtained a custody order from the home country post-abduction.

15. Proceedings under the 1980 Convention may be prolonged, costly or require significant experts, and there are more exceptions (or defenses) available to a Taking Parent than in a UCCJEA enforcement proceeding.

The Impact of Social Media on Family Law

Jamel D. Rowe, Esquire
jrowe@livesaymyers.com

#wcw, #mcm, followers, posts, likes, shares, and tweets¹. These are terms that are familiar to those who spend time on social media. Although social media was initially the playground for teenagers and young adults, there has been a dramatic increase in use by older adults. In March 2005, 6% of individuals aged 30-49 and 4% of individuals aged 50-64 used at least one social media site.² By February 7, 2019, those numbers skyrocketed, such that 82% of individuals aged 30-49 and 69% of individuals aged 50-64 used at least one social media account.³ These adults are also spending significant time on social media platforms. In 2019, 74% of people state that they use Facebook daily, 63% state they use Instagram daily and 42% state they use Twitter daily.⁴

What is Facebook? Is that the same thing as Twitter? What about Instagram?

Facebook, Instagram and Twitter are public or semi-public social media platforms that come up often in family law cases. Their increased use provides a greater opportunity for people to get themselves into trouble by posting information and photographs that should otherwise remain private. The information from social media can be used to help prove, among other things, adultery as a grounds for divorce, cohabitation with a new significant other that could cause termination of spousal support, a party's waste of marital assets, or a party's extravagant lifestyle.

Although Facebook, Instagram and Twitter are similar, there are some differences that attorneys need to know. Facebook is a social media website that allows users to post statuses, photos and videos for Facebook Friends to see. These posts can reflect how the user feels at any given moment, any problems or concerns they may have, who they

associate with and where they travel to. Users can also communicate publicly by posting on another user's "wall" or privately with paramours through Facebook Chat.

Instagram is primarily used to upload photos or short videos that users can caption. Similar to Facebook, photos or videos can be used to track where a user travels or how they spend their free time. Upon setting up an account, a user finds friends, families, organizations or even celebrities to "follow." Users can also message contacts directly and privately through the app.

Although Twitter allows users to post short videos and photos, the focus of this website is to permit users to "tweet" statements for public consumption in 280 characters or less. Similar to Instagram, Twitter users can "follow" friends, families, celebrities or organizations. They can also have private conversations with each other through direct messaging.

Preliminary Social Media Searches

Due to the useful information these accounts contain, there is an increase in attorneys scouring social media themselves in the initial stages of a case for information on opposing parties and even their own client. Despite a general awareness of social media privacy settings, individuals repeatedly leave their profiles open for public viewing, thus allowing counsel an opportunity to review and copy pertinent information for later use. Although litigants may secure their personal pages, counsel can locate relevant information through a litigant's relatives who may not have shielded their profile from public view.⁵

In the event counsel is not technology savvy, they can hire a private investigator to conduct social media investigations. Such assistance may be useful

as an attorney can then utilize a professional private investigator as a fact witness to testify as to their findings.

How Can Discovery Help Me?

If counsel cannot easily gather information through an internet search they can issue a Request for Production of Documents or the issuance of a subpoena *duces tecum*. For example, the below questions can yield helpful documentation:

- All correspondence between you and X including, but not limited to, instant messaging and communication via social media (i.e. Facebook, Instagram, Twitter, Snapchat).
- Copies of your Facebook profile/account and information contained therein that can be accessed by following the instructions listed at https://www.facebook.com/help/212802592074644?helpref=faq_content including, but not limited to:
 - Profile photos, photos and videos you have shared or been tagged in
 - Comments posted on your wall, comments you have posted on the walls of others or groups you belong to
 - List of Facebook Friends
 - Messages exchanged with other people through Facebook
 - Likes and reactions to posts, comments, pages
 - List of people, organizations or businesses you follow and groups you belong to
 - Payment history and activity on Facebook Marketplace
 - Pokes given or received
 - Your saved items including articles
 - Apps and websites you log into using Facebook
- Copies of your Instagram profile/account and information contained therein that can be accessed by utilizing the following instructions listed at <https://help.instagram.com/181231772500920> including, but not limited to:

