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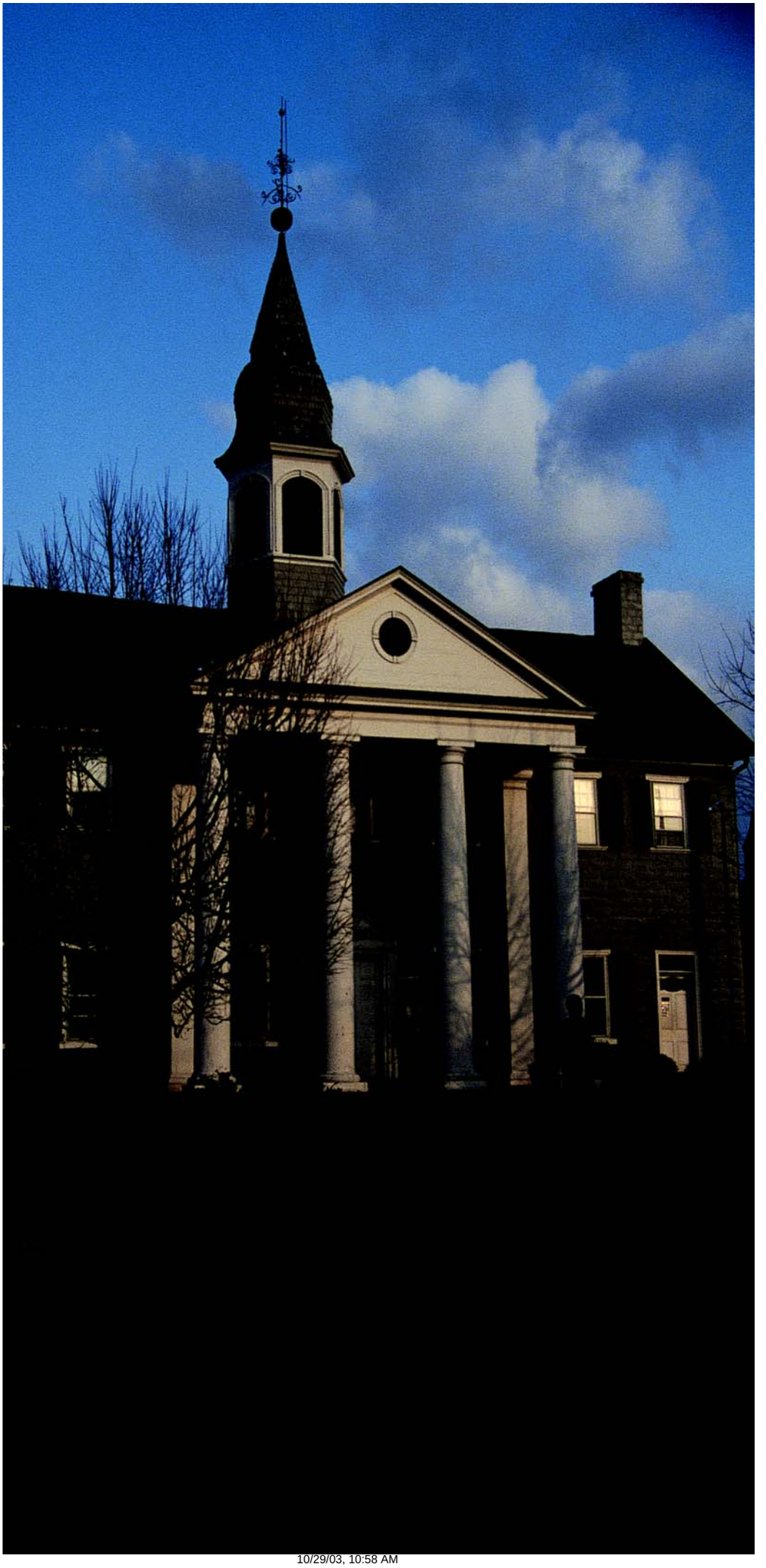

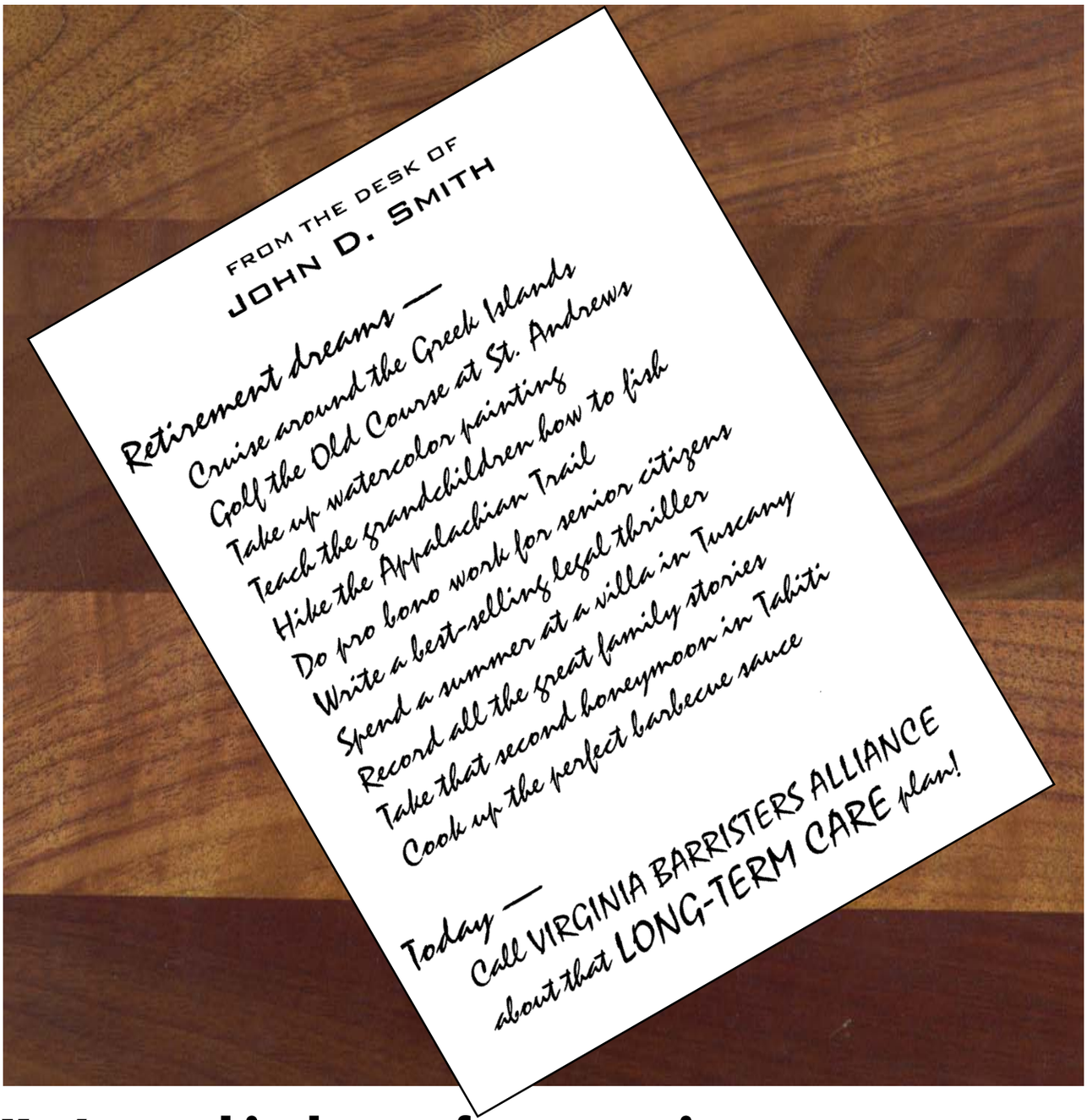

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Suite 1120
701 East Franklin Street
Richmond, VA 23219
(804) 644-0041
FAX (804) 644-0052
E-mail: thevba@vba.org
Web: http://www.vba.org

OUR MISSION

The Virginia Bar Association is a voluntary organization of Virginia lawyers committed to serving the public and the legal profession by promoting the highest standards of integrity, professionalism, and excellence in the legal profession; working to improve the law and the administration of justice; and advancing collegial relations among lawyers.

V·B·A News Journal

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On the Cover: The Shenandoah County Courthouse (1795). One hundred forty photographs of Virginia courthouses are contained in *Virginia's Historic Courthouses*, written by John O. and Margaret T. Peters with a foreword by the late Justice Lewis F. Powell Jr.; photographs by John O. Peters; published by University Press of Charlottesville; and sponsored by The Virginia Bar Association. To order the book, call the VBA at (804) 644-0041 or 1-800-644-0987.

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PRESIDENT'S PAGE

Unique Opportunities, Special Obligations

by Frank A. Thomas III

Shortly before the onslaught of Hurricane Isabel, I had the opportunity to participate in the activation of the Disaster Legal Assistance Program. This program, which is jointly sponsored by The Virginia Bar Association and the Virginia State Bar, consists of a well-organized network of 300 attorneys who have volunteered to give legal assistance that might be needed after a disaster.

While it might appear that servicing legal needs of disaster victims would be a relatively minor concern when they are facing larger issues of loss of power or finding shelter, the lawyers who are providing this assistance are performing a valuable public service. I had occasion to participate in the program when there was flooding in my locality several years ago and witnessed the genuine appreciation and gratitude of the flooding victims that were able to find a sympathetic ear to help them through the problems they were facing.

While we can be justifiably proud of the involvement of the VBA in the Disaster Legal Assistance Program, it is only one of many public service programs in which we participate.

The Commission on the Needs of Children has been a tireless advocate for the rights of children sponsoring most recently significant reforms concerning the duties and training of guardians *ad litem* in proceedings regarding juveniles.

The Capital Defense Workshop provides education and support for those representing defendants facing the ultimate penalty.

In addition to sponsoring legislation of interest to our various substantive law sections, we have also sponsored legislation addressing the rights of adults in guardianship proceedings and the insanity defense for juveniles in criminal proceedings.

What is it that makes the VBA different from the myriad of other organizations that devote time, talent and treasure to public interest? Unlike many other organizations, it is our members who are actually doing the public interest work in which we are engaged.

The work of our young lawyers covers a wide range of public interest programs, including programs on domestic violence, child abuse, educational rights of special-needs children, the Pro Bono Hotlines and rights and interest of working parents, to name just a few. Many of their efforts have been recognized with state and national awards.

Our Committee on Issues of State and National Importance has sponsored programs which have addressed issues in the forefront of the public mind such as terrorism, biotechnology, the transportation crisis in Virginia, and the issues of growth, development and sprawl faced by Virginia.

Our substantive law sections are responsible for the *Virginia Homebuyers Manual, A Guide to Administration of Decedents' Estates in Virginia,* and other publications for the benefit of the public.

We sponsor or facilitate educational programs of The John Marshall Foundation and joint programs on alternative dispute resolution and domestic relations issues.

While there is no shortage of organizations involved in examining and promoting the public interest, lawyers and associations of lawyers seem to have a particular relationship to these issues. While there are several possible explanations, the most fundamental reason is that at heart, these issues relate to the relationships among members of society and sooner or later involve the relationship of government and the legal system to members of society. It is at that point that public interest issues become legal issues and of particular concern to lawyers.

Public service is not without its benefits. The personal satisfaction a lawyer obtains from doing good work simply because it needs to be done reminds us that nonmaterial rewards can be as gratifying as material ones. For many of us, it also provides experiences that we would not otherwise get in the routine practice of law and through the rounding out of our experience makes us better persons and better lawyers.

