Message from the Chair
Patrick L. Maurer

The timeless adage that “law school doesn’t teach you how to be a lawyer; you will learn that on your own” is often spoken in jest or as a nugget of wisdom to younger members of the Bar. I have offered it in jest from time to time. While the maxim makes a good point between the difference between academic education and practical experience, it falls short on accurately describing how a lawyer gains the experience required to be an effective advocate for our clients. The fact is, we don’t learn these pragmatic lessons alone. We learn by interacting with clients, trying cases, and most importantly, from other lawyers.

A young lawyer should not have to reinvent the wheel when entering practice. While we all had to make mistakes when starting out, the humbling practice gaffes force us to reflect and improve. This is how we learn the hard and necessary lessons that we keep with us throughout our careers. However, having access to an experienced attorney as a mentor is critical in building a successful career and practice. I have been fortunate to have attorneys throughout my career who were willing to offer advice and show me the ropes so I would not be left to learn every step the hard way.

Most critical lessons I have learned have come from colleagues, opposing counsel, or an attorney unrelated to the case at hand. Friendly advice from more experienced counsel can make the difference between thriving at the practice or struggling. Most in the practice of law have had the opportunity to assist younger attorneys and help them develop. Others have not had the same access or opportunity. There are a number of mentor programs that allow attorneys of varying levels of experience access to one another in an effort to assist in fostering a mentor/mentee relationship. Many professional associations, bar associations, and Inns of Court make it a priority to have such programs. The Virginia State Bar’s Family Law Section in conjunction with the Young Lawyers Committee is launching a new mentor program. The goal is to link young

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Editor’s Note  
_Brian M. Hirsch_

Although Pat Maurer mentioned Colleen Quinn and Mary McLaurin’s Quarterly article being cited in _Jessee v. Jessee_, 73 Va. App. ___ 0349212 (2021), I want to add a personal shout out. When I was reading the case and saw the citation to their article, I have to admit I did a doubletake. It is articles like Colleen’s and Mary’s that have made the Quarterly a quality publication. I am so appreciative to all of the authors for their contributions over the past eight years that I have been editor.

The Virginia State Bar Family Law Section had its first annual Family Law Writing Competition for third-year law students attending Virginia and DC law schools. There was a total of $5,000 donated by the Virginia Chapter of the American Academy of Matrimonial Lawyers for the top three entries. Rebekah Bunch’s first prize entry regarding a new view on domestic violence is in this issue of the Quarterly. Also in this issue is an article by Mitch Broudy about judicial notice of Bureau of Labor Statistics income information to establish income to a party who is voluntarily unemployed or underemployed without the need of a vocational expert. Finally, Corrie Sirkin highlights an important issue in her article about representing parents of special needs children.

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.

Brian M. Hirsch, Editor
Wage surveys may be an answer to the evidentiary “headwind” that swirls around income imputation. Except for motions for reduction of support, the party seeking the imputation has the burden of proof to establish (1) the other party is voluntarily unemployed or underemployed and (2) the other party’s earning capacity. Wage surveys have proven effective in other states to meet both of these burdens.

A wage survey provides the prevailing compensation of an occupation in a given geographical area. The Bureau of Labor Statistics (BLS), a bureau of the U.S. Department of Labor, compiles the Occupation Employment Statistics (OES) wage survey. The OES wage survey contains employment and wage estimates for about 800 occupations. The BLS publishes the OES wage survey annually, releasing the publication every March for the prior year. These surveys are made available at the national, state and local levels. For example, to provide evidence of earning capacity for an accountant in Richmond, Virginia, the OES wage survey provides the median annual earnings for an accountant in Richmond, Virginia at $75,310; for accountants in Virginia at $79,670; and for accountants in the U.S. at $73,560.

An internet search makes it easy to access the OES wage survey at https://www.onetonline.org/. At the top right of the webpage, enter the job title in the text box next to the heading, “Occupation Quick Search” and click enter. Next, scroll down to Wages and Employment Trends and enter the zip code or state, and the wage information will appear. To download the information for court, click on the link next to heading, “Full Details” and the information appears in a downloadable worksheet.

Va. Code Ann. § 8.01-388 and Va. Sup. Ct. Rule 2:203 dealing with judicial notice of official publications turns the “headwind” into a “tailwind” by creating a realistic vehicle for the judge to take judicial notice of the OES wage survey. Va. Sup. Ct. Rule 2:203 implements the statute and functions to streamline the use of government documents. Judges are required to take judicial notice of official publications of the United States and its agencies that are published “pursuant to the laws thereof.”

Title 29 of the United States Code mandates the BLS to publish these wage surveys. Section 1 declares as follows:

The general design and duties of the Bureau of Labor Statistics shall be to acquire and diffuse among the people of the United States useful information on subjects connected with labor, in the most general and comprehensive sense of that word, and especially upon its relation to … the hours of labor, the earnings of laboring men and women …

Section 2 mandates that BLS “collect, collate, and report at least once each year … full and complete statistics of the conditions of labor …”

In addition, Chapter 4(b) of Title 29, requires the Secretary of Labor to do the following:

[O]versee the development, maintenance, and continuous improvement of a nationwide employment statistics system of workforce and labor market information system at national, state, and local levels … that includes … enumerating employment opportunities … employment and unemployment status, wages and benefits, skill trends by occupation … with wide dissemination of such data, information, and analysis in a user-friendly manner….

With judicial notice, there are no other evidentiary issues, such as authentication requirements, because it is not the document that is being admitted into evidence; rather, it is the contents of the docu-
ment that the court must give judicial notice to (a subtle but crucial point). Judicial notice is a shortcut to avoid the necessity for the formal introduction of evidence in certain cases where there is no need for such evidence. The Virginia Supreme Court commenting on this issue declared as follows:

It is a rule of necessity and public policy in the expedition of trials. It relieves the party from offering evidence because the matter is one which the judge either knows or can easily discover.

Expert witnesses are expensive. Judicial notice of BLS OES wage surveys may provide the “tailwind” for parties who cannot afford experts to successfully meet their burdens of proof for imputing income while avoiding a pyrrhic victory due to litigation cost.

Endnotes
1. Antonelli v. Antonelli, 242 Va. 152, 154, 409 S.E.2d 117, 119 (1991) – “must establish that he is not voluntarily unemployed or voluntarily under employed”
6. 29 U.S.C. § 1
7. 29 U.S.C. § 2

Message from the Chair, cont. from page 1

lawyers with members of the Section who can assist them with questions about how to handle a specific situation or need guidance in a case. It is not a traditional relationship-based program, but one that provides specific guidance in a particular situation. While not yet up and running, the program is set to launch in the near future. Mentor applications are currently being accepted at: https://www.vsb.org/site/sections/family/mentor. I encourage all members of the Section who meet the required criteria to sign up as a mentor and participate in the program. Our young lawyer liaison Ra Hee Jeon has spent considerable time and effort in bringing this program to fruition. Her dedication to the project and determination to make it happen are inspiring. She deserves our gratitude for her work. The best way to do that is to sign up as a mentor and join in helping the next generation of attorneys carry on the legacy of exceptionalism for which our section has become known.