- Profile photos, photos and videos you have shared or been tagged in
- Comments posted on your photos and videos
- List of Instagram Followers
- List of individuals following you
- Messages exchanged with other people through Instagram
- Copies of your Twitter profile/account and information contained therein that can be accessed by utilizing the following instructions listed at <https://help.twitter.com/en/managing-your-account/how-to-download-your-twitter-archive> including, but not limited to:
 - Profile photos, photos and videos you have shared or been tagged in
 - Tweets you posted and any replies thereto
 - List of Twitter Followers
 - List of individuals following you
 - Messages exchanged with other people through Twitter

In the event a responding party objects to production on the basis of privacy or relevancy, the Court's ruling in *James v. Edwards* may be persuasive. The Court held that a request to view a Facebook account did not infringe upon the privacy expectations of a litigant or third parties they shared information with because Facebook policy makes it very clear that the information could be further disclosed.⁶ Further, when the Facebook content sought is directly related to the claims made in litigation, it is reasonable and proper to seek such information on the basis of relevance.⁷

The benefit of issuing a Request for Production of Documents is that it is an easier process than issuing a subpoena. As with most Requests for Production of Documents there is a risk or concern that the receiving party may not be forthcoming with the production of all responsive documents. Therefore, issuing a subpoena *duces tecum* to the social media entity is appealing as it would yield responsive documentation directly from the source without concern of receiving incomplete or tampered documentation.

How do I Issue a Subpoena to Social Media Entities?

Facebook and Instagram require an issuing party domiciled in the United States or Canada to acquire a federal, California or California-domesticated subpoena and that the subpoena be addressed to and served on Facebook, Inc.⁸ For Facebook, the subpoena must list the specific accounts a person seeks by listing their URL or Facebook User ID.⁹ With regard to Instagram, the subpoena must list the username, profile URL and relevant date.¹⁰ Facebook and Instagram are known to be fiercely protective of their users' information and will only provide basic subscriber information if it is indispensable to the case and not within a party's possession upon personal service of a valid subpoena or court order and after notice to affected account holders.¹¹ As a result of the Stored Communications Act, 18 U.S.C. § 2701 *et seq.* social media websites cannot provide the content of communications such as the substance of postings, messages sent through social media chatting programs or photos.

Although Twitter does not have their process for civil subpoenas clearly delineated, it is safe to conclude that the process noted above for Facebook and Instagram would be very similar for Twitter. Similarly, Twitter would be bound by the Stored Communications Act and would be unable to provide anything other than limited subscriber data. Basic subscriber information can include the name of the specific user, the date they created their account, dates and timestamps of logins and IP addresses. At first glance, one would wonder why they should bother with issuing a subpoena if all they receive is basic subscriber information, but this data could then lead to additional helpful information on other social media or internet websites. For example, you suspect the opposing party, John Doe, is using the handle Arbiter2 on a website. You see that Arbiter2 is posting online that they are going through marital troubles and asks users for suggestions on how to hide marital funds. Because you issued a subpoena to Instagram they confirm that they have a user registered as Arbiter2 who is in fact John Doe.

Although the social media companies are unable to provide the content of communication, they can provide the springboard that launches your case into other, more useful areas.

I have documents. What next?

Once you receive documentation, how can you introduce them at trial? You will want to introduce the records from the subpoena through the business record hearsay exception. Pursuant to Rule 2:803(6), a record kept in the ordinary course of regularly conducted business can be admissible if you have a Certificate of Authenticity. Although major entities such as Facebook, Instagram and Twitter will likely have their own Certificate of Authenticity, it is best practice to provide them with one that you know complies with Virginia law at the time that you issue the subpoena. This reduces the likelihood that the company may, inadvertently, respond to the subpoena without providing the Certificate.