As long as the practice of law is regulated and limited to those who have a license to do so, lawyers have an opportunity to affect the public

interest in ways that other individuals cannot. Their training and critical analysis make them effective advocates. By advocating the interest of particular members of society before courts, legislatures and agencies, they have the ability to define the public interest and further the public interest in ways that are not available to nonlawyers.

Because of their knowledge and training, they also have the ability to explain legal rights and responsibilities more effectively than many lay persons. The same communication skills and training which makes them good advocates also makes them good communicators.

Many lawyers acknowledge this unique position imposes on them a special obligation to offer their time and talent in supporting public interest projects. For those for whom the relationship may be less than clear, the rules of professional conduct and their admonition with respect to pro bono legal services serves as a reminder of the special position lawyers serve in society.

While we may not have the inclination or the ability to practice with a public interest law firm and the specialized form of advocacy that it represents, we as lawyers are presented with numerous opportunities to further the interest of the public at large. There are many opportunities in our communities through various forms of service to both public and private institutions. There are also larger stages and more significant areas in which we can act.

What is it that makes The Virginia Bar Association different from the myriad of other organizations that devote time, talent and treasure to public interest? As an organization of lawyers, it provides a unique opportunity to channel and focus the special abilities of lawyers into public interest programs. Unlike many other organizations, it is our members who are actually doing the public interest work in which we are engaged. For those who are not actively involved in the programs themselves, membership provides the opportunity to provide direct and tangible support in the form of membership and patron dues which directly support the actions of others.

For those members who want a direct, hands-on experience, membership provides them a unique venue in which to use their legal skills in a variety of public interest programs.

For those of you who are actively involved in the public interest work of our Association, you have the thanks and admiration of your fellow members. For those of you who are not, try it. You will find it rewarding in ways you did not expect. ***VBA***

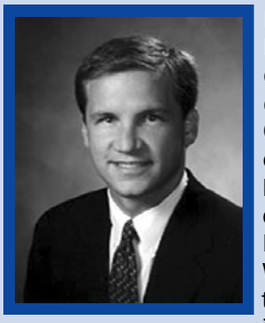
YOUNG LAWYERS DIVISION

The Bar's Response to Hurricane Isabel

Volunteers needed to provide pro bono legal assistance to storm victims

by Stephen D. Otero

As many of us know from our own personal experience, Hurricane Isabel wrought widespread havoc throughout much of the Commonwealth on September 18. The Virginia Department of Emergency Management (VDEM) reports that Isabel delivered to the Commonwealth sustained winds nearing 100 mph and tropical storm winds for 29 hours, as well as rainfall totals between two and 11 inches and a storm surge of five to eight feet along the Chesapeake Bay. Compounding the situation, a series of thunderstorms and tornadoes rolled through many already damaged areas in Southeast Virginia on September 23, 2003. VDEM reports that Isabel and the ensuing storms are responsible for more than two dozen fatalities, the destruction of almost 600 homes, and major damage to more than 6,500 additional homes. In addition, well over a million Virginians throughout an area stretching from Tidewater through Southside to Roanoke and through the Valley to Northern Virginia were without power and water for several days, and in some cases, for over a week. It has been estimated that Isabel will be the most expensive natural disaster ever to hit the Commonwealth, with damages in the tens to hundreds of millions of dollars. Both President Bush and Governor Warner have declared the Commonwealth to be in a state of disaster.



Needless to say, the citizens of the Commonwealth could use a little help in the wake of Hurricane Isabel. As members of the bar, we have the unique opportunity to assist many of our fellow citizens who find themselves facing significant legal questions, such as: Do I have to pay my mortgage or my rent if a tree has destroyed my home? What do I do if my insurance company denies my claim for repairs to my car or home? What can I do about seemingly exorbitant prices for goods and services in the wake of the hurricane? What do I do if my family's vital records were lost or destroyed in the storm?

Continued on next page

The Emergency Legal Services (ELS) program, a joint effort of the young lawyers of The Virginia Bar Association and the Virginia State Bar, was developed years ago to provide citizens of the Commonwealth rendered needy by a natural disaster or other emergency with pro bono legal assistance as they struggle through legal issues such as these. Over the years, the ELS program has provided much needed legal assistance to victims of a host of disasters and emergencies, most recently the extensive flooding in the western parts of the state in 2002, the September 11, 2001, terrorist attack on the Pentagon, and the widespread flooding in the Franklin area following Hurricane Floyd in 1999. In response to Hurricane Isabel, the leaders of the VBA and the VSB have again activated the ELS program. Moreover, because of the unprecedented levels of damage in the Commonwealth, the need for volunteer attorneys to participate in the ELS program is particularly acute in the wake of Hurricane Isabel.

Participation in the ELS program is typically a two-step process. First, volunteer attorneys are required to attend a training session that provides two hours of CLE credit at no charge. During the training session, young lawyers from the VBA and the VSB explain the history and structure of the ELS program and provide an overview of several areas of law that frequently arise in disaster and emergency situations (e.g., housing law, landlord-tenant, insurance law, consumer law, probate, lost documents). The VBA and VSB young lawyers also provide volunteer attorneys with a copy of a training manual they have developed which contains summaries of relevant legal authorities, as well as contact and reference numbers for a host of state and federal agencies. Once trained, volunteer attorneys are able to provide pro bono legal services to victims, either by telephone or in person at specified Disaster Recovery Centers (DRCs) established by VDEM and the Federal Emergency Management Agency (FEMA).

Historically, ELS has been able to service the needs of qualified victims by making trained volunteer attorneys available through an 800 number routed through the Virginia Lawyer Referral Service. This model has been successful largely because even the worst disasters to strike the Commonwealth in recent years have only required the establishment of a handful of DRCs to assist victims in a limited geographic area. In contrast, the damage caused by Hurricane Isabel has required FEMA and VDEM to establish an unprecedented number of DRCs in almost two dozen locations. As of the second week in October, FEMA and VDEM had already established DRCs in 16 locations (Poquoson, Norfolk, Hampton, Gloucester, Virginia Beach, Yorktown, Portsmouth, Chesapeake, Suffolk, Chesterfield, Henrico, Montross, Richmond, Surry, Isle of Wight, and Alexandria), and they expected to open an additional seven DRCs by the middle of October (Lancaster, Page, Franklin, Emporia, Petersburg, Middlesex, and Tangier).

In short, Hurricane Isabel has caused extensive and widespread damage throughout the Commonwealth. Consequently, the ELS program is in dire need of volunteer lawyers in virtually all regions of the state. Young lawyers from the VBA and the VSB will be conducting ELS training sessions as needed throughout October, and videotapes of earlier training programs are available for those who cannot attend the training programs in person. I strongly encourage each of you to attend one of these training programs and assist our fellow citizens in this time of need. ***VBA***

Interested in volunteering your services with the ELS program? A link to a volunteer sign-up form is available in PDF format on the VBA website homepage at www.vba.org. (To download and print the form, you must have Adobe Acrobat Reader installed on your computer; the free program is available at www.adobe.com.) You may also contact Richard Ottinger at (757) 446-8673, rottinger@vanblk.com, or Valerie Long at (434) 977-2545, vlong@mcguirewoods.com, for more information.

Service projects welcome lawyers of all ages and practice levels

Listed below is a sampling of various public service programs of the VBA Young Lawyers Division, which welcome volunteer lawyers of all ages and levels of practice. For more details, visit the VBA/YLD page at www.vba.org.

Child Support Enforcement Project

Collegiate Athletics Advisory Committee

Community Law Week and Law Day

Disaster Legal Assistance

DMV Project

Domestic Violence Project

Health Law Project

Immigrant Assistance

Lawyers for the Arts/Nonprofits

Legal Services for the Mentally Ill

Mentor Programs

Minority Recruitment

Model Judiciary Program

Nonprofit Legal Support Program

Pro Bono Hotlines

Project Focus

Town Hall Meetings

Video Series

Wills for Heroes

Watch for more information about the VBA Community Service Council, which will be launched at the Annual Meeting in January. This new venture, co-chaired by Hon. Harry L. Carrico and Alfred M. Randolph Jr., is a top priority of President-elect Ted Ellett.

Shoup, *Riggins* & The New §20-109.1: What It All Means

by Richard J. Byrd

Are parents in Virginia able to settle and agree as to the support of their minor children? Our courts, including our Supreme Court, have consistently encouraged us to help litigants settle their child support disputes by agreement, not litigation. However, our appellate courts over the past two years have demonstrated much confusion and a striking disregard of the wishes of parties expressed in their agreed orders that we have helped our clients negotiate. New legislation, effective July 1, 2003, will hopefully put to rest some of the conflicts our appellate courts have created regarding self-modifying child support orders. We will here discuss the major steps along this tortuous path: *Shoup I*, *Shoup II*, *Riggins*, and the new 2003 provisions of §20-109.1.

The *Shoup* case

In June 1994, the Shoups entered into a Property Settlement Agreement (PSA) that included child support for their three children. The key provision stated:

> *d. The Husband shall make consecutive monthly installments of the child support on the first day of each month* ***until*** *each child dies, marries,… or otherwise becomes emancipated, whichever event first occurs,…..*[emphasis added]
>
> e. If there is any change in circumstances, the parties shall follow the child support guidelines contained in § 20-108.2 of the Code of Virginia or its successor statute and any other relevant Virginia statutes and case law for determination of child support.

When the eldest child turned age 18, Mr. Shoup reduced the support he was paying by one-third. Two years later, he reduced the support by another third when the second child turned 18. One year after that, the mother filed a contempt motion to seek arrearages based upon the original support for the three children.

The father contended that the terms of the PSA required the original support to be only payable **until** each child reached age 18. Then the support was to be recalculated per the Virginia guideline.[1] He argued that he had the right under the PSA and decree to act upon each emancipation event and to apply the Virginia guideline and recalculate the support.

The mother contended that only by a new court order could the child support be changed. The only *right* the father had by the PSA was the *right* to come to court and seek relief. This the father did not do, hence he owed the support based on the original three-children rate. Judge Kathleen MacKay, the trial judge in the case, basically agreed with the mother.

Shoup I - *Shoup v. Shoup*, 34 Va. App. 347 (2001)

In February 2001, a three-judge panel of the Court of Appeals issued its opinion supporting Judge MacKay's view of Mr. Shoup's unilateral changes in child support.[2] However, Judge Rosemarie Annunziata went much further than was needed to resolve the case, and stated in her opinion:

> However, a decree that incorporates an agreement permitting automatic, unilateral, or agreed upon modification of support without prior court approval is a legal nullity and void.
>
> 34 Va. App. 347, 354.

This language is bizarre, and was unnecessary to decide the case. Why is the *Shoup* divorce decree *a legal nullity and void*. Are the Shoups still married to each other? How can Mr. Shoup owe any arrearage at all if the decree on which it is based is *a legal nullity and void*?

Shoup II - *Shoup v. Shoup*, 37 Va. App. 240 (2001)

The *en banc* Court of Appeals reconsidered the panel's opinion and reversed it in an amazing demonstration of fortitude and humility by Judge Annunziata. She wrote the opinion overruling her own previous opinion! Truly the mark of a great justice. The *en banc* opinion is very analytical and reasonable and directly addresses the value to society in allowing parents the freedom to agree as to how the support of their children is to be handled. On remand, the trial court was ordered to follow the Shoup agreement and determine the actual guideline support at the time of each emancipating event, and calculate the arrearage on that basis.

