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Virginia Family Law Quarterly

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Message from the Chair

Regina F. Amick

Welcome Spring! It is that time of year again! Please join us **Thursday, April 18**, **at the Jefferson Hotel in Richmond for the 40th Annual Advanced Family Law Seminar**. The Board is excited about our topics and presenters, and as always, we will be presenting the Betty A. Thompson Lifetime Achievement Award, and the Family Law Service Award. We are also hopeful to finally roll out the mentoring program that our Board's Young Lawyers' Section liaison, Ra Hee Jeon, has worked so hard on for the past few years.

I would like to dedicate this message to publicly thanking Brian M. Hirsch for his invaluable contribution to our section. After a full ten years of tireless service as the editor of the *Virginia Family Law Quarterly*, Brian has decided to step down.

In his role as editor, Brian has gone above and beyond, collecting articles and summarizing cases that have transformed the VFLQ into a widely admired publication, even among those who do not specialize in Family Law. We owe him a debt of gratitude for producing 40 informative and thought-provoking issues of the Quarterly.

In addition, he has personally written the articles: "The Case for Using Lawyer Mediators in Family Law," and "Term Sheets in Mediation," and "Maximizing Your Chances of a Fee Award in a Family Law Case." This translates into approximately 15,000 words, 40 editor's notes, and countless hours responding to emails. Brian undertook this demanding editorial role entirely unpaid, all while maintaining his practice as a skilled trial attorney, mediator, and frequent CLE presenter. Brian served as a member of the Board of Governors of the Family Law Section for six years, and as an *ex officio* member for the past 11 years. He has also attended 50 Board of Governors meetings over the past decade.

This is my written standing ovation for Brian, a distinguished attorney who has undeniably left a mark on the practice of Family Law in the Commonwealth. Thank you, Brian, from all of us, for the your outstanding work on the *Family Law Quarterly*.

Brian has confidently turned over the reins to Jennifer Bradley, of Mullett Dove & Bradley Family Law, PLLC, who he specifically recommended to the Board based on her well written articles and past contributions to the VFLQ. Thank you, Jennifer. We look forward to you taking VFLQ into the future.

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Editor's Note

Jennifer A. Bradley

I'm honored to be taking over for Brian Hirsch as the new *Family Law Quarterly* editor, and will do my best to continue his legacy of curating top-notch educational content for the family law bar.

Judge Martin and Sophie Arnold's article on sealing domestic relations court files is particularly thought-provoking—and I would argue makes an excellent case for amending Va. Code § 20-124 to require a presumption in favor of sealing divorce and custody files upon motion of either party, absent a showing of good cause to keep it open.

Mark Sullivan tells yet another cautionary tale regarding dividing military pensions upon divorce, and Heather Cooper shares some interesting updates to the Thrift Savings Plan.

Articles for future issues are welcomed and needed! If you have any ideas, questions or comments about the *Quarterly*, please feel free to contact me jbradley@mdbfamilylaw.com

Enjoy,
Jennifer A. Bradley, *Editor*

CALL FOR BOARD NOMINATIONS

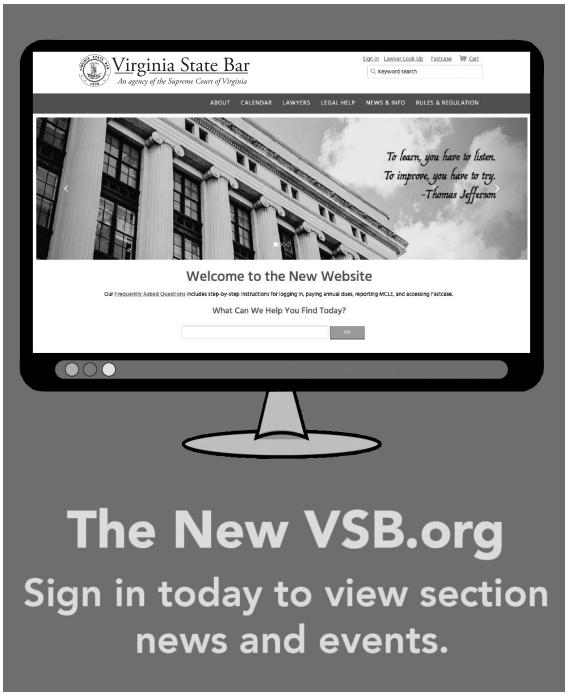
We are one of the largest and most active sections of the Virginia State Bar. Each year we add new members to our board of governors as other members complete their four-year terms. Board members meet five times a year; serve on committees; plan and speak at CLE Programs; vote for the Family Law Section Betty A. Thompson Lifetime Achievement and the Family Law Service Awards; maintain the content of the section's website; and write for our publication, *The Virginia Family Law Quarterly*. It's not all work, as board members also enjoy regular social events with other leading family law attorneys and judges from around the Commonwealth.

Would you like to serve your profession, build relationships with other family law attorneys and judges, and become more involved with the Virginia State Bar, or do you know someone who would? If so, email your nomination (self or third-party) to FamilyLaw@vsb.org. Nominations should provide biographical information, including prior professional volunteer work. **The nomination deadline is May 10, 2024.**

For more information, please visit our website.

HOW TO SUBMIT AN ARTICLE

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



Recent Changes to the Thrift Savings Plan

By Heather Cooper, Esq.
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Many family law practitioners are unaware of recent changes to the requirements for drafting and submitting court orders dividing Thrift Savings Plan benefits. This article will provide an overview of the Thrift Savings Plan, a "refresher" of the rules related to the division of the Thrift Savings Plan in divorce cases, and a summary of relevant new requirements and procedures.

Overview of the TSP

The Thrift Savings Plan ("TSP") is a retirement savings plan for federal employees covered by the Federal Employee Retirement System ("FERS") or the Civil Service Retirement System ("CSRS"), members of the uniformed services, and certain civilians of other categories of federal service (such as some congressional positions). The TSP is similar to the private sector's 401(k) plan. The purpose of the TSP is to provide eligible participants with a long-term savings plan featuring advantages such as automatic payroll deductions, a diversified selection of investment options, choice of tax treatments for contributions, agency matching in some circumstances, and various options for designation of beneficiaries and distribution of accumulated assets upon retirement.

The TSP has 5 individual investment funds:

The Government Securities Investment Fund (G Fund) – invested in short-term U.S. Treasury Securities; a low volatility investment.

The Fixed Income Index Investment Fund (F Fund) – tracks the Bloomberg U.S. Aggregate Bond Index; a broad index representing the U.S. government, mortgage-backed, corporate, and foreign government sectors of the U.S. bond market.

The Common Stock Index Investment Fund (C Fund) – tracks the S&P 500 Stock index (a market index made up of the stocks of 500 large U.S. companies); a moderately volatile investment.