On a related note of spreading our collective wisdom to our colleagues, I am very proud of Colleen Quinn and Mary McLaurin’s Virginia Family Law Quarterly article “Who Gets Our Future Children? The Need for Execution of Separate Embryo Disposition Agreements” 41 Va. Fam. L. Q. 7 (Fall 2021) being cited by the Virginia Court of Appeals in Jessee v. Jessee, 73 Va. App. ___ 0349212 (2021). It is an outstanding accomplishment that their article was cited in a published opinion. Thank you to everyone who works on and has submitted content for the publication. Without your involvement and participation this periodical could not exist.

Patrick Maurer, Chair
ABUSED, BUT NOT PHYSICALLY BRUISED: How Virginia Can Protect Coercively Controlled Domestic Abuse Victims

By Rebekah Bunch*

Introduction

“If I limped onto the court, you’d notice. If I had black eyes and broken bones, you’d notice. If I had marks on my arms and fear in my voice, you’d notice. It’d be easy to see that I need help, . . .. But what about the abuse you can’t see?”

The Violence Against Women Act (VAWA) defines the term “domestic violence” as “felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner, by a person with whom the victim shares a child, by a person who is cohabiting with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or young victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.”

The term is defined very broadly. However, under Virginia law, what constitutes domestic violence is much narrower in scope.

Luckily, projects such as Netflix’s true story-based series Maid which follows a young woman and her daughter fleeing a mentally and financially abusive home, are garnering the public’s attention and opening the eyes of many who may have believed that domestic violence consisted of only physical violence. Some states have already amended their domestic violence laws to include coercive control. This article offers a brief critique of Virginia domestic violence law and provides sample language for laws to improve the lives of abuse victims otherwise under coercive control.

A. What Is Coercive Control & Its Effects?

Coercive control is a form of abuse which involves controlling behaviors to deprive victims of their rights and liberties and instill fear-based compliance and domination in the victim’s life through acts of intimidation, degradation, and isolation. It is estimated that 60-80% of victims in abusive relationships experience coercive control. The psychological and emotional damage can create a trauma-bond. While not always present, this bond tends to give an abuser an open door to physical violence because the victim will be less likely to seek help or leave their abuser. Coercive control tactics include frequent “check-up” texts and calls to monitor a partner’s location, handling all financial business and limiting the victim’s access to money, isolation from family and friends, and exerting control over daily tasks.

B. Virginia Domestic Abuse Laws

Virginia law defines family abuse as “any act involving violence, force, or threat that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury and that is committed by a person against such person’s family or household member. Such act includes, but is not limited to, any forceful detention, stalking, criminal sexual assault in violation of Article 7. . . , or any criminal offense that results in bodily injury or places one in reasonable apprehension
of death, sexual assault, or bodily injury.”7 A family or household member includes a spouse or ex-spouse, in-laws who reside in the home, a person with whom one has a child, co-habitants, and those who have cohabited in the past year and their children. There are many gaps in Virginia’s domestic violence law, such as the narrow definition of who can commit domestic violence against a victim, but this article will focus on the missing topic of coercive control. Virginia very clearly holds that domestic violence may only include physical violence or threat of physical violence. This flaw in Virginia’s legislation leaves victims of psychological abuse without recourse, remedy, or protection until their abuse turns physically violent.8

C. Which States Recognize Coercive Control as Domestic Abuse?

A movement of legal recognition of coercive control may be sweeping the nation. States such as Hawaii, California, and Connecticut have led the evolving legislative movement to hold coercive control abusers liable for the psychological damage they cause. Hawaii was the first state to take steps towards better protecting domestic abuse survivors by enacting law that defines abuse in a broad and more complete manner. In 2020, the Hawaii legislature passed House Bill 2425 which extends the reach of law enforcement in situations of coercive control by allowing the abuse to be prosecuted. This bill built upon another law which allows victims to seek temporary protective orders based on coercive control. However, this bill did not pass without opposition from law enforcement agencies and Hawaii’s attorney general, who holds that coercive control is not suited for criminal prosecution. Advocates of domestic abuse victims fought for the change, arguing that it is important to bring awareness to the unseen psychological abuse that leaves no physical trace but nonetheless traps victims in their abusive relationship. Ultimately, the bill passed due to the spike in the number of calls to the Domestic Violence Action Center’s helpline during the COVID-19 stay-at-home orders.9 Hawaii defines coercive control as “a pattern of behavior that seeks to take away an individual’s liberty or freedom and strip away the individual’s sense of self, including bodily integrity and human rights.”10 The state goes further to say that the pattern is meant to “make an individual dependent by isolating them from support, exploiting them, depriving them of independence, and regulating their everyday behavior.”11

Before California legislation recognized coercive control as a form of domestic abuse, the California courts held in McCord v. Smith that abuse victims may receive a protective order against a partner that engages in coercive and controlling behavior.12 The appellate court went further to state that isolated events must be evaluated under a totality of the circumstances test, finding that continuous and unwanted text messages from the abuser to the victim were a part of an overall series of actions which threatened the victim’s peace of mind and showed an intention to exert dominion and control.13 In late 2020, California amended the Domestic Violence Prevention Act by passing Senate Bill 1141 which established coercive control, specifically actions that result in the destruction of a victim’s “mental or emotional calm,” as domestic abuse. The new law, signed by Governor Gavin Newsom, categorizes coercive control as actions that “disturb the peace of the other party” and further defines the phrase as “a pattern of behavior that in purpose or effect unreasonably interferes with a person’s free will and personal liberty.”14 The law allows a victim to obtain a domestic violence protective order.15

Connecticut governor Ned Lamont signed Senate Bill 1091, more widely known as “Jennifer’s Law,” into law in mid-2021.16 The law received its name from the high-profile case of Jennifer Farber Dulos, who went missing in May 2019 after taking her children to school. It is alleged that Jennifer was violently murdered by her estranged ex-husband in her home. She left her husband in 2017 and sought a protective order and emergency custody of her children; however, the judge denied the request because there were no signs of physical abuse.17 Jen-
Jennifer’s Law includes multiple new statutes relating to domestic abuse, but most notably, the law which considers coercive control as domestic abuse by allowing coercive control survivors to file protective orders against their abusers. The bill states that coercive control includes “isolation from support, depriving the household or a certain family member of basic necessities, regulating or monitoring movements and communication, daily behavior, and money as well as committing or threatening to commit violence to animals in the household.”