Riggins v. O'Brien, 263 Va. 444 (2002)

We bathed in the luxury of the reasonable opinion in *Shoup II* for exactly 64 days. Then the Supreme Court decided the *Riggins* case and we were thrust again into chaos. The *Riggins* PSA had an emancipation-modification clause that stated:

> …the amount payable hereunder shall be renegotiated or submitted to a court for adjudication on the first event of emancipation, as set forth above, as to each child."
>
> 263 Va. 444, 446.

Mr. Riggins made unilateral reductions in the support as each child reached majority, similar to the actions of Mr. Shoup. However, there are significant differences in the PSA provisions in the two cases. The *Shoup*

decree provided that the original support was payable only **until** an emancipation event, and it set forth the standard to use in re-calculating support – the Virginia guideline. The *Riggins* decree contained no such termination language or standard to be applied.

Instead of rejecting the father's unilateral support modifications on the appropriately narrow grounds that the Riggins' PSA modification provision was simply not self-enforcing,[3] the Supreme Court instead made a broad declaration that outlawed many support decrees in the Commonwealth. The majority said:

> With the exception of terminating a non-unitary support award upon achieving majority, **specifying future changes in the amount of child support is inappropriate because it does not allow the divorce court to determine child support based on contemporary circumstances.** 263 Va. 444, 448. [Emphasis added]

Mull over this pronouncement for a moment. A child support decree containing any automatic future change in support is inappropriate and unenforceable. The application of the Court's opinion in *Riggins* would give the following conclusions to some very ordinary and common provisions in support orders:

a. *Child support of $1,200 for the two children until Jill graduates from high school in June 2003. The support shall be $900 starting with the July 2003 payment.* The father follows the court order, and lowers the support amount from $1,200 to $900 in July. Under *Riggins*, he is falling in arrears every month that he follows the court order, because he did not go back to court to "to determine child support based on contemporary circumstances."

b. *Child support shall increase by 10 percent each year.* The father never pays these cost-of-living increases for 10 years. Does he have any arrears? Not under *Riggins*! The court did not approve the 10 percent increase each year. Hence, this father who violated the court order did the proper thing.

c. *Child support is to be $800 per month, plus $65 towards the child's orthodontia.* The orthodontia is completed and paid, so the father stopped paying the additional $65. According to *Riggins*, he is accumulating an arrearage because the court did not consider and approve the $65 reduction in child support when orthodontia ended.

Any divorce practitioner will easily conclude that **all** of the above decisions, although in conformance with *Riggins*, are incorrect, inappropriate and just plain stupid. Similar provisions to these are found in thousands of agreed orders filed in our courts. Do we now advise a client to disobey a court order so as to comply with *Riggins*? This is a scary question![4]

ABOUT THE AUTHOR

Richard J. Byrd obtained a bachelor's degree in electronics engineering from George Washington University and had a career as an electronics engineer in communications and computer design for eight years before entering law school. He attended the GWU National Law Center and earned his J.D. degree in 1972, graduating *magna cum laude*, and first in his graduating class. He has practiced law in Fairfax since 1972 and is presently a principal in Byrd, Mische, P.C. Mr. Byrd, a member of the VBA Coalition for Family Law Legislation, has been very active in family law legislation and has been associated with every change to the child support guidelines and the statutory changes to spousal support in the past 10 years. He served as the principal drafter of the following Virginia legislation: rehabilitative spousal support; shared custody child support guidelines; spousal support "cohabitation" provisions; child support "Colorado Method" legislation, and the 2003 legislation overruling the *Riggins* and the *Flanary* cases. In 2003, he drafted House Bill 2386, modifying §20-109.1, which is the major subject of this article. Among other professional activities, he chairs the Family Law Section of the Fairfax Bar Association and received the 2002 Lifetime Achievement Award from the Virginia State Bar.

The New Additions to §20-109.1:

A. Changes to §20-1-09.1:

We overruled the Supreme Court's *Riggins* decision in House Bill 2386 in the 2003 session of the General Assembly. This new legislation modifies §20-109.1:

> Any court may affirm, ratify and incorporate by reference in its decree dissolving a marriage ….. any valid agreement between the parties, …. Concerning….custody and maintenance of their minor children, …. *Provisions in such agreements for the modification of child support shall be valid and enforceable. Unless otherwise provided for in such agreement or decree incorporating such agreement, such future modifications shall not require a subsequent court decree. This section shall be subject to the provisions of § 20-108.* [Added provision italicized]

B. Legislative History:

The bill was drafted by your author and sponsored by the VBA Coalition on Family Law Legislation. This was not an easy bill to pass, as a look at the legislative history reveals.[5] The original bill submitted was more complex and attempted also to fix other problems in the Support Guideline, along with the proposal to repair *Riggins* case damage. Opposition from the Department of Child Support Enforcement (DCSE) and eventually the Office of the Attorney General (OAG) made passage of all parts of our original bill impossible. It was vital that we pass the provisions to overrule *Riggins* in the 2003 session. Hence, we proceeded with only the modifications to §20-109.1.

What the New Statute Allows – And What it Does Not Allow:

The new code provision states that child support clauses which provide for future modifications in support are valid and enforceable without contemporaneous court approval. The new statutory language is the exact opposite of the offending *Riggins* language. The new addition to §20-109.1 clearly allows implementation of all of the child support provisions in the hypotheticals in Section II above. But beware, this new statute solves some problems, but it may create others and it has traps for the unwary.

Does the new statute reverse the *Riggins* judgment? Surprisingly, I believe Mr. Riggins would still lose! The *Riggins* PSA did not provide a modification method that could be determined by any standard *internal* or

external to the PSA.[6] They merely agreed to renegotiate or go to court. An agreement to agree is not an agreement! In contrast, the *Shoup* PSA had the stated support amount only payable **until** a child was emancipated, and it set forth the Virginia guideline to be applied to re-calculate support.

How should we better draft such emancipation modification clauses? Try this provision:

Emancipation of Children: As each child reaches emancipation, per §20-124.2, the support shall be recalculated pursuant to the Virginia Child Support Guideline. The parties shall exchange all income information, daycare costs, extraordinary medical expenses and health insurance costs upon request by the either party within 60 days of an emancipation event. The father shall submit his calculation of the new support to the mother. If the mother does not agree with his calculation, she shall submit her calculation to him within 30 days. If the parties do not agree, then either may seek adjudication by the court. The new support shall be effective from the later of: (i) The first of the month following the month that the child reaches an emancipation event, or (ii) The first of the month after the father submits his calculation of the new support to the mother.

This provision gives the parties guidance as to a rational procedure to follow in handling the recalculation upon a child's emancipation. Stating the new starting date is very important in the event of litigation, since it requires the new support to relate back to the specified date.

Another warning. This new §20-109.1 does not in any way eliminate the famous *Fearon* Rule, *Fearon v. Fearon*, 207 Va. 927 (1967) most recently re-affirmed in *Gallagher v. Gallagher*, 35 Va. App. 470 (2001). As always — *A court order wins over an agreement.* Hence, you must be careful in implementing these future modifications in support orders. For example, suppose we have an emancipation clause like the one above. The parties exchange e-mails recalculating the support and quickly agree to the new amount.

Case 1: They enter a new order based upon their agreement.

Case 2: They rely on their "e-mail agreement" as evidence of the new support.

Three years later, the mother discovers that she could have used the Colorado method for the two children she has with her new husband, and she could have deducted one-half of her substantial self-employment tax. The actual guideline support she *should* have been receiving was $300 higher than the amount she had agreed to with the father. She complains to the father and demands her $10,800 "loss" in support. In Case 1, the new order governs per Rule 1:1, and she cannot go back and change the support. Under Case 2, the original order still governs, and it trumps the email agreement. The mother can now have the court calculate the "new" support she should have been receiving, and the father will have a $10,800 arrearage. Obviously, the new code provisions do not eliminate the necessity of entering a new order if the parties want certainty in implementing these future modification provisions. The new statute overrules Riggins, but it does not overrule *Fearon* and *Gallagher*.

In the situation where the future modification in support is a fixed dollar or percentage amount set forth in the agreement, there is no need for a subsequent court order. The hypothetical provisions in Section II above should not require a new court order. But when the modification provision sets forth merely a method for a recalculation of support, the best advice is still to enter a new order containing the new amount.

If possible when drafting a modification clause, put in the future support amount, or a way to calculate it. For example, if there are two children, ages 17 and 14, do the re-calculation in advance: "Child support of $1,200 for the two children until Jill graduates from high school in June 2004, and then to be $900 starting with the July 2004 payment." If a material and unexpected change in a party's income makes this new support inappropriate, the aggrieved party can always have the support reviewed, but at least you can be assured that you have drafted an automatic, self-enforcing, future modification provision.

Conclusions

The Supreme Court's *Riggins* opinion would nullify thousands of provisions in existing child support orders and decrees. The opinion in *Riggins* and the Court of Appeals' opinion in *ShoupII* are irreconcilable. However, the *judgments* of those disparate opinions may be reconciled by the subtle, but significant, differences in the PSA provisions in the two cases.

The new addition to §20-109.1 overrules the offending language in the *Riggins* opinion. Parties may now plan ahead and agree as to how their child support will vary in the future. Such modification clauses are enforceable without court approval at the time of the change in support.

In drafting these agreements, we must be careful to provide that future modifications be determined and implemented by the parties with as much certainty as possible. A agreement to agree is still not an agreement under the new provisions of the Code. A future modification provision in a support order should be *self-enforcing* if at all possible, in that the information needed to implement the change should be well-defined and easily ascertainable, and it should have a clear starting date, or condition upon which that date can be determined.

The new statutory provisions do not eliminate the advisability of entering a new order whenever the parties agree to a change in support, even though that change is pursuant to a modification provision of the existing court order. This is especially true when the parties need to calculate the new support

amount to implement the modification provision. A court order still trumps an agreement, and having to sort out what parties intended years ago is never a pleasant experience.

Ever since the original adoption of the child support guidelines in 1987, this area of domestic relations law has been in a state of instability and change. We have modified our child support guideline every year since its adoption. The appellate courts are constantly changing the law with new statutory interpretations. In general, they do an admirable job of sorting out difficult precedent and adjudicating fact patterns which often cry for an equitable solution. Yet it seems as though we must call upon the General Assembly every January to repair the damage. Perhaps this ever-changing state of the law is to be expected when a law touches so many people in so many disparate ways. We will continue our job of regularly adjusting our guideline statutes to maintain them as fair and neutral as possible, while serving the best interests of the children of Virginia. ***VBA***

NOTES

1. Note that the father's reducing the support by 33 percent was definitely **not** a reduction per the Guideline. A guideline reduction from three children to two children would have been closer to only 20 percent.
2. This article will not discuss in detail the issue in the *Shoup* case of the reduction in support due to the termination of daycare.
3. For example, a child support provision which states that "Support shall be increased by $100 per month for June, July and August each year." is a self-enforcing clause, and the mother need not return to court to receive the extra $100 for the summer months. However, a clause which states "This support shall be increase as the costs of the child increase." is not self-enforcing. If the parties cannot agree, then a court must determine if the child's costs have increased, and how this should affect the child support.
4. A Petition for a Rehearing was filed in the *Riggins* case at the Supreme Court. The author filed a brief *amicus curiae* on behalf of the Virginia Mediation Network setting forth the arguments used in this article, among others. However, the rehearing was denied.
5. You can view the history of HB 2386 at: http://leg1.state.va.us/cgi-bin/legp504.exe?031+sum+HB2386.
6. For example, an *internal* standard might be "...support to be increased by five percent each year." An *external* standard might be "...support to be increased by the CPI each year." Both should qualify as *self-enforcing* agreements.