The Small Capitalization Stock Index Investment Fund (S Fund) - tracks the Dow Jones (a market index of companies not included in the S&P 500 index).

The International Stock Index Investment Fund (I Fund) – tracks the MSCI EAFE (a broad international market index, made up of primarily large companies in more than 20 developed countries); volatility of investment is moderately high.

The TSP also offers the Lifecycle Fund or "L Fund," which is a fund designed by investment professionals to include a diversified portfolio of each of the five individual funds. Particular asset allocations are based on personal assumptions regarding future investment returns, inflation, economic growth and interest rates.

A participant may take loans against his/her TSP by borrowing against his/her own contributions and earnings on those contributions. There are two types of permissible loans: (1) general purpose loans, and (2) loans for purchase or construction of a primary residence. A participant may only have two loans at one time (and only one of those loans may be for a primary residence). The loan must be repaid with interest. With very limited exceptions, spouses of FERS and/or uniformed services participants must consent to any

loans. Spouses of CSRS participants are notified of loans.

Participants may also take "financial hardship" or "age 59½" withdrawals from their TSP while still serving in their employment positions. These withdrawals, known as "in-service withdrawals," deplete the balance of the account by the amount of the withdrawal, and are subject to taxes and a 10% penalty. Legal expenses related to separation or divorce are among the "hardships" that would support an in-service withdrawal. As with loans, FERS and/or uniformed services' spouses must consent to an in-service withdrawal. CSRS spouses are notified of the withdrawal.

Dividing a TSP in Divorce

A TSP is divisible in divorce pursuant to a Retirement Benefits Court Order ("RBCO"). Note that the order is not a "QDRO," which is an order that divides private sector retirement plans pursuant to ERISA. An RBCO is a court order (certified and signed by a judge) that complies with the following requirements:

- Relates to alimony payments or marital property rights of a spouse or former spouse (or to the support of a child or other dependent) of a TSP participant;
- Contains a statement that the order is issued pursuant to a state's domestic relations laws;
- Clearly identifies the name of the plan ("Thrift Savings Plan") and specifies the account if the participant has more than one ("Uniformed Services TSP account" or "Civilian TSP account");
- Includes the following information for both the participant and payee: name, last known mailing address, last 4 digits of participant's social security number and full social security number of payee;
- Clearly sets forth the amount or percentage of benefits to be paid;
- Clearly sets forth when to calculate the award ("valuation date");
- Does not require the plan to pay more benefits than the participant has earned;
- Does not require the plan to provide any benefit not otherwise provided by the plan; and
- Does not require the plan to pay benefits to a payee that are already required to be paid to another payee pursuant to a previously issued RBCO.

The award to the former spouse must be a specific dollar amount or percentage of the participant's account as of a valuation date (such as the parties' date of separation). The valuation date may not be a future date (unless the future date is the date of liquidation). The amount awarded to the former spouse may not exceed the participant's account balance as of the date of valuation.

For purposes of calculating the former spouse's benefit, a participant's account balance will include any loan balance outstanding as of the valuation date (meaning, the loan amount will be "added back in" and the resulting figure will be divided), unless the RBCO provides otherwise.

The RBCO can include or exclude earnings and losses from the valuation date to the liquidation date. If the RBCO is silent as to earnings and losses, the former spouse will not receive earnings and losses between the valuation date and the liquidation date. If earnings are awarded, the TSP record keeper will calculate the earnings based on the participant's investments as of the date of valuation (regardless of whether the participant has changed his/her investments after the date of valuation). Consider the scenario where the former spouse is awarded 40% of the participant's account balance as of June 1, 2023, plus/minus gains and/or losses from that date to the date of distribution/liquidation. If the participant changes his investments after June 1, 2023 and the new investments perform poorly, the former spouse's share is still calculated based on the (better performing) investments as of June 1, 2023 (which could result in the former spouse receiving more than 40% of the account balance as of the date of liquidation).

Hiccups, Changes and New Procedures

In 2020, the Federal Retirement Thrift Investment Board transitioned to a private company, Accenture Federal Services ("AFS"), for the purposes of managing TSP record-keeping and implementing more modern features (such as a TSP mobile app, the ability to electronically sign documents, designate/change beneficiaries and undertake certain transactions on a "user friendly" website, and a procedure for uploading RBCOs). The process did not turn out to be a smooth one, with AFS officials admitting to mistakes and design problems that "negatively impacted the participant experience and TSP brand." The call center experienced significant challenges, participants were unable to make certain transactions or view historical data/statements, and waits for customer service assistance were long and frustrating. The chaos caught the attention of Congress, and lawmakers asked the Government Accountability Office to conduct a "comprehensive examination" of the missteps. This investigation is underway (as is a class action lawsuit filed on behalf of certain TSP participants).

In the meantime, family law practitioners should be aware of the following changes and new procedures:

1. **Form RBCO**. The Thrift Savings Plan Court Order Center provides a form RBCO on its new website: https://qoc.rk.tsp.gov/qoc/b/QdroOvrw010QdroOvrwFederal.htm. Use of this form (without any handwritten changes) should easily result in an order that will be approved. The "form order" is not required, and drafts created by the parties may still be submitted; they will be approved so long as they meet all of the RBCO requirements.
2. **Review of draft RBCOs**. Draft RBCOs (as well as entered orders) may now be uploaded to the Thrift Savings Plan Court Order Center for review and/or implementation via the website: https://qoc.rk.tsp.gov/qoc/b/CsSndDocs010sndOvrw.htm.
3. **What TSP does upon receipt of an RBCO**. Upon receipt of a draft RBCO, the TSP recordkeeper will (a) restrict the participant's benefit activity by prohibiting distributions, loans and/or withdrawals until the order is qualified or 18 months after the order (even just a draft order) is received; (b) review the order to ensure that it meets all requirements; and (c) notify the parties within 20 calendar days of receipt whether it meets the requirements. Assuming the draft order is approved, the parties are then directed to resubmit the order once it has been signed by a judge and certified by the clerk of court. Court-certified orders may now be uploaded for implementation. They may also be mailed to: TSP Court Order Center, c/o Broadridge Processing, PO Box 120, Newark, NJ 07101-0120.
4. **Review fee**. There is now a $600 fee for reviewing and processing the RBCO. Upon receipt of a draft *or* signed court order, and prior to reviewing the order to determine whether it qualifies as an RBCO, the $600 fee will be deducted from the participant's TSP account balance. If the order is rejected and never thereafter determined to be qualified, the fee is not refunded. The fee is, however, only charged once (meaning, it is not charged again to review edits to a previously rejected order). The RBCO can direct the TSP record keeper to split the fee between the participant and payee (in which case, the record keeper will deduct the payee's portion of the fee from his/her payment and credit it back to the participant).
5. **Obtaining statements**. Gone are the days when counsel for the former spouse could write to the Thrift Savings Investment Board and/or submit form TSP-92D to easily obtain copies of the participant's TSP statements. Form TSP-92D (and many others) were declared obsolete pursuant to a TSP bulletin issued February 2, 2023. If litigation is pending, a subpoena *duces tecum* may be issued

to: Court Order Center, c/o Broadridge Processing – Thrift Savings Plan, Post Office Box 120, Newark, New Jersey 07101-0120. (You should note on the subpoena that the entity has agreed to accept service via first class mail at the noted address so as to avoid any potential ethical problems associated with issuing an out-of-state subpoena.)

