January 3, 2005

The recent article, "*Gray v. Rhoads:* Doing Indirectly What You Can't Do Directly" [*Virginia Lawyer,* December 2004] raises a number of points that beg a response. But before I respond, let me be up front about my bias—something unfortunately the authors of the piece did not do. I am a plaintiff's lawyer, and perhaps more importantly, I co-counseled both the trial and the appeal of the *Gray* case.

Reading the article, one would think that the code section involved, *Virginia Code* § 8.01-404, was entitled the "policeman's protection act." The authors refer to the many supposed dangers posed to police officers because of the Court's ruling in *Gray.* But in reading the decision only for its impact on police officers, the authors miss the basic point of the decision and of the underlying code provision. Code § 8.01-404 was enacted not to protect police officers from having "vague and confusing" statements used against them at trial by plaintiffs, but instead responded to a practice of the insurance industry of sending adjusters to the scene of accidents and taking misleading and incomplete statements from potential witnesses to the accident. *Harris v. Harrington,* 180 Va. 210, 220, 22 S.E.2d 13, 17 (1942). The statute was written to protect witnesses for either side. Seen in this light, the statute's purpose is to further the truth-seeking process at trial by outlawing the practice of intentionally obtaining misleading and incomplete statements and then using them to devastate a witness's testimony at trial.

Party admissions stand in contrast to statements obtained in this manipulative fashion. As any police detective will tell you, the words coming out of the suspect's own mouth are often the strongest evidence of truth. Unlike prior inconsistent statements which are not admitted into evidence but are only used for impeachment purposes, party admissions are admissible in their own right and are often quite valuable pieces of direct evidence. "An admission deliberately made, precisely identified and clearly proved affords evidence of a most satisfactory nature and may furnish the strongest and most convincing evidence of truth." *Tyree v. Lariew,* 208 Va. 382, 385, 158 S.E.2d 140, 143 (1967).

In *Gray,* the Supreme Court of Virginia was confronted with the intersection between these two competing concepts. On the one hand, the officers had made statements after the shooting that, were they to be used on cross-examination against the officers, would fall within the bar of § 8.01-404. On the other hand, the officers' statements—since Frederick Gray was shot dead—provided the only direct (if not slanted in their favor already, as we believe was the case) evidence of some of the events that happened prior to the shooting. To bar a plaintiff from using the statements in his direct case would prevent plaintiff from proving his case. In the similar criminal context, should the Commonwealth be barred from using confessions because they were *ex parte* or given while the suspect was still under the influence of the event? The same logic would apply. The Court correctly held that the statute did not bar use of party admissions as direct evidence. To hold otherwise would allow the statute to swallow the party admissions doctrine—something the legislature clearly did not intend to do.

As a final note, the authors make certain factual assumptions about post-event statements made by officers that did not hold true in *Gray.* They note that "[m]any times, the officer's version of an event, provided in a question-and-answer format with a detective, is incomplete . . . [I]naccuracies are not identified and corrected . . . [T]he questioner fails to follow up," resulting in "vague or confusing statements." While I can only assume that this was true in some cases defended by the authors, it certainly was not true in *Gray.* There, the officers involved in the shooting were thoroughly interviewed by quite friendly detectives immediately after the shooting. The questions and answers, taped and transcribed, record the detectives using leading and suggestive questions to help the officers justify the shooting, and even use phrases such as "the bad guy" to describe the victim of the shooting (the use of which at that point in the case was particularly telling, given that the purpose of the interview was supposedly to determine if the shooting was justified and just *who* the bad guy was). Moreover, the officers had yet another chance, over a month later, to describe the events leading to the shooting to yet another police official. The questioning in this later interview was likewise friendly. Clearly, the pitfalls of the rushed "stream of consciousness" statements described by the authors were not present in *Gray.* Indeed, it is ironic that the authors, who defend police officers as part of their practice, would take this stand against "scene of the crime" statements when the very officers they defend frequently use the very same type of statements against suspects in the criminal context. I wonder if their clients would join them in arguing that these statements are "inherently problematic."

Richard Armstrong
Charlottesville

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Send your letter to the editor* to:
E-mail: coggin@vsb.org
fax: (804) 775-0582
mail: Virginia State Bar,
Virginia Lawyer Magazine
707 E. Main Street, Suite 1500,
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Remarks on the Observance of the 225th Anniversary of the Virginia Supreme Court by Virginia State Bar President David P. Bobzien

May it please the Court.

Mr. Chief Justice and Justices of the Supreme Court of Virginia, Governor Warner, Governor Baliles, Governor Wilder, Lieutenant Governor Kaine, Attorney General Kilgore, Senator Stolle, Delegate Griffith, members of the Virginia Court of Appeals and other members of the Virginia Judiciary, and Honored Guests:

As the President of the Virginia State Bar, which is an administrative agency of the Supreme Court, it is a great pleasure for me to participate in this anniversary observance.

On August 12, 2003, in San Francisco, Richmond's own Robert Grey became the president-elect of the American Bar Association. In remarks he gave that day, he talked about a house that was constructed in America over two centuries ago—the "House of Justice." Like any house, the House of Justice has a foundation. That foundation includes the cornerstones of due process; the presumption of innocence; trial by jury; and an independent judiciary. The foundation is solid, but it needs constant strengthening, repair, and care so that it will not be eroded. The House of Justice also has a door—a door through which those who seek justice must pass, a door that for too long was closed to too many. When a former reporter of decisions of the Virginia Supreme Court of Appeals—a former reporter by the name of Thomas Jefferson—wrote that all men are created equal, the door was opened. When Susan B. Anthony made it clear that women were created as equals of men, the door opened wider. When Thurgood Marshall won *Brown v. Board of Education* fifty years ago, everyone could then use the front door. When Oliver Hill challenged massive

resistance and reopened the public schools in Virginia, the door swung wider still.

One of the core missions of the Virginia State Bar, along with regulating the practice of law and improving the legal profession and the judicial system, is to advance the availability and quality of legal services provided to the people of Virginia—in short to see that the door to the House of Justice will always be opened wide for the weak, for those who have no voice, and for those whom we dislike and even despise.

Robert Grey's House of Justice is allegorical, but today we celebrate the birthday of a real house of justice, one which has endured and flourished for 225 years. While today we celebrate the anniversary of the Supreme Court as an institution, we also celebrate the entire Virginia judicial system, which the Supreme Court oversees. The Supreme Court, the entire judiciary, and the Virginia State Bar are dedicated to shouldering our shared responsibility to the people of the Commonwealth of Virginia. That responsibility is to keep the door to the House of Justice opened to its very hinges.

Robert Grey concluded his remarks in San Francisco on that beautiful summer day with the following:

> "I was brought up to believe that some day we will all stand in a house not built with hands. And in that house we will be judged with both justice and mercy. Until that day, let us use our hands and minds and hearts to ensure that our current dwelling reflects both the justice and mercy of that house."

I thank you very much.

Left: David P. Bobzien, president of the Virginia State Bar, addressed the Supreme Court of Virginia as it marked its 225th anniversary December 9 with a forty-five minute ceremony. Dignitaries attending included Governor Mark R. Warner; Lieutenant Governor Timothy M. Kaine; Attorney General Jerry W. Kilgore; Senator Kenneth W. Stolle, R-Virginia Beach and chair of the Senate Courts of Justice Committee; House Majority Leader H. Morgan Griffith, R-Salem; former Governor Gerald L. Baliles; and now-Richmond Mayor L. Douglas Wilder. The Supreme Court of Virginia predates the United State Supreme Court—and the U.S. Constitution—by nine years.

Below: The seven justices of the current Supreme Court of Virginia (l–r): Donald W. Lemons, Lawrence L. Koontz Jr.; Elizabeth B. Lacy; Chief Justice Leroy R. Hassell Sr.; Cynthia D. Kinser; Barbara Milano Keenan; and G. Steven Agee.

Virginian Jimmy Morris Takes Helm of Trial Lawyers' College

by Dawn Chase

James W. "Jimmy" Morris III of Richmond is the 2004–2005 president of the American College of Trial Lawyers. He was installed as head of the 5,400-member organization at its annual meeting in October.

And what a Virginia-influenced meeting it was, Morris says. Speakers included Richmond lawyer Robert J. Grey Jr., president of the American Bar Association, and novelist/attorney John Grisham, who has a home near Charlottesville. Retired United States District Judge Robert R. Mehrige Jr. of Richmond received the ACTL's Samuel E. Gates Litigation Award. And Oliver W. Hill, an ACTL fellow from Richmond, was recognized for his work in *Brown vs. Board of Education*.

Morris concedes he might be biased. But, "The Virginians so distinguished themselves that many people said it was easily the best program of any time."

A Virginia lawyer for forty-four years, Morris follows attorney R. Harvey Chappell Jr. of Richmond and the late United States Supreme Court Justice Lewis F. Powell Jr. in the ACTL presidency.

Morris defends products liability cases and represents clients in professional and trial matters at Morris & Morris, a fourteen-member firm where he practices with his brother, Philip B. Morris.

He estimates that he and his wife Jane will travel to forty or fifty cities representing the college during his term.

The ACTL was founded in 1950. It selects its fellows from the United States and Canada by invitation only after an investigation, and its aim is to "maintain and improve the standards of trial practice, the administration of justice and the ethics of the profession." Fellows are lawyers "who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality." Less than one percent of trial lawyers receive an invitation. Jimmy Morris was inducted into the college in 1984.

Morris attended Virginia Military Institute and Randolph Macon University. He received his law degree from the University of Richmond in 1958.

He is a former president of the Virginia Association of Defense Attorneys, the Richmond Bar Association and the Defense Research Institute, a national organization.

The ACTL gets involved in national issues that include defending the independence of judges and addressing a deteriorating relationship between Congress and the federal judiciary.

In the past two years, under the leadership of Richmond lawyer Michael W. Smith, the college's Virginia Committee has expanded its definition of who qualifies as a "trial lawyer," and Morris says he wants to see that continue. In the ACTL's early days, fellows were limited to plaintiffs' and defense lawyers with experience in jury trials. Recently, however, the college has inducted Henry W. McLaughlin III of the Central Virginia Legal Aid Society, who represents indigent people in consumer law and housing disputes, and Gerald T. Zirken, a federal public defender in Richmond with a national reputation in habeas appeals. Morris said he also wants to see the college draw in more women and minorities.

In Virginia, the ACTL also has drawn on the volunteer time of its 141 active Virginia fellows to provide free training in trial skills to legal aid and pro bono lawyers. Last year's training also drew in high school students, who served as "jurors" in a mock trial and gained insight into the practice of law.

The ACTL also sponsors regional mock-trial and moot-court competitions for law students. And it bestows national awards.

The college has bestowed its Courageous Litigator Award only fourteen times. Two of the recipients—the late Richmond trial lawyer George E. Allen Sr. and civil rights icon Oliver Hill—are Virginians, Morris said.

IN MEMORIAM

Geoffrey F. Birkhead
May 1946–September 2004
Norfolk

L. Franklin Davis
March 1925–June 2004
Accomac

Harold G. Hernly Jr.
January 1936–May 2004
Alexandria

The Honorable Henry J. Schrieberg
April 1914–October 2004
Richmond

Edwin A. Shalloway
May 1934–September 2004
Alexandria

McDonald Wellford Jr.
February 1942–November 2004
Richmond

LOCAL & SPECIALTY BAR ELECTIONS

Fauquier County Bar Association:

Tracy Ann Gallehr, President
Whitson Winstanley Robinson, President-elect
Hanna Lee Ethel Rodriguez, Secretary
Jerome Charles Loftus, Treasurer
Susan Flournoy Pierce, Conference Representative

Fredericksburg Area Bar Association:

Thomas Yates Savage, President
Tracy Ann Houck, President-elect
Brenda Lee Greene, Secretary
Albert Henry Jacoby, Jr., Treasurer
Andrea Smith McCauley, Assistant Secretary
Barry Jay Waldman, Assistant Treasurer
Thomas Yates Savage, Conference Representative

Prince William County Bar Association:

Tracy Calvin Hudson, President
William Michael Phipps, President-elect
Dennis Robert Carluzzo, Secretary
Robert Paul Coleman, Treasurer
Gifford Ray Hampshire, Conference Representative

Virginia Association Of Criminal Defense Lawyers:

Esther Jeanette Windmueller, President
John Hunter Cobb, Jr., President-elect
Charles Thomas Turbeville, Jr., Secretary
Richard Ernest Gardiner, Treasurer

Mediation Programs To Be Held in March

In recognition of March as Mediation Month in Virginia, several programs will promote alternative dispute resolution throughout the commonwealth next month.