Incriminating photographs of people, places or things are not subject to the hearsay rule and can be admitted into evidence if authenticity is proven. Wall postings, status updates, video conversations or captions on photographs of the opposing party can be admissible under the hearsay exception of party opponents, statement against interest, present sense impression or then existing mental, emotional, or physical condition. Of course, it is up to the attorney to evaluate the evidence and to determine which exception to utilize.

Conclusion

Technology has become integrated into our everyday lives. As lawyers in 2020, it is our responsibility to know how to use social media to our client's advantage to reach an outcome that is beneficial to them. ❖

Endnotes

1. #wcw stands for "hashtag" Women Crush Wednesday". #mcm stands for "hashtag" Man Crush Monday".
2. *Social Media Fact Sheet*, Pew Research Center (June 12, 2019), <http://www.pewinternet.org/fact-sheet/social-media/>
3. *Id.*
4. *Id.*
5. *See Womach v. Yeoman*, 83 Va. Cir. 401 (2011) (Court held it was not illegal for counsel to gather information about

Plaintiff's injuries by searching through Plaintiff and Plaintiff's family social media).

6. See *James v. Edwards*, 85 Va. Circ. 139 (2012).

7. *Id.*

8. Can I obtain information about someone's Instagram account, Instagram, <https://help.instagram.com/232762833582105> (last visited 7/17/2019); Law Enforcement & Third Parties, Facebook, <https://www.facebook.com/help/473784375984502> (last visited 7/17/2019).

9. Law Enforcement & Third Parties, Facebook, <https://www.facebook.com/help/473784375984502> (last visited 7/17/2019)

10. Can I obtain information about someone's Instagram account, Instagram, <https://help.instagram.com/232762833582105> (last visited 7/17/2019).

11. Can I obtain information about someone's Instagram account, Instagram, <https://help.instagram.com/232762833582105> (last visited 7/17/2019); Law Enforcement & Third Parties, Facebook, <https://www.facebook.com/help/473784375984502> (last visited 7/17/2019).

Practicing Law So that Opposing Counsel Would Want to Share a Meal with You Afterwards

Nanda Davis

nanda@davislawpractice.com

We have all heard the admonition that we should practice law so that opposing counsel would like to have dinner with us after the case, but what does that actually mean? The following rules show how you get that dinner invite and keep your sanity in the practice of family law.

Rule Number 1: Don't Take it Personally

Trial work, and especially family law, is filled with maneuvering to put your client in the best possible position. For example, it is perfectly acceptable to file a case and to then nonsuit, or to file a divorce case to divest juvenile court of jurisdiction. Family attorneys also maneuver through pleadings and motions practice, like motions to compel and motions for show cause. None of these actions, however aggravating they can be, should be perceived as a personal attack on you by another attorney. I have seen lawyers take motions to compel as personal attacks on their work ethic. I have heard lawyers complain that divesting jurisdiction is somehow sanctionable. When I hear this, I wish these lawyers had had an older, wiser attorney take them aside when they first started practicing law and tell them not to take it personally. The moment you take one of these legitimate moves

personally is the moment the case stops being about the clients and starts being about you. You do your clients a disservice by getting personally involved. Moreover, the practice of law is going to be a long journey if these are the types of things that get you riled up.

Rule Number 2: Sometimes the Other Side Cannot Respond

We've all had that case where we know for certain that if the other side would just call us back or agree to our one very reasonable request, we could prevent hours of headache and litigation. However, keep in mind that sometimes the other attorney cannot respond. Maybe the other party has not kept in contact with her attorney. Maybe the opposing party has given her attorney direct marching orders that prevent them from responding. Maybe the other party revealed some criminal activity to her attorney and any response from that attorney on this issue would reveal what that lawyer is obligated to keep in confidence. If none of this has happened to you in your practice yet, it will. While we would all love if opposing counsel returned our calls within a couple hours after having gotten their client to agree to our requests, that

is not realistic. Keep in mind, if you haven't heard from opposing counsel, you never know what that opposing counsel may be dealing with from their client. If you aren't getting the response from opposing counsel that you want, then file something in court. That's why we have courts. See Rule Number 1—opposing counsel shouldn't take your filing personally.