6. **Asking for help**. Parties and/or their counsel can now ask for help and even expect assistance within a reasonable period of time! Specifically, the TSP Court Order Center promises a response within two business days to emails sent to courtorder@tsp.gov, so long as the email includes the sender's full name, reference to the Thrift Savings Plan including the participant's full name, and the last four digits of the participant's social security number.

Heather A. Cooper is one of three founding partners of Cooper Ginsberg Gray, PLLC, a family law firm in Fairfax, Virginia. Heather has a particular interest in division of retirement benefits in divorce and is a frequent lecturer on the topic. ❖

To Seal or Not to Seal? It Shouldn't Be a Question

By The Honorable Everett A. Martin, Jr. and Sophie L. Arnold, Esq.[1]

The 2023 Boyd-Graves Conference examined whether Virginia Code § 20-124 ought to be amended, and, if so, how. The group of judges and lawyers assigned to review the statute was unable to reach a consensus, and the question was carried over to 2024.

Family lawyers have reported that judges across Virginia, and even within the same courthouse, construe the statute quite differently. Some judges will seal a divorce file on motion of either party without any explanation required, while others require a showing of some particular need to overcome the presumption of openness of court records.[2] Your authors suggest the former approach is proper. Motions to seal divorce files in the Circuit Court of Norfolk, one of Virginia's more popular divorce venues,[3] are rare, but routinely granted when made. The statute provides:

> *Upon motion of a party to any suit under this chapter, the court may order the record thereof or any agreement of the parties, filed therein, to be sealed and withheld from public inspection and thereafter the same shall only be opened to the parties, their respective attorneys, and to such other persons as the judge of each court at his discretion decides have a proper interest therein.*[4]

Two questions have been raised about the statute. First, is it constitutional? Second, what effect does Virginia's open judicial records statute, § 17.2-205(B), have on it? We answer the first question "yes" and the second question "none," at least concerning unopposed motions.

The Constitutional Non-Problem

First, it should be noted that the Supreme Court of Virginia has long held every law the legislature enacts is presumed to be constitutional, that every doubt is to be resolved in favor of its constitutionality, and that to hold a statute unconstitutional the conflict between the statute and the constitution must be clear and palpable. *Commonwealth v. Brown,* 91 Va. 762, 781, 21 S.E. 357, 363 (1895); *Marshall v. Northern Virginia Transp. Auth.,* 275 Va. 419, 427-28, 657 S.E.2d 2d 71, 75 (2008). Federal courts are not bound by this standard, but Virginia circuit courts are.

The Supreme Court of the United States has found a qualified First Amendment right of access to criminal proceedings, but it has never extended this right to civil cases. *In re: Honorable Adrianne L. Bennett,* 301 Va. 68, 71, 871 S.E.2d 445, 448 (2022). In *Richmond Newspapers, Inc. v. Virginia,* the plurality gave as its principal rationale the history of open criminal court proceedings going back to medieval times. 448 U.S. 555, 564-67. Two years later, a majority of the Court adopted this view in *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 605 (1982).

In *Press Enterprise Co. v. Superior Court,* the Court adopted the "tests of experience and logic" to determine if the First Amendment gives a right of access to a specific proceeding. 478 U.S. 1 (1982). The experience test asks "whether the place and process have historically been open to the press and general public," and the logic test considers "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* at 8. If both questions are answered

affirmatively for a particular proceeding "a qualified First Amendment right of public access attaches."[5] *Id*. at 9.

The constitutional right of access "extends to the inspection of documents filed in [criminal] proceedings." *Daily Press, Inc. v. Commonwealth,* 285 Va. 447, 455, 739 S.E.2d 636, 640 (2022). There is no doubt that the pleadings and any separation agreement filed in a divorce suit are judicial records. *Daily Press, Inc. v. Commonwealth,* 301 Va. 384, 407, 878 S.E. 2d 390, 403 (2022).

However, albeit not in a constitutional context, even the Supreme Court of the United States has recognized that the rules for access to divorce files might be different. In *Nixon v. Warner Communications,* 435 U.S. 589, 598 (1978), Justice Powell wrote:

> *It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common law right of inspection has bowed before the power of a court to insure that its records are not 'used to gratify private spite or promote public scandal' through the publication of 'the painful and sometimes disgusting details of a divorce case.'*

In re Bennett was a petition for mandamus and prohibition in the Supreme Court of Virginia arising out of a pending Judicial Inquiry and Review Commission proceeding. The Supreme Court had summarily denied Judge Bennett's petition and ordered the record, including the denial order, sealed. A newspaper filed a petition to intervene, seeking access to certain materials. The Supreme Court noted that "judicial disciplinary proceedings differ from ordinary civil or criminal proceedings." *Id*. at 72, 871 S.E.2d at 449. Yet it also stated:

> *Although the United States Supreme Court has not addressed the point, we conclude that the same qualified right of access to proceedings and records that the Court has recognized in criminal cases should also be recognized in civil trials and to their related proceedings and records. Id. at 68, 871 S.E.2d at 448 (modified slightly).*

The Court concluded that the presumption of openness did not apply to JIRC records attached to the petition. Lawyers and judges can sometimes disagree whether a statement in a judicial opinion is dictum; however, this clearly was, given that *Bennett* was not a civil case. In discussing the effect of dictum, the Supreme Court has stated: "… only a specific point officially decided or settled by a judicial holding in a case in which it is directly and necessarily involved can truly be called binding precedent." *Vasquez v. Commonwealth,* 291 Va. 232, 242, 781 S.E.2d 920, 926 (2016) (modified slightly).

Have the courts been trying divorces in public view since medieval times? No. Prior to 1857, only ecclesiastical courts in England had the authority to grant divorces *a mensa et thoro*, and Parliament to grant divorces *a vinculo matrimonii*. In 1857, Parliament granted jurisdiction over divorces to a newly created Court for Divorce and Matrimonial Causes.[6]

In Virginia, the General Assembly had the sole authority to grant a divorce *a vinculo matrimonii* until it vested jurisdiction in the superior courts of chancery in 1827 to grant divorces only for impotence, idiocy, and bigamy. Such suits were to be "prosecuted according to the rules of proceeding in said courts." The same act gave those courts jurisdiction to grant divorces *a mensa et thoro* for adultery, cruelty, and "just cause of bodily fear." It further set forth the procedure to petition the General Assembly for a divorce.[7] The General Assembly was divested of jurisdiction over divorces by the Constitution of 1851, Art. IV, § 35.