The programs, which are supported or sponsored by the Council of the Virginia ADR Joint Committee, will include:

- A Mediation Competition, February 26-27 at Regent School of Law, and ADR Joint Committee members are needed to serve as judges and mediators.
- A Peer Mediation Conference at George Mason University on March 15 for elementary students and March 16 for middle school students. ADR Joint Committee members are needed to support these programs and serve as mediators.
- Public information booths at courthouses statewide.
- Programs for caregivers, guardians ad litem and other professionals who provide services to seniors in Richmond, Hampton Roads and Northern Virginia.
- A continuing legal education program, "Skills and Strategies for Lawyers Representing Clients in Mediation" on May 12 in Richmond and May 13 in Northern Virginia . The course is offered in collaboration with Virginia CLE and the Virginia Mediation Network

To assist with the programs, call Marge Bleiweis at (703) 876-5247 or email her at **mlbleiweis@fcps.edu**.
March was designated as Mediation Month by Virginia Governor Mark Warner.

Supreme Court Training Session Offered for Skilled Lawyers Who Defend Indigents in Criminal Cases; Basic-Skills Course Set by Indigent Defense Commission

Virginia lawyers who want to represent indigent criminal defendants will have an unprecedented choice of training programs in the near future—before July 1, when new, tougher requirements for qualifying to be on the court-appointed list go into effect.

An all-day program of Advanced Skills for the Experienced Practitioner, taught by nationally recognized experts from Virginia and elsewhere, will take place May 20 in two locations. The live program will be held at the Richmond Convention Center, with a simulcast to the Southwest Virginia Higher Education Center in Abingdon. The program will carry approximately six hours of continuing education credits. Details, such as cost, are still being worked out.

The Advanced Skills program is a creation of Chief Justice Leroy R. Hassell Sr. and the Supreme Court of Virginia, with support from the Virginia State Bar.

A more basic two-day CLE program—Indigent Defense Certification Training, designed for less-experienced lawyers who want to be on the list that judges draw from for court-appointed criminal defense—will be offered several times at different locations from March 28 through May 24 by the Virginia Indigent Defense Commission. No charge will be made for the training; attendance will be limited to fifty or fewer attorneys for each program.

Both the advanced and basic training programs are available to public defenders and to private practitioners who want to qualify as court-appointed counsel to indigents.

Virginia Code § 19.2-163.03 sets out the criteria that lawyers of different experience levels must meet as of July 1, 2005, to receive court-appointed misdemeanor and felony cases in adult and juvenile courts. The criteria require specified hours of approved Mandatory CLE credit and experience as counsel or co-counsel in criminal trials.

The new standards and training programs are responses to ongoing criticism that Virginia's indigent defense system inadequately protects the rights of people charged with crimes.

Indigent Defense Certification Training

The basic certification training was developed by the Indigent Defense Commission, which the General Assembly created last year to take the place of the Virginia Public Defender Commission. The Indigent Defense Commission is charged with supporting, training and overseeing all attorneys who defend indigent people charged with jailable crimes.

The commission is charged with monitoring the quality of court-appointed lawyers, keeping a list of qualified attorneys that courts can draw from, and establishing standards of practice.

Topics covered during the two-day course include client interviewing; pretrial strategies; and handling misdemeanor, traffic and felony cases in general district and circuit courts. Topics also include the function of juvenile court, the role of the juvenile defender, and the juvenile court adjudicatory and disposition process.

By statute, the certification programs are required to provide six hours of misdemeanor/felony training and four hours of juvenile defense training. The commission has applied for that CLE credit.
Locations and times for the certification training were still being worked out at press time. The schedule so far is:

March 28–29 (live)—Fredericksburg, at the Holiday Inn Select, 2801 Plank Road. This session is cosponsored by the Virginia Association of Criminal Defense Lawyers.

April 11–12 (live)—Virginia Beach.

April 18–19 (live)—Richmond.

April 25–26 (live plus video)—Radford.

May 9–10 (live plus video)—Manassas.

May 23–24 (live plus video)—Bristol.

Further details and registration information will be posted at the Indigent Defense Commission's Web site, **www.indigentdefense.virginia.gov**.

Advanced Skills

After reviewing information and concerns about the quality of representation of indigent defendants, the Chief Justice decided to focus on providing training to more experienced lawyers. He assembled a group—the Indigent DefenseTraining Initiative—to develop the project for the Supreme Court. [See sidebar, page 17.]

In addition to expressing concerns about low pay, public defenders and court-appointed lawyers said better training needs to be in place. "Some voiced concerns that the level of training for those who represent indigent defendants has not been consistent from year to year," said Virginia Court of Appeals Judge Walter S. Felton Jr., who chairs the training initiative.

Hassell's discussions with the judiciary and criminal bar convinced him that an important factor in quality representations is "to assure that attorneys … have trial skills beyond the basic level, that these attorneys understand the unique situations involving the indigent accused, and that they have access to training to provide and hone those skills," Felton said.

Topics for the May 20 program will include use of experts; working with DNA; current issues in scientific evidence; carrying a case from trial to appellate court; using demonstrative evidence; and hearsay and confrontation issues raised by the Crawford case.

Felton said Hassell hopes to provide ongoing advanced defense training in different parts of the state.

VSB President-elect Phillip V. Anderson, a member of the organizing group for the advanced training project, said, "The VSB is pleased to be a part of this important training initiative for Virginia lawyers who represent indigent people charged with crimes. Better training will improve skills, which will strengthen the quality of representation and ultimately result in justice for all Virginians," he said.

For details on the Advanced Skills programs, watch the Virginia State Bar Web site—**www.vsb.org**—beginning in late March. A brochure also will be mailed.

Indigent Defense Draws Critics—Initiatives Announced by Court and Bar Groups

The Supreme Court of Virginia, with its Indigent Defense Training Initiative, joins a growing number of groups and projects that are attempting to improve Virginia's system for defending criminal defendants who do not have money to hire a lawyer.

Chief Justice Leroy R. Hassell Sr. directed the Court's initiative toward enhancing training for lawyers experienced in court-appointed or public defender work, while the General Assembly's Virginia Indigent Defense Commission developed courses for attorneys who need basic skills training.

Both programs will support the new criteria for qualifying to be on Virginia's court-appointed list—criteria that go into effect July 1.

Under the chairmanship of Virginia Court of Appeals Judge Walter S. Felton Jr., the Court's training initiative chose for its first two venues a major city and a rural region. Advanced Skills for the Experienced Practitioner will be presented May 20, live at the Richmond Convention Center, with a simulcast to the Southwest Virginia Higher Education Center in Abingdon. (See accompanying story, page 16.)

The course is financially supported by the Virginia State Bar.

A series of reports and recent editorials in Virginia-circulated newspapers have drawn attention to serious flaws in indigent criminal representation. Among the groups that have taken on projects to try to remedy the problems are:

- The Virginia Association of Criminal Defense Lawyers, which, with a grant from the Virginia Law Foundation, is cosponsoring some of the training provided by the Indigent Defense Commission.
- The Virginia Bar Association, which last week released a report on Virginia's indigent defense system that concluded: "The state of indigent defense in Virginia has long been, and continues to be, deplorable . . . . That fact is well-known to all three branches of state government . . . . Drastic remedial action to increase compensation for court-appointed counsel and resources for [public defenders] is necessary . . . . Increases in compensation and resources must be accompanied by quality controls."
- The Virginia Crime Commission, which is in the midst of a multiyear study of the prosecutorial system.
- The Virginia Indigent Defense Coalition, sponsored by the Virginia Trial Lawyers Association Foundation and several other groups, which provides education and brings together different constituencies on indigent-defense issues.
- The Virginia Indigent Defense Commission, created by the General Assembly to train, certify and oversee public and private lawyers who defend indigents in criminal cases.
- The Virginia State Bar's Criminal Law Section, which is monitoring legislation that bears on indigent defense issues.
- The VSB's Task Force on Indigent Defense, which issued a list of needed reforms that was endorsed by the VSB Council.
- The Virginia Women Attorneys Association, which endorsed legislation that would increase court-appointed attorney fees by 50 percent. The legislation was pending before the General Assembly at press time.

Clients' Protection Fund Board Petitions Paid

On December 3, 2004, the Clients' Protection Fund Board approved payments to twenty-eight clients. The matters involved eleven attorneys.

Attorney/Location	Amount Paid	Type of Case
Andrea K. Amy-Pressey, Williamsburg	$400.00	Unearned Retainer/Bankruptcy
Andrea K. Amy-Pressey, Williamsburg	$1,000.00	Unearned Retainer/Personal injury
Margaret L. McLeod Cain, Charlottesville	$3,000.00	Unearned Retainer/Child custody
John Michael DiJoseph, Arlington	$1,500.00	Unearned Retainer/Employment discrimination case
John Kelley Dixon, III, Richmond	$125.00	Unearned Retainer/Divorce
Roger Cory Hinde, Richmond	$1,500.00	Unearned Retainer/Driving record matter
Roger Cory Hinde, Richmond	$3,500.00	Unearned Retainer/Traffic violation
Roger Cory Hinde, Richmond	$750.00	Unearned Retainer/Restoration of son's driving license
J. Daniel Kilgore, Wise	$600.00	Unearned Retainer/Bankruptcy
J. Daniel Kilgore, Wise	$600.00	Unearned Retainer/Bankruptcy
George E. Leedom, Richmond	$464.00	Unearned Retainer/Divorce
George E. Leedom, Richmond	$900.00	Unearned Retainer/Child custody
Beverly M. Murray, Petersburg	$3,150.00	Unearned Retainer/Child custody
Beverly M. Murray, Petersburg	$1,400.00	Unearned Retainer/Divorce
Beverly M. Murray, Petersburg	$3,500.00	Unearned Retainer/Employment matter
Beverly M. Murray, Petersburg	$600.00	Unearned Retainer/Criminal matter
Beverly M. Murray, Petersburg	$1,400.00	Unearned Retainer/Civil matter
Beverly M. Murray, Petersburg	$700.00	Unearned Retainer/Employee benefit dispute
Beverly M. Murray, Petersburg	$250.00	Unearned Retainer/Employment matter
John H. Partridge, Herndon	$1,000.00	Unearned Retainer/Collection matter
John H. Partridge, Herndon	$1,300.00	Unearned Retainer/Contractor dispute
John H. Partridge, Herndon	$3,000.00	Unearned Retainer/Dental malpractice case
John H. Partridge, Herndon	$2,000.00	Unearned Retainer/Divorce/Immigration matter
John H. Partridge, Herndon	$7,500.00	Unearned Retainer/Employment discrimination
John H. Partridge, Herndon	$4,500.00	Unearned Retainer/Employment discrimination
Robert M. Short, Vienna	$9,700.00	Unearned Retainer/Personal injury claim
Patricia Maria Wright, Portsmouth	$910.00	Unearned Retainer/Bankruptcy
Patricia Maria Wright, Portsmouth	$750.00	Unearned Retainer/Estate matter
Total	**$55,999.00**	

Family Law Today: Dynamic, Complex Cases Challenge Practitioners

by Edward D. Barnes

The practice of family law becomes more challenging every day. It is a dynamic and rapidly developing area that requires the practitioner to be aware of ever-changing law. In Virginia, between September 2003 and September 2004, there were 151 Court of Appeals cases and two Supreme Court cases that involved family law issues.

The Court of Appeals decision in *Smith v. Smith*, 41 Va. App. 742, 589 S.E.2d 439 (2003), is just one example of how family law evolves. *Virginia Code* § 20-109.1 allows a court to affirm, ratify and incorporate a property settlement agreement into the parties' final decree of divorce. The agreement then becomes "enforceable in the same manner as any provision of such decree." However, it remained unclear what effect merger had on a marital agreement. Before the decision in *Smith*, the debate among family law attorneys centered around the following question: If a property settlement agreement was merged into a final decree, did it become subject to modification by a court, or did the provisions of the agreement remain in effect despite later statutory amendments that would alter the parties' obligations under the agreement? The parties in *Smith* were divorced in 1990 and their property settlement agreement stated that spousal support would end only in the events of the wife's death, the husband's death or the wife's remarriage. The final decree affirmed, ratified and incorporated the agreement. The husband petitioned to terminate his support obligation in 2001 after statutory amendments allowed for the termination of support upon cohabitation. The husband argued that his wife was living with another person, and therefore his support obligation should end. The trial court terminated the husband's support obligation, explaining that "the agreement ceased to exist as a separate contract immune from court interference." The Court of Appeals reversed, and said that merger "prescribes the methods of enforcing entitlements created by contract." However, merger does not make a contract subject to judicial modification.

Likewise, in *Newman v. Newman*, 42 Va. App. 557, 593 S.E.2d 553 (2004), the Court of Appeals held that the trial court could not modify or terminate the husband's support obligation because it was contained in a consent decree. The court held that "an agreement setting the amount of spousal support—embodied in a consent decree signed by counsel

Family law issues are often intertwined with issues related to criminal law, tax law, estate planning and elder law.

on behalf of the respective clients—qualifies as a stipulation or contract under *Code* § 20-109(C)." Therefore, the terms cannot be rewritten by the courts. The court order was held to be a nonmodifiable contract. So, in *Smith*, the husband's spousal support obligation remained nonmodifiable by the court because it was contained in a property settlement agreement that was incorporated into the par-

continued on following page

ties' final decree; and in *Newman*, the husband's spousal support obligation was non-modifiable by the court because it was contained in a consent order negotiated by the parties.