LEGAL FOCUS/**DOMESTIC RELATIONS**

What, Who, Where, When, How:

Personal Jurisdiction in Domestic Relations Cases in Virginia

by Frances W. Russell

As an attorney, you have a responsibility to every potential client, to determine whether his[1] case can be heard in Virginia, and whether a Virginia court can establish or enforce his rights or responsibilities with respect to an opposing party. No matter how compelling your client's story may be, nor how persuasive you are in the courtroom, your time and effort on his behalf will be wasted if the court does not have the authority to grant him the relief he seeks.

Jurisdiction in all domestic relations matters in Virginia is governed by statute.[2] Once you've confirmed that a Virginia court will have jurisdiction over the subject matter – that is, your client's circumstances meet the basic statutory prerequisites for the court to grant him a divorce or make a determination of custody or support issues – then you must determine whether the court can exercise personal jurisdiction over all of the necessary parties. If the court doesn't have jurisdiction over the opposing party, no order can be entered affecting her personal rights or responsibilities.[3]

The prospective client tells you he wants a divorce. You confirm that he has lived here for at least six months and considers Virginia his home,[4] and that he and his wife have been living apart for more than a year.[5] So far, so good. You can file the bill of complaint, and the court can dissolve his marriage. Now it's time for the "where," "when" and "how" questions that will determine whether the court can do anything else.

Where is the spouse? If she is a Virginia resident, Code §§ 20-99 (3) and 20-99.2 allow you to have her served with the divorce papers by a sheriff or private process server[6] either (i) personally; (ii) by posted service on the front door or other "main entrance" to her home; or (iii) by delivery to a member of her family, 16 years old or older, who resides in her home with her, and giving that family member "purport" of the papers.[7] If the service is made on a Virginia resident in one of those three ways, the court will have personal jurisdiction over her.[8] She may also agree to the personal jurisdiction of the court by executing a notarized statement, waiving or accepting service.[9]

Even if the defendant is a nonresident, personal service on her in Virginia will usually be sufficient for personal jurisdiction.[10] Furthermore, if she files an answer to the bill of complaint or otherwise enters a general appearance, the court will have personal jurisdiction over her, whether or not she resides here, and whether or not you have had her properly served.[11] Note that almost any pleading, even a motion for a continuance, may constitute a general appearance under Virginia law.[12] However, the mere presence of a party or her attorney at depositions will not amount to a general appearance.[13]

If your client's spouse does not live in Virginia, and it does not appear that you will be able to have her served

ABOUT THE **AUTHOR**

Fran Russell is a partner in the Virginia Beach office of Williams Mullen. She has been a member of the Virginia State Bar since 1992. She is also a Certified Financial Planner. She was for many years the legal columnist for Soundings, a weekly newspaper for the military community in the Hampton Roads area, and is also the author of "ERISA and Division of Employee Benefits in Matrimonial Cases," published in the Winter 2001 issue of the *American Journal of Family Law*.

here, you must ask where the parties last lived together as husband and wife. Under our "long-arm" statute, a Virginia court may exercise personal jurisdiction over a nonresident defendant in divorce proceedings only if she "maintained within this Commonwealth a matrimonial domicile at the time of separation of the parties upon which grounds for divorce … is based, or at the time a cause of action arose for divorce … or at the time of commencement of [the divorce proceedings],"[14] and the plaintiff spouse is residing here. If the parties last lived together in some other state, and the defendant is a nonresident, the Virginia court will have only *in rem* jurisdiction.

If the nonresident spouse last lived with your client in Virginia, the next question you must ask is: where can she be found now? Personal service on a nonresident defendant is an absolute prerequisite to personal jurisdiction over her in divorce proceedings.[15] Anything less is equivalent to service by publication.[16] Also note that if the affidavit of service [17] does not indicate that the person who served the nonresident party met the requirements of Code § 8.01-320, the Virginia court will not have jurisdiction over that party, [18] and any order purporting to affect her rights or obligations will be invalid.[19]

This situation is likely to be especially frustrating for the client whose spouse has executed a separation agreement. After all, the Virginia long-arm statute provides that our courts will have personal jurisdiction over a nonresident who has "executed an agreement in this Commonwealth which obligates [her] to pay spousal support or child support to a domiciliary of this Commonwealth …."[20] Furthermore, Code § 20-109.1 specifically states that, "[i]n any case where jurisdiction is obtained over a nonresident defendant by order of publication …, any properly acknowledged and otherwise valid agreement entered into between the parties may be affirmed, ratified and incorporated" in the decree. That is, personal service is not a prerequisite to incorporation of an agreement in a divorce decree. Unfortunately for the client, these statutory provisions are meaningless in the absence of personal service on the nonresident spouse. The incorporated agreement will not be enforceable by the court.[21]

Incidentally, if your client is in the military, he may not want to make himself a party to divorce proceedings here. Under federal law,[22] the Virginia court may award a share of your client's military pension to his spouse as marital property in divorce proceedings, but only if his rights under the Soldiers' and Sailors' Civil Relief Act of 1940[23] have been observed, and the court had jurisdiction over him by reason of (i) his residence within the court's territorial jurisdiction (other than by reason of his military assignment here); (ii) his domicile within the court's territorial jurisdiction; or (iii) his consent to the jurisdiction of the court, by taking some affirmative action in the proceedings.[24] If your client is the plaintiff, he has taken the "affirmative action" necessary to give the court jurisdiction to award his spouse a share of his retired pay. The same outcome will result if he is the defendant, and you file a cross-bill on his behalf, requesting equitable distribution of the marital property.[25]

Even if your client's spouse is a nonresident, and you can obtain only an *in rem* divorce for him, that does not mean he cannot be awarded custody of his children or support for them. You may file a bill of complaint in the circuit court, asking for a divorce *in rem*, and file separate petitions for determination of custody and support in the juvenile and domestic relations district court.[26]

Jurisdiction in custody cases is governed by the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act, Code §§ 20-146.1 *et seq.* (UCCJEA). The purpose of the UCCJEA is to resolve uncertainties or disputes over subject matter jurisdiction. Once you have established that the Virginia court has jurisdiction to decide what arrangements for custody and visitation will be in the best interests of the children (*in rem* jurisdiction), that power is indistinguishable from its authority to determine the parties' rights and obligations (*in personam* jurisdiction) with respect to custody and visitation.

Furthermore, unlike divorce proceedings in Virginia, the mode of service on the other party will not affect the court's ability to hear and decide the issues. Unless your client is seeking custody in the context of divorce proceedings, notice to nonresidents in a custody case need not be given by personal service. Notice may be given by certified or registered mail, return receipt requested, to the last known address of the other party,[27] or even by publication if the party's whereabouts are unknown.[28] All that is required is that "notice must be given in a manner reasonably calculated to give actual notice and an opportunity to be heard."[29] Under Code § 20-146.5, anyone who has been given notice in accordance with these requirements is bound by the court's decision.

Your client may also file a petition for spousal and/or child support in the juvenile court, pursuant to the provisions of the Uniform Interstate Family Support Act (UIFSA).[30] Code § 20-88.35 lists the bases for personal jurisdiction over nonresidents in support matters. Specifically, a Virginia court may "establish, enforce or modify"[31] support if the nonresident respondent: (1) is personally served with process in Virginia; (2) submits to the jurisdiction of the Virginia court by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction; (3) resided with the child in Virginia; or (4) resided in Virginia and paid prenatal expenses or provided support for the child; or (5) if the child is residing in

Virginia as a result of the acts or directives of the nonresident; (6) the exercise of personal jurisdiction is authorized under our long-arm statute[32]; or (7) there is any other basis for personal jurisdiction consistent with the United States and Virginia constitutions.

The "acts or directives" clause has been construed to mean almost any action on the part of the respondent that resulted in the child's presence in Virginia. For example, in *Franklin v. Commonwealth,* 27 Va. App. 136, 497 S.E.2d 881 (1998), the parties and their children had been living in Africa pursuant to the husband's employment. After several incidents of domestic violence, the husband ordered the wife and children out of their home. With emergency assistance from the husband's employer and the American embassy, she and the children returned to the United States. She established residence in Virginia, where the parties had lived before moving to Africa. In proceedings for support, the husband argued that the wife and children were not living here as the result of any specific direction from him, and that therefore, the Virginia court did not have personal jurisdiction over him under the "acts or directives" provision. The juvenile and circuit courts held, and the Court of Appeals agreed, that this was too narrow an interpretation of the law. UIFSA is "remedial in nature and should be liberally construed so that its purpose is achieved."[33]

Aside from the specific requirement for personal service in cases where jurisdiction arises under the long-arm statute, UIFSA does not mandate any particular form of service. Assuming the Virginia court has grounds for the exercise of personal jurisdiction, the court may enter a support order as long as the respondent has been given "notice and opportunity to be heard."[34] This does not mean your client can get away with dropping a postcard in the mail to the other party, telling her that he has a support petition pending against her. Code § 8.01-296, *supra*, specifies what forms of service are acceptable, in proceedings "for which no particular mode of service is prescribed."

Ultimately, your client's case depends upon the answer to just one question: How much do you know? The more you know about jurisdiction – who is subject to the authority of the court, where that party is, and what notice must be given to that party to enable the court to exercise its authority – the more you can do for your client. ***VBA***