The grounds for a divorce *a vinculo matrimonii* were broadened in subsequent years, but the directive that divorce suits be conducted according to equity procedure remains today. [8] Evidence in suits

in equity was traditionally given by interrogatories and depositions that were presented to the chancellor;[9] witnesses did not testify live in open court. Only in 1930 did the General Assembly authorize, but not require, the receipt of evidence *ore tenus* in divorce suits.[10] In many parts of Virginia, evidence in divorce suits was heard by divorce commissioners until 2005. The commissioners would take testimony in their offices, have it transcribed, and send it to the court with a report making recommendations. The parties might appear before a judge only if exceptions to the commissioner's report were filed.

In 2005, the General Assembly greatly restricted the use of commissioners in uncontested divorce cases.[11] Commissioners can still be used in contested divorces, but the practice has nearly disappeared. Thus, conducting divorce trials in open court only became a statewide standard of practice in 2005. Seven years later, the General Assembly authorized uncontested divorce on non-fault grounds by affidavit.[12] This has been so popular with the Bar that most parties to divorce cases never see the inside of a courtroom.

In our research, which we do not claim was exhaustive, we were able to find a only a single federal or state appellate decision recognizing a First Amendment right of access in divorce cases. *In re Marriage of Burkle*, 37 Cal. Rptr.3d 805, 135 Cal. App 4th 1045 (2006).[13]

Divorce cases do not pass the Supreme Court's "experience test," so the "logic test" need not be considered.

No Statutory Problem

Virginia's open judicial records statute provides: "Except as otherwise provided by law, any records that are maintained by the clerks of the circuit courts shall be open to inspection in the office of the clerk by any person and the clerk shall, when required, furnish copies thereof, except in cases in which it is otherwise specifically provided."[14] Section 20-124 is a law—and it otherwise provides.

There is also the rule of statutory construction that when two statutes relate to the same subject, the more specific controls the more general. *Virginia Nat'l. Bank v. Harris,* 220 Va. 336, 340, 257 S.E.2d 867, 870 (1979). Section 20-124 is the more specific. Furthermore, "proper construction seeks to harmonize the provisions of a statute both internally and in relation to other statutes." *Parrish v. Callahan*, 78 Va. App. 630, 643, 892 S.E.2d 384, 390 (2023).

The text of § 20-124 suggests sealing the record may be granted liberally. When may sealing to be granted? "Upon motion of any party …." Not necessarily upon motion of both parties. Nor does the statute even require the moving party to establish one of the law's lowest standards for obtaining judicial relief: good cause shown. The phrase "good cause shown" appears 290 times in the *Code of Virginia*.[15] Its omission from § 20-124 cannot have been inadvertent.

The General Assembly's policy of respecting privacy in divorce is also shown by the "cameras in the courtroom" statute, § 19.2-266. That statute gives judges broad authority to allow or prohibit the presence of cameras during proceedings. However, since its enactment in 1987[16] it has prohibited cameras in "divorce proceedings."

A Possible Precedential Hiccup

In *Shiembob v. Shiembob,* the circuit court sealed the divorce file on the husband's motion. 55 Va. App. 234, 685 S.E.2d 234 (2009). At the end of the case, on the wife's motion, and over the husband's objection, the circuit court unsealed the file. The husband appealed.

The Court of Appeals applied the abuse of discretion standard and affirmed. In reaching its conclusion, the Court applied *Shenandoah Publishing House, Inc. v. Fanning,* 235 Va. 253, 368 S.E.2d 256 (1988) and *Perreault v. Free Lance-Star,* 276 Va. 375, 666 S.E.2d 352 (2008). It held the husband's concern for his professional reputation did not rebut the presumption of openness of judicial records. The husband apparently did not argue the first clause of § 17.1-208(B) nor that the existence

of § 20-124 exempted divorce cases from the usual presumption of openness.

In *Fanning*, the Supreme Court of Virginia was asked to find a constitutional right of access to records in civil cases. It declined to do so, instead finding former § 17-43 (now § 17.1-208) codified the common law rule of openness and required a compelling interest that could not reasonably be protected by some other measure before a court record could be sealed. 235 Va. at 257-59. Both *Fanning* and *Perrault* were wrongful death cases, but the considerations expressed in those cases would apply to *any* record in *any* case unless a statute required the record to be sealed.

If the *Fanning-Perrault* considerations apply to a joint or uncontested motion to seal a divorce file, § 20-124 is rendered useless. This would violate another rule of statutory construction: one statute is not to be construed in such a way as to render another statute of no effect. *Lynchburg Div. Soc. Serv. v. Cook,* 276 Va. 465, 483, 666 S.E. 2d 361, 370 (2008).

Conclusion

A party has no right to have the record sealed. The statue's use of the word "may" makes sealing permissive. We submit however that a joint or unopposed motion to seal ought to ordinarily be granted. Unless a politician, celebrity, or billionaire is a party, the public rarely has an interest in divorce cases, and even then, it is only, as Justice Powell wrote, for the "sometimes disgusting details." The General Assembly's adoption of § 20-124 and the exception for divorce proceedings in § 19.2-266 show a policy preference for some privacy in divorce cases.

If a motion to seal the record is opposed, or, as in *Shiembob,* there is a motion to vacate a previous sealing order, a judge ought to consider whether there is a legitimate public interest in the case, or whether one party is merely trying to embarrass or harm the other to obtain some advantage in the case.

Endnotes

1. Judge Martin has been a judge of the Circuit Court of the City of Norfolk since 1995. Mrs. Arnold is a law clerk to the judges of that Court, a 2023 graduate of the University of Richmond School of Law, and a member of the Virginia State Bar.

The opinions in this essay may not be those of all judges of the Circuit Court of the City of Norfolk. A judge may write concerning the law unless prohibited by one or more Canons or standards. Rules of the Supreme Court of Virginia. Part 6, § IV, Canon 1(L).

2. *Falkoff v. Falkoff,* 103 Va. Cir. 405 (Fairfax 2019).

3. Excluding Fairfax County and Alexandria, which have their own data reporting systems, the Supreme Court of Virginia's caseload statistics show 24,835 divorces were filed in Virginia in 2022, and 3,071 of those (12%) were filed in Norfolk.

4. First enacted by 1978 *Acts of Assembly,* c. 484. A 1990 amendment added "or any agreement of the parties, filed therein." 1990 *Acts of Assembly,* c. 623.