The family law practitioner must be knowledgeable about the current status not only of family law, but also of many other practice areas. Family law issues are often intertwined with issues related to criminal law, tax law, estate planning and elder law. Brian M. Hirsch's article addresses insurance issues that arise in family law cases.

Family law also involves a variety of practical and strategic solutions that require the expertise of a family law attorney. Andrea Stiles's article addresses practical issues that arise when the parties have decided to separate, but neither wants to leave the house. Shelly James's article explores the court's power to deal with the day-to-day lives of parties by entering orders addressing school placement, the apportionment of educational expenses and other issues related to the education of the parties' children.

Virginia courts and the legislature are constantly facing new family law issues. Recent developments in other states concerning same-sex marriages and same-sex unions led to the passage here of House Bill 751 in 2004. This bill added *Virginia Code* § 20-45.3, which provides that: "[a] civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable." As evidenced by House Bill 751, family law practitioners must deal continually with new issues. In her article, Lynne Marie Kohm discusses the state of the law on marriage.

These are just a few of the subject areas that family law attorneys face on a daily basis. If you are interested in this exciting area of the law, we urge you to join the Family Law Section of the Virginia State Bar. The Family Law Section is the fourth largest section of the VSB. As a member, you will receive the *Family Law News* on recent trends in family law. The section also sponsors continuing legal education programs. The annual Family Law Seminar is held in October, and the Advanced Family Law Seminar is held in May. The section also sponsors a joint seminar with the Criminal Law Section in June and another joint seminar in January with the American Academy of Matrimonial Lawyers. For more information, please visit the Virginia State Bar's Web site at *www.vsb.org* and the new Family Law Section's Web site at **http://www.vsb.org/sections/fa/index.htm**.

Edward D. Barnes is founder and CEO of The Barnes Law Firm P.C. He is chair of the Board of Governors of the Virginia State Bar Family Law Section; a fellow of the American Academy of Matrimonial Lawyers (Chicago); a fellow of the International Academy of Matrimonial Lawyers (London); past president of the Metro Richmond Family Law Bar Association; and past president of the Chesterfield-Colonial Heights Bar Association. He recently served on a regional committee of judges and lawyers to promulgate guidelines for handling family law matters in the Richmond, Chesterfield and Henrico Circuit Courts.

The State of Marriage in America —and in Virginia

by Lynne Marie Kohm

You are a lawyer—you may even be a family law attorney. Can you explain the state of marriage today in America? Many lawyers ask themselves that question. Few people are able to follow changes that have happened at near-breakneck speed over the past decade.

Marriage in America has been within the domain of the government for the last several hundred years. Until about ten years ago, marriage was state regulated and inherently (if not statutorily) defined as the legally protected commitment between one man and one woman. Vast changes have occurred in American law and culture since then. The perplexity started in Hawaii in 1993. Several same-sex couples applied for marriage licenses on the grounds that Hawaii's constitution guaranteed liberties to all, regardless of sex.[1] The plaintiffs claimed discrimination on the basis of "sex," which they defined as sexual orientation rather than gender. Hawaii courts and commissions, the legislature and the Hawaiian people wrestled for five years over the issue, and finally amended the state constitution to define marriage as the legally sanctioned relationship between one man and one woman. A new statutory code provided for certain benefits to be afforded to domestic partners.[2]

Alaska became the next forum. In 1998, when litigation was about to begin, Alaskans beat litigators to the punch by passing a state constitutional amendment that, again, defined marriage as the legally sanctioned relationship between a man and a woman. From there, the action moved to Nebraska, where voters passed a similar amendment in record numbers. Nevada followed, and by 1999 four states had passed marriage amendments.

During all these events, federal winds began to blow. In 1966, Congress passed and President Bill Clinton signed into law the Defense of Marriage Act (DOMA), which allows states to decide for themselves the legal definition of marriage and guarantees that no state has to honor the marriage of another state against the forum state's public policy.[3] This seemed sensible in light of what had been happening in the western United States.

Following the Federal DOMA, states passed their own so-called state or mini-DOMAs. Soon, thirty-nine states had their own acts in defense of marriage.[4]

Surveys report that Virginians believe equal liberties ought to be available for all, regardless of sexual orientation.

Then litigation moved to Vermont. In the 1999 case of *Baker v. Vermont,* several same-sex couples filed a successful claim similar to that filed in Hawaii. But *Baker* was based on the Vermont constitution's "common benefits" clause. The court ordered the legislature to create a parallel marriage statute for same-sex couples.[5] This litigation was intriguing. In 1999 the Vermont legislature enacted 15 Vt. Stat. ch. 1 sec. 8, which limited marriage to a man and a woman. In the wake of *Baker*, the Vermont legislature was forced to establish a new legal relationship called a civil union.[6] Civil unions could be entered into and dissolved in Vermont for Vermont citizens. These unions were thought to be a step above domestic partnerships, and on a parallel track with marriage. But those who entered into civil unions in Vermont found their unions were not necessarily valid in other states.[7]

In 2003, Massachusetts became the forum for same-sex litigation. Again, several same-sex couples petitioned the court to be granted marriage licenses based on the state's constitution. The highest court in Massachusetts wrestled with its own constitution and with emerging international trends and, in a 4 to 3 decision, ordered the state legislature to guarantee nothing short of full and complete legal marriage to same sex-couples who choose marriage.[8] The legislature tried unsuccessfully to establish a rational basis for marriage between a man and a woman only. Today, Massachusetts is the only state that recognizes a marriage between two people of the same sex. The legislature has drafted a proposal that would amend the state constitution to define marriage as between a man and a woman and create a parallel civil union track, but the legislation must pass the legislature twice and cannot be placed before voters until 2006.

States are divided over how to receive civil unions and Massachusetts same-sex marriages. This conundrum arises under the United States Constitution's Full Faith and Credit Clause, which requires states to give full honor and credit to laws of all other states. The only exception would be when a state has an already existing strong public policy against the behavior sanctioned by another state's law.

Virginia saw the ramifications of the conflicts of these laws in the recent *Miller-Jenkins* case heard in Fredericksburg. The court ruled that a Vermont civil union has no bearing on Virginia law. The court viewed the incidents of the civil union not as the incidents of marriage but as a pure custody issue, and awarded full custody to the natural mother of the child, disregarding the civil union.[9] The Vermont judge ruled conversely and held the Virginia litigant in contempt.

The 2004 Marriage Protection Act resolution and the Affirmation of Marriage Act, signed into law by Governor Mark Warner, denies legal recognition in Virginia to all same-sex or civil unions.[10]

Surveys report that Virginians believe equal liberties ought to be available for all, regardless of sexual orientation. Virginians also believe that equality does not exclude the regulation of marriage as between one man and one woman. Much of this thinking appears to be based on the concept that a child's best interests are served by having a mother and father married to each other.

Furthermore, all these changes are happening in a global context. The Netherlands has strong same-sex marriage legislation, as does Belgium, Sweden and several other European countries, most recently Spain. Canada likewise has judicially established same-sex marriage recognition. All these nations, however, place certain limits on same-sex relationships. They control or restrict parenting in ways much more restrictive than those applied to marriage between a man and a woman who wish to build a family.[11]

An attempt to establish marriage as a legal union between one man and one woman on a federal level failed this summer, when the proposed Federal Marriage Amendment (FMA) was declined for a vote by the United States Congress.

In the November 2004 elections, voters in eleven states easily passed marriage-defining constitutional amendments. Seventeen states now have amendments that define marriage as between one man and one woman: Alaska, Arkansas, Georgia, Hawaii, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon and Utah. California was set to implement comprehensive benefits to same-sex domestic partners, but that law is currently in litigation in the California courts, as it appears to collide

with the fact that the state also has a comprehensive and defining marriage law which limits marriage and its benefits to legal relationships consisting of one man and one woman. Finally, the American Bar Association Family Law Section has issued a white paper in support of same sex marriage trends, and the ABA has opposed the Federal Marriage Amendment.

What ought a Virginia lawyer look for in the future?

- Expect that more states will move toward constitutional amendments.
- Pay attention to what will happen with the proposed Federal Marriage Amendment. Congress may move away from interfering with the rights of states to regulate marriage. Or momentum for the amendment might build as federal lawmakers look at how states stand on the issue. Challenges to DOMA in state and federal courts may work to hasten FMA progress. Currently, challenges are pending in eleven states (California, Connecticut, Florida, Indiana, Maryland, Nebraska, New Jersey, New York, Oregon and Washington).
- The judiciary and the legislature will continue to struggle over the issue. After several months in court, Louisiana just recently settled its marriage amendment litigation in favor of placing the affirmed amendment permanently in Louisiana's constitution. Ohio remains in litigation over the constitutionality of its marriage amendment. As DOMA litigations are ruled on, other strategies will take shape. Florida courts recently ruled to uphold that state's DOMA in favor of marriage between a man and a woman.
- Look for a case to come before the U.S. Supreme Court. The high Court has already denied *cert* on a review of the Massachusetts ruling, but the Court has federalized so much family law over the past one hundred years[12] that states have increasing difficulty regulating family law matters. The Supreme Court might still be reluctant, however, to decide such a critical family law issue that so many Americans have decided on a state level—even in the wake of the Court's landmark decision invalidating a state sodomy prohibition in *Lawrence v. Texas* in 2003.[13]

Virginia seems solidly placed in the camp of limiting marriage to one man and one woman. Its constitutionality rests on judicial authority, but there is a constitutional amendment now being considered by the General Assembly.

Virginia attorneys—and particularly family law attorneys—need to understand court rulings and legislation on marriage. Additional sources include **www.stateline.org** for a fifty-state listing of marriage laws and information provided by the Institute of Marriage and Public Policy at **www.imapp.org**. ⚖

Endnotes:

1 The case originally filed was *Behr v. Lewin*, 852 P.2d 44 (1993).

2 This is also known as the Hawaii Reciprocal Benefits Act.

3 P.L. 104-199, *28 USCS § 1738C.*

4 States that have mini DOMAs include Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington and West Virginia.

5 *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

6 VT. STAT. ANN. tit. 15 § 1204 (Supp. 2004).

7 *Rosengarten v. Downes*, 71 Conn. App. 372; 802 A.2d 170; 2002 Conn. App. LEXIS 407 (where the Connecticut Court of Appeals affirmed a lower court's dismissal of case holding that because neither Connecticut nor Vermont recognized civil unions of out-of-state residents, there was no factual dispute that would require an evidentiary hearing; because the litigants were not Vermont residents, Vermont did not have jurisdiction over their petition for dissolution. Without remedy in their home state or in the state granting them a civil union, the civil union litigants were truly faced with "till death do us part"). See also *Burns v. Burns*, 560 S.E. 2d 47 (Ga. Ct. App. 2002)(ruling that the Georgia DOMA precluded a Georgia court from recognizing a civil union as a marriage when offered as a stability factor in custody).

8 *Goodridge v. Dept. of Pub. Health*, 798 N.E. 2d 941 (2003).

9 *Lisa Miller-Jenkins v. Janet Miller-Jenkins*, No. CH04-280 (Frederick Co., Va., Cir. Ct.) (where Virginia judge awards sole custody of child to Lisa Miller-Jenkins, the child's biological mother, despite a previous temporary order given by Vermont judge that awarded custody to Lisa and visitation rights to Janet). *See also* Andrew Martel, *Vermont Ruling Will Not Change Child Custody*, WINCHESTER STAR, Dec. 1, 2004 discussing the Miller-Jenkins case.

10 *See* **http://leg1.state.va.us/cgi-bin/legp504.exe?041+ful+HB751**.

11 *See generally*, Lynn D. Wardle, *The Forest and The Trees: Issues in Domestic and International Adoption*, available at **http://www.lawrights.asn.au/docs/wardle2001.pdf** (2001).

12 *See* David Wagner, *The Family and American Constitutional Law*, 1 LIFE, LIBERTY & FAM. 145 (1994).

13 123 S. Ct. 2472 (2003). In fact, in December of 2004 the Supreme Court denied *cert* on an appeal of *Goodridge*.

Lynne Marie Kohm is the John Brown McCarty Professor of Family Law at Regent University's School of Law. Her teaching and scholarship focus on issues surrounding women, children, marriage and families, and she serves as the law school liaison for the Virginia State Bar Family Law Section Board of Governors.

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How Can I Miss You If You Won't Go Away?

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Methods for Achieving a "Separation" When Neither Spouse Will Leave Home

by Andrea R. Stiles

Increasingly, I hear my fellow family law practitioners voicing concerns about how difficult it has become to have a spouse ordered out of the marital residence when there is not a showing of actual or threatened physical violence. To complicate things, it seems more and more couples are refusing to separate because of child custody or economic issues.