Rule Number 3: *Don't Make it Personal*

Whenever you write a letter, draft a pleading, or send an email, always keep the focus on the parties, and what they are doing, not what the attorneys are doing. While it is natural to sometimes feel frustrated by the other side, remember this is not personal. It's about your client and what your client wants from the other party. Replace "I am disappointed" with "my client is disappointed" and replace "you should" with "your client should." Don't say "I never expected you to ask for," and instead say "my client was not expecting your client to take the position that." Keep in mind that opposing counsel often cannot control the bad behavior of their clients (we've all been there); they are trying to do their best to help their clients out of a bad spot.

Sometimes, you truly are frustrated with the attorney and not the opposing party. However, you should never express that frustration about opposing counsel in emails, letters or pleadings. Putting your personal feelings about another lawyer in writing makes you look unprofessional in the eyes of your client, the court and anyone who might ever look at your file. Such actions are often taken in the hope that the recipient attorney might change their behavior, but this expectation is unrealistic. Opposing counsel will take such actions as a personal attack, which often cause people to dig in further. Tensions are then raised and you have done nothing to advance your client's position. If you cannot stand another attorney, quietly vent to a trusted friend and then let it go. Don't make it personal because it's not about you and the other attorney. It's about your clients.

Rule Number 4: *Give Opposing Counsel the Benefit of the Doubt*

Just like you, opposing counsel has a personal life, with responsibilities and distractions. You never know what another person is dealing with. Perhaps opposing counsel is caring for an elderly parent, a sick child, a house damaged by a storm, chronic health issues, a spouse with substance abuse issues, a miscarriage or had a nanny quit on the eve of a big trial. Opposing counsel may not want to share these details with the legal community, but they are hoping that someone gives them a break if they are late or say the wrong thing. If none of these things have happened to you, rest assured that one day they will, and you will be hoping someone gives you the benefit of the doubt. Maybe opposing counsel is a jerk, or maybe she or he is quietly going through a crisis at home. Continue to advocate for your client, but in your mind, acknowledge that the behavior you see from opposing counsel may be caused by something in their personal lives and let it go.

If you truly want to practice law so that opposing counsel would be happy to share a meal with you afterwards, these are rules to follow to get there. And if you do get invited to lunch or dinner afterwards, for goodness sake, don't talk about the case! Talk about the practice of law, life, or anything else.

Nanda opened her solo practice six years ago in Roanoke, Virginia and specializes in divorce, custody, support, and matters involving the Department of Social Services. More about her can be found at: <https://www.davislawpractice.com/about/> ❖

Endnotes

1. Motions to compel are special because you do need to reach out to opposing counsel to inquire about the status of discovery responses prior to filing a motion to compel. However, even if the opposing counsel says their client is working on them, sometimes motions to compel are still necessary because answers may be incomplete, or the opposing party's timeline may severely prejudice your client. Again, it's not personal; it's about what is best for your client.



Spousal Support – Failure to Consider § 20-107.1 Factor

Name: *Chaney v. Karabaic-Chaney*, 71 Va. ____ (2020)

Facts: The wife filed a complaint for divorce, requesting spousal support among other relief. The husband did not file a counterclaim for divorce nor did he allege the wife’s adultery as an affirmative defense in any responsive pleading. At the final hearing, the trial court prohibited the husband from putting on any evidence of the wife’s adultery at trial since he failed to plead it. The trial court subsequently awarded the wife spousal support of \$45,000 payable over five years and granted her a five-year reservation of spousal support. The husband appealed.