5. We acknowledge that under the experience test a court is not to look at the experience of a particular jurisdiction but rather that throughout the United States. *El Vocero de Puerto Rico v. Puerto Rico,* 508 U.S. 147, 150 (1993). We leave a 50-state historical survey to some intrepid law professor or law student but from what we have found, practices vary across the country. Maddie McDermott, a law student at the University of Richmond, assisted the study group, and reported that in Delaware divorce hearings are private and only the litigants and legitimately interested parties have access to divorce files. In Maryland, a judge may limit access to files if there is a clear and compelling reason to do so. In Pennsylvania, family law case files, with exceptions, are not accessible online and the court may close divorce proceedings to the public. In West Virginia, most documents in domestic relations cases are not open for public inspection. Members of the study group corresponded with family lawyers in other states, and we learned that a showing of need that outweighs the public interest in open records must be made to seal a file in Arizona, California, Florida, and Texas. We found that in New York, records in divorce cases are sealed for 100 years. *NY Dom. Rel. L § 235*. Some other states require a showing of need for access.

6. Matrimonial Causes Act, 20 & 21 Vict., c. 85; J.H. Baker, *An Introduction to English Legal History* (4th ed. 2002); W.H. Bryson, *Virginia Civil Procedure,* 2-46, 47 (5th ed. 2017).

7. *Acts of Assembly,* 1826-7, c. 23, p. 21; *Supplement to the Revised Code,* Ch. 165 (1833). The General Assembly granted the General Court the power to dissolve incestuous marriages in 1730. Today this would be an annulment. 1730 *Acts of Assembly,* c. II, § v in 4 Hening's *Statutes at Large* 245-46; *Code* §§ 20-38.1, 20-89.1.

8. *Code of Virginia* (1849), Title 31, Ch. 109, § 9; *Code* (1860), Title 31, Ch. 109, § 9; *Code* (1873), Title 31, Ch.CV, § 9; *Code* (1919) § 5106; *Code* (1950) § 20-99.

9. Bryson, *supra*, 8-1 to 8-5; W.M. Lile and E.B. Meade, *Equity Pleading and Practice*, §§ 245, 246 (3rd ed. 1952).

10. 1930 *Acts of Assembly,* c. 132; Lile, *id*. § 247. Many states merged law and equity earlier than Virginia, and thus evidence *ore tenus* may have been received in divorce cases earlier than here. In New York, the issue of adultery was at one time tried to a jury. 2 J. Kent *Commentaries on American Law* 98 (O.W. Holmes ed. 1873). We do not know if this is still done.
11. 2005 *Acts of Assembly,* c. 885, amending § 8.01-607.
12. 2012 *Acts of Assembly*, c. 72, amending § 20-106.
13. We did find one state supreme court opinion holding there was no constitutional right of access under the state constitution's freedom of the press provision. *Husband C. v. Wife C.*, 320 A.2d 717 (Del. 1974). This opinion also has a good discussion about how evidence was received in divorce cases and how Delaware's divorce practices evolved over time.
14. Code § 17.1-208(B).
15. *Virginia Code*, Virginia Law, https://law.lis.virginia.gov/search_cov/?query=%22good%20cause%20shown%22 (last visited Nov. 15, 2023)
16. 1987 *Acts of Assembly,* c. 580.

Four Deadly Mistakes: Scott v. Tran

By Mark E. Sullivan, Esq.
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Introduction

In the opening scene of *The Music Man*, the assembled salesmen all agree that "you've got to know the territory." The same saying is true in the legal world. While knowing the facts is important, knowing the law and having a good lawyer are even higher priorities. The recent case, *Scott v. Tran*, 2021 U.S. App. Vet. Claims LEXIS 127, shows the importance of teaming up with a good advocate, knowing what you're asking for, and where to request it. Or, to change the metaphor slightly, "If you're knocking on the wrong door, don't be surprised if nobody answers."

The Facts

Sheila Scott, representing herself, filed an appeal to the 2019 decision of the Board of Veterans' Appeals which determined that she was not a surviving spouse of Billy Scott, and thus she was not entitled to VA death pension benefits as a result of his death. Long on patience and kindness, Judge Grant C. Jacquith (a retired Army JAG colonel) gently reminded Ms. Scott of the importance of knowing what you're looking for and where you should go to find it.

Sheila married Billy in 1973. They were divorced in 2010. The only information regarding Billy's military service was: "Mr. Scott served on active duty from July 1954 to April 1958." There was nothing about his continued service in the Reserves or in the National Guard. And there was no information about military retired pay.

The decree of divorce stated that Sheila was entitled to an equitable share of Billy's military and law enforcement pensions, and gave her the responsibility of preparing the requisite orders to implement the divisions. In 2012, an order dividing Billy's law enforcement pension was entered by the court; it retained jurisdiction to enter another order dividing the military pension.

Dead Wrong

Two months after their 2010 divorce, Sheila petitioned the Department of Veterans Affairs ("the VA") for half of Billy's "VA pension." It is not clear from the opinion which VA pension was intended. There is a VA pension program that provides monthly payments to wartime veterans who meet certain age or disability requirements, and whose worth and net income are below certain limits. Given that Billy had a law enforcement pension, he probably would not have qualified for a "VA pension."

There's also a military pension, payable to retirees of the uniformed services under Chapter 71 of Title 10, U.S. Code. This pension generally requires at least 20 years of active duty. These are divisible upon divorce under the Uniformed Services Former Spouses' Protection Act (USFSPA), found at 10 U.S.C. § 1408.

There is also a pension for members of the National Guard or the Reserves, pursuant to Chapter 1223 of Title 10, U.S. Code. This requires 20 years of creditable service and a minimum of 50 retirement points in each year. The USFSPA also allows the division of these retirement benefits.

If a servicemember is disabled as a result of his service and found to be unfit to continue serving, then he may qualify for a disability pension under Chapter 61 of Title 10. As a general rule, little or none of the disability pension can be divided upon divorce.

Military pension division is handled by the Defense Finance and Accounting Service (DFAS) for the Army, Navy, Air Force and Marine Corps. In response to Sheila's pension division request, the VA responded that pensions were not handled through the Department of Veterans Affairs, and she should send her request to DFAS. DFAS responded that Billy was receiving VA *disability pay*, not *retired pay*, so she needed to go through the VA.

Dead on Arrival

In 2012, Sheila wrote to the VA again, this time inquiring about survivor benefits.

Survivor benefits are an important part of a divorce settlement when one is representing the former spouse. The Survivor Benefit Plan, if elected, pays the former surviving spouse 55% of the chosen base amount (which is usually one's full retired pay) for the rest of his/her life, adjusted for inflation by annual cost-of-living adjustments (COLAs).

Is there a downside? Yes – in fact, there are three:

- First, it's not free. Former-spouse SBP coverage costs 6.5% of the base amount in the case of a "regular retirement" (i.e., from active duty). For a non-regular retirement (i.e., from the Reserves or National Guard), the cost is closer to 10% of the base amount.
- Second, survivor benefit payments are taxable income.
- Third, the benefit is suspended if the former spouse remarries before reaching age 55. (The benefit can be restored if that remarriage ends in divorce, annulment or death of the new spouse.)