Here is a commonplace scenario:

Linda, your new client, sits in front of you trembling uncontrollably. Tears are streaming from her eyes and she begs for your help as she describes the torment she suffers daily as a result of her husband Don's emotional and financial abuse. Don is self-employed and not earning any meaningful income. He refuses to get a "real job." The bill collectors are calling incessantly and foreclosure proceedings on the house have begun; but as usual, Don will con a friend to "borrow" the money to keep the house from being foreclosed. Linda is a schoolteacher and uses her meager income to buy food, clothe the parties' two children, ages five and seven, and make her car payment. Don stopped paying the utility bills, resulting in the utilities being turned off and he stopped paying for day care—leaving Linda responsible for the family's daily living expenses.

Linda can't make it financially and wants her husband out of the house. Don refuses to leave. Both parties want custody of the children and neither party wants to pay child or spousal support. Both parties believe that the spouse leaving home will lose leverage in a custody battle. Neither party will budge, and each is doing his and her best to make life miserable for the other.

Your client is emotionally and physically disintegrating as a result of the marital stress. Recently, she was hospitalized for stress related to the marital discord. Antidepressants and antianxiety medications have been prescribed. Linda tells you that the children are not doing well and that their school work is being negatively

affected as a result of the arguing and tension in the home. Don keeps the kids up late and interferes with their homework time. There have not been any "intentional" acts of physical violence between the parties, but Don "accidentally" smashed the side door of Linda's car with his vehicle after an argument over who was going to bring the kids home from day care.

These parties need a divorce. You file a Bill of Complaint for Divorce on the grounds of cruelty and constructive desertion, and petition the court to award Linda exclusive use and possession of the marital residence.

Pursuant to *Va. Code* § 20-103 (A) (vi), the court has discretion to award a spouse exclusive use and possession of the family residence during the pendency of the suit. Prior to 1994 amendments creating separate subparts for *Virginia Code* § 20-103, this code section required a party to show reasonable apprehension of physical harm as a prerequisite for obtaining exclusive use of the home. In 1994, the statute was revised and eliminated this stringent standard. The decision to award exclusive possession of the home rests solely within the trial court's broad discretion. The code section does not require any specific type of evidence in order to obtain relief.

An instructive case with substantially similar facts to our hypothetical is *Smith v. Smith*, CH 04-264, Spotsylvania Circuit Court (2004). After hearing the evidence, the trial court held:

> The parties are not separated . . . They live together with their two children at their marital home in Spotsylvania County. Simply put, Mrs. Smith wants Mr. Smith removed from the home because of the cruelty he allegedly inflicts on her, which is the basis of the divorce itself. Mrs. Smith offers the testimony of Dr. William A. Reese, her treating physician, in support of her claim that Mr. Smith's cruelty is adversely affecting her health. Dr. Reese testified at depositions that Mrs. Smith suffered from "acute stress, acute anxiety" directly related "to the problems she's having with her relationship with her husband now as they are going through this divorce process; stress as it relates to the fact that they're in the same house, that they're in intimate contact with each other through this process." He prescribed medication for her "to control anxiety" . . .
>
> [A] next door neighbor testified that she was "scared" of Mr. Smith. She offered no concrete examples of frightening behavior and gave no reason for her feeling other than her observation that he seemed to be "very tense," "very argumentative," "has mood swings," "does his own thing," and "doesn't pay attention to the kids or [Mrs. Smith]." She said that Mr. Smith was putting Mrs. Smith through a lot of stress by "living in that house." "[He] needs to move out or he needs to allow [Mrs. Smith] to move out with the kids," she opined.
>
> Mrs. Smith described Mr. Smith's behavior as "emotional abuse." She said "it dates back to even before we got married." She said that he badgered her and used manipulative tactics that some people would refer to as "bullying." The emotional abuse progressed as the years went on, she continued. She described his financial problems and his pattern of inattentiveness toward her and the children. She also testified about an incident that occurred on April 1, 2004, at the children's day-care center. That occurrence gave rise to a temporary protective order that was dismissed after a hearing in juvenile court.

The decision to award exclusive possession of the home rests solely within the trial court's broad discretion.

In the early cases, cruelty was defined as violence or conduct that caused reasonable apprehension of bodily harm. The definition was later expanded to include conduct that caused serious nervous or mental illness. Most recently, it is described more broadly as any conduct that renders cohabitation unsafe; that involves danger of life, limb or health; or that is so abusive as to imply "malice," giving rise to endangerment of life or health. See *Sollie v. Sollie*, 202 Va. 855 (1961). Thus, the modern view is that violence and apprehension of bodily harm are not indispensable ingredients of cruelty. Mental anguish, repeated and unrelenting neglect and humiliation may be as bad as physical wounds and bruises, and may be visited upon a spouse in such a degree as to amount to cruelty. *Ringgold v. Ringgold*, 128 Va. 485 (1920); *see* also Swisher, Diehl and Cattrell, *Virginia Family Law*, (2ND Ed.) § 7-3(a).

On the other hand, financial irresponsibility and difficulties arising from extravagance do not amount to legal cruelty. *Upchurch v. Upchurch*, 194 Va. 990 (1953). A single act of physical cruelty does not suffice unless it is so severe and atrocious as to endanger life or health or cause reasonable apprehension of future violence. *DeMott v. DeMott*, 198 Va. 22 (1956). Further, austerity of temper, petulance of manner, rudeness, want of civil attention, or even occasional sallies of passion that do not threaten harm, although they may be high offenses against morality, do not amount to legal cruelty. *Beers v. Beers*, 198 Va. 682 (1957).

Considering these principles and their application here, it is possible that in due course, during the litigation, cruelty can be established by corroborated evidence as alleged in the bill of complaint. At this juncture, however, the court finds the evidence insufficient.

while the family is intact. It follows that Mrs. Smith's requests for such *pendente lite* relief must also be denied.

After a ruling like this, you can expect the trial court to announce: "The court is not in the business of breaking up marriages. If it gets bad enough, someone will leave."

. . . by the time the client comes to you for help, if the one-year period has not already passed, most divorcing spouses are unable to remain in the same home for an entire year before seeking relief.

It is a drastic step to oust a spouse/parent from the marital home *pendente lite*. Exigent circumstances must exist—violence, threats of violence, acts that create genuine danger or reasonable apprehension of harm—for a court to take such action before all the evidence has been developed and presented. This is especially true where, as here, a lower court has already heard testimony about the alleged act of violence (the day-care center incident) and declined to grant a protective order.

The fact that Mrs. Smith is suffering from stress and anxiety related to her living with Mr. Smith and going through a divorce, as explained by Dr. Reese, is an inadequate basis for a court to remove Mr. Smith from the home. All contested divorces are stressful. Anecdotal evidence indicates that divorce is the most stressful event in a person's life except the death of a close relative. Courts would be on a slippery slope if they ousted a spouse from the marital home upon testimony that the other spouse finds the arrangement stressful.

This court has consistently refused to make awards of custody and support

While *Virginia Code* § 20-103 provides courts with the power to separate the parties, courts are hesitant to do so unless they feel circumstances within the house pose a significant threat to a party or the children. If the court believes the marital discord boils down to economic disagreements or simply an inability to get along with each other, your client will probably not succeed on a motion for exclusive use of the marital home. So how are you going to get your client divorced if neither party is willing to move out of the house and you just lost your *pendente lite* motion?

The Long, Hard Road to Divorce—Separation under the Same Roof

Virginia Code § 20-91(9)(a) provides that a divorce may be decreed upon application by either party after the "husband and wife have lived separate and apart without any cohabitation and without interruption for one year." The intent to live separate and apart does not need to be mutual, but must be possessed by one party.[1]

It is possible to live separate and apart under the same roof for purposes of obtaining a "no fault" divorce under *Virginia. Code* § 20-91(9)(a). In *Bchara v. Bchara*,[2] the Court of Appeals affirmed the trial court's ruling that the wife had established that the parties lived separate and apart even though they resided in the same home. The wife established that the following events occurred more than a year before the hearing requesting that the final decree be entered:

- After discovering a video tape of her husband having sex with another woman, the wife moved all of her husband's personal effects into the guest bedroom where he slept.
- The wife announced to her husband that she intended to live separate and apart.
- The wife announced to friends and neighbors that she and her husband were no longer a couple.
- The wife stopped depositing money in the joint account.
- The wife ceased having sexual intercourse with her husband.
- The wife's friend who visited weekly testified that she observed the parties living separate and apart in the home.
- The wife stopped accompanying her husband to church and family functions.
- The husband openly continued a sexual relationship with another woman.

The husband's evidence in opposition to entry of the decree—that his wife bought food for the family and cooked for him—did not persuade the court that the parties were still living together as a couple. "Continuing to share food and keep a clean house" are not behaviors that, as a matter of law, require a finding that the parties were living together.[3]

If your client has a number of factors that point toward living separately under the same roof, you may be able to bifurcate the divorce and have a final decree entered reserving equitable distribution. One way to start the clock ticking and develop evidence is to have your client deliver a letter to the other spouse citing your client's intention to live separate and apart under the same roof as of a date certain.

Realistically, however, by the time the client comes to you for help, if the one-year period has not already passed, most divorcing spouses are unable to remain in the same home for an entire year before seeking relief. There is simply too much tension, stress and unhappiness. You may need to search for other options.

Fault-Ground Divorces

A spouse may immediately obtain a final decree of divorce upon establishing adultery, sodomy or buggery committed outside the marriage.[4] If any of these grounds exists, no waiting period is required.

A bed-and-board decree may be obtained on the grounds of cruelty, reasonable apprehension of bodily hurt, willful desertion or abandonment.[5] The purpose of a bed-and- board decree is to decree that the parties shall be perpetually separated; however, neither can remarry until such time as a final decree of divorce is entered.

Obtaining relief on any fault ground requires substantial evidence and requires more of the court's time than typically allotted for a *pendente lite* hearing.[6] You will need to request adequate time for the trial court to hear testimony of the parties and multiple witnesses.

Bed-and-Board Decrees—Cruelty or Reasonable Apprehension of Bodily Hurt

Cruelty can be established by any conduct that makes continuation of the marriage unsafe or intolerable.[7] Cruelty does not have to take the form of physical violence. Purely verbal conduct can constitute cruelty.

> [T]here may be cases in which the husband, without violence, actual or threatened, may render the marriage state impossible to be endured. There may be angry words, coarse and abusive language, humiliating insults, and annoyances in all forms that malice can suggest which may as effectually endanger life or health as personal violence, and which, therefore, would afford grounds for relief by the court. But it is obvious that what merely wounds the feelings without being accompanied by actual bodily injury or actual menace—mere austerity of temper, petulance or manner, rudeness of language, want of civil attention and accommodation, or even occasional sallies of passion that do not threaten harm, although they be high offenses against morality in the married state, does not amount to legal cruelty. *Latham v. Latham*, 71 Va. (30 Gratt.) 307, 321 (1878).

Verbal cruelty must be extreme. In *Baytop v. Baytop*, 199 Va. 388, 100 S.E. 2d 14 (1957) the Supreme Court of Virginia recognized that there may be a cause of action for cruelty where there is no evidence of physical abuse or apprehension of bodily hurt. In *Ringgold v. Ringgold*, 128 Va. 485, 104 S.E. 836 (1920) the court held:

> The husband has never offered any physical abuse or violence, and the wife has not claimed to have ever had any reason to apprehend bodily hurt. But violence and apprehension of bodily hurt, though nearly always appearing in suits for divorce on the ground of cruelty, are not indispensable ingredients of that offense. The authorities generally, including those in our own state, wisely allow for exceptional cases in which there may be extreme cruelty without the slightest violence. *Mental anguish, repeated and unrelenting neglect and humiliation, may be as bad as physical wounds and bruises, and may be visited upon an unoffending spouse in such degree as to amount to cruelty* even in the very strict sense in which that term ought always to be used in the law of divorce. (emphasis added)

Virginia has recognized that alcohol and substance abuse can be considered as factors in establishing an overall pattern of abuse sufficient to constitute cruelty. *Hoffecker v. Hoffecker*, 200 Va. 119, 104 S.E. 2d 771 (1958). But abuse of drugs or alcohol alone, will probably not warrant a finding of cruelty. *Seehorn v. Seehorn*, 7 Va. App. 375, 375 S.E. 2d 7 (1988).

Engaging in unprotected sex can provide grounds for a cruelty finding. The Virginia Court of Appeals in an unpublished decision held:

> The chancellor did not plainly err in finding husband guilty of cruelty and constructive desertion. By engaging in sexual intercourse with multiple paramours without any form of protection against sexually transmitted diseases, and then continuing to have sex with his unsuspecting wife, husband rendered "cohabitation unsafe" for cruelty purposes [*Zinkhan*, 2 Va. App. At 208, 342 S.E. 2d at 662 (citation omitted)], and palpably "intolerable" for constructive desertion purposes, Gottlieb, 19 Va. App. At 82, 448 S.E. 2d at 669 (citation omitted). To deny wife a divorce on this ground would be tantamount to placing upon her the legal duty to remain married (subject to conjugal obligations) to a man who, through numerous adulteries, put her at risk of sexually contracted diseases and whose behavior—based on his own admission—strongly suggested he would continue to do so in the future. Knowingly placing a spouse at risk of an HIV infection or some other sexual contagion is a cruelty the law does not require the innocent spouse to tolerate. *Shaffer v. Shaffer*, 2003 WL 21739039 (Va. Ct. App. Unpublished 2003).