Issue: Whether the trial court erred in prohibiting the husband from introducing evidence of the wife’s adultery at the final hearing since he failed to plead such in a counterclaim for divorce or any responsive pleading.

Ruling: The Court of Appeals reversed the trial court and remanded the matter back for a hearing on the issue of spousal support.

Rationale: A trial court must consider all of the factors in Virginia Code § 20-107.1 in making a determination of spousal support. Subsection (E)(13) requires the trial court to consider “the circumstances and factors that contributed to the dissolution, specifically including any ground for divorce.” This subsection implies that there may be other admissible evidence that contributed to the dissolution of the marriage, such as evidence of physical violence despite no claim for divorce on the ground of cruelty, or evidence of an extramarital relationship that was insufficient to rise to the level of adultery as a fault ground. Therefore, the trial court’s failure to consider the mandatory factor was error.

Equitable Distribution – Finality of Order

Name: *Jackson v. Jackson*, ____ Va. ____ 181229 (2019)

Facts: The trial court entered a final order of divorce in 2011 which affirmed and ratified the parties’ agreement concerning property division. The order provided that the wife would receive 50% of the husband’s military pension. On the same day, the court entered an Order Dividing Military Pension (the “Retirement Order”) intended to give effect to the final order of divorce. The Retirement Order specified that the wife was “formally assigned an annuity in the monthly amount of \$1,053.39.” The wife thereafter began receiving \$1,053.39 per month. In 2017, the wife obtained new counsel and filed a motion requesting the trial court to enter an amended order changing the amount she was receiving. Specifically, the wife argued that the Retirement Order failed to award annual cost of living increases. She also argued that the parties incorrectly calculated the payment amount of the wife’s share of the husband’s pension. The trial court refused to go “behind the scenes to determine the accuracy of the calculation,” holding that the Retirement Order was enforceable. The Court of Appeals affirmed the trial court since, according to Rule 1:1 of the Rules of the Supreme Court of Virginia, “[a]ll final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer.” Thus, the Retirement Order being entered more than 21 days after the wife’s request, deprived the court of jurisdiction to modify it under Rule 1:1. Furthermore, the trial court’s power under Virginia Code § 20-107.3(K)(4) to modify a retirement order is limited to “establishing or maintaining the order as a qualified domestic relations order or to revise or conform its terms so as to effectuate the expressed intent of the order.” However, here, the wife sought

to change substantive terms of the order, which exceed the court's authority under § 20-107.3(K)(4). The wife appealed.

Issue: Whether the Court of Appeals erred in affirming the trial court.

Ruling: The Supreme Court of Virginia affirmed the Court of Appeals.

Rationale: The Supreme Court of Virginia agreed with the Court of Appeals' reasoning.

Protective Order – Appeal when Order Denied

Name: *Jacobs v. Wilcoxson*, 71 Va. App. ____ (2020)

Facts: Ms. Wilcoxson was granted a preliminary protective order against Mr. Jacobs in juvenile and domestic relations district court ("JDR"). However, she was denied a permanent protective order at a subsequent hearing. Ms. Wilcoxson appealed the case to circuit court for a trial de novo. The circuit court granted a two-year protective order. Mr. Jacobs appealed.

Issue: Whether an appeal could be taken from JDR to the circuit court by Ms. Wilcoxson based upon the denial of a protective order.

Ruling: The Court of Appeals affirmed the circuit court.

Rationale: Code §16.1-296(A) provides,

From any final order or judgment of the juvenile court affecting the rights or interests of any person coming within its jurisdiction, an appeal may be taken to the circuit court within 10 days from the entry of a final judgment, order or conviction and shall be heard de novo Protective orders issued pursuant to § 16.1-279.1 in cases of family abuse . . . are final orders from which an appeal may be taken.