Former Connecticut Senator, Alex Kasser, strongly pushed for the law, believing that the law will save lives. Kasser will most likely be proven right because statistics show that abusers who kill their partners will have first controlled them without physical violence.

Studies show that homicide or a homicide attempt is the first act of physical violence against 28% to 33% of domestic violence related murder victims. Jennifer’s Law gives victims protection before being subjected to physical violence when the court deems the coercive control severe enough to be considered a threat. Senator Martin Looney believes that the law will help judges provide support and safety for victims who have not been subjected to any physical harm but are clearly facing “psychological warfare.”

The State of Washington has also passed a law which is helpful to victims of coercive control. Although not a law recognizing coercive control, this new law prohibits a coercive control tactic – “procedural abuse.” Abusers are prohibited from bringing abusive litigation against domestic violence survivors, including misusing family law or civil lawsuits to “control, harass, intimidate, coerce, and/or impoverish an abused partner.”

Currently, there are coercive control laws pending in New York, Maryland, and South Carolina. The proposed bill in New York, which will establish coercive control as a crime and make the abuse a Class E Felony, is in active review and awaiting a Senate Committee hearing. The Maryland bill will expand the state’s definition of abuse and include coercive control as a reason to obtain a protective order. In South Carolina, a proposed amendment to the 1976 Domestic Violence Bill creates the offense of coercive control.

D. Virginia’s Next Step

Virginia’s current domestic violence law is much too narrow to help victims silenced by their abusers. First, it is widely known that victims can be subjected to physical violence by people who are not in their family or household. Current law gives non-cohabiting significant others who are physically abusive an apparent free pass. An easy solution would be to amend the law to mirror the VAWA and include violence committed “by a current or former spouse or intimate partner, by a person with whom the victim shares a child, by a person who is cohabiting with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or young victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.”

Second, current law defines abuse as only including physical violence or threat of physical violence. However, as this article points out, domestic abuse includes more than physical abuse. Virginia should amend the law to include coercive control definitions and a non-exhaustive list of examples. The language of the law could read:

A. A person commits an act of physical domestic violence if he or she engages in any act involving violence, force, or threat that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury. Such act includes, but is not limited to, any forceful detention, stalking, criminal sexual assault, or any criminal offense that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury.
B. A person who commits a domestic violence related assault and battery against a person is guilty of a Class 1 misdemeanor. Upon conviction for domestic violence related assault and battery, where it is alleged in the warrant, petition, information, or indictment on which a person is convicted, that such person has been previously convicted of two domestic violence related offenses within a period of 20 years and occurred on different dates, such person is guilty of a Class 6 felony.

C. Whenever a warrant for a violation of this law is issued, the magistrate shall issue a permanent protective order.

D. A person commits an act of psychological domestic violence if they engage in an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim. Psychological domestic violence includes, but is not limited to, acts such as isolation from friends and family, deprivation of basic needs, such as food, monitoring the victim’s time, monitoring the victim via online communication tools or spyware, controlling aspects of the victim’s everyday life, such as where they go, who they see, what they wear and when they sleep, deprivation of access to support services, such as medical services, repeatedly putting the victim down, such as saying the victim is worthless, or humiliating, degrading or dehumanizing the victim, controlling finances, and/or making threats or intimidating the victim.28

E. Any victim who is subjected to psychological domestic violence shall be entitled to receive a permanent protective order from the magistrate.

**Conclusion**

Virginia can be a leader in the much-needed evolution of domestic abuse laws. Family law attorneys and domestic abuse victim advocates owe a duty to those who need protection under the law. Advocating for the passage of new domestic abuse laws in Virginia will serve these victims who are now being deprived of their basic human rights. The Commonwealth can work to give them an avenue of protection from their abusers.

**Endnotes**

* 2022 Juris Doctor Candidate, Regent University School of Law.
8. *Id.*
9. *Id.*
10. *Id.*
13. *Id.* at 366, 264 Cal. Rptr. 3d 270, 277.
14. Jessica Dayton, *NEW CA LAW CODIFIES WHAT


18. Id.

19. Fontes, supra note xvi.

20. Id.


23. Id.


25. Id.

26. Id.


Family Law and Children with Special Needs

By Corrie Sirkin, Esq.
corrie@novalegalprofessionals.com

During your initial consultation or at least prior to any filing, do you ask your clients whether any child in their family has special needs? Do you ask if any of the children receive special assistance at school, whether they are receiving any therapies, counseling or treatments, and whether they are taking any medication? Parents are often unaware that such issues impact their divorce, and therefore fail to disclose the information to their attorney. When representing the parent of a child with special needs, you will need to address the questions above and, depending on the answers, you will need to address additional tough issues as well. What is the child’s diagnosis? Is the condition treatable? What is the child’s life expectancy? Is the child expected to ever be able to live independently? How is the child’s life affected by the special needs?

There are four general categories of special needs: physical, developmental, behavioral/emotional, and sensory. Examples might include muscular dystrophy, multiple sclerosis, cerebral palsy, Down Syndrome, autism, dyslexia, attention deficit disorder, oppositional defiance disorder, sight impairment, or hearing impairment.

Attorney must carefully assess their ability to represent parents of children with special needs and to provide them with specialized advice to meet their particular challenges. Family lawyers working with parents of children with special needs should understand that this area of our practice may implicate federal, state, and local law with regard to disabilities, education, benefits, and trust law.

The Individuals with Disabilities Education Act (IDEA) requires the provision of a free and appropriate public school education for eligible children and youth ages 3 to 21. Thirteen percent of children and youth in public school qualify for services under the IDEA. In March 2017, the Supreme Court held that under the IDEA, a school must offer an individual education plan (IEP) reasonably calculated to enable a child to make progress appropriate to that child’s circumstances. A school’s substantive obligation required more than a de minimis or non-trivial benefit. Moreover, in February 2017, the Supreme Court held that exhaustion of administrative remedies was not necessary before parents could file suit for monetary damages under the Americans with Disabilities Act (ADA) and Section 504.

It is important that family law attorneys understand this education law. When parents divorce, it may become necessary to name one parent as the decision-maker for medical and educational decisions, including an IEP or 504 plan. Family law attorneys must understand these education plans, how they work, and their differences in order to properly advocate for their clients. Additionally, the parties may be paying out of pocket for services that should be included in their child’s IEP. With the higher standard of education enunciated by the Supreme Court, family law attorneys may need to refer their clients to lawyers who specialize in representing parents facing these education matters.