The *Shaffer* ruling is a sign of the times. If a spouse engages in acts that threaten the health or safety of your client, you likely have a foundation for a cruelty claim.

Desertion

Desertion is the termination of matrimonial cohabitation coupled with one spouse's intent to terminate the marital relationship.[8] Desertion usually occurs in connection with a physical separation of the parties. However, desertion can occur while the parties continue to reside under the same roof. In *Jamison v. Jamison*,[9] the Virginia Court of Appeals held that intentional withdrawal of sexual contact

Separation *continued on page 36*

School Choice in Joint Custody Cases:

Tips to Help the Judge Decide

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by Shelly James

With the increased scrutiny that public schools receive today, and the increasing number of options that parents have for educating their children, disagreements between divorcing or divorced parents over where to enroll their children are likely to become more common. When parents cannot reach an agreement, they can petition the courts for resolution of the disagreement. An attorney representing such a parent is faced with a difficult task when advising the parent, because the law in Virginia does not provide clear guidance on the factors a court will consider to determine which school a child should attend.

In custody cases in general, the Virginia courts' priority is to determine what action is in the best interest of the children. The Supreme Court emphasized the importance of the best interest principle over fifty years ago in *Mullen v. Mullen,* 188 Va. 259, 269, 49 S.E.2d 349, 354 (1948), when it stated, "In Virginia, we have established the rule that the welfare of the infant is the primary, paramount, and controlling consideration of the court in all controversies between parents over the custody of their minor children. All other matters are subordinate." The Court of Appeals recently acknowledged the importance of this principle in *Brown v. Spotsylvania Dep't of Soc. Serv.*, 43 Va. App. 205, 211, 597 S.E.2d 214, 217 (2004), noting, "When addressing matters concerning the custody and care of a child, this Court's paramount consideration is the child's best interests." Therefore, in cases involving enrollment, the courts must consider which school is in the best interest of the children. However, the law in Virginia provides little guidance for the application of this standard in such cases.

As in other custody cases, *Virginia Code* §§ 20-124.2(B) and 20-124.3 prevent the courts from applying a presumption that favors the custodial parent's educational choice over the other parent's wishes. Some states have legislated a presumption in favor of the decision of the parent with primary physical custody. For example, Louisiana statute R.S. 9:335(B)(3) requires that courts presume the decisions of the "domiciliary parent," even where the parents have joint custody, are in the best interest of the child. In Virginia, the courts may not presume that the physical custodian knows which school will best meet the interests of the child.[1]

Instead, the courts must consider the general factors listed in *Code* § 20-124.3 when determining which action is in the best interest of a child. This list emphasizes factors important in determining where a child should live, but includes many factors that seem irrelevant or unimportant in determining where a child should be schooled. For example, the age and health of a parent, the child's relationship with the parent and a history of abuse, while very relevant in determining which parent should have primary physical custody, are not generally important in deciding where a child should be educated. However, some of the factors listed in the *Code* are potentially relevant.

Factors one and four of *Code* § 20-124.3, which relate to the developmental needs of a child, are obviously relevant at a basic level to determining which school a child should attend. If the child has special needs and only one school meets those needs, then the court should have a relatively easy decision. If the child is not yet five years old or needs to wait a year before attending kindergarten, then the court could decide that the child should not be enrolled in school at all.

However, most of the controversy in this area will focus on which school best meets the developmental needs of the particular child, not whether the child needs to

attend school. For this reason, an attorney attempting to litigate such a case will need to present evidence about the quality of the schools. Such evidence may include test scores of the students, Standards of Learning rates, curriculum, graduation rates, future success of graduates, parent and student testimonials, news articles, and anything else that suggests which school is "better."

Sometimes, however, the "obviously" better choice is not in the best interest of the child. For example, the Richmond Circuit Court found in a 1992 case that attending a public school in Henrico County was in the best-interests of a child, rather than attending Collegiate School, a well-regarded private school in the city.[2] This judge was convinced that the public school met a need that the private school did not. This case highlights an important aspect of the best interest standard—the courts must determine the best interests of the particular child, not children in general. Attorneys therefore should focus their evidence, where they can, on factors that relate to the particular circumstances of the case. General information should be presented, but the argument should discuss this evidence as it relates to the particular child.

Factor eight in *Code* § 20-124.3 requires that the courts consider the preference of the child, if the child is old enough to develop an informed preference. However, when deciding which school best meets the needs of a child, the court might be suspicious of a child's preference.

The final consideration listed in the *Code* section is "[s]uch other factors as the court deems necessary and proper."[3] While the appellate courts have not defined these other factors in the specific context of school choice, three Virginia Court of Appeals cases have discussed school choice when one parent is asking that support amounts be increased to pay for attendance at a particular school.

In *Solomond v. Ball*, 22 Va. App. 385, 470 S.E.2d 157 (1996), the Court of Appeals found that a trial court erred in increasing a previously ordered child support award. The appellate court mentioned several factors, "such as the availability of satisfactory public schools, the child's attendance at private school prior to the separation and divorce, the child's special emotional or physical needs, religious training, and family tradition," as elements that a trial court should consider when determining if a "demonstrated need has been shown for the child to attend private" school and determining if "there is justification for requiring a parent to pay." *Id.* at 391-92, 470 S.E.2d at 160. The Court of Appeals ruled that the increased expense was not a "change in circumstances" allowing the trial court to order the father to pay more child support than previously ordered. *Id.* at 394, 470 S.E.2d at 161.

Although listing several factors that can be helpful in determining the best interest of a child, *Solomond* occurred in the context of a petition to change an existing order, which required the mother to prove that a "change in circumstances" occurred before the court could amend the existing order. *Id.* at 392, 470 S.E.2d at 160.[4] Therefore, while *Solomond* is helpful, attorneys relying on this case should be careful that they do not argue for application of the wrong burden of proof. *Solomond*, 22 Va. App. at 394, 470 S.E.2d at 161 (reversing the trial court's finding that a change of circumstances had occurred).

Sometimes, however, the "obviously" better choice is not in the best interest of the child.

In *Ragsdale v. Ragsdale*, 30 Va. App. 283, 516 S.E.2d 698 (1999), reviewing a final divorce decree, the Court of Appeals affirmed a trial court's upward deviation from the child support guidelines, based on the tuition for private school for the parties' children. The court noted that the presumed amount of support can be rebutted by evidence regarding "the ability of each party to provide child support, the best interests of the child, the standard of living enjoyed by the family during the marriage, and other factors 'necessary to consider the equities for the parents and children.' *Code* § 20-108.1(B)." *Id.* at 295, 516 S.E.2d at 703-04. The court concluded that the guidelines' presumption was rebutted by evidence that the children attended private school before the divorce and that changing schools would unnecessarily disrupt the children's education and lives. *Id.* at 295, 516 S.E.2d at 704. The court also pointed to the children's success at the private school and the desire to "avoid the inequitable result of penalizing them as a consequence of their parents' separation and divorce." *Id.* at 296, 516 S.E.2d at 704. In *Ragsdale*, the court held, among the factors "relevant to determining whether there is a need for private education, the court may consider the child's 'attendance at private school prior to the separation and divorce' and the family's tradition." 30 Va. App. at 295, 516 S.E.2d at 704 (quoting *Solomond*, 22 Va. App. at 391, 470 S.E.2d at 160).

Again, while the opinion lists several important factors, *Ragsdale* discusses them in the context of a presumption that does not exist where the parents disagree about the place to enroll the children but not how much each parent should pay. No guidelines, legislative or otherwise, exist in Virginia establishing a presumption that children should attend a particular school or type of school.

The most recent case decided by the Court of Appeals is *Joynes v. Payne*, 36 Va. App. 401, 551 S.E.2d 10 (2001), which also involved a deviation from the child sup-

port guidelines. The *Joynes* opinion affirms the trial court's ruling, noting that a commissioner is required to consider the factors listed in *Ragsdale* when deciding if the presumptive amount of child support is rebutted. *Id.* at 424, 551 S.E.2d at 21. However, the opinion does not list the factors involved in the case and does not discuss the evidence presented at trial.

These three cases list several factors that a trial court could consider when deciding where a child should be educated, such as the quality of the schools, the schools previously attended by the child, family tradition, special needs of the child, the standard of living established during the marriage, and the equities involved. *Solomond*, 22 Va. App. at 391, 470 S.E.2d at 160; *Ragsdale*, 30 Va. App. at 2959 6 , 516 S.E.2d at 703-04; *Joynes*, 36 Va. App. at 424, 551 S.E.2d at 21. While these discussions center on controversies over the cost of education, these additional factors seem relevant to determining which school, regardless of cost, is in the best interest of the child.

Another unnamed factor may also hold some influence in these cases. Although not mentioned explicitly, the opinions suggest that stability is important in a child's life and an important factor to consider when determining what action is in the best interest of a child. The appellate courts have mentioned this factor in other contexts, such as in *Yopp v. Hodges,* 43 Va. App. 427, 440, 598 S.E.2d 760, 766 (2004), where the Court of Appeals affirmed a lower court's decision to allow visitation with grandparents who were a source of stability for a child. Other states have explicitly applied this factor in cases involving education decisions.[5]

Some people have argued that *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), sets forth another factor for the trial courts to consider when faced with disagreements over children's education. In *Pierce*, the United States Supreme Court ruled that a state infringes upon fundamental liberties when it forces children to attend public schools. While an important case when government actors and parents are the parties, the situations confronting courts today involve disagreements between parents. No state actor is advocating that the child attend one school or another in these custody disputes. As the holding in *Pierce* addresses a legislative body's attempt to require that all children attend public schools, not an attempt by a parent to enroll a child in a school of his/her choice, the analysis does not apply in custody cases. The state is not infringing upon a parent's liberty when resolving these controversies.

Custody disputes are often bitter and difficult. If the parties are in agreement on the schools that the children should attend, then those agreements should be memorialized in written agreements and consent orders. If the parties do not agree, attorneys should consider raising the issue with the court at the time of the divorce to avoid future litigation.

Shelly Renee James is an associate in the Law Office of Franklin Blatt in Harrisonburg, where her practice focuses on divorce and related matters. She received a bachelor's degree in political science and journalism from James Madison University in 1983, a master's in rhetorical studies and public discourse from the University of Massachusetts in 1985, and her law degree from the University of Iowa in 1995.

Endnotes:

1 The statute does not prevent the parent with primary physical custody from claiming more credibility on the issue of schooling, as that parent spends more time with the child and has a better sense of the child's needs.

2 *Hickman v. Hickman,* Richmond Circuit Court Case No. N-6594-D (October 9, 1992).

3 *Code* § 20-124.3(10).

4 For further discussion of this burden of proof, see *Hatloy v. Hatloy,* 41 Va. App. 667, 672, 588 S.E.2d 389, 391 (2003).

5 The Missouri Court of Appeals noted in *in re: Marriage of Manning,* 871 S.W.2d 108, 111 (Mo. App. 1994), a case involving determination of child support, that "Dissolution is difficult for a child. Not allowing the child to continue at the school she has been attending would make it more so. Allowing children to continue at a private school can be 'a condition essential to the welfare of the [child].' *See Margolin v. Margolin,* 796 S.W.2d 38, 43 (Mo. App. 1990)." In *Matter of Marriage of Debenham,* 896 P.2d 1098, 1100-01 (Kan. App. 1995), the Kansas court held the evidence was sufficient for the trial court to find "the stability of continuing Cortney at Cair Paravel, at the time, was in the child's best interest . . . ." although the child had attended the school only one year.

Family Law Section

The Virginia State Bar Family Law Web site provides information about family law services and resources in Virginia.

www.vsb.org/sections/fa/index.html

You Bet Your Spouse's Life:

Examining Virginia's Position on Life Insurance in Divorce

by Brian M. Hirsch

Many married couples have life insurance[1] to cover the economic loss resulting from the death of one or both spouses. This insurance typically names the surviving spouse as beneficiary or places the insurance proceeds in trust for the couple's children, to cover education and other expenses. However, when couples divorce, life insurance takes on a new (and sometimes uncomfortable) meaning. After all, who would want an ex-spouse to have a financial interest in his or her death?

Virginia law takes a definitive stance on this topic. A Virginia court has the authority to require a divorcing spouse to maintain life insurance for the parties' children's benefit.[2] Yet, it can only be an existing life insurance policy, and only for so long as a child-support obligation is owed. The same is not true for life insurance covering one spouse (or an ex-spouse) for the benefit of the other.