Mr. Jacobs argues that the second portion of this statute specifically applies to when a protective order is entered and not when it is denied. Therefore, he avers, a protective order can only be appealed

from JDR to circuit court if the order was granted. However, the first portion of §16.1-296(A) allows for an appeal of all final orders or judgments, which includes an order denying a protective order. When a protective order is granted, it is not necessarily a final order since it does not leave "nothing to be done in the cause save to superintend ministerially the execution of the order." Thus, the second portion of the statute allows for an appeal in the circumstance a protective order is granted even though it does not qualify as a final order or judgment. Further, to rule otherwise would result in an absurd situation where only the alleged wrongdoer could appeal if the protective order was granted, but the victim of domestic violence could not appeal and would be remediless until there is a further act of domestic violence.

Bill of Review – Correction of Mistake of Law

Name: *Highsmith v. Highsmith*, 19 Vap UNP 0395194 (2019)

Facts: The wife was in the military for 28 years of eligible service, only 3 years and one month of which were during the parties' marriage. At the equitable distribution trial, the court found that 11% of the wife's military pension was marital and awarded all 11% (*i.e.*, all of the marital share) of the pension to the husband. The trial court thereafter entered an order confirming the award of the wife's military pension. The wife filed a motion to reconsider since the court did not have authority under Virginia Code § 20-107.3 to order more than 50% of the 11% of the wife's military pension to the husband. The husband's counsel argued that the trial court lacked jurisdiction under Rule 1:1 of the Rules of the Supreme Court of Virginia to entertain the wife's motion to reconsider since the order was filed more than 21 days from entry of the final decree (not counting the time the order was suspended). The trial court found that it had jurisdiction to correct a clerical error despite the 21 days running and amended its award to 50% of the marital share in an Amended Final Order of Divorce which was entered *nunc pro tunc*. The husband appealed.

Issue: Whether the trial court had jurisdiction to

correct a substantive error after the Amended Final Order of Divorce became final.

Ruling: The Court of Appeals affirmed the trial court.

Rationale: While the trial court had the ability to correct clerical errors after the 21-day period ran, it may not have had the ability to correct a substantive error when ruling on the motion to reconsider, such as the amount of an award. However, the motion to reconsider filed by the wife in this case could be considered a bill of review, which is a common law pleading used to reopen a suit in equity after the final order is entered to correct an error of law. According to Virginia Code § 8.01-623, a bill of review must be filed within six months of entry of the final decree, and the motion to reconsider was filed within such time period. Here, the trial court erred as a matter of law since Virginia Code § 20-107.3(G)(1) only permits a court to award up to 50% of the marital share of a pension to the non-employee spouse. Given the that the bill of review was filed prior to six months after the entry of the final decree, it was timely.

Equitable Distribution – Retroactive Pension Payments

Name: *Ferry v. Beard*, 20 Vap UNP 1134194 (2020)

Facts: The parties executed a property settlement agreement granting the wife half of the marital share of the husband’s pension. Specifically, the agreement provided that the “Husband shall . . . perform such acts as may be necessary or required so that Wife shall receive her share of the gross monthly annuity.” The wife filed a rule to show cause alleging that the husband had failed to provide the wife with information to prepare a qualified domestic relations order and that the husband had begun receiving distributions from his pension but had not given any of those funds to the wife. The trial court ordered the husband to pay an arrearage of \$70,074 to the wife for his failure to provide the wife with her share of the pension as the husband received distributions from the pension. The husband appealed,

stating that he was not personally liable to pay the wife directly for her share of the pension which he was receiving.

Issue: Whether the trial court erred in ordering the husband to pay the wife an arrearage for her share of the pension distributions which the husband received.

Ruling: The Court of Appeals affirmed the trial court.

Rationale: The agreement specifically required the husband to perform such acts so the wife received her share of the pension. Further, Virginia case law has repeatedly affirmed a trial court’s power to retroactively order one spouse to make payments to the other when pension payments are not distributed as required under a property settlement agreement. Once the trial court determined that the wife was not receiving her share of the pension payments, it was empowered to modify its order to effectuate those payments. To do otherwise would have been reversible error.