It took a year for the VA to respond; this time, they claimed that Sheila was not entitled to VA benefits because she was divorced from the veteran.

Sheila followed up with the VA to request division of Billy's disability pay in 2014 and 2015; both attempts to collect funds were denied.

Dead in the Water

In March 2015, Billy died. The next month, Sheila filed a claim for "dependency and indemnity compensation (DIC), death pension and accrued benefits." Her claim was denied a month later, and she took an appeal to the Board of Veterans' Appeals. The Board denied the claim because she was divorced from Billy. To be eligible for VA benefits, the claimant must have been married to the veteran at the time of his death.

Unwilling to admit defeat, even though she "does not contest that she and the veteran were divorced prior to his March 2015 death," Sheila pushed on, this time filing an appeal with the U.S. Court of Appeals for Veterans Claims. According to the Court's opinion, "she alleges that she is entitled to some type of payment from VA in accordance with the family court orders related to their divorce. The government responded that the parties were divorced, she is not a surviving spouse, and she was thus not entitled to any VA benefits as a matter of law, since the benefits which might be involved are only payable to surviving spouses.

DIC payments are made to a veteran's surviving spouse if the veteran died from a service-connected disability. 38 U.S.C. § 1310. The Department of Veterans Affairs can also award a pension to a veteran's surviving spouse when the veteran at the time of his death was getting disability compensation in regard to a service-connected disability.

The Court noted that Sheila had acknowledged in her submissions to the VA that she and Billy were divorced. Thus she failed to meet the basic threshold requirement for receipt of VA benefits, and her claim was denied by the Court. The opinion stated that no divorce court order referred to any benefits administered by the Department of Veterans Affairs, and that the division of a military pension was not within the purview of the VA. The payments to Billy were based on his disability, not longevity of military service. The U.S. Supreme Court in *Mansell v. Mansell*, 490 U.S. 581 (1989), made it clear that the USFSPA does not grant state courts the power to treat as divisible property in a divorce proceeding any portion of a military pension which has been waived to receive VA disability compensation.

Dead Reckoning

In addition to the foregoing errors, Sheila's fourth error was a failure to obtain advice and assistance from competent legal counsel. It appears that she had prior counsel, but they withdrew from her case, citing differences on how to proceed and instructions from Sheila that they cease representing her. She pressed on *pro se*, committing error after error in seeking some sort of VA payment in accord with the divorce court's orders.

"Dead reckoning" is a nautical term referring to voyaging without the help of celestial navigation, an essential component of accurate travel on the high seas. In Sheila's case, it meant plunging onward in the hope of wresting some form of payment from the government without having a legal or factual basis for her claims.

Had the case been handled correctly, she would have had a competent attorney to assert a claim on Billy's military pension (if it existed) and to argue for an allocation of the Survivor Benefit Plan. If there was no pension, she could have asked the court to consider Billy's VA disability compensation as a source of income from which she could be paid spousal support. She would have known what to argue and where to locate the resources that could persuade the court.

Lessons Learned

The rules for military pension division can be found in the Department of Defense Financial Management Regulation (DoDFMR), Volume 7b, Chapter 29, "Former Spouse Payments." Informal guidance comes from several sources, including:

- The DFAS website: https://www.dfas.mil at "Retired Military and Annuitant;" and
- The *Silent Partner* series of information letters, located at "Publications" on the website of the North Carolina State Bar's military committee: https://www.nclamp.gov.

Attorneys who want to learn about the Survivor Benefit Plan can find the statutes at 10 U.S.C. § 1447-1455. The rules are in several chapters of Volume 7b of the DoDFMR. There are tabs at https://www.dfas.mil/RetiredMilitary/ for "Provide for Loved Ones" and "Survivors and Beneficiaries" that contain information about the SBP. There is also information about the SBP at the above URL for the N.C. State Bar.

One need not be a certified and experienced expert to help clients with military pension division, SBP allocation, VA benefits such as DIC, and other benefits related to military service, such as SGLI (Servicemembers Group Life Insurance) for those serving on active duty when death occurs, and VGLI (Veterans Group Life Insurance), for those no longer serving.

If divorce counsel needs special assistance, then it's time to look for a "wingman." Getting an expert to assist the divorce attorney can bring a much higher level of knowledge and expertise to the table.

Who can act as the wingman? The expert might be a former JAG officer, a Guard or Reserve judge advocate, a retired JAG, or a lawyer with prior military experience. If the expert has specialized knowledge in the area of military divorce, then he or she can make the difference between a poor settlement and a good one. And a wingman is essential if the case is headed for trial.

Asking around for information on who in the local or state bar has written or spoken on military family law issues will usually reveal one or two attorneys in a given state who could be consultants for the divorce attorney. But a good consulting expert can be from any jurisdiction; the goal is to have someone who is fully understands the statutes for pension division (the Uniformed Services Former Spouses' Protection Act) and the Survivor Benefit Plan, the retired pay center rules, and the specialized issues that often arise in the military divorce case.

Mr. Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina, and is the author of The Military Divorce Handbook *(Am. Bar Assn., 3rd Ed. 2019) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law for over 30 years. He works with attorneys nationwide as a consultant on military divorce issues in drafting military pension division orders. He can be reached at (919) 832-8507 and at mark.sullivan@ncfamilylaw.com.*

VFLQ CASES OF THE QUARTER

Military Pension – Waiver for Disability Pay

Name: *Lott v. Lott,* No. 1322-22-1 (Va. App. Dec. 12, 2023)

Facts: The parties entered into a property settlement agreement giving Wife 41% of Husband's disposable military retirement pay. The agreement stated:

> "If the Husband is allowed to waive any portion of his retired pay in order to receive disability pay, then the Wife's portion of the Husband's disposable retired pay shall be computed based on the amount that the Husband was to receive before any such waiver was allowed or occurred. The Husband shall pay to the Wife directly any sums necessary in order that the Wife will not suffer any reduction in the amount due to her as a result of the Husband's waiver in order to receive disability pay."

Husband subsequently retired and elected to waive a portion of his retirement pay to receive disability pay. A military pension division order was submitted to DFAS awarding Wife "41% of the value of Husband's military pension benefits." Husband claimed that Wife had been overpaid by virtue of the fact that she was receiving 41% of the value of his disability pay. The trial court ruled that Husband was receiving concurrent retirement and disability pay (CRDP), all of which qualified as "disposable retired pay" under 10 U.S.C. § 1408(a)(4); therefore, it was subject to division. This appeal followed.

Issue: Whether the trial court erred in determining that Wife was entitled to receive 41% of Husband's disability pay.