Despite popular belief, a Virginia court does *not* have the power to order a spouse (or an ex-spouse) to obtain or maintain life insurance for the benefit of the other.[3] Neither does a Virginia court have the authority to allow one party to take out life insurance on the other even if the party benefitting from the life insurance pays the premiums. However, property settlement agreements commonly provide for one spouse to maintain life insurance exclusively for the benefit of the other spouse, or allow one party to take out life insurance on the other.[4] This is usually done to protect a recipient of spousal support in the event of the death of the payer. Absent a private agreement incorporated into an order, though, a court has no authority to order such insurance.

Not only is there no statutory basis for a Virginia court to order one spouse to keep life insurance for the other, but any designation of a spouse as a beneficiary of life insurance is automatically revoked by operation of law at the time of divorce. *Virginia Code* § 20-111.1 specifically directs:

> Upon the entry of a decree of annulment or divorce from the bond of matrimony on and after July 1, 1993, any revocable beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other party is revoked . . . The term "death benefit" includes any payments under a life insurance contract, annuity, retirement arrangement, compensation agreement or other contract designating a beneficiary of any right, property or money in the form of a death benefit.

To inform the consuming public about this automatic revocation, *Virginia Code* § 38.2-305 requires that the following language be in all life insurance policies:

> Under Virginia law (*Virginia Code* § 20-111.1), a revocable beneficiary designation in a policy owned by one spouse that names the other spouse as beneficiary becomes void upon the entry of a decree of annulment or divorce, and the death benefit prevented from passing to a former spouse will be paid as if the former spouse had predeceased the dece-

dent. In the event of annulment or divorce proceedings, and if it is the intent of the parties that the beneficiary designation of the former spouse is to continue, you are advised to make certain that one of the following courses of action is taken prior to the entry of a decree of annulment or divorce: change the beneficiary designation to make it irrevocable; change the ownership of the policy or contract; execute a separate written agreement stating the intention of both parties that the beneficiary designation is to remain in effect beyond the date of entry of the decree of annulment or divorce; or make certain that the decree of annulment or divorce contains a provision stating that the beneficiary designation is not to be revoked pursuant to § 20-111.1.

Virginia is not alone in preventing courts from ordering life insurance for an ex-spouse or revoking a life insurance beneficiary designation upon divorce.

Thus, the only way to maintain life insurance on an ex-spouse for the benefit of the other ex-spouse is to make the beneficiary designation irrevocable, change ownership of the policy to the beneficiary, or enter into a property settlement agreement or final decree that such insurance is to remain in effect beyond the date of divorce. Otherwise, the divorce causes an automatic revocation of the beneficiary designation.

Comparison to Other States

Virginia is not alone in preventing courts from ordering life insurance for an ex-spouse or revoking a life insurance beneficiary designation upon divorce.[5] However, other states take different positions on whether to require an ex-spouse to provide life insurance for the benefit of the other.

New Jersey permits a court to order a party to maintain life insurance "for the protection of the former spouses or the children of the marriage in the event of the death of the payer spouse's death." *See*, N.J.S.A. 2A:34-25. In addition, New Jersey Rule 5:4-2(f) requires the first pleading of each party in an action "to have annexed thereto an affidavit listing all known insurance coverage of the parties and their minor children, including but not limited to life, health, automobile, and homeowner's insurance." This same rule directs that all such insurance identified in the affidavit "shall be maintained pending further order of the court."

New York also authorizes a trial court to order a party "to purchase, maintain or assign a policy of accident insurance or insurance on the life of either spouse, and to designate in the case of life insurance, either spouse or children of the marriage . . . as irrevocable beneficiaries during a period of time fixed by the court." NY CLS Dom. Rel. § 236(B)(8).[6] However, such obligation shall cease "upon termination of the spouse's duty to provide maintenance, child support or a distributive award." *Id.*

Pennsylvania takes a more moderate approach. It permits a court to direct "the continued maintenance and beneficiary designations of existing policies insuring the life . . . of either party which were originally purchased during the marriage and owned by or within the effective control of either party." 23 *Pa. C.S.* § 3502 (2004).[7] The court also has the ability to require a party to purchase life insurance and designate a beneficiary where it is necessary to protect the interests of the other party. *Id.* For instance, a Pennsylvania court can require a spouse to carry life insurance until he or she pays certain marital debt. See, *Davin v. Davin*, 842 A.2d 469 (PA Super 2004).

Delaware's approach is similar to that adopted by Pennsylvania. As part of the distribution of marital property in a Delaware divorce proceeding or in modification of support, a spouse may be required to maintain an existing life insurance policy with his or her former spouse as the beneficiary. 13 *Del. C.* § 1513(e) (2004).[8] The statute limits the court's power to require such insurance for policies originally purchased during the marriage and owned by or within the effective control of either party. Unlike Pennsylvania, though, a Delaware court cannot order one ex-spouse to "obtain and maintain" a new policy insuring his or her life naming the other ex-spouse as the beneficiary. See, *Husband B.W.D. v. Wife B.A.D*, 405 A.2d 123 (Del. 1979).

Consideration of Modification to Virginia Law

The gap in Virginia law in this area is most apparent in a long-term marriage where there are disparate earning capacities between the parties and few assets to divide. Consider the following example. The parties are each fifty-five years old and have been married for thirty years. During their entire married life they have resided in Northern Virginia, which has the highest cost of living in the state. The parties separated upon the wife learning of the husband's adulterous relationship. The wife has an associate's degree. She recently found work as a teacher's aide, but was not gainfully employed in the prior twenty-six years, when she was raising the parties' four children. Due to the wife taking care of "hearth and home," the husband was able to build a successful dental practice. The parties have few assets due to putting four children through college and the husband's unwise investment in speculative financial ventures. The husband currently earns $175,000 per year through his dental practice, and the wife earns $19,000 per year as a teacher's aide. The court orders the husband to pay the wife $5,000 per month in permanent spousal support. With a total

annual income of $79,000 (*i.e.,* $60,000 spousal support and $19,000 through employment), the wife is able to live comfortably, but not lavishly, considering the cost of living in Northern Virginia. If the husband refuses to allow the wife to maintain life insurance on him, then the wife will be left with only her $19,000 annual salary (and Social Security at the appropriate age) in the event of the husband's death. This is not fair for the wife, who has invested at least as much effort in the marriage as her spouse and who was not at fault for the dissolution of the marriage.

While the above example is not typical, it is not that uncommon either. Furthermore, the genders in the above example could easily be switched, considering the changing roles of men and women. Nevertheless, whether Virginia law should allow a court to order either that one ex-spouse maintain life insurance on his or her life for the benefit of the other or that one ex-spouse be able to purchase a policy on the life of the other is a thorny issue. It raises such issues as:

- Do we want someone benefitting from the death of his or her ex-spouse?
- How much life insurance should a court be allowed to order? It would seem that if someone could take a five million dollar life insurance policy on his or her ex-spouse that it would seem more like a bounty on the insured's head.
- How long should one spouse be required to keep life insurance for the other? Age sixty, sixty-five, seventy?
- What if the intended insured party smokes or has physical problems which result in higher-than-normal premiums or renders the intended insured uninsurable?
- What if the intended insured will not submit to a physical examination?

While all of the above issues deserve scrutiny, it should be kept in mind that a close cousin of life insurance still exists in one area of divorce in Virginia. A Virginia court can still order survivor benefits for retirement plans. *Virginia Code* § 20-107.3(G) permits a court to divide the marital share of any "pension, profit-sharing or deferred compensation plan or retirement benefits, whether vested or nonvested." This same code section further authorizes a Virginia court, to the extent permitted by federal or other applicable law, to "designate a spouse or former spouse as irrevocable beneficiary during the lifetime of the beneficiary of all or a portion of any survivor benefit or annuity plan of whatsoever nature, but not to include a life insurance policy." The court, in its discretion, may apportion the cost of maintaining such survivor benefits between the parties. *Virginia Code* § 20-107.3(G)(2).

Conclusion

While states like New Jersey have comparatively extensive laws regarding life insurance in divorce, Virginia's total elimination of life insurance for an ex-spouse seems to go too far in the other direction. Given the inequities resulting from the current law, Virginia should consider allowing a court to order life insurance in long-term marriages where one spouse is extraordinarily financially dependent on the other. Naturally, any modification to this law should be approached with a fair amount of caution, as there is clearly a potential for abuse. ⚖

Brian M. Hirsch is a founding partner of Craig & Hirsch PC in Reston, where he limits his practice to family law. He is a fellow of the American Academy of Matrimonial Lawyers and serves as secretary on the Board of Governors of the Virginia State Bar's Family Law Section.

Endnotes:

1 *Virginia Code* § 38.2-102 defines life insurance as follows:

A. "Life insurance" means insurance upon the lives of human beings. "Life insurance" includes policies that also provide (i) endowment benefits; (ii) additional benefits in the event of death, dismemberment, or loss of sight by accident or accidental means; (iii) additional benefits to safeguard the contract from lapse or to provide a special surrender value, a special benefit or an annuity, in the event of total and permanent disability of the insured; and (iv) optional modes of settlement of proceeds. As used in this title, unless the context requires otherwise, "life insurance" shall be deemed to include "credit life insurance," "industrial life insurance," "variable life insurance" and "modified guaranteed life insurance."

B. "Life insurance" also includes additional benefits to provide for educational loans, subject to the provisions of § 38.2-3113.3. (1952, c. 317, § 38.1-3; 1976, c. 562; 1986, c. 562; 1992, c. 210; 2000, c. 173.)

2 *Virginia Code* § 20-108.1(D) provides that in "any proceeding under this title [*i.e.,* 20], Title 16.1 or Title 63.2 on the issue of determining child support, the court shall have the authority to order a party to (i) maintain any existing life insurance policy on the life of either party provided the party so ordered has the right to designate a beneficiary and (ii) designate a child or children of the parties as the beneficiary of all or a portion of such life insurance for so long as the party so ordered has a statutory obligation to pay child support for the child or children.

3 This article only addresses the issue of a Virginia court's inability to order one spouse to carry term life insurance for the benefit of the other. It does not address the issue of division of cash value of whole life insurance policies, which a Virginia court has the authority to do. See, *Frazer v. Frazer,* 23 Va. App. 358, 477 S.E.2d 290 (1996); *Johnson v. Johnson,* 25 Va. App. 368, 488 S.E.2d 659 (1997).

4 *Virginia Code* § 20-150(6) specifically authorizes parties to enter into marital agreements regarding the "ownership rights in and disposition of the death benefit from a life insurance policy."

5 Texas takes a similar approach as Virginia. *Texas Family Code* §§ 9.301 states:

(a) If a decree of divorce or annulment is rendered after an insured has designated the insured's spouse as a beneficiary under a life insurance policy in force at the time of rendition, a provision in the policy in favor of the insured's former spouse is not effective unless: (1) the decree designates the insured's former spouse as the beneficiary; (2) the insured redesignates the former spouse as the beneficiary after rendition of the decree; or (3) the former spouse is designated to receive the proceeds in trust for, on behalf of, or for the benefit of a child or a dependent of either former spouse. (b) If a designation is not effective under Subsection (a), the proceeds of the policy are payable to the named alternative beneficiary or, if there is not a named alternative beneficiary, to the estate of

Insurance *continued on page 36*

Insurance *continued from page 29*

the insured. (c) An insurer who pays the proceeds of a life insurance policy issued by the insurer to the beneficiary under a designation that is not effective under Subsection (a) is liable for payment of the proceeds to the person or estate provided by Subsection (b) only if: (1) before payment of the proceeds to the designated beneficiary, the insurer receives written notice at the home office of the insurer from an interested person that the designation is not effective under Subsection (a); and (2) the insurer has not interpleaded the proceeds into the registry of a court of competent jurisdiction in accordance with the Texas Rules of Civil Procedure.

6 This section of the New York State Consolidated laws states that the "court may also order a party to purchase, maintain or assign a policy of accident insurance or insurance on the life of either spouse, and to designate in the case of life insurance, either spouse or children of the marriage, or in the case of accident insurance, the insured spouse as irrevocable beneficiaries during a period of time fixed by the court. The obligation to provide such insurance shall cease upon the termination of the spouse`s duty to provide maintenance, child support or a distributive award."

7 This section of the *Pennsylvania Consolidated Statutes* states that the "court may direct the continued maintenance and beneficiary designations of existing policies insuring the life or health of either party which were originally purchased during the marriage and owned by or within the effective control of either party. Where it is necessary to protect the interests of a party, the court may also direct the purchase of, and beneficiary designations on, a policy insuring the life or health of either party.

8 This section of the *Delaware Code* states that the "court may also direct the continued maintenance and beneficiary designations of existing policies insuring the life of either party. The Court's power under this subsection shall extend only to policies originally purchased during the marriage and owned by or within the effective control of either party."

Photo on page 33 ©Comstock.