NOTES

1. Of course, every family law attorney is well aware of – in fact, dependent upon – the fact that there are two genders. However, constant references to "he or she," and "her or him" are cumbersome and potentially confusing. Therefore, this writer will generally refer to the client in this article as "he." She apologizes to any of her colleagues who find this usage offensive.
2. Specifically, Title 20, Domestic Relations; Chapter 11 of Title 16.1, Juvenile and Domestic Relations District Courts; and Chapters 8 and 9 of Title 8.01, pertaining to process and personal jurisdiction.
3. *Gibson v. Gibson*, 5 Va. App. 426, 364 S.E.2d 518 (1988), citing *Pennoyer v. Neff*, 95 U.S. 714 (1877).
4. Code § 20-97.
5. Code § 20-91 (A) (1) (a).
6. Code § 8.01-293.
7. Code § 8.01-296.
8. Although a witness may be served with a summons by delivery of the summons to his manager or supervisor at his place of employment, Code § 8.01-298 (1), this is not a valid method of service on a defendant in divorce proceedings. *Lee v. Lee*, 02 Vap UNP 2195012 (2002).
9. Code § 20-99.1:1.
10. *Ragouzis v. Ragouzis*, 10 Va. App. 312, 391 S.E.2d 607 (1990). If the defendant's presence in the state is induced by deception or contrivance, the service may be invalid. *See Cannington v. Cannington*, 19 Cir. 158636, 50 Va. Cir. 165 (Fairfax Co. 1999), citing *Tickle v. Barton*, 142 W. Va. 188, 95 S.E.2d 427 (1956) and *Shaw v. Hughes*, 303 S.C. 337, 400 S.E.2d 501 (1991). But a husband who returned to Virginia after his wife told him she was filing for divorce and custody of their children was unsuccessful in persuading the court that she had used the children has "bait" to "drag" him back here in order to obtain personal service. *Blackson v. Blackson*, 40 Va. App. 507, 579 S.E.2d 704 (2003).
11. Code §§ 20-99 and 20-99.1:1.
12. *See, e.g., Kiser v. Amal. Clothing Workers*, 169 Va. 574, 591, 194 S.E. 727 (1938) (motion for continuance or motion to quash, other than for defects in process or return, amount to general appearance); *Brown v. Burch*, 30 Va. App. 670, 677, 519 S.E.2d 403 (1999).
13. *Minton v. First National Exchange Bank*, 206 Va. 589, 594, 145 S.E.2d 139 (1965).
14. Code § 8.01-328.1 (A) (9). In a case where the husband was employed by the U.S. State Department, so that the parties traveled and resided temporarily in various foreign countries, but their last fixed residence was in Virginia; and the husband attempted, by registering to vote, obtaining a driver's license and a library card, etc., in another state, but never resided there; the husband's matrimonial domicile necessarily remained in Virginia. "Domicile" is established by "1) personal presence in [the] state and 2) the intention to make that ... place a home." *Oliver v. Oliver*, 19 Cir. C178681 (Fairfax Co. 2003).
15. *See* Code §§ 8.01-328.1; 8.01-320; and 8.01-296. These three sections must be read together.
16. Code § 8.01-320 (A).
17. Code § 8.01-325.
18. *See Harrel v. Preston*, 15 Va. App. 202, 421 S.E.2d 676 (1992). Note that in that case, the parties had been divorced in Virginia, so one might think that the Virginia courts would have had continuing jurisdiction over them to enforce the terms of their decree. Not so. The former husband no longer resided here, so the provisions of § 8.01-320 applied.
19. But *see* Code § 8.01-322, which provides that if a judgment, decree or order is entered against a party pursuant to an order of publication, she has only two years in which to petition the Virginia court to have the decree set aside. The deadline is one year for a party served (other than by publication) with a copy of the decree.
20. Code § 8.01-328.1 (A) (8).
21. *See Morris v. Morris*, 4 Va. App. 539, 359 S.E.2d 104 (1987).
22. Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 ("USFSPA").
23. 50 U.S.C. Appx. §§ 501 *et seq.*
24. USFSPA, 10 U.S.C. § 1408 (c) (4). Note that under the USFSPA, even if a Virginia court acquired personal jurisdiction over a nonresident military defendant in accordance with the statutory provisions for service described more fully elsewhere in this article, the plaintiff spouse may find it difficult or impossible to enforce a divorce decree awarding her a share of the defendant's pension. If the defendant did not file pleadings or otherwise come within the court's jurisdiction in accordance with the terms of the USFSPA, the Defense Finance and Accounting Service ("DFAS") will not honor the decree. That is, the plaintiff will be unable to obtain direct payment from DFAS. Instead, she will have to locate the defendant and take whatever action is available through the courts of the jurisdiction where he is then residing and/or domiciled, to enforce the Virginia decree against the defendant directly.
25. *Blackson v. Blackson*, 40 Va. App. 507, 579 S.E.2d 704 (2003).
26. *See* Code §§ 16.1-241, 16.1-244, and 20-79(a).
27. The persons who may be entitled to notice in a custody matter include not only your client's spouse or the other parent, as the case may be, but also "any person having physical custody of the child." Code § 20-146.16.
28. Note that Code § 8.01-316 requires the petitioner seeking an order of publication to file an affidavit stating the last known post office address of the respondent, and that Code § 8.01-317 requires the clerk of the court to mail a copy of the order of publication, including a brief statement of the object of the suit, to the respondent at the address provided by the petitioner. When publication is completed, the clerk must file a certificate of compliance. If the record indicates that these requirements were not met, any order entered in the case may be invalid. *See Carlton v. Paxton*, 14 Va. App. 105, 415 S.E.2d 600 (1992).
29. Code § 20-146.7.
30. Code §§ 20-88.32 *et seq.*
31. Jurisdiction to modify an out-of-state support order is subject to the limitations set forth in Code §§ 20-88.76 and 20-88.77:1.

32. Code § 8.01-328.1 (A) (8). The referenced subsection provides for personal jurisdiction over a nonresident who has (i) executed an agreement here, obligating herself to pay spousal or child support to a Virginia domiciliary or to someone who is in the armed forces and meets the "deemed domiciliary" requirements of Code § 20-97; (ii) been ordered to pay spousal or child support by a Virginia court having personal jurisdiction over her; or (iii) by "personal conduct," conceived or fathered a child here. Note that the Virginia court can exercise personal jurisdiction over a nonresident under § 8.01-328.1 (A) (8) (iii) only if the nonresident has been personally served as provided in Code § 8.01-320 – the same mode of service required in divorce proceedings.

33. *Franklin*, 27 Va. App. at 146. *See also Oliver v. Oliver*, 19 Cir. C178681 (Fairfax Co. 2003) (where the husband, a U.S. State Department employee, had originally requested an assignment to Virginia when his wife became pregnant, to ensure better medical care for her and their child; and although the parties had traveled extensively overseas after their period of residence in Virginia, they never established a domicile anywhere else; and the wife returned to Virginia after the parties began experiencing marital difficulties, and filed for divorce here; the circuit court found that the husband never established a "matrimonial domicile" in any other state, and the child was living in Virginia as the result of his "acts or directives.")
34. Code § 20-88.63.

LEGAL FOCUS/**DOMESTIC RELATIONS**

Valuing Closely-Held Businesses for Virginia Equitable Distribution:

Five Tips for Divorce Attorneys

by Robert R. Raymond

Business valuations can be confounding to even the most seasoned of attorneys. Weighted average cost of capital and unlevered betas are topics better suited for graduate finance classes than the courtroom. While application of such nuances is best left to the expert valuator, it is essential that the divorce attorney appreciate key concepts underlying the appraisal of closely-held business interests. Such an understanding is necessary to evaluate the work products of one's own expert, as well as that of the opposition; to conduct effective examinations; and to communicate opinions to the court.

As a starting point, it is important to appreciate that divorce valuations are but a subset of the business appraisal discipline. Indeed, the majority of appraisals are performed for other purposes including estate, gift and income taxes, mergers and acquisitions, and damage cases. While each area is supported by a common body of knowledge, each also exhibits unique considerations. Within the arena of divorce valuations, significant differences exist from state to state and sometimes even from locality to locality. Furthermore, these differences are continually reshaped by case law and statutory modification.

Following is a non-technical explanation of five valuation concepts specific to Virginia equitable distribution.[1] Hopefully, the tips will serve as a useful compass guiding lawyers through the business appraisal maze.

Tip 1: *Heed the Advice of Yogi.* The starting point in every appraisal is selecting a standard of value. Standard of value defines the type of value being sought by addressing the question: "Value to whom?" As Yogi Berra observed, "You've got to be very careful if you don't know where you are going, because you might not get there."

Too many divorce business appraisals fail because preparers rely on an incorrect standard of value. One cause of this shortcoming is that practitioners in Virginia have been provided mixed signals as to the issue. Va. Code Ann. § 20.107.3 refers to "fair" value. Cases have relied on "true" value, "fair market" value and "intrinsic" value, among others.

The Court of Appeals decision in *Howell* v. *Howell III*[2] appears to have resolved these conflicts by dictating the use of an intrinsic standard of value, explicitly rejecting use of alternatives in the process. The explanation provided by Judge Bumgardner in the *Howell* case is an instructive explanation of the intrinsic standard of value.

"Intrinsic value is a very subjective concept that looks to the worth of the property to the parties. The methods of valuation must take into consideration the parties themselves and the different situations in which they exist. The item may have no established market value, and neither party may contemplate selling the item; indeed, sale may be restricted or forbidden. Commonly, one party will continue to enjoy the benefits of the property while the other must relinquish all future benefits. Still, its intrinsic value must be translated into a monetary amount. The parties must rely on accepted methods of valuation, but the particular method of valuing and the precise application of that method to the singular facts of the case must vary with the myriad situations that exist among married couples."[3]

The definition of intrinsic value as adopted in the *Howell* case is "the value of the business interest to its current owner given the owner's current use of the interest, current resources, and current capabilities for economically exploiting the business interest."[4]

Alternative standards of value often erroneously encountered in practice are fair market value, fair value and strategic value. Differentiating each from intrinsic value is a useful legal tool.

Fair market value is widely defined as "the price at which property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of the relevant facts."[5] While the IRS code dictates use of fair market value in estate, gift and income tax matters, the lack of relevance to divorce situations is apparent. As noted in the *Howell* opinion, in a divorce there are no buyers or sellers, sale of an interest may be prohibited by contract

ABOUT THE **AUTHOR**

Robert R. Raymond, CPA, ABV, MAC, is managing partner of Raymond, Satchell & Associates, LLP, in Richmond. Mr. Raymond has performed more than 400 valuations for various purposes. He has been involved as an expert in a number of significant Virginia equitable distribution cases including *Howell*, *Rowe* and *Congdon*. Mr. Raymond is a frequent lecturer to bar-related groups.

(e.g., a buy/sell arrangement) or ethical canons (e.g., a law firm) and one side often has limited knowledge of relevant factors. Some states mandate the use of the fair market standard of value. In Virginia, however, business appraisals that utilize such a standard are of questionable admissibility.

Fair value as used in valuation literature is a statutory standard of value applicable to cases involving dissenting shareholder's appraisal rights. Application of the concept is, therefore, specific to the statutes and case law in each venue. The Uniform Business Corporation Act provides this definition: "Fair Value, with respect to dissenter's shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable."[6] In light of *Howell*, it is reasonable to conclude that use of the term "fair value" in Va. Code Ann. § 20.107.3 and the *Bosserman*[7] case is not as a valuation term of art, but as a substitute for the term "intrinsic value."

Strategic or investment value is the value of a business interest to a particular investor based upon discrete investment requirements and opportunities. This standard is commonly encountered in mergers and acquisitions where competitors or consolidators pay enhanced prices justified by economics of scale, elimination of a competitor or operating synergies. The problem with extrapolating a strategic standard of value to divorces is that observed premiums can only be realized upon the actual sale of the business. This event will usually trigger income taxes, necessitate non-competition agreements, evoke contingent liabilities, and may involve consideration of speculative value such as buyers stock and earnouts. Strategic value is only relevant in a divorce if facts indicate that the actual sale of a business is likely.[8] A frequent shortcoming in divorce business appraisals is reliance on values obtained from merger and acquisition data bases (such as the Institute of Business Appraisers, MergerStat, Done Deals, or Pratt's Stats) without appropriate adjustments to reconcile the concept of strategic value to that of intrinsic value.

Tip 2: ***A Standard of Value Does Not a Premise Make.*** Another common error in divorce valuations is the failure to distinguish between a premise of value and a standard of value. A premise of value is an assumption as to the set of actual or hypothetical transaction circumstances applicable to the subject value and is defined after selection of a standard of value. Alternate premises of value include

- Value as a going concern;
- Value as an assemblage of assets;
- Value in an orderly disposition;
- Value in a forced liquidation;
- Value as defined in a contractual agreement.