When a parent of a child with special needs is obtaining a divorce or when support is being modified, the attorney representing that parent must understand disability benefits, special needs trusts, and Achieving a Better Life Experience (ABLE) savings trusts. In negotiating or litigating child support, equitable distribution, and life insurance, the attorney must also understand that the form of sup-
port may negatively impact some government benefits. The attorney should consider whether child support or other benefits should be paid directly to the other parent, to the child, or into a special needs trust. Special needs trusts may be necessary to protect the child’s access to therapies, treatments, rehabilitative services, facilities, and other governmental benefits. Children can lose out on significant governmental benefits depending on how support or benefits are paid. In obtaining such benefits, even money put into a 529 plan in the name of the child with special needs may negatively affect their eligibility for or access to government benefits.

Family law attorneys should also ensure that any life insurance policies with the child as a beneficiary are changed to be paid directly to a special needs trust to prevent negatively impacting other benefits. Attorneys should advise their clients to speak with an attorney who specializes in special needs trusts. A trust can provide for the future needs of the child including health, education, food, shelter, clothing and transportation even into adulthood and after the death of the parents. Virginia Code § 20-124.2(C) specifically provides that, “[t]he court may order that support be paid for any child of the parties. Upon request of either party, the court may order that such support payments be made to a special needs trust or an ABLE savings trust account as defined in § 23.1-700.”

Furthermore, the costs of raising a child with special needs may be astronomical, depending on the severity of the special needs. A 2014 study from JAMA Pediatrics estimated that the costs of raising a child with an autism spectrum disorder and intellectual disability was approximately $2.4 million in the United States. In an intact family of a child with special needs, these costs frequently cause financial concerns and strain as parents face difficult decisions regarding the child’s needs and their own needs. Parents may not agree on whether certain therapies are necessities or luxuries. Depending on the severity of the special needs, the primary caregiver’s ability to work may be impeded by their caretaking responsibilities. When a child has special needs, a parent may need more time off and is more likely to work reduced hours and to decline overtime. There are substantial opportunity costs for such parents, as they suffer from lost or disrupted employment throughout their children’s lives.

In a divorce, caregiving spouses frequently must explain to the court why they are unable to work, must work reduced schedules, and/or why another caregiver cannot provide the child with the needed care. The other spouse frequently alleges that they are overreaching or exaggerating with regards to support, costs, and the ability to work. Family law attorneys should assist the caregiving spouse in providing evidence to the court regarding the child’s therapy and treatment schedule, as well as a detailed daily schedule that shows how the child’s condition affects the child’s life as well as that of the caregiving parent. If representing the non-caregiving parent, the lawyer must present the reasonable needs of the child, while defending against allegations of underestimating and minimizing the child’s needs. For both parties, the court may look to the school as an unbiased third party from which to obtain records and evaluations of the child’s condition.

The Virginia Child Support Guidelines specifically recognize that the special needs of a child are a factor in rebutting the presumption of a guidelines-based child support award. This is also seen in Virginia Code § 20-124.2(C) where the court may also order that support be paid or continue to be paid for any child over the age of 18 who is “(a) severely and permanently mentally or physically disabled, and such disability existed prior to the child reaching the age of 18 or the age of 19 if the child met the requirements of clauses (i), (ii), and (iii); (b) unable to live independently and support himself; and (c) residing in the home of the parent seeking or receiving child support.”

Depending on the severity of a child’s special needs, the child may reach full self-sufficiency or may never be self-sufficient and remain in need of life-long support. Many children with severe disabilities will need day-to-day care for the rest of their lives and will never achieve self-sufficiency. This
dependence may impede a parent’s ability to work. Virginia Code § 20-107.1€(5) anticipates this situation in determining spousal support, by requiring a court to consider “[t]he extent to which the age, physical or mental condition or special circumstances of any child of the parties would make it appropriate that a party not seek employment outside of the home.”

For example, one of my clients had a 25-year-old adult non-verbal autistic child who showed behavioral problems and aggression. Through detailed analysis and evidence, we were able to show the court that the caregiver parent was unable to work full time or most part time jobs even though their son was in a program Monday through Friday from 10 a.m. to 3 p.m.. Because of his behavioral issues, the son was sent home from the program an average of five days per month. The caregiver parent needed to pick up the son within 20 minutes of a behavioral issue pursuant to the program policy, and these disruptions prevented the caregiver parent from being able to work many jobs. Moreover, the program also closed for staff training days and holidays.

When advocating for a parent of a child with special needs, it is critical to develop a budget for the child in addition to any family budget. In developing a budget, the parties must consider not only the services for which they are paying out of pocket, but also those services that are provided for by insurance or through the board of education in their current locale. A court may order parents to be responsible for a variety of therapies, including psychotherapy, behavioral therapy, physical therapy, and occupational or speech therapy. Careful documentation must be kept regarding the person or organization providing the therapy, the credentials of the provider, where the service is obtained, the type of therapy, and the methodology in case there are disputes between the parents regarding the necessity or reasonableness of the therapy. Each of the child’s doctors – and the frequency of the child’s visit to each – must be included in the budget. Other practitioners that the child sees should be listed as well. The budget should include the costs of medications, supplements, equipment, supplies, and caregiver training.

The caregiving parent should be prepared to explain to the court the costs of obtaining a non-parental caregiver or other respite care. Special clothing, personal care costs, mileage, and meals must be included in the budget as well, since these smaller costs add up significantly over time. Each line of the budget that is not agreed upon by the parents should be developed by the attorney, detailing the name, address, and credentials of the provider. Any information, articles, or book excerpts regarding the child’s condition, treatments, and prognosis should be categorized and developed in the client file. Any waiting lists for therapies, programs, schools, or funding should also be explored.

Negotiations regarding custody, parenting time, and visitation schedules should address the distinctive behavioral challenges of the child. For example, some autistic children have difficulties with transitions between routines or environments and may have a need for “sameness” and predictability.8 The parties should work with the child’s existing therapists or counselors to create a parenting schedule that addresses the child’s special needs. It is not necessary that there be no changes at all, since a reasonable plan instituted over time may become the child’s “new normal.” Many children with special needs require assistance with daily living activities, from eating, dressing, grooming, and toileting to communicating, mobility, and behavior management. Sometimes parenting schedules may need to take into consideration that necessary aids such as lift equipment, orthopedic devices, and mobility assistance are only available in one household.

During a divorce, parties frequently contemplate moving for a variety of reasons. Parents of children with special needs often must consider how a change in school system would affect that child’s IEP or 504 plan, as the new school system may either adopt the child’s plan or opt to develop its own. If the parents fought long and hard with the school system or even obtained special needs
counsel to obtain the current plan, those costs must be taken into consideration in determining the reasonability of a move. A move might also impose other large budgetary items such as vehicle, school, and home modifications.