Separation *continued from page 29*

without just cause, coupled with the willful neglect of other marital duties constituted desertion even though the parties resided in the same home. A claim for desertion often is accompanied by a claim for cruelty.

Conclusion

Requests for bed-and-board relief diminished over the years, but it may be time to revive this form of relief as more divorcing couples refuse to separate. Dockets clogged with these motions may cause the pendulum to swing back to a time when courts awarded *pendente lite* exclusive use of the home to a spouse upon a showing that the parties were not going to reconcile and no good could come of the parties' stalemate to remain together in the home. ⚖

Endnotes:

1 *Hooker v. Hooker,* 215 Va. 415, 417, 211 S.E. 2d 34, 36 (1975).

2 *Bchara v. Bchara,* 38 Va. App. 302, 563 S.E. 2d 398 (2002).

3 *See Chandler v. Chandler,* 132 Va. 418, 112 S.E. 856 (1922).

4 *Va. Code* § 20-91(1)

5 *Va. Code* § 20-95

6 Many courts only permit 30 minutes for *pendente lite* hearings. *See* Suggested Guidelines & Practices in Domestic Relations cases for the 12th, 13th, and 14th Circuits.

7 *Sollie v. Sollie,* 202 Va. 855, 120 S.E. 2d 281 (1961). *See also,* Peter N. Swisher, Lawrence D. Diehl and James R. Cottrell, *Virginia Family Law: Theory of Practice* §§ 7-3 (2004).

8 *Petachenko v. Petachenko,* 232 Va. 296, 350 S.E. 2d 600 (1986).

9 *Jamison v. Jamison,* 3 Va. App. 644, 352 S.E. 2d 719 (1987).

Andrea Stiles is a partner at Williams Mullen PC and has practiced there since 1986. She has a bachelor of science degree from the University of Florida and a law degree from the University of Richmond's T.C. Williams School of Law. Stiles is a member of the Virginia State Bar Family Law Section's Board of Governors, a member of the John Marshall Inns of Court and a member of the American Academy of Matrimonial Lawyers. Her practice focuses on family law.

YLC Conference Supports ABA Jury Initiative

"I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."

—Thomas Jefferson

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Savalle C. Sims, 2004–2005 Young Lawyers Conference President

The legal profession does not operate in a vacuum. It depends upon the skill, expertise and commitment of not only lawyers, but also people outside the legal profession, to ensure that laws are upheld and administered fairly, efficiently and evenly.

Perhaps one of the greatest ways that the public at large gives back to the legal profession is through the American jury system. The right to trial by jury is a fundamental right of American jurisprudence guaranteed by the United States Constitution as well as individual states' constitutions. Thomas Jefferson, a Virginian, once said that he considered "trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." Jurors provide a tremendous service to our profession and society at large. They give of their time and leave their families and employment to cull through and consider facts and to apply those facts to the law to facilitate the resolution of disputes.

Past Young Lawyers Conference President and current American Bar Association President Robert J. Grey Jr. is devoting his term to creating better juries. He has launched the American Jury Initiative to strengthen the jury as a democratic institution and enhance Americans' understanding of its role in our system of law and government. The ABA Young Lawyers Division has joined its support by creating a program designed to educate high school students about the importance of jury service. The Virginia YLC has pledged its support to Robert Grey's initiative and looks forward to implementing projects designed to educate the bar and public about jury service this year. One of those opportunities will be at the fourth Professional Development Conference.

The PDC was first created and presented by the YLC under the leadership of Tracy Giles and O'Kelly McWilliams. It is a comprehensive program that offers CLE and non-CLE programming designed to address substantive legal and professional issues facing young lawyers. The YLC will hold its fourth annual PDC at the University of Virginia Darden Graduate School of Business Administration in Charlottesville on March 18–19, 2005.

As part of the PDC, the YLC is pleased to announce that it will hold a dialogue between the bench, bar and jurors entitled. *We the Jury: A View from the Box*. U.S. District Judge James P. Jones of the Western District of Virginia will moderate a panel of jurors and litigators. Panelists will include noted criminal defense attorney Craig S. Cooley and noted civil litigator Julia B. Judkins. The program will offer rare and valuable insights into the inner workings of juries in criminal and civil cases and promises to be a one-of-a-kind event.

In addition to the *We the Jury* dialogue, this year's PDC will include programs led by experienced and well-respected practitioners, including Stuart A. Raphael on temporary restraining orders and injunctions; Thomas E. Spahn on privilege issues; the Honorable Jane M. Roush on legislative and case law developments for Virginia litigators; and the Honorable Terrence R. Ney on effective oral advocacy. Topics of other sessions will include legal accounting issues, mediation, negotiation and drafting effective contracts. The PDC will also feature noted practitioner and author Jacob A. Stein as its keynote speaker.

We hope that young lawyers will avail themselves of the wonderful programming that this year's PDC will provide.

I look forward to seeing you in Charlottesville. ⚖

R. Edwin Burnette Jr. Young Lawyer of the Year Award

Young Lawyers Conference
Virginia State Bar

Seeking Nominations

The Virginia State Bar Young Lawyers Conference is seeking nominations for the R. Edwin Burnette Jr. Young Lawyer of the Year Award.

This award honors an outstanding young Virginia lawyer who has demonstrated dedicated service to the YLC, the profession and the community.

The nomination deadline is April 29, 2005. Letters of nominations and any supporting materials should be sent to:

Kathleen M. Uston,
Law Office of Kathleen Uston, 118 S. Royal Street, Alexandria, VA 22314
(703) 683-0440; Fax: (703) 549-8664; law@uston.com

The Senior Lawyers Conference and the Family Law Section

William B. Smith, 2004–2005 Senior Lawyers Conference Chair

The board of the Senior Lawyers Conference serves on various SLC committees, such as Pro Bono Services, *Senior Citizens Handbook,* Planning for Disability or Death, Civility and Professionalism, and Indigent Defense. SLC board members also are assisting the Chief Justice's efforts to improve involuntary civil commitment proceedings. One of the top priorities of the Senior Lawyers Conference is to increase participation by SLC members.

Since I began practicing law almost fifty years ago, my law practice has included family law cases of every type, and I have been a divorce commissioner of the Virginia Beach Circuit Court since 1979. Over these years, particularly since the mid-1980s, family law has greatly changed procedurally and substantively. The division of marital assets and spousal support has become more prevalent as issues in divorce cases, prompted by greater accumulation of marital assets and earnings by both parties contributing to the marriage. Fathers have become more proactive in asserting custodial and visitation claims. Statutory and case law regarding equitable distribution and spousal support have expanded over the past twenty years—case law especially, because of the automatic right of appeal to the Virginia Court of Appeals. Legal concepts previously unheard of are now commonplace in the family law arena—concepts such as "tracing," "hybrid property," "commingling of assets" and "commutation." The litigation of marital entitlement to retirement benefits and, in many cases, the arcane requirements of resulting Qualified Domestic Relations Orders present a daunting challenge to family law practitioners. Although I'm glad to say I have not been involved in many divorce cases involving elderly couples, they present unique and compelling issues.

Of the more than nine thousand members of the Senior Lawyers Conference (made up of Virginia State Bar members fifty-five years of age and older), many have practiced family law. Family law provides many opportunities for senior lawyers to share their knowledge and experience. They can:

- Serve as mentors to younger lawyers in the practice of family law.
- Consult with and advise family lawyers on particular issues—particularly where the parties are elderly.
- Serve as guardians ad litem for minor children in contested custody and visitation proceedings.
- Partcipate in local and state bar family law sections and committees.
- Serve as panel members on family law continuing legal education programs.
- Write family law articles for section and committee newsletters and Virginia Lawyer magazine.
- Serve as liaisons between the family law bar and the circuit and juvenile and domestic relations courts.
- Assist the circuit courts in processing uncontested pro se divorce cases for indigent parties.

I would like to appeal to senior lawyers who practice family law—particularly those who are active in the Family Law Section—to come forward and contribute their experience and expertise to the improvement of the procedure and substance of family law practice. I would be glad to hear from any members of the Family Law Section who are interested in this concept. ⚖

RISK MANAGEMENT CORNER

Family Lawyers Have A Special Calling

by John J. Brandt

Whether your practice focuses on family law, or you only occasionally represent clients involved in the most difficult times of their lives involving their spouses and their children, yours is one of the most challenging positions in the practice of law.

What type of person makes a good family lawyer? First, the family lawyer should be self confident and in complete control of the attorney-client relationship. Not all prospective family-law clients should be represented—particularly if the client is determined to be "his/her own attorney." Learn to say "no" if you are convinced that a prospective client and you will not make a good team. It is strongly recommended that you establish a written representation agreement that sets forth your fees, costs and other conditions with precision to avoid misunderstanding later. Be careful to obey Rule 1.5 *Fees* of the *Virginia Rules of Professional Conduct* (VRPC), particularly with respect to contingent fees, which are prohibited except in special circumstances.

At the outset of the representation, be careful to identify any possible conflict of interests that may disqualify you. The Virginia State Bar's Legal Ethics Opinions offer guidance on potential conflicts. The VSB's Web site—at **http://www.vsb.org/profguides/opinions.html**—provides links to sites that list the opinions, including excellent summaries of LEO's dating back to 1980, organized by topic by attorney Thomas E. Spahn. Another helpful site—**http://www.vsb.org/profguides/FAQ_leos/LegalEthicsFAQs.html**—provides the article "Answering your Questions about Legal Ethics," written by Anne P. Michie, assistant VSB ethics counsel. In opinions that affect family lawyers, the VSB has stated over the years that an attorney who represented both spouses in drafting a property settlement agreement may not subsequently represent one spouse in a divorce action. Nor may that attorney's officemate, who shares the attorney's space and secretarial space, represent one of the parties. LEO 677 (4.2.85) An attorney who mediated a divorce cannot later represent one of the parties in a divorce proceeding, even if it is uncontested. LEO 544 (3.1.84) The conflict cannot be cured even with the other spouse's consent. LEO 159 (2.24.02)

Do not accept a case that is beyond your competence. Refer cases to competent family lawyers if there is any question of your skill and experience. (Rule 1:1—VRPC) Be certain to advise your client of mediation as a possible means to solve their dispute. Not only will the lawyer comply with Rule 1.2, Comment [1], but mediation might be a reasonable, economical means to a speedier resolution.

Be careful also of the "wise" husband or wife who attempts to block his/her spouse from using the services of all of the competent family lawyers in a given community—particularly a small community. LEO 1794 (6.20.2004) presents a situation where a husband tried to stop his wife from obtaining a good lawyer by visiting every family lawyer in his community, "with no intent to hire them." One of the attorneys visited by husband in his "scheme" was later retained by the wife. The LEO committee found no conflict problem for the wife's attorney—even though he had consulted with the husband—because the husband had no legitimate purpose in the meeting, since he had already decided to retain another attorney. Therefore, there was no "reasonable expectation of confidentiality" and the committee found that the wife's attorney had no duty to maintain the confidentiality of information he received from the husband and he did not have to withdraw. Although not at issue in this case, it is obviously improper for an attorney to direct a party to a scheme of "strategic elimination" of available attorneys in violation of Rule 3.4(j) and Rule 8.4(a)—VRPC.

When a family law representation is nearing an end, it would be wise for the attorney to consider placing in any final decree a clause relieving him of his representation to prevent future notices, etc., from automatically being sent to him. Although family law matters may go on forever, an attorney is entitled to end representation for a specific matter. If the client wishes to re-engage the attorney, that is all well and good. However, a termination of legal representation is as important to both lawyer and client as the commencement of the relationship. Once the legal task is over, there should be a "termination letter" sent to the client making it clear that the legal representation is over. Not only does this clarify the relationship between attorney and client, it also starts the running of the statute of limitations.

No specialty in the law in these complicated times is easy. However with continued dedication and competence, the relationship between family lawyer and client can be fruitful and beneficial for both of them and Virginia society as a whole.

First Solo & Small-Firm Practitioners Forum Slated for March 18 in Southwest Virginia

Attorneys to share ideas and concerns with Court and bar

Virginia's solo and small-firm lawyers will have a new forum for learning practical, nuts-and-bolts law-firm management strategies—and earning free continuing legal education credits—next month in Southwest Virginia.

They also will have an opportunity to describe their needs and concerns to members of the Supreme Court of Virginia and Virginia State Bar officials.

The first-ever Solo & Small-Firm Practitioner Forum will be held Friday, March 18, at 1:30 P.M. at the Southwest Virginia Higher Education Center, located off Interstate 81 at exit 14 in Abingdon. The forum will be followed by a Town Hall Meeting. The program will conclude with a reception at 5:30 P.M. No charge will be made for the program, which is supported by the VSB.

The forum takes the place of what previously was the afternoon session of the VSB's Abingdon Bar Leaders Institute. The Twentieth Annual BLI consists of only a morning session in Abingdon, but will maintain its traditional morning-and-afternoon format at its March 7 session in Richmond. (See story at right.)