Civil Procedure – Failure to Identify Party as Witness in Discovery

Name: *Sitahar v. Al-Jawahiry*, 19 Vap UNP 0349194 (2019)

Facts: Relative to the parties’ custody trial, the court entered a scheduling order requiring that “[t]he parties shall complete discovery . . . by thirty (30) days before the applicable trial date; . . . ‘[c]omplete’ means that all interrogatories . . . must be served sufficiently in advance of trial to allow a timely response at least 30 days before” trial. The order also imposed on the parties “a duty to seasonably supplement and amend discovery” and a requirement to exchange exhibit and witness lists 15 days prior to trial. The father asked in his interrogatories for the mother to identify each person who she might call as a witness at trial and the subject matter and facts underlying each person’s anticipated testimony. The mother listed herself as a witness in her witness list, but did identify herself as a potential witness nor did she include her

anticipated testimony as requested in the interrogatory. At trial, the father objected to the mother testifying in her case-in-chief. The trial court sustained the objection and only let the mother testify on rebuttal to issues raised in the father's case-in-chief. The mother did not proffer on the record what the mother's testimony would be if she were allowed to testify. The trial court granted the father final decision-making authority and substantially increased his time with the child. The mother appealed.

Issue: Whether the trial court erred in not allowing the mother to testify in her case-in-chief instead of being limited to testify in rebuttal to the father's case-in-chief. The mother also appealed on other grounds.

Ruling: The Court of Appeals affirmed the trial court.

Rationale: The Court of Appeals did not reach the question of whether the circuit court abused its discretion in denying the mother the opportunity to testify in her case-in-chief since the record is insufficient to allow the appellate court to determine whether the ruling, if erroneous, would constitute reversible error. Virginia law requires the proponent of excluded testimony to proffer the specific substance of the testimony to allow the appellate court to determine if its exclusion was harmless error or not. Since the mother did not proffer what her excluded testimony would be on the record, this was fatal to her argument on appeal. ❖

The Betty A. Thompson Lifetime Achievement Award Winner

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 36th Annual Advanced Family Law Seminar on April 16th at The Jefferson Hotel in Richmond, Virginia. We are pleased to announce the 2020 winner is David D. Masterman of Masterman Krogmann of McLean.



The Family Law Service Award Winner

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 will be presented at the 36th Annual Advanced Family Law Seminar on April 16th at The Jefferson Hotel in Richmond, Virginia. The Family Law Section, Board of Governors is proud to announce the 2020 Recipient is Brian M. Hirsch of Hirsch & Ehlenberger, in Reston. Please join us in Richmond on April 16th at the Jefferson Hotel to see Brian receive his award.





Virginia Family Law

VIRGINIA STATE BAR

1111 EAST MAIN STREET, SUITE 700

RICHMOND, VIRGINIA 23219-0026



FIRST CLASS
U.S. POSTAGE
PAID
PERMIT NO. 709
RICHMOND

2019-2020 Board of Governors Virginia State Bar Family Law Section

Susan M. Butler

Chair

Fairfax

Ra Hee Jeon

Virginia Beach

Melanie E. Peters

Roanoke

Steven L. Raynor

Vice Chair

Charlottesville

Robert E. Henley, III (Bob)

Richmond

Hon. Deborah V. Bryan

Virginia Beach

Patrick L. Maurer

Secretary

Brian H. Jones

Richmond

Hon. Wesley G. Russell, Jr.

Richmond

Mary G. Commander

Immediate Past Chair

Norfolk

Michelle M. Jones

Winchester

Hon. Richard S. Wallerstein, Jr.

Henrico

Besianne Tavss Maiden

Norfolk

Associate Dean Lynne M. Kohm

Virginia Beach

Brian M. Hirsch

Editor, Virginia Family Law

Quarterly

Reston

Richard Brent Orsino

Fairfax

Ms. Dolly Shaffner

Liaison

Richmond