Attorneys handling these cases should be prepared for the substantial undertaking involved and should be prepared to reach out to the specialists, education counsel, trust counsel, and financial planners who are involved with the family. Attorneys must be willing to ask difficult questions and learn the specific intricacies of this area of the law to serve these particular families and meet their individual needs. The decisions that the courts, these families and their counsel make may literally last a lifetime.

Endnotes

**Equitable Distribution – Indemnification of VA Disability Benefits Election**

**Name:** Yourko v. Yourko, 74 Va. App. ___ (2021)

**Facts:** The parties’ property settlement agreement guaranteed that the wife would receive $1,202.70 per month from the husband’s retired military pay. It further stated that the husband “guarantees the level agreed upon by the parties and agrees to indemnify and hold [the wife] harmless as to any breach hereof. Furthermore, if the [the husband] takes any action, including additional waiver of retired pay for disability compensation which reduces the former spouse share she is entitled to receive, then he shall indemnify her by giving to her directly the amount by which her share or amount is reduced as additional property division payments which do not terminate upon remarriage or cohabitation.” At the time the parties negotiated their agreement, they believed the husband would receive $4,009.00 per month in disposable retirement pay. Subsequently, the Defense Finance Accounting Service (DFAS) computed the husband’s disposable retirement pay to be only $844.00 per month, the remainder being disability pay which is not divisible in divorce proceedings. Over a year after entry of the final order and pension order, the husband filed a motion for modification of the final order and pension order. The husband argued that the “indemnification” and “guarantee” language required the husband to pay almost $1,000.00 per month more in military benefits-based pay to the wife than DFAS calculated was due. The husband averred that disability pay is not divisible in a divorce proceeding under federal law and that giving the wife 140% of his divisible disposable retirement pay violated federal law. He also argued that federal law prohibited the circuit court from requiring him to indemnify the wife for any reduction she received in divisible disposable pay. The circuit court held that it could not re-open the case as the 21-day deadline in Rule 1:1 had passed and dismissed the husband’s motion. The husband appealed.

**Issue:** Whether the circuit court erred when it dismissed the husband’s motion based on the fact that the 21-day deadline in Rule 1:1 had passed.

**Ruling:** The Court of Appeals reversed the circuit court.

**Rationale:** The matter is reviewed *de novo* as the current appeal is based on a question of law and not fact. The Uniformed Services Former Spouses Protection Act (USFSPA) permits state courts to divide a servicemember’s retired disposable pay. However, USFSPA specifically excludes military retirement pay waived in order to receive veterans’ disability payments. Even if an indemnification provision does not specifically require that a veteran use his disability pay to indemnify or reimburse the former spouse, the purpose of such a requirement contradicts and seeks to circumvent prior case law preventing a division of pay waived to receive veteran’s disability payments. Requiring a veteran to indemnify a former spouse for the retirement pay that was waived in order to receive veteran’s disability payments. Requiring such a requirement would create a semantic difference. Virginia courts should not issue orders that require or permit servicemembers to make contracts, guarantees or indemnifications to former spouses in contravention of this policy. A court order may be attacked after 21 days when it is void *ab initio*. As the order issued in the present case was issued without the court having the power to render it, the order is void *ab initio*.
The case is remanded back to the circuit court to set the marital share of the military pension and perform any necessary balancing of relevant factors to establish appropriate spousal support and child support.

[Editor’s Note: This case has been appealed to the Supreme Court of Virginia.]

Military Retirement – Calculation of “Marital Share”

Name: Maly v. Maly, 22 Vap UNP 0685214 (2022)

Facts: The wife requested at the equitable distribution hearing that she be awarded 50% of the marital share of the husband’s military retirement. The wife defined the marital share as the number of months of creditable service from the date of marriage to the date of separation (as the numerator) divided by the number of months of creditable service accrued during the marriage as of the date of the husband’s retirement (as the denominator). At the time of the trial, the husband was active military. The court ruled that the wife was entitled to 40% of the marital share of the husband’s pension and that an order should be prepared “according to federal law.” The wife prepared an order with the foregoing numerator but with a denominator of the number of months of creditable service accrued during the marriage as of the date of divorce. The husband objected since the wife’s position at the time of the entry of the order was inconsistent with the position she took at trial. The husband argued that the denominator should be the number of months of creditable service accrued as of the date of the husband’s retirement and not as of the date of marriage. The trial court agreed with the husband, stating that the wife could not approbate and reprobate. The trial court entered the husband’s proposed order dividing his military retirement using the accrued creditable service as of the date of the husband’s retirement as the denominator. The wife appealed.

Issue: Whether the trial court erred in using the number of months of creditable service accrued as of the date of the husband’s retirement as the denominator (instead of the date of divorce) when calculating the marital share of his military pension.

Ruling: The Court of Appeals reversed the trial court and remanded the matter.

Rationale: The final order of divorce stated that a retirement order dividing the husband’s pension should be drafted according “to applicable federal law.” Pursuant to 10 U.S.C. § 1408(a)(4)(B), for division of a pension prior to the servicemembers date of retirement, the “total monthly retired pay to which the member is entitled shall be . . . the amount of retired pay to which the member would have been entitled using the member’s retired pay base and years of service on the date of the decree of divorce.” As a court speaks through its orders, and the order required the parties to comply with federal law in computing the marital share, the wife did not take inconsistent positions. Thus, she did not approbate and reprobate.

Equitable Distribution – Preserved Pre-Embryo

Name: Jessee v. Jessee, 74 Va. App. ___ (2021)

Facts: Using in vitro fertilization (IVF) and the biological material of the husband and wife, a clinic facilitated fertilization of three pre-embryos. Two of the three pre-embryos were viable. One pre-embryo was implanted in the wife, but the pregnancy ended in a miscarriage. Prior to the fertilization, the parties signed a contract with the IVF clinic that specified in the event of a divorce between the parties that disposition of the pre-embryo would be decided by court decree or a settlement agreement. The parties separated, and the husband filed for divorce in 2020. In his complaint for divorce, the husband requested the circuit court award him the cryopreserved, viable pre-embryo. The husband planned to have the pre-embryo destroyed. The wife wanted to use the pre-embryo to become pregnant again. At 43 years of age, she desired to have another child.
age, she believed that due to her decreased fertility and limited financing, it might be her only chance to have a biological child. The trial court awarded the pre-embryo to the wife. The husband filed a motion to reconsider, asking the court to identify the methodology used in determining the award. The husband asked that the trial court also award him the pre-embryo or award him his monetary share of the property. The trial court explained that it had considered the equity of the parties’ respective positions in making the award, and that the pre-embryo had no market value and no practical replacement value. The husband appealed.