Ruling: The Court of Appeals affirmed the trial court using the "right for a different reason doctrine," basing its decision on the Supreme Court's ruling in *Yourko v. Yourko*.

Rationale: In *Yourko*, the Supreme Court held that courts can enforce voluntarily agreements to indemnify a spouse when military retired pay is reduced as a result of a waiver for disability pay, noting that neither the U.S. Supreme Court nor Congress has placed limits on how a veteran can use tax free disability pay after it has been received. Thus, Husband was properly ordered to pay Wife 41% of his disability pay pursuant to the terms of their agreement; however, the case was remanded to the trial court to amend its order to require that the payments were made directly from Husband rather than through DFAS.

Equitable Distribution – Valuation of Marital Home

Name: *Murphy v. Murphy*, No. 1211-22-2 (Va. App. Dec. 12, 2023).

Facts: The trial court valued the marital home at $405,000 and found the marital equity to be $178,251. The Wife was ordered to sell the property, and was awarded "55% of the marital equity of $178,251" and Husband receiving "45% of the marital equity of $178,251"; the final decree further stated that Husband was entitled to $72,573 upon sale and Wife was entitled to $105,678 upon sale. Wife sold the home for $495,958, and the parties filed a joint motion asking the court to determine the parties' interests in the $57,873 of the excess equity from the sale. Wife argued that she was entitled to the total excess amount since the decree identified the exact amount that she was to pay Husband. He argued that the decree did not allocate the excess equity, therefore it did not control the distribution and the parties should each receive 50% because they were tenants in common at the time of sale. Both parties took the position that if the home had sold for less $405,000 value, Wife would have still had to pay Husband the

$72,573 specified in the decree. The trial court ruled that the final decree fully disposed of the marital home and Wife was entitled to all of the excess equity, reasoning that neither party had appealed the ruling on the $405,000 valuation, and the decree was silent as to how any excess or deficiency would be addressed.

Issue: Whether the trial court properly interpreted the final decree in holding that Wife was entitled to keep the excess sale proceeds.

Ruling: The Court of Appeals affirmed the trial court's ruling and agreed that Wife was entitled to all sale proceeds exceeding the $72,573 owed to Husband.

Rationale: The Husband's position was rejected because "determining who has legal title . . . has little or no bearing upon how the value of an asset is to be equitably distributed . . ." The Court of Appeals viewed Husband's argument as an attempt to "go behind the final decree" and ruled that the trial court's interpretation of the final decree was reasonable, given Wife's responsibility to sell the home, and the risk she bore if it sold for less than $405,000.

Child Support Agreement – Calculation of Arrearage

Name: *Deel v. Schmidt*, et al., No. 0816-22-3 (Va. App. Jan. 30, 2024).

Facts: On December 6, 2012, an unmarried couple entered into a separation agreement including terms for the custody and support of their minor child. The agreement stated that Father would make child support payments to Mother "in an amount as would be required by Code § 20-108.2," and "until such time as that figure is actually calculated, the Father agrees to make voluntary payments to the Mother for which he will be entitled to a credit against any amount ultimately calculated to be due and owing pursuant to the referenced support guidelines." The parties acknowledged that either may bring the agreement before a court for "confirmation, ratification, or approval" and that the court can incorporate some or all of the agreement "binding the parties to the fullest extent possible." On October 10 2018, Mother filed a petition for child support in the Juvenile Court; Father was to pay $545.51/month and arrearages to the date of filing the petition. Mother appealed to the circuit court requesting arrearages retroactive to December 2012. The circuit court incorporated the agreement into a court order granting Mother the relief requested; Father was ordered to pay $49,206 in child support arrearages, retroactive to December 2012.

Issue: Whether the circuit court erred by incorporating the parties' separation agreement into a court order and calculating arrearages prior to October 2018.

Ruling: The majority held that the circuit court properly incorporated the agreement, but remanded for recalculation of the arrearages owed retroactive to October 2018.

Rationale: The circuit court could not award arrearages for the period before Mother's petition for child support was filed in 2018. The language of Code § 20-108.1(B) states: "Liability for support shall be determined retroactively for the period measured from the date that the proceeding was commenced by the filing of an action with any court . . . ."

Justice Beales dissented in part and disagreed with the ruling that Mother could not receive child support prior to the date that she filed suit, arguing that Code § 20-108.1(B) prohibits awarding *statutory* child support retroactively, but Mother could receive damages for failure to pay child support as a breach of contract. In her complaint, Mother specifically asked for monetary relief for the amounts owed "pursuant to the contract." Additionally, the circuit court's final order stated that Father "is found to have been in breach of the parties' Agreement."

Justice Causey also dissented in part and disagreed with the ruling that the incorporation of the agreement was valid, arguing that the five year statute of limitations prevented Mother from seeking enforcement of the contract.

Custody Modification – Child's Preference

Name: *Livingston v. Stark*, Case No. CL-2019-850 (Fairfax County, Dec. 18, 2023)

Facts: The parties' agreed custody order provided that they would alternate weekends from after school Friday until Sunday at 6pm; Father had the children from 6pm Sunday until after school Wednesday, and Mother had the children from after school Wednesday until after school Friday. Mother filed a motion requesting to extend the weekend through Monday morning so that the parties would have an equal number of overnights; the only material change cited was that the children wanted to equalize time with their parents and didn't want to transfer households on Sunday evenings.

Issue: Whether a child's preference alone is sufficient to constitute a material change in circumstances.

Ruling: Mother's Motion to Reconsider was denied, as a child's preference does not constitute a material change in circumstances warranting a modification of custody.

Rationale: To determine whether a custodial change should be made, the court must 1) determine if there has been a material change in circumstances since the most recent custody award and 2) if the change would be in the best interest of the child. If there is no material change, then custody will not be modified. A material change in circumstances can be "broad enough to include changes involving the children themselves" or "changes relating to the parents and their circumstances." *Keel v. Keel*, 225 Va. 606 (1983). If the legislature intended to have a child's preference constitute a material change, it would not have listed child's preference as only one of ten factors in determining the child's best interest. There was no evidence that the schedule was causing the children psychological distress, which could be an independent basis for a material change in circumstances.

Mandatory Reporting of Child Abuse – Criminal Conviction for Failure to Report

Name: *Creekmore v. Commonwealth*, ___ Va. App. ____ (2023).