The relationship between the concepts of standard and premise of value may be conceptualized as the matrix illustrated below:

	Standard of Value			
Premise of Value	**FMV**	**Intrinsic**	**Strategic**	**Fair**
Going concern				
Assemblage				
Orderly liquidation				
Forced liquidation				
Contractual				

Virginia courts have generally held that the appropriate premise of value in divorce appraisals is as a going concern in continued use unless circumstances indicate a liquidation event is likely.[9]

The use of contractual agreements as a premise of value has spawned much controversy. In numerous cases, including *Bosserman* and *Howell*, courts have ruled that prices established by transfer agreements do not control value, but are a factor to be considered. Contradicting this position is the *Kaufman*[10] case where a buy-out agreement did control valuation. *Kaufman*, however, can probably be distinguished from these other opinions because the interest in question was acquired six months after separation. This distinction notwithstanding, it is important to realize that the use of a contractual premise of value is not inconsistent with the intrinsic standard of value, as some have maintained. For this reason, in appropriate situations reliance on restrictive agreements to establish business values in divorces should not be viewed as a dead issue.

Tip 3: ***Don't Get Personal.*** The equity value of any enterprise may be segregated into tangible and intangible (if any) components.

In determining the value of tangible assets, it is usually necessary to adjust book balances, which are based on accounting or tax conventions, to realizable amounts. For example, accounts receivable should be on a collectible basis and supplies that have been expensed should be capitalized. While the mechanics of this exercise involve complexities, the concept is straightforward — tangible value is the difference between adjusted asset values and liabilities.

Intangible value is often broadly referred to as goodwill. Conceptually, it is represented by a stream of excess earnings. Types of commonly observed intangibles include customer lists and relationships, trained and assembled work force, and favorable relationships.

A tenet of valuation theory is that

intangible value cannot exist in the absence of a history or expectation of excess earnings.[11] Implicit in this principle is the fact that a majority of businesses will not have intangible value and, therefore, may be appraised solely in reference to tangibles.

In those cases where intangible value exists, a unique requirement for divorce appraisals is that such value must not only be quantified, it must be bifurcated into personal and commercial (practice) components. The importance of this distinction is described in the *Howell* opinion.

"The value of goodwill can have two components. Professional goodwill (also designated as individual, personal, or separate goodwill) is attributable to the individual and is categorized as separate property in a divorce action. Practice goodwill (also designated as business or commercial goodwill) is attributable to the business entity, the professional firm, and may be marital property."[12]

Determinants of personal goodwill include the individual's reputation, work ethic, age, health, training, knowledge, experience and expertise. Commercial goodwill is influenced by attributes such as an investment in capital, assembled and trained work force, facilities, size, name recognition, financial contracts, institutional referral sources, customer lists and management depth.

The complete divorce business valuation will account separately for the tangible and intangible components of equity and will go on to provide both quantitative and qualitative information supporting the calculation of any commercial goodwill.

Tip 4: *Beware of the Cookie Cutter.* While there are numerous accepted methods of business appraisal, each may be subsumed into one of three approaches, viz: income, asset or market. Standards promulgated by every credible organization[13] that accredits business valuation experts require consideration of each of these three approaches in every valuation or, in the alternative, justification of the departure from such application. The aforementioned issues affecting the classification of goodwill uniquely influence inputs into each of these approaches. Methodologies appropriate to other types of valuations cannot be mechanically extrapolated to divorce business appraisals.

The income approach calculates the value of a business based on the present value of an expected future income stream. In a divorce valuation, estimation of that income stream should be based on the present resources of the owning spouse and passive factors. Adjustments to eliminate the effect of personal attributes such as an abnormal work ethic or unique specialty may also be necessary. Absent such adjustments, the expert will have no objective basis to opine as to what part of intangible value (if any) calculated under the income approach is divisible.

Neither can the divorce business valuator rely on conventional measures of computing a discount rate, which is the quantification of the risk associated with realizing the selected benefit stream. If future income growth is limited because it is based on present or historical circumstances, as opposed to prospective events, the risk of realization may be significantly reduced. A danger sign arises when divorce business appraisal reports contain discount rate computations utilizing conventional approaches to the "build-up method" without consideration of assumptions unique to the specific divorce case.

The asset approach is balance sheet oriented in that asset and liability accounts of the subject are restated to current amounts. Included in the process is the identification and valuation of unrecorded intangibles as well as the revaluation of assets and liabilities from net book (i.e., accounting) values. While application of the asset method can be complicated and often requires significant assumptions, it is useful in divorces because each intangible asset is valued discretely, thereby facilitating identification of components of commercial (versus personal) goodwill.

The market approach is based on the assumption that the pricing relationship of observable sales of comparable companies can provide relevant indications of value (the Merger and Acquisition Method) or that data concerning publicly traded equities can be extrapolated to the subject enterprise to provide indications of value (the Guideline Company Method). Obviously, the market approach does not apply to all types of businesses because some, such as law firms, are not bought and sold. As discussed, the Merger and Acquisition Method must be applied carefully in divorce business appraisals because it is based on a strategic, rather than intrinsic, standard of value. Because the Guideline Company Method is rarely applicable to smaller enterprises, it is infrequently encountered in practice. It is, however, a valid approach to appraising larger privately-held companies.

In most divorce business appraisals, the market approach is, at best, a way to validate the outcomes of alternative methodologies. It is seldom appropriate as a primary valuation approach.

Tip 5: *Don't Believe Recent Court Decisions When It Comes to Discounts.* While a full discussion of the issue of discounts is beyond the scope of this article, recent developments in Virginia case law are disturbing. Business valuation theory holds that there are levels of value for any business interest ranging from a control, marketable basis to a minority, non-marketable basis. There is an abundant body of research supporting the proposition that a liquid investment will trade at a premium compared to a non-liquid counterpart and that investors will pay for control prerogatives.

Recent cases such as *Ferraro*,[14] *Howell*, and *Congdon*,[15] however, suggest to many that Virginia Courts as a matter of law will not allow marketability or lack of control discounts in divorce business valuations. This logic originates from the view that under the intrinsic standard of value there is no assumed buyer or seller because nothing is being sold.

Such a position, however, misses the point. In divorce cases, discounts may be necessary to conform assumptions in the utilized appraisal methodologies to the business interest being appraised. For example, if in applying the income approach the benefit base is all of the cash flow of the business and the discount rate is calculated based on

data from publicly traded stocks, some adjustment is necessary if the interest being valued is a minority one in a non-marketable business. On the other hand, if the benefit stream is based on what a minority holder has actually realized and the discount rate is tailored to the facts, marketability and lack of control discounts may be unwarranted. While the subject of discounts is a complex one, failure to consider these material adjustments in equitable distribution will create serious inequities for owning spouses.

Expert business valuators rely on a body of technical knowledge that is both vast and complex. Simplicity may only be achieved at the price of accuracy, usually an untenable trade-off. While most attorneys cannot realistically expect to achieve technical parity with appraisal experts, it is essential to develop touchstones to distinguish the accomplished valuation from the flawed one. Woody Hayes spoke of the "man who drowned in a river whose average depth was only three feet." Hopefully, the foregoing five tips will help Virginia divorce attorneys stay afloat. **VBA**

NOTES

Thanks to Mary Beth Joachim of ButlerCook in Richmond, Virginia, for her assistance with legal research for this article.

1. Many of the definitions and descriptions used in this article are adapted from the text of *Valuing a Business: The Analysis and Appraisal of Closely Held Companies* by Pratt, Reilly and Schweihs (4th ed 2000), McGraw-Hill.
2. 31 Va. App. 332, 523 S.E. 2d 514 (2000).
3. Note 2, *supra*.
4. Note 2, *supra*.
5. Revenue Ruling 59-60 (1959 – 1 CB 237).
6. Note 1, *supra*, p. 32.
7. 9 Va. App 1, 384 SE 2d 104 (1989).
8. *See* for example, *Stephenson* v. *Stephenson*, 2002 WL 507769 (Va Cir. Ct.) (2000).
9. *But see Thompson III* v. *Thompson* 2000 WL 135041 (Va. App) (2000) for an exception to this statement.
10. 7 Va. App 489, 375 SE 2d 374 (1988).
11. This is a position that the Henrico County Circuit Court ratified in *Jiral* v. *Jiral* (unpublished) (CH00814)(2002).
12. Note 2, *supra*.
13. Examples of organizations with such standards are the American Society of Appraisers, Institute of Business Appraisers, National Association of Certified Valuation Analysts and the American Institute of Certified Public Accountants.
14. 2000 Va. App. Lexis 164 (2000).
15. 40 Va. App. 255, 578 S.E. 2d 833 (2002).

Summary of Post-1998 Rehabilitative Alimony Cases

by Cheryl Watson Smith and Kimberlee Harris Ramsey

In 1998, the legislature amended *Virginia Code* § 20-107.1 to include the option of awarding spousal support for a *defined* duration, often referred to as rehabilitative alimony.[1] The amendments followed an extensive legislative study, statewide discussions and surveys. The Study Committee's Report[2] indicates the concept was that in short marriages, five years or less, rehabilitative alimony would be appropriate; whereas, in long marriages, 20 years or more, periodic support would be appropriate. However, no presumptions were included in the statute.[3] The developing case law, has been in the extreme situations, i.e., long marriage—undefined duration awards/ short marriages—permanent awards.

This article summarizes the post-1998 reported and unreported cases on rehabilitative alimony. While this may not be an exhaustive list, it is a representative summary.[4]

Published Court of Appeals Cases:

1. *Torian v. Torian*, 38 Va. App. 167, 562 S.E. 2d 355 (Apr. 23, 2002). The Court of Appeals affirmed spousal support of $1,000 a month for seven years in a 26-year marriage rejecting Wife's argument that the legislature had never intended for defined duration awards to be made in cases involving long-term marriages. The Husband was 66 years old and retired. The Wife was 52 years old and employed part-time, as she had been throughout the marriage. But at the seven-year point, the Wife would be able to draw upon her IRA ($300,000) without penalty while at the same time the Husband's income would be reduced. The Wife raised the trial court's lack of findings of fact under § 20-107.1(F)[5] for the first time on appeal, so this argument was barred.

2. *Joynes v. Payne*, 36 Va. App. 401, 551 S.E. 2d 10 (2001). The Court of Appeals affirmed an award of permanent support, flatly rejecting Husband's argument that the amendment required all periodic spousal support awards to be time-limited. This was a 20-year marriage. Both spouses were attorneys. The Husband earned $300,000 per year and the Wife had an earning capacity of $80,000 per year.

Unpublished Court of Appeals Cases[6]:

1. *Baxani v. Baxani*, No. 2945-02-2 (Va. Ct. App. July 1, 2003). The award of permanent spousal support of $450 per month to Wife was summarily affirmed in this 30-year marriage. The Husband earned $36,000 per year. Wife earned $24,000 per year and was in poor physical health. Husband raised the trial court's failure to make findings of fact under § 20-107.1(F) for the first time on appeal, so this argument was barred.

2. *Shaffer v. Shaffer*, No. 3329-02-4 (Va. Ct. App. June 29, 2003). Wife's award of permanent support of $2,000 per month was upheld in a marriage of a little over 10 years. There was a disparity of incomes. Husband's behavior was egregious. Wife had a legitimate interest in the "high standard of living" she enjoyed during the marriage. The trial court did not impute income to Wife, who had her own business. The business had a bright future, and "her flexible self-employment allowed her to schedule her business appointments around her children's schedules and thus provide much needed regularity and stability to her still-emotionally fragile children."[7]

3. *Whitehead v. Whitehead*, No. 3219-02-1 (Va. Ct. App. March 18, 2003). In this 23-year marriage, the Husband's contention that the trial court erred by not setting a time limitation on the award of $725 per month support was summarily dismissed. His income was $48,000. The Wife's income was less than $25,000.