**Issue:** Whether the trial court applied the correct standard in awarding the wife the pre-embryo.

**Ruling:** The Court of Appeals reversed the trial court and remanded the case back to the trial court.

**Rationale:** The Court of Appeals, after reviewing various standards of deciding the issue, endorsed the method which honors a contract between the parties governing the disposition of the pre-embryo if such a contract exists. Absent such an agreement, then the trial court should employ a balancing test to weigh the parties’ respective interests in the pre-embryo. Here, the parties did not have an agreement regarding how the pre-embryos would be disposed of other than the issue would be decided by court decree or a settlement agreement. Thus, the trial court should then have employed the balancing test. This involves the trial court inquiring into, among other things, the original reasons for undergoing IVF, the reasonable ability of the party seeking the pre-embryos to have biological children by other means, and the potential burden on the party seeking to avoid becoming a genetic parent. The record does not reflect that the trial court adopted the balancing approach. Accordingly, the trial court did not apply the proper standard in ruling on the disposition of the parties’ pre-embryo.

*Editor’s Note: This opinion cites Colleen Quinn’s and Mary McLaurin’s article in the Fall 2021 issue of the Virginia Family Law Quarterly, Who Gets Our Future Children? The Need for Execution of Separate Embryo Disposition Agreements.*

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**Equitable Distribution – Classification of Property**

**Name:** *Leyrer v. Hajiha, 21 Vap UNP 0585214 (2022)*

**Facts:** The parties purchased a home five months prior to their marriage; at the time of purchase, the property was titled in the wife’s sole name. The husband’s family wired transferred $70,020 into the wife’s account to pay toward the purchase price. The wife paid $39,073 toward the purchase of the home from other funds. The husband also contributed $5,000 toward the earnest money deposit for the purchase. The wire transfer of the $70,020 was made out directly to the wife with the notation “GIFT” listed in a portion of the form reserved for the description of the transfer. After the marriage, the property was retitled in both parties’ names. At trial, the wife testified that she did not really know the source of the money from the husband’s parents other than what was notated on the transfer form. The husband testified that he earned the money and gave it to his father to hold in Iran since the banks offered higher interest rates. While the husband testified there was no written agreement regarding the money, he never intended it as a gift to the wife. The trial court awarded the husband $137,902 in equity from the marital home but did not explain how the parties’ contributions to the marital home were classified or how it calculated the husband’s share of the equity. The Court of Appeals reversed the trial court and remanded it for clarification as to how it classified the contributions and how it calculated the amount of the husband’s share. On remand, the trial court clarified, among other things, that the $70,020 transferred from the husband’s family to an account in the wife’s name prior to the marriage was the husband’s contribution to the purchase of the marital home. The wife again
appealed.

**Issue:** Whether the trial court erred when it classified the $70,020 as the husband’s separate contribution where such funds were transferred by the husband’s family to an account in the wife’s name prior to the marriage.

**Ruling:** The Court of Appeals reversed the trial court and remanded the case for proper classification of the $70,020.

**Rationale:** Pursuant to Virginia Code § 20-107.3, a court must: (1) classify the property, (2) value the property, and (3) distribute the property. Property that was acquired by a party prior to marriage is separate. If the property is later jointly retitled, it is transmuted to marital property; however, to the extent separate property is retraceable by a preponderance of the evidence and was not a gift, the retitled property shall retain its original classification (i.e., maintain its classification as separate). Since the wife obtained the $70,020 prior to the parties’ marriage, it was separate. Even assuming the funds were earned by the husband prior to the marriage, these funds were transferred to the wife prior to the parties’ marriage and are separate according to the definition of separate property. Thus, the trial court erred in classifying the $70,020 as the husband’s separate property.

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### Prenuptial Agreement – Unconscionability

**Name:** Shifflet v. Shifflet, 21 Vap UNP 0606213 (2022)

**Facts:** The parties were living together for 10 years when the wife stated she wanted to get married; the husband did not. At least six months prior to the parties’ wedding, the husband said that he would marry the wife only if they entered into a prenuptial agreement. The wife asked who should draft the agreement; the husband said a lawyer who had conducted real estate closings for the husband. The wife had the attorney draft the agreement. Five days prior to the wedding, the parties drove to the attorney’s office, made some changes to the agreement, and executed the agreement. The parties subsequently divorced. The wife asked the trial court to set aside the prenuptial agreement as being unconscionable since she was coerced into signing it. The wife testified at trial that, as a child, she was the victim of sexual and emotional abuse. The wife and her witnesses testified that the marriage was tumultuous and that the husband was verbally abusive. The husband testified that the verbal abuse was mutual. The wife’s therapist testified that, when the wife signed the prenuptial agreement 22 years prior, she did not have the ability to contravene the husband’s wishes. As a result, the wife argued that the agreement was unconscionable since there were oppressive influences in obtaining the agreement. The trial court did not give weight to the wife’s expert testimony, gave more weight to the husband’s testimony, and found the agreement enforceable. The wife appealed.

**Issue:** Whether the trial court erred in finding that there was no coercion by the husband in having the wife execute the prenuptial agreement.

**Ruling:** The Court of Appeals affirmed the trial court.

**Rationale:** The record contains substantial evidence supporting the trial court’s findings. The husband told the wife six months prior to the wedding that he wanted a prenuptial agreement. He did not threaten to evict the wife if she did not sign the agreement. To the contrary, he said they could continue to live as they had when unmarried for the previous ten years. The trial court was not required to give any weight to the testimony of the wife’s therapist, especially since the therapist was opining as to the wife’s state of mind over 20 years prior to the wife’s therapeutic treatment. Although the wife’s testimony and her witnesses’ testimony conflicted with the husband’s testimony, the trial court was entitled to weigh the husband’s evidence more heavily than the wife’s. It is not the role of the Court of Appeals to substitute its judgment for that of the trier of fact.
Settlement Agreements – Oral Modification

Name: Lyon v. Lyon, 21 Vap UNP (2021)

Facts: The parties signed a written agreement and stipulation (“PSA”) wherein the husband was to pay the wife spousal and child support. The parties subsequently sold the marital home and rented a home together where they continued to cohabit with their two children. The parties agreed that the husband would pay the rent instead of paying the wife spousal and child support. The husband subsequently moved out of the rental property in February 2019 and stopped paying the rent. However, he paid the wife spousal and child support pursuant to the terms of the PSA beginning March 2019. The wife paid the rent until the end of the lease term in July 2019. The wife filed a Motion to Enforce, alleging that the husband had not fulfilled his obligations under the PSA. The trial court found that the parties had an oral agreement that the husband would pay the rent instead of paying spousal and child support. The trial court ordered the husband to pay back for the rent she paid from March to July 2019. The husband appealed.