The Solo & Small-Firm Practitioner Forum is a project of the Supreme Court of Virginia. Its aim is to give lawyers information they need to deal with the management problems they encounter in small practices. The program will carry 3 CLE credits, with 1.5 in ethics, at no charge.

"I hope to see a lot of attorneys from Southwest Virginia," said Virginia Supreme Court Justice Cynthia D. Kinser of Pennington Gap, who chairs the committee that put the forum together. She hopes the program will "reach practically all attorneys who practice in this part of the state."

A featured speaker for the forum will be Nancy Byerly Jones, president of a North Carolina-based law-office management consulting and mediation firm and once director of the North Carolina State Bar's former Lawyers' Management Assistance Program. She will offer practical advice on technology and trust-account management.

Other speakers will include:

- Roscoe B. Stephenson III of Covington, immediate past chair of the VSB Disciplinary Board. He will outline ethical issues crucial to solo and small-firm lawyers.
- Frank O. Brown Jr. of Richmond. A former chair of the VSB Senior Lawyers Conference, he will describe how to set up a plan for protecting clients should a lawyer die or become disabled.
- A panel of bar leaders, who will talk about VSB resources that lawyers can draw on to help with their practices. Moderated by VSB President David P. Bobzien of Fairfax, the panel includes Phillip V. Anderson of Roanoke, VSB president-elect; William E. Bradshaw of Big Stone Gap, a VSB Executive Committee member; Joseph A. Condo of McLean, a former VSB president; Jeannie P. Dahnk of Fredericksburg, VSB immediate past president; and Elizabeth K. Dillon of Roanoke, a past president of the Virginia Women Attorneys Association.

The Town Hall Meeting will be moderated by Virginia Chief Justice Leroy R. Hassell Sr., joined by Kinser and VSB officials, including Bar Counsel Barbara A. Williams, who oversees the disciplinary department.

Kinser said the panel wants lawyers to answer the questions, "What are your needs? How can the state bar help you?"

The organizers plan to take the forum and Town Hall Meeting on the road to three or four other areas of the state, Kinser said.

For registration form, see page 44.

Bar Leaders Institute To Be Held Next Month

The Twentieth Annual Bar Leaders Institute—the Virginia State Bar's program to energize, encourage and inspire officers of local bar associations across the commonwealth—will take place in March at two locations.

The first will be Monday, March 7, from 8:30 A.M. until 3 P.M. at the University of Richmond's T.C. Williams School of Law. The program will carry 2 hours of CLE, with 1 hour ethics credit, and the fee will be forty dollars.

The second BLI will take place Friday, March 18, from 9:30 A.M. until 1:30 P.M. at the Southwest Virginia Higher Education Center in Abingdon. The center is off Interstate 81 at exit 14. That BLI program will carry 1 hour of CLE, with 1 hour ethics credit, at no charge.

The Abingdon BLI will be immediately followed by the Supreme Court of Virginia's first-ever Solo & Small-Firm Practioner Forum and Town Hall Meeting, from 1:30 to 5:30 P.M. The forum will carry an additional 3 hours of CLE, with 1.5 hours ethics credit, at no charge. (See story at left.)

Lunch will be included in both BLI programs and will be sponsored by Attorneys Liability Protection Society.

The luncheon speaker in Richmond will be Dadie Perlov of Consensus Management Group. She is an expert in association structure, governance and culture. Her topic will be "A Good General Knows Where His Army Is—A Great One Knows Where It Will Be Tomorrow."

In Abingdon, Dr. Thomas A. Morris—president of Emory and Henry University and a commentator on Virginia politics—will be the luncheon speaker.

The BLI program details and a registration form follow on pages 42–44.

The Bar Leaders Institute is sponsored by the VSB's Conference of Local Bar Associations.

— TWENTIETH ANNUAL —

BLI

BAR LEADERS INSTITUTE

Richmond BLI — March 7
T. C. Williams School of Law, University of Richmond

Abingdon BLI — March 18
Southwest Virginia Higher Education Center

Solo & Small-Firm Practitioner Forum — March 18
Southwest Virginia Higher Education Center

Richmond BLI — March 7: University of Richmond School of Law
($40)

9:00–9:30 **WELCOME** — *Manuel A. Capsalis* — Chair, CLBA Executive Committee
GREETINGS — *David P. Bobzien* — President, Virginia State Bar
***SO YOU'RE 18* UPDATE**
LEGALLY INFORMED

9:30–10:30 **NUTS & BOLTS OF LEADERSHIP** — Tips for Reenergizing Your Bar
- *George W. Shanks* — Secretary, CLBA Executive Committee (moderator)
- *Raymond B. Benzinger* — VSB Council Representative, 17th Circuit
- *Frank O. Brown Jr.* — Past Chair, VSB Senior Lawyers Conference
- *Andrew M. Condlin* — President-elect, Henrico County Bar Association and 2004 Local Bar Leader of the Year
- *Jimmy F. Robinson Jr.* — President-elect, VSB Young Lawyers Conference

10:30–10:45 **BREAK**

10:45–11:15 **INDIGENT DEFENSE TASK FORCE REPORT** — *Steven D. Benjamin* — Member, VSB Indigent Defense Task Force; Member, Chief Justice's Indigent Defense Training Initiative; Immediate Past President, Virginia Association of Criminal Defense Lawyers; Board Member, National Association of Criminal Defense Lawyers; 2003 Lewis F. Powell Jr. Pro Bono Award Recipient

11:15–12:15 **LAWYERS HELPING LAWYERS (CLE/ETHICS)**
James E. Leffler, MS — Mental Health Services Coordinator, LHL

12:15 **LUNCH (SPONSORED BY ALPS)** — Introduction by *David P. Bobzien*
Dadie Perlov of Consensus Management Group, an expert in association structure, governance and culture, will present "A Good General Knows Where His Army Is — A Great One Knows Where It Will Be Tomorrow"

1:15–2:00 **WHAT I KNOW NOW THAT I WISH I HAD KNOWN THEN** — *Glenn C. Lewis* — VSB Council Representative, 19th Circuit; 2004 VSB Family Law Section Lifetime Achievement Award Recipient; Past President, Fairfax Bar Association

continued on page 43

Richmond BLI—March 7

(continued)

2:00–3:00 **FUTURE OF THE JUDICIARY (CLE)**—*Kathy L. Mays*—Director of Judicial Planning, Office of the Executive Secretary, Supreme Court of Virginia

2 hours CLE (1 hour Ethics)

Abingdon BLI—March 18

Southwest Virginia Higher Education Center

(No charge)

9:30–10:00 **REGISTRATION**

10:00–10:30 **WELCOME**
Manuel A. Capsalis—Chair, CLBA Executive Committee

GREETINGS
David P. Bobzien—President, Virginia State Bar

***SO YOU'RE 18* UPDATE**

LEGALLY INFORMED

10:30–11:30 **NUTS & BOLTS OF LEADERSHIP—Tips for Reenergizing Your Bar**
- *Phillip V. Anderson*—President-elect, Virginia State Bar (moderator)
- *Tracy A. Giles*—Past President, VSB Young Lawyers Conference
- *Lisa A. McConnell*—Assistant Commonwealth's Attorney, Scott County
- *Gregory T. St. Ours*—Past President, Harrisonburg-Rockingham County Bar Association and 2001 Local Bar Leader of the Year
- *William T. Wilson*—At-Large Member, CLBA Executive Committee and Board Member, VSB Senior Lawyers Conference

11:30–11:45 **INDIGENT DEFENSE TASK FORCE REPORT**
Steven D. Benjamin—Member, VSB Indigent Defense Task Force; Member, Chief Justice's Indigent Defense Training Initiative; Immediate Past President, Virginia Association of Criminal Defense Lawyers; Board Member, National Association of Criminal Defense Lawyers; 2003 Lewis F. Powell Jr. Pro Bono Award Recipient

11:45–12:30 **LAWYERS HELPING LAWYERS (CLE/ETHICS)**
Susan D. Pauley, CSAC—Executive Director, LHL

12:30–1:30 **LUNCH (SPONSORED BY ALPS)**
Introduction by *Phillip V. Anderson*,
Dr. Thomas A. Morris—President, Emory & Henry College

1 hour CLE (1 hour Ethics)

Solo & Small-Firm Practitioner Forum and BLI registration form on page 44

Solo & Small-Firm Practitioner Forum—March 18 (No charge)

Abingdon—Southwest Virginia Higher Education Center

A resource for attorneys, inspired by the Supreme Court of Virginia.

1:30–2:15 **ETHICAL ISSUES CRUCIAL TO SOLO AND SMALL-FIRM PRACTITIONERS (CLE/ETHICS)**—*Roscoe B. Stephenson III*—Immediate Past Chair, VSB Disciplinary Board

2:15–3:15 **LAW OFFICE MANAGEMENT, TECHNOLOGY & TRUST ACCOUNTING (CLE)**
Nancy Byerly Jones—President of Nancy Byerly Jones & Associates Inc., a law office management consulting and mediation service firm

3:15–3:30 **BREAK**

3:30–4:00 **LAW OFFICE MANAGEMENT, TECHNOLOGY & TRUST ACCOUNTING (CLE)** *(continued)*

4:00–4:30 **PROTECTING YOUR CLIENTS IN THE EVENT OF DEATH OR DISABILITY (CLE/ETHICS)**—*Frank O. Brown Jr.*—Past Chair, VSB Senior Lawyers Conference

4:30–5:00 **WHAT IS THE VIRGINIA STATE BAR DOING FOR YOU— *Available Resources Provided by the Virginia State Bar***
- *David P. Bobzien*—President, Virginia State Bar (moderator)
- *Phillip V. Anderson*—President-elect, Virginia State Bar
- *William E. Bradshaw*—Executive Committee Member, Virginia State Bar
- *Joseph A. Condo*—Past President, Virginia State Bar
- *Jeannie P. Dahnk*—Immediate Past President, Virginia State Bar
- *Elizabeth K. Dillon*—President, Roanoke Bar Association and Past President, Virginia Women Attorneys Association

5:00–5:45 **TOWN HALL MEETING**
- *The Honorable Leroy R. Hassell Sr.*—Chief Justice, Supreme Court of Virginia (moderator)
- *The Honorable Cynthia D. Kinser*—Justice, Supreme Court of Virginia
- *Manuel A. Capsalis*—Chair, CLBA Executive Committee
- *Thomas A. Edmonds*—Executive Director and Chief Operating Officer, Virginia State Bar and President-elect, National Association of Bar Executives
- *Barbara A. Williams*—Bar Counsel, Virginia State Bar

5:45 **RECEPTION**—All attendees are invited to attend

3 hours CLE (1.5 hours Ethics)

REGISTRATION

Please reserve a place for me at the 20th Annual Bar Leaders Institute.

Please check one:

Richmond
- ❑ I will attend the Richmond BLI (lunch included)*

Abingdon
- ❑ I will attend the Abingdon BLI Only (lunch included)*
- ❑ I will attend the Abingdon Solo & Small-Firm Practitioner Forum Only
- ❑ I will attend the Abingdon BLI and Solo & Small-Firm Practitioner Forum (lunch included)*

Name _____

Preferred first name (for name tag) _____

Bar Title _____

Bar Association _____

Address _____

City and State _____ Zip _____

Telephone _____ Fax _____ E-mail _____

Please return this registration form and your check (if applicable) made payable to the Virginia State Bar to:
Local & Specialty Bar Relations, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800
*Lunches in both locations are being sponsored by the Attorneys Liability Protection Society (ALPS).

2005 GENERAL ASSEMBLY

Virginia's Lawyer-Legislators

Currently, twenty-eight of the one hundred members of the House of Delegates and ten of forty state senators are lawyers.

In addition to the attorney general, Virginia's other top two officers are attorneys: Governor Mark R. Warner and Lieutenant Governor Timothy M. Kaine both have degrees from Harvard Law School.

In October, Kaine, speaking at the Virginia Association of Defense Attorneys' annual meeting, called for more lawyers to run for public office.

The General Assembly needs not only attorneys' intellectual training, but also their abilities to understand different sides of an issue, to debate, and to advocate without personalizing conflict, he said.

The following thirty-eight lawyers serve in the 2005 General Assembly. The list includes their party affiliations and legislative districts, their firms or employers, the law schools they graduated from, the years they were admitted in Virginia, and their addresses and phone numbers.

More information on legislators can be obtained on the General Assembly's Web site at **legis.state.va.us**.

D = Democrat
I = Independent
R = Republican

HOUSE OF DELEGATES

David B. "Dave" Albo
R-42nd
Albo & Oblon LLP
University of Richmond
Admitted 1988

6350 Rolling Mill Place,
Suite 102
Springfield 22152
District: (703) 451-3555
Capitol: (804) 698-1042
Del_Albo@house.state.va.us

HOUSE OF DELEGATES

Ward L. Armstrong
D-10th
Ward L. Armstrong, Attorney at Law
University of Richmond
Admitted 