4. *Turonis v. Turonis*, No. 2110-0204 (Va. Ct. App. March 11, 2003). The Wife was 46 years old with a 19-month-old child. But she had worked during the marriage and did well. Wife argued the new factors, § 20-107.1(E) (4) and (5), compelled an award of support so she could stay home. The trial court disagreed, imputed income to Wife and denied her request for spousal support finding that the Wife was "intelligent," and "eminently qualified to work." She had done extremely well in the work force; this was not a case of a child with special needs, or a marriage involving a stay-at-home mom; nor was there an agreement in this marriage that Wife would be a stay-at-home mom. Indeed, Wife worked and brought home a substantial amount of the income during the marriage, of short duration, seven years and eight months. "Given the financial stress of both parties, [wife] has no choice but to work."[8]

5. *Rousell v. Rousell*, No. 1562-02-3 (Va. Ct. App. Nov. 5, 2002). In affirming a permanent award of $2,250 per month to the Wife, the Court held that the Code does not require the trial court to specify the date of termination and permits an award for an undefined duration. The Husband was a doctor with an income of $144,000 and the Wife was employed with a salary of $40,000. The trial court considered the Husband's adultery, their financial resources, their high standard of living, length of marriage, etc.

6. *Carr v. Carr*, No. 1848-01-4 (Va. Ct. App. May 7, 2002). In this 23-year marriage, the award of permanent support was affirmed, rejecting the Husband's argument that support

ABOUT THE **AUTHORS**

Cheryl Watson Smith has her own law firm, Cheryl Watson Smith, P.C., in Roanoke, and practices primarily in the area of family law, including complex property matters. She is a mediator certificed by the Supreme Court of Virginia and mediates cases by private and court referral. She was previously a partner in the law firm of Mundy, Rogers & Frith, L.L.P. Ms. Smith is a graduate of the University of Virginia and the University of Richmond's T.C. Williams School of Law, where she was a member of the University of Richmond Law Review and co-chaired the Client Counseling and Negotiation Board. She has been in the private practice of law since 1988. Among her numerous professional activities, she serves on the VBA Domestic Relations Section Council and lectures frequently on family law issues and mediation. **Kim Ramsey** is a director of Florance, Gordon & Brown, P.C., and is a graduate of the University of Virginia and the University of Richmond's T.C. Williams School of Law. She concentrates her practice in domestic relations and civil litigation, advising clients in the preparation and negotiation of prenuptial agreements as well as property settlement agreements, and has extensive experience in the litigation of family law matters. Ms. Ramsey is a member of the VBA Domestic Relations Council and a former co-chair of the VBA/YLD Child Support Enforcement Committee, among a number of professional and civic affiliations. She was listed among the "Legal Elite" (Family Practice) for 2001 and 2002 in Virginia *Business* magazine

should terminate in four years when the youngest child reached age 18. The Wife's income was $1,936 per month, or $23,232 per year. The Husband's income was $1,936 per week, or $100,672 per year. The Wife's exact need for support in four years could not be reasonably determined.

7. *Mabie v. Mabie*, No. 0729-01-4 (Va. Ct. App. Mar. 19, 2002). The award of $600 per month to the Wife for six years after a 28-year marriage was upheld. The trial court considered the length of marriage, Wife's earning capacity and her present needs. Details of the parties' incomes and the Wife's work history were not included.

8. *Miller v. Miller*, No. 1443-01-1 (Va. Ct. App. Dec. 11, 2001). The Court of Appeals summarily affirmed an award of $500 per month for one year to the Wife after a 12-year marriage. The trial court found that the Wife needed limited support to secure the education and training necessary for her to enhance and improve her earning ability.

9. *Raiello v. Raiello*, No. 2444-00-4 (Va. Ct. App. July 17, 2001). The Wife's award of $1,000 per month permanent support was affirmed over Husband's objection that the undefined duration was awarded to punish him. Husband raised the lack of findings of fact under § 20-107.1(F) for the first time on appealed, so this argument was barred.

10. *Saleh v. Ashoor*, No. 2307-00-4 (Va. Ct. App. Feb. 20, 2001). The Court of Appeals summarily affirmed an award of 48 months' support, plus a separate lump-sum award, after a marriage of unstated duration. The 48 months was necessary for the Wife, who had custody of a small child, to be rehabilitated. She had no work history in this country, had a diminished earning capacity and demonstrated an immediate need for the lump sum support.

Circuit Court opinions:

1. *Gray v. Gray*, No. HQ-167-4, 2003 WL 1873097 (City of Richmond April 8, 2003). The Husband, age 61, was laid off involuntarily and unable to get a new job. He could not afford to pay permanent support. Wife, age 60, was a retired schoolteacher. She retired with Husband's consent. Husband caused the marital breakdown. Wife received $500 per month in support until August 2004, when she would be ready to return to full time employment. Findings of fact about Wife's employment were not given in the opinion.

2. *Park v. Park*, No. 172986, 2002 WL 31188502, 17 VLW 547 (Fairfax 2002). In this 10-year marriage, Wife was awarded $1,500 per month for four years, plus one more year reservation. There was no explanation for the four-year period. The Husband earned $128,300 and the Wife earned $28,600. There were a lot of marital debts, but a very strong disparity in income.

3. *Van Buren v. Van Buren*, Ch. No. 157787 (Fairfax County, Va., Cir. Ct. Mar. 20, 2001). The Wife requested permanent support. The Husband requested she be awarded no support. The trial court awarded support for five years. The Husband had income of $9,600 per month, or $115,200 per year, while the Wife earned $4,456 per month, or $53,472 per year. The court did not state the duration of the marriage and gave no reason for the award of limited-term support.

***4. Bilbo v. Bilbo*, Ch. No. 156461 (Fairfax County, Va., Cir. Ct. Aug. 12, 1999).** The parties stipulated to limited-term support after a 12-year marriage, but disagreed as to the period. The Wife wanted seven years, and the Husband offered only five. The Husband's income was $123,914; the Wife's income was $33,213. The court found that an award of $1,500 per month for five years was appropriate.

* * * * *

Five years after the amendments, the determination of spousal support issues remain fact driven and discretionary.[9] There is no presumption in the statute and no bright line test is emerging from the case law. But, these cases have not been reviewed for lack of findings under § 20-107.1(F). As a practice pointer for future cases, include a procedural objection, when applicable: "The court erred by failing to make findings on [insert subject here] as required by Code § 20-107.1(F)." Perhaps, then, we can glean more guidance from the cases which in turn may increase settlement of the support issues. As it is, the emerging attitude is to take your chances with the judge instead of conceding the support duration or lack of duration in settlement. **VBA**

NOTES

1. *See* B. Turner, "Spousal Support In a Time of Transition: Recent Changes in Virginia Spousal Support Law," Fourth Annual Virginia Chapter of the American Academy of Matrimonial Lawyers CLE (October, 1998) for an outline summarizing Virginia and non-Virginia law on the issue of rehabilitative alimony.
2. *Rehabilitative Alimony and the Reservation of Spousal Support in Divorce Proceedings,* House Doc. No. 55 (1997) ["Study Committee Report"]
3. For a discussion of the general history of the legislation, the jurisdiction and applicability of the amendments see Peter N. Swisher, *et. al.*, *Virginia Family Law: Theory and Practice* § 9-6.1 (2003 Ed.)
4. If you are aware of other cases, please forward a copy or a case cite to me by December 31, 2003, and I will send an update to the members of the VBA Domestic Relations Section or to non-members who provide their names and addresses: Cheryl Watson Smith, P.C., 5440 Peters Creek Rd, Suite 103, Roanoke, VA 24019-3863 or cwsmithpc@roava.net.
5. All statutory references are to the *Code of Virginia,* as amended.
6. Please note that since unpublished cases carry no precedential value and only those facts necessary to the disposition of the appeal may be in the opinion the reader should use caution in drawing conclusions or inferences from such cases.
7. *Shaffer v. Shaffer*, No. 3329-02-4 (Va. Ct. App. June 29, 2003). *Rehearing en banc* denied. Appeal period for petition to Supreme Court of Virginia had not expired as of article submission date.
8. *Turonis v. Turonis*, No. 2110-0204 (Va. Ct. App. March 11, 2003).
9. *Torian v. Torian*, 38 Va. App. 167, 562 S.E. 2d 355 (2002); *Joynes v. Payne*, 36 Va. App. 401, 551 S.E. 2d 10 (2001).

UR Law Review ad (full)

VBA will oppose proposed sales tax on professional services

The Virginia Bar Association has announced that it will oppose a proposed sales tax on professional services, following discussion at the October meeting of the VBA Board of Governors in Charlottesville.

The proposal would require lawyers to levy and collect a 4.5 percent tax for services provided to their clients. It was included in a package of recommendations produced by the Tax Reform Commission in September.

At the meeting, Board members addressed the policy and technical issues which would be created by any such proposal. As a set percentage of sales tax revenues is allocated to localities, it would be difficult to distribute funds equitably when a trial, parties and lawyers all are located in different jurisdictions.

While supporters of the sales tax on legal services claim that it and other proposals in the Commission's package could simplify the Commonwealth's tax code, the VBA disagrees and has announced that it would join with other concerned organizations to oppose any legislative action in the 2004 General Assembly.

The VBA also announced that it would establish a working group to study the issue in more depth.

Kelley, Urbanski tapped for federal bench

VBA members Walter D. Kelley Jr. of Norfolk and Michael F. Urbanski of Roanoke will soon serve on the federal bench at the district level. Kelley will be nominated by President Bush to fill a vacancy on the Eastern District of Virginia bench caused by the decision of Hon. Henry C. Morgan Jr. to take senior status. Urbanski was elected by the Western District judges to be a new magistrate judge for the district, succeeding Hon. Glen Conrad, who in turn has succeeded Hon. James C. Turk, who has taken senior status.

Kelley, a partner in the firm of Troutman Sanders LLP who was suggested by the VBA as "highly recommended" for the nomination, is a member of the VBA Civil Litigation Section. He received his undergraduate and law degrees from Washington & Lee University. Urbanski, a partner in the firm of Woods Rogers & Hazlegrove, has served on the council of the VBA Civil Litigation Section. He is a graduate of the College of William and Mary and the University of Virginia School of Law.

Legislative season draws nearer as VBA plans for '04 Assembly

VBA sections and committees are finalizing their next crop of legislative proposals for the 2004 General Assembly. Bill prefiling begins November 14.

Association leaders and staff will gather at Richmond's Berkeley Hotel on November 18 for the annual VBA Legislative Workday, to review proposals and plan for the upcoming 60-day "long" session, which starts January 14.

Information on 2003 legislative proposals and other bills of interest is available on the legislation page at www.vba.org. Bill information as far back as 1994 is online at leg1.state.va.us, and General Assembly information is located at legis.state.va.us. Breaking Virginia political news is now featured on the VBA legislation webpage through a link to StatePulse.

VBA leaders reach out to local bar groups

In September, VBA Board of Governors members Greg St. Ours of Harrisonburg and Judge Jay Wetsel of Winchester took the VBA message on the road to their own local bar associations.

Appearing before the Winchester Bar Association on September 5 and the Harrisonburg/Rockingham Bar Association on September 10, the bar leaders addressed the issue of judicial independence and the activities of the VBA in the areas of public service and law reform. Both meetings were well attended, and the Harrisonburg/Rockingham program offered one hour of CLE credit to attendees.

In preparing their presentations, St. Ours and Wetsel utilized speeches and background material prepared by the VBA Judiciary Committee and the VBA Board of Governors Committee on Outreach.