Issue: Whether the trial court erred in ordering the husband to reimburse the wife for half of the household expenses when the husband was paying the wife spousal and child support during such time.

Ruling: The Court of Appeals reversed the trial court.

Rationale: A court has broad discretion in setting spousal suThe PSA required that any modifications to the PSA be made in writing and executed by the parties with the same formality as the original document. Nonetheless, the trial court found that the parties entered into an oral agreement for husband to pay rent and household expenses in lieu of paying spousal and child support. Because the court found that under the terms of the oral agreement, the husband’s obligation for the rent and household expenses remained, regardless of whether he was living at the residence, it ordered the husband to reimburse the wife for half of the household expenses. This arrangement to pay rent and expenses in lieu of support was a wholesale modification of the PSA. The modification was not executed in writing or with the formality required by the PSA. Accordingly, the wife may not compel compliance with an oral contract by a motion to enforce a PSA that forbids oral modifications. Therefore, the court erred in requiring the husband to pay half of the rent and household expenses between March and July 2019 when he was also paying the wife spousal and child support according to the PSA.

Equitable Distribution – Sufficiency of Evidence

Name: Stark v. Dinarany, 73 Va. App. 733 (2021)

Facts: The parties were married in 2012 and separated in 2019. From the date of marriage until late 2016, the husband served in the United States Army. The husband subsequently retired from the military with a pension after 25½ total years of service. At trial, the husband argued a motion in limine to prevent the wife from putting on evidence of financial information due to her failure to produce any documents relevant to equitable distribution before the discovery deadline set by the scheduling order. The court granted the motion, and the wife was precluded from putting on any financial information. In its ruling, the trial court held that it could not award the wife any portion of the husband’s pension since there was no evidence presented as to the marital portion of the pension. The wife appealed.

Issue: Whether the trial court erred when it failed to award the wife any of the husband’s military pension.

Ruling: The Court of Appeals reversed the trial court and remanded the matter back to the trial court for determination of the marital share of the pension.
and any award of the pension to the wife.

Rationale: The record reflects that the husband was in the military from the date of marriage until late 2016 when he retired, and that he retired after a total of 25½ years of service. When asked to divide hybrid property, the trial court must determine the marital share of such property. In doing so, Virginia Code § 20-107.3(G)(1) instructs the court that the marital share of retirement is “that portion of the total interest, the right to which was earned during the marriage and before the last separation of the parties, if at such time or thereafter at least one of the parties intended that the separation be permanent.” As there was evidence in the record as to: (i) the date of marriage, (ii) the date of the husband’s retirement, and (iii) the total length of the husband’s military service, the trial court was able to determine the marital share of the pension.

Child Support – Inheritance as Income

Name: Da’mes v. Da’mes, 74 Va. App. ___ (2022)

Facts: The father was paying $587 per month in child support for the parties’ three children. The father filed a motion to decrease child support when the first child was no longer owed a duty of support. After the last support order was entered but prior to the hearing on the father’s motion, the father inherited $600,000.00 which he deposited into a savings account yielding very low interest. At trial, the father argued that his inheritance should not be considered income since it was producing almost no income. The trial court disagreed and divided the inheritance by five (5), the number of years remaining until the last child was no longer owed a duty of support. This yielded a presumptive child support amount of $2,247 per month. The court, deeming this result to be unjust, deviated to $795 per month, an amount greater than the amount the father had been paying for all three children. The father appealed.

Issue: Whether the trial court erred in including the father’s inheritance as income for purposes of determining child support and distributing the inheritance over five (5) years.

Ruling: The Court of Appeals affirmed the trial court.

Rationale: Virginia Code § 20-108.2 includes gifts as income. Gifts include inheritances and constitute income, even if irregular. A court is not constrained to looking only to the income produced by the inheritance; it may also consider the principal as income in determining child support. Here, the trial court found that the inheritance was a substantial financial resource and readily available to the father. The decision by the trial court to distribute the inheritance over five (5) years was not an abuse of discretion since it contemplated consistent and ongoing support while the children remained dependents. Also, when a motion for modification of child support is before the court, the court may increase or decrease the amount of support regardless of the wording on the motion seeking modification and regardless of whether the other parent specifically requests such relief.

Grandparent Visitation – Standing to Sue

Name: Haley et al. v. Commonwealth, Case No. 2:21CV00031 (Western Dist. VA 2021)

Facts: Plaintiffs are the biological mother and adoptive father of the minor child (the “Parents”). The biological mother (the “Mother”) is the sole custodian of the child. Defendants are the parents of the biological father who died in 2020 (the “Grandparents”). The Grandparents petitioned the Juvenile and Domestic Relations District Court (“JDR Court”) for visitation. The Mother objected to visitation and moved to dismiss the petition since the Grandparents conceded that the Mother was a fit parent and that they had failed to demonstrate actual harm would result if visitation were denied.
The JDR Court granted the Mother’s motion and the Grandparents appealed to circuit court. While the litigation was pending, the Virginia General Assembly enacted Virginia Code § 20-124.2.B.2, which allows a court to bypass the “actual harm” requirement by introducing evidence that the child’s deceased or incapacitated parent, who is related the grandparent, consented to visitation. If the grandparent can provide by a preponderance of the evidence such parent’s consent, the court may consider whether grandparent visitation is in the best interest of the child. The Grandparents indicated that they intended to rely upon this law in their pending action in state court. The Parents sought relief in federal district court alleging violations of the 14th Amendment and the corresponding provision in the Virginia Constitution. The Parents claimed that the Virginia law is unconstitutional since the statute would allow a grandparent to obtain visitation rights without first showing that the custodial parent is unfit or that actual harm would result if visitation is denied. The Grandparents responded that the Parents lack standing to sue.

**Issue:** Whether the Parents have standing to sue the Grandparents in federal court.

**Ruling:** The federal district court dismissed the Grandparents’ Complaint for lack of standing.

**Rationale:** A federal court’s jurisdiction extends only to “cases” and “controversies,” and no case or controversy exists if a plaintiff lacks standing to sue. To establish standing, the plaintiff must show, among other things, that they have suffered a concrete or particularized injury-in-fact, or they will suffer an imminent injury. To be “concrete,” an injury must actually exist; an alleged harm is too speculative. Here, the Parents do not have standing since they failed to allege that they have or will imminently suffer a concrete injury. While they are concerned the new statute could result in visitation ultimately being granted to the Grandparents without the need for showing actual harm or a finding of parental unfitness, their concerns are too speculative since the state court proceeding has not yet occurred.