Facts: Creekmore was a licensed psychologist who began counseling sessions with R.P., a minor who was referred to therapy in March 2020 after she had a panic attack at school. During the second or third session, R.P. reported to Creekmore that she was being sexually abused by her mother, and it had been going on for several years. Creekmore recommended that R.P. defend herself by using her hands to block her mother and suggested that she read a book titled "Courage to Heal." When the abuse continued, Creekmore then recommended group therapy with R.P.'s parents. Only father participated and stated that having mother attend would disrupt their home life. Father had witnessed the abuse and made it clear that he would not involve himself to help stop the abuse. R.P.'s last therapy session was in April 2020. Creekmore, a mandatory reporter, did not report her findings at any point during R.P.'s therapy. A month later, Child Protective Services (CPS) received an anonymous tip regarding the abuse and removed R.P. from the home. Creekmore was subpoenaed by CPS to be a witness in a protective order hearing. After outlining R.P.'s treatment plan to the investigator, Creekmore was charged and convicted of violating Code § 18.2-371 for contributing to the delinquency of a minor. Creekmore argued that the legislature didn't intend for her conduct to be criminalized on the grounds that 1) failing to report is not an overt act that "contributed, encouraged, or caused the child to be abused or neglected;" 2) the word "omission" only refers to an omission by a third party; and 3) the mandatory reporting statute only subjected Creekmore to a fine.

Issue: Whether Creekmore's failure to report R.P.'s abuse justified a criminal conviction for contributing to the delinquency of a minor.

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

Rationale: Code § 18.2-371 provides that an adult who "willfully contributes to, encourages, or causes any act, omission, or condition that renders a child delinquent, in need of services, . . . or abused or neglected" is guilty of a Class 1 misdemeanor. The Court of Appeals found that Creekmore's failure to report and instead give advice to R.P. about how to defend herself caused the child to remain in her home, where the abuse and neglect continued. Regarding the term "omission," Creekmore's argument that the term only applies to omissions by third parties is a misinterpretation of the statute—she did in fact cause an omission that rendered R.P. subject to continuing abuse. The Court noted that Creekmore did not dispute that she was required by statute to report suspected abuse or neglect, nor did she dispute that she neglected her duty to report. Regarding the issue of the legislature's intent to criminalize her conduct, the Court cited *United States v. Batchelder,* 442 U.S. 114 (1979), which held that "when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants."

Termination of Parental Rights – Failure to Cooperate with Investigation

Name: *Howard v. Radford City Dept. of Social Services*, No. 0095-23-3 (Va. App. Feb. 6, 2024).

Facts: Mother and the maternal grandmother brought the 3-year-old child to see a doctor for a possible yeast infection; the doctor diagnosed the child with genital warts caused by human papilloma virus (HPV), a sexually transmitted disease, and reported to the Department of Social Services. When interviewed, Mother denied that any adult other the child's grandmother had ever cared for her, and denied that the child had ever been left alone with the grandmother's boyfriend—a registered sex offender. Mother signed a safety plan agreeing to cooperate with the Department's investigation, but subsequently violated the plan. The child was then placed in foster care, and Mother was offered services including a parental capacity evaluation, a sex offender risk assessment, parenting classes, mental health counseling, assistance with housing options, and supervised visitation. Mother failed to complete the parental capacity evaluation or the polygraph required by the court-ordered sex offender risk assessment, she refused independent living assistance, and missed several supervised visitation appointments. When the Department petitioned for termination of Mother's rights, she testified that she did not believe the child had been abused, and that she had been homeless for six months preceding the hearing,

Issue: Whether the trial court erred in terminating Mother's parental rights.

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

Rationale: The trial court terminated Mother's parental rights pursuant to both Va. Code § 16.1-283(B) and 16.1-283(C)(2). When a lower court's judgment is made on alternative grounds, the Court of Appeals need only determine whether any of the alternatives is sufficient to sustain the judgment. Mother's assignments of error related only to Code § 16.1-283(B) and did not address § 16.1-283(C)(2), which provides that a parent's rights may be terminated if "the parent or parents, without good cause, have been unwilling or unable within a reasonable period of time not to exceed 12 months from the date the child was placed in foster care to remedy substantially the conditions which led to or required continuation of the child's foster care placement, notwithstanding the reasonable and appropriate efforts of social, medical, mental health or other rehabilitative agencies to such end."

Domestic Assault & Battery – Insufficient Evidence of Cohabitation

Name: *Yellock v. Commonwealth of Virginia*, ____ Va. App. _____ (2024)

Facts: Appellant, Yellock, got into an altercation with his girlfriend while at a gas station. He jerked her head back with his hand and was convicted of domestic

2024 Family Law Service Award Winner

The Family Law Service Award is given to an individual or organization who has consistently given freely of time, talent and energy to provide valuable services in advancing family, domestic relations or juvenile law in Virginia, whether such services are rendered to the Virginia legal community or directly to the citizens of Virginia. The recipient is determined by a majority vote of the Board of Governors of the Family Law Section from nominations submitted by members. The Award will be presented at the 40th Annual Advanced Family Law Seminar on April 18th at The Jefferson Hotel in Richmond, Virginia. The Family Law Section Board of Governors is proud to announce the 2024 recipient is Charles E. Powers of Stiles Ewing Powers, P.C. in Richmond. Please join us on April 18th at the Jefferson Hotel to applaud Chuck as he receives his award.

2024 Betty A. Thompson Lifetime Achievement Award

The Betty A. Thompson Lifetime Achievement Award was established by the Virginia State Bar Family Law Section to recognize and honor an individual who has made a substantial contribution to the practice and administration of family law in the Commonwealth of Virginia. The award is given at the discretion of the VSB Family Law Section Board of Governors, and will be presented at the Annual Family Law Seminar on April 18th at The Jefferson Hotel in Richmond, Virginia. We are pleased to announce the 2024 winner is James Ray Cottrell of Cottrell Fletcher & Cottrell, P.C. in Alexandria. Please join us on April 18th at the Jefferson Hotel to congratulate Jim on his award.

assault and battery in violation of Code § 18.2-57.2 which states: "Any person who commits assault and battery against a family or household member is guilty of a Class 1 misdemeanor." The statute's definition of "family or household member" includes "any individual who cohabits or who, within the previous 12 months, cohabited with the person." Yellock argued that the evidence failed to prove that the victim was a "family or household member."

Issue: Whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Ruling: The Court of Appeals held that there was insufficient evidence of cohabitation and reversed Yellock's conviction for domestic assault and battery.

Rationale: The Court of Appeals relied on factors in *Rickman v. Commonwealth,* 33 Va. App. 550 (2000), to determine whether cohabitation was established. These factors include: 1) sharing of familial or financial responsibilities, which may include payment of utilities, shelter, food, or having commingled assets; 2) consortium, which may include conjugal relations, fidelity, affection, and cooperation; and 3) the length and continuity of the relationship. The Court held that there was no evidence on the record proving that Yellock and his girlfriend shared familial or financial resources, and there was no evidence of consortium or a lengthy relationship. Beyond the fact that Yellock and his girlfriend were a couple on the day of the incident, there was no evidence to suggest that the relationship involved mutual respect, fidelity, or a very close partnership, and there was no testimony regarding the length of their relationship.

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