The Judiciary Committee spent several months in 2002 developing a model speech on judicial independence, the text of which is posted on the Committee page at www.vba.org. It is available for use by any Virginia judge or VBA member.

The Outreach Committee, in an effort led by former VBA presidents Jeanne Franklin and Ed Betts, developed a compendium of materials about the VBA's history, activities, values and achievements in such areas as law reform and public service. The packet includes a model speech and provides a useful resource for VBA leaders or members seeking to promote the Association in their local bar associations or other community groups. Again, any VBA member may use the packet and speech.

John B. Donohue Jr. of Richmond chairs the Judiciary Committee. Frank West Morrison of Lynchburg chairs the Board Committee on Outreach.

For more information, please call the VBA office at (804) 644-0041.

Author John Grisham speaks at Boyd-Graves Conference banquet

Acclaimed author John Grisham of Charlottesville addressed the Boyd-Graves Conference banquet on Friday evening, October 24. The banquet was a highlight of the annual conference, held October 24-25 at The Boar's Head Inn in Charlottesville.


John Grisham

A native of Jonesboro, Ark., John Grisham as a child dreamed of being a professional baseball player. Realizing he didn't have the right stuff for a pro career, he shifted gears and majored in accounting at Mississippi State University. After graduating from law school in 1981, he went on to practice law, concentrating in criminal defense and personal injury litigation. In 1983, he was elected to the state legislature and served until 1990.

Since publishing *A Time to Kill* in 1988, Grisham has written one novel a year (his other books are *The Firm, The Pelican Brief, The Client, The Chamber, The Rainmaker, The Runaway Jury, The Partner, The Street Lawyer, The Testament, The Brethren, A Painted House, Skipping Christmas, The Summons,* and *The King of Torts*) and all of them have become bestsellers. His works have been translated into 29 languages. Seven of his novels have been turned into films (*The Firm, The Pelican Brief, The Client, A Time to Kill, The Rainmaker, The Chamber, and A Painted House*), as was an original screenplay, *The Gingerbread Man.* His newest book, *Bleachers,* was published earlier this fall.

Grisham took a break from writing for several months in 1996 to return to the courtroom after a five-year hiatus, honoring a commitment made before his retirement from the law to become a full-time writer: representing the family of a railroad brakeman killed when he was pinned between two cars. Grisham successfully argued his clients' case, earning them a jury award of $683,500 — the biggest verdict of his career.

Grisham devotes time to charitable causes, including taking mission trips with his church group. He and his family divide their time between homes in Mississippi and Virginia. He also maintains his passion for baseball as the local Little League commissioner.

The Boyd-Graves Conference was created by the late Thomas V. Monahan, a former VBA president, who believed that civil practice in Virginia would be improved if lawyers with different types of practices, from all regions of the state, would meet and attempt to reach consensus about ways to improve the law.

Beginning in 1978, Monahan began arranging annual meetings of lawyers at the Tides Inn in Irvington. At first a small and informal gathering known as the "Tides Inn Conference," the meeting eventually became a carefully planned event for nearly 100 lawyers, professors and judges representing a wide variety of practices throughout the Commonwealth.

Later, the conference was renamed the Boyd-Graves Conference in honor of the contributions of revered law professors T.Munford Boyd and Edwards S. Graves to the advancement of Virginia's civil procedure.

Items are discussed at the Conference after they are studied by committees of Conference members. A steering committee meets twice during the year to plan the conference.

Deadline announced for 2004-05 letters of intent for VLF grants

The Virginia Law Foundation, a 501(c)(3) not-for-profit organization, is now accepting Letters of Intent from organizations wishing to request grant support for the 2004-05 grant cycle (July 1, 2004, through June 30, 2005).

Letters of Intent to be submitted under the VBA umbrella should be prepared in the name of The Virginia Bar Association Foundation and must reach the VBA office at 701 East Franklin Street, Suite 1120, Richmond, Virginia 23219, no later than December 8, 2003.

An estimated $450,000 is expected to be awarded to support programs which promote or provide improvements in the administration of justice, legal services to the poor, education of the public about the law and the legal profession, and public service internships for Virginia law students.

Letters of intent should be no more than three pages and should (1) state the applicant organization's name, tax exemption status, and FEIN; (2) briefly explain the organization's mission; (3) describe the proposed project; and (4) summarize expense and income items for the total project, indicating the amount of funding to be requested from the Virginia Law Foundation.

From among letters received, the Foundation Grants Committee will select for further consideration projects for which a fully developed proposal will be invited.

VBA staff can be reached to assist with basic information about The Virginia Bar Association Foundation and preparation of Letters of Intent by calling (804) 644-0041.

Ellett represents VBA at ABA conference

VBA President-elect Ted Ellett represented the Association at the American Bar Association's "Strengthening the Guiding Hand of Counsel: Reforming Capital Defense Systems" Conference at Hofstra University in New York on October 24. The conference was the kickoff of a campaign to gain state-by-state adoption of the ABA's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

VBA/YLD sponsors candidates' debate

As Virginians geared up for Election Day on November 4, the VBA Young Lawyers Division's Hampton Roads Town Hall Meeting Committee organized a debate for State Senate candidates in the Sixth and Seventh Districts. The event was held October 29 at the Contemporary Art Center of Virginia in Virginia Beach and was open to the public. Mike Gooding of WVEC-TV 13 served in a dual role as moderator and panelist, with Marc Davis of *The Virginian-Pilot* and Andy Fox of WAVY-TV 10 as panelists.

The VBA/YLD Town Hall Meeting Committees sponsor events which focus on topical issues of interest in a public forum, including debates between political candidates. In addition to the Hampton Roads group, regional committees are located in Charlottesville, Northern Virginia, Richmond and Roanoke.

NEWS IN BRIEF

VBA member **Philip J. Bagley III** of Richmond, a partner at Troutman Sanders LLP, has been elected chair of the American Bar Association Section of Real Property, Probate and Trust Law.

Best wishes to VBA member and Capital Defense Workshop Co-Chair **Overton P. Pollard** of Richmond, who retired as executive director of the Virginia Public Defender Commission on September 24.

Several VBA members have been selected for the Leadership Metro Richmond Class of 2004. They are **David N. Anthony** of Kaufman & Canoles; **Thomas J. Dillon III** of Hirschler Fleischer; **Christopher R. Graham** of Hunton & Williams; **Jennifer McClellan** of Verizon; and **Albert W. Thweatt II** of The Law Offices of Albert W. Thweatt II, P.C.

Lawyers Helping Lawyers, which offers confidential, nondisciplinary help for lawyers, judges, law students and their family members with substance abuse or mental health problems, is now located at 700 East Main Street, Suite 1501, in downtown Richmond, phone (804) 644-3212 or 1-800-838-8358, web www.valhl.org, e-mail info@valhl.org.

Does the VBA have **current contact information** for you? Please let us know if you have moved and/or changed employment by sending your information to Judy King at the VBA office, jking@vba.org.

The Virginia Lawyer was first published in 1966 by the VBA Young Lawyers Division. In 2000, Virginia CLE and the VBA/YLD joined in a cooperative effort to produce a new version of the **two-volume guide for practitioners** designed to assist attorneys in dealing with unfamiliar areas. Details are available on the Internet at http://www.vacle.org/wn111.htm#valawyer.

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The *VBA News Journal* offers classified advertising. Categories available are as follows: positions available, positions wanted, books and software, office equipment/furnishings, office space, experts, consulting services, business services, vacation rentals, and educational opportunities. Rates are $1 per word for VBA members and $1.50 per word for non-members, with a $35 minimum, payable at the time of submission. Ad costs must be paid in advance. The *VBA News Journal* reserves the right to review all ad copy before publication and to reject material deemed unsuitable. Professional announcements may be printed; the cost per announcement is $15 and text may be edited for style and space limitations. Deadlines are one month in advance of the date of publication (August 1 for September, etc.). Information is available online at www.vba.org, or call for details at (804) 644-0041.

You're invited

to become a VBA Patron in 2003.

To become a Patron, a VBA member pays $100, in addition to regular dues, to support the Association's public service and law reform programs.

The VBA has always sought to offer substantial value to its members in return for their dues investment. Our substantive law sections, which now number 18, provide the basis for quite a bit of that value — but there is much more. Our CLE programs are recognized for their quality as well as diversity; our strong law reform and legislative programs continue to make constructive contributions to good government in Virginia; our Pro Bono Hotline Project has received national acclaim and is being emulated in other states as a significant way in which lawyers can assist in the delivery of legal services to the poor; and the VBA's continuing growth in membership illustrates the value which the Association delivers to its members.

Our activities have expanded — but we continue to operate with a modest budget. That is why VBA Patron participation is so greatly appreciated. In 2002, Patrons provided nearly $40,000 in additional revenue, without which some of our efforts would have had to be curtailed. This support will be even more important to our public service and law reform work in the future.

If you have not already done so, please consider becoming a VBA Patron in 2003 and join our members listed on the opposite page. (The list will be republished with additions in December 2003.) Many Patrons simply check the appropriate box on the dues statement and enclose an additional $100 with their dues. You may also send your check for $100 (note that it is for VBA Patron dues) to the VBA office or call the Association toll-free at 1-800-644-0987 and charge your $100 payment to MasterCard, AmEx or Visa.

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Today's successful law firm has to be client-focused, organized and efficient in order to compete and be profitable. All that takes good management. The key to improving your practice and achieving your goals is to find resources you can trust containing information you can use. That can sometimes be difficult, but The Virginia Bar Association Law Practice Management Division is dedicated to bringing lawyers fresh ideas, new perspectives and creative ways to manage every aspect of your practice.

The VBA Law Practice Management Division has established an agreement with the American Bar Association to sell ABA books to all members of the VBA/LPMD — that is, all members of The Virginia Bar Association — at a *20 percent discount.* You can visit the VBA website at **www.vba.org,** click on a link to the Book Program **(www.vba.org/books.htm)**, peruse a list of available books with pricing information, and print out an order form to send to the VBA office with your payment. Other arrangements are offered to VBA members who do not have Internet access. The Book Program will be promoted in VBA publications, our website and at our meetings.

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CALENDAR OF EVENTS

November 6-7, 2003
VBA Capital Defense Workshop
Richmond Marriott

November 6-8, 2003
Region IV Competition, National Moot Court
United States Courts Building, Richmond

November 7-8, 2003
VBA/YLD Executive Committee & Council Meeting
Wintergreen

November 18, 2003
VBA Legislative Workday
The Berkeley Hotel, Richmond

January 15-18, 2004
VBA 114th Annual Meeting
Colonial Williamsburg

February 4-10, 2004
American Bar Association Midyear Meeting
San Antonio, Texas

March 23, 2004
VBA Leadership Conference
The Jefferson Hotel, Richmond

April 16-18, 2004
VBA Board of Governors Meeting
The Ritz-Carlton, Tysons Corner

April 23-25, 2004
VBA Bankruptcy Law Conference
The Sanderling, Duck, North Carolina

April 30-May 2, 2004
VBA/YLD Executive Committee & Council Meeting
The Sanderling

June 24-26, 2004
Fourth Circuit Judicial Conference
The Greenbrier

For more details, please visit our website at www.vba.org or call the VBA office at (804) 644-0041.
A complete calendar of events with links to additional information is posted on the website.

Make plans now to attend

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The Virginia Bar Association
701 East Franklin Street, Suite 1120
Richmond, Virginia 23219
(804) 644-0041