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**Child Custody – Relocation**

**Name:** Gulley v. Brinkley, 22 Vap UNP 0714214 (2022)

**Facts:** The parties divorced in 2019. Their marital settlement agreement provided for joint legal custody and an equal time-sharing physical custody arrangement. The parties lived in Northern Virginia when the schools went virtual in March 2020 due to the COVID 19 pandemic. With the mother’s consent, the father took the children to his parents’ home two hours away in Chesterfield County. At the time, it was understood that this was a temporary custodial arrangement. The children did well under the father’s care and developed a close relationship with their paternal grandparents. The father subsequently informed the mother he was going to purchase a home in Chesterfield County and live there permanently with the children, even though he maintained an apartment in Northern Virginia at the time. The father filed his motion and a trial ensued. At trial, the mother made a motion to strike after the father put on evidence of how well the children were doing and the mother’s limited contact with the children. She stated that there was no material change in circumstances since the custody arrangement was temporary and COVID restrictions were being lifted. The trial court granted the motion stating that, among other things, the father’s move to Chesterfield County was a temporary arrangement; there was no evidence that the prior custody arrangement was inappropriate; and COVID restrictions were being lifted. The father appealed.

**Issue:** Whether the trial court erred when it granted the mother’s motion to strike based on the fact that there was no material change in circumstances.

**Ruling:** The Court of Appeals affirmed the trial court.
**Rationale:** A court has the ability to modify an existing custody order when two criteria are met: (1) a material change in circumstances, and (2) such modification of custody is in the children’s best interests. Here, the parties’ custody arrangement was temporary and based upon the effects of the pandemic on the children’s schooling. This change was then negated when many of the COVID restrictions were being lifted. Furthermore, the father maintained a home in Northern Virginia and did not show that the parties’ prior custody agreement of the children living in Northern Virginia was unworkable.

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**Criminal – Child Cruelty**

**Name:** *Eberhardt v. Commonwealth, 74 Va. App. ___* (2021)

**Facts:** The child, B.E., told the school nurse that her right arm hurt. The nurse examined the child’s arm and saw “significant bruising,” and also observed “tons of bruising” on the child’s legs, buttocks and right hip. The school nurse notified law enforcement. Upon interview by Child Protective Services, the investigator saw redness from a single mark on the child’s upper right arm and a number of linear marks on her right arm, the back of her legs, and her buttocks. The child stated that when she came home from school, her father was angry because her teacher had reported that she was “talking again” in class. The father told B.E. to go upstairs and remove her clothes. The father then hit the child with the webbed “belt” portion of a dog leash. The child screamed and cried. The Defendant admitted to whipping the child but said he did so since B.E. continued to talk in class, despite prior punishments. He said that “in the bible Jesus stated, ‘spare the rod, spoil the child.’” He said that he intended to continue to discipline the child the same way. He said he had only intended to hit B.E. on the buttocks but that she kept moving to avoid being hit. At trial, the Defendant contested the sufficiency of the evidence to prove the charged offense of child cruelty, that the behavior did not amount to beating within the statute, and that the Commonwealth failed to prove that the Defendant acted with criminal negligence and not merely with the intent to impose an appropriate corporal punishment. The trial judge said the blows to the child were not merely on the soft tissue of her buttocks but also landed on her arms and legs, and that they were strong enough to leave welts. The court relied on the dictionary definition of “beating” as meaning to “repeatedly strike so as to harm or hurt.” In holding that the evidence satisfied the definition, the trial judge observed that the Defendant’s behavior was clearly beyond anything that would be considered reasonable based upon the number of blows; the force used to inflict them; the use of the dog leash; and the ultimate injury that was sustained. The father was convicted of child cruelty and sentenced to five years in prison with three years and seven months suspended. The Defendant appealed.

**Issue:** Whether the evidence at trial was sufficient to convict the Defendant of child cruelty.

**Ruling:** The Court of Appeals affirmed the trial court.

**Rationale:** A parent has the right to administer such “reasonable and timely punishment as may be necessary to correct faults in his growing children” as long as “the right is not used as a cloak for the exercise of malevolence or the exhibition of uncontrolled passion.” Virginia Code § 40.1-103(A) provides that it shall be unlawful for a parent with custody of a child “to cause or permit such child to be overworked, tortured, tormented, mutilated, beaten or cruelly treated.” Given the reason the Defendant hit the child, as well as the other factors considered by the trial court, the evidence was sufficient to support the trial court’s finding that the father’s actions constituted an unlawful beating within the meaning of Virginia Code § 40.1-103(A).
Life Insurance – Required Elements

Name: Sobol v. Sobol, 74 Va. App. ___ (2022)

Facts: The trial court awarded the wife spousal support of $12,000 per month for ten years. In order to address the risk of spousal support terminating upon the death of the husband, the trial court ordered the husband to maintain the wife as the beneficiary of an existing MassMutual life insurance policy with a death benefit of $1,000,000. The MassMutual policy was taken out when the parties set up a family trust, and the trust was always the beneficiary of the policy. The husband objected to a variety of the trial court’s rulings and filed a motion to reconsider which was denied. The husband appealed a variety of issues, including naming the wife as beneficiary of the MassMutual life insurance policy.

Issue: Whether the trial court erred in ordering the husband to maintain the wife as beneficiary of the MassMutual policy when the family trust had always been designated as the beneficiary.

Ruling: The Court of Appeals reversed the trial court on this issue but affirmed the trial court on all other issues.

Rationale: Virginia Code § 20-107.1:1 permits a trial court to order the payor of spousal support to maintain a life insurance policy for the benefit of the recipient. However, certain conditions must first be met. The policy must already be in existence; the policy must have been purchased during the marriage; and the trial court may order that the recipient be designated as the beneficiary only if he or she “has been designated as a beneficiary of such policy during the marriage” (emphasis added). In the present case, the policy was in existence and purchased during the marriage. However, the wife was never designated as a beneficiary of the policy during the marriage. So, it was error for the trial court to order the husband to name the wife as the beneficiary of the policy.

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 38th Annual Advanced Family Law Seminar on April 12th at The Jefferson Hotel in Richmond, Virginia. The Family Law Section, Board of Governors is proud to announce the 2022 Recipient is Daniel L. Gray of Cooper Ginsberg Gray PLLC. Please join us in Richmond on April 12th at the Jefferson Hotel to see Dan receive his award.
2022 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 Annual Family Law Seminar on April 12th at The Jefferson Hotel in Richmond, Virginia. We are pleased to announce the 2022 winner is Ronald S. Evans of Barnes & Diehl of Richmond. Please join us in Richmond on April 12th at the Jefferson Hotel to see Ron receive his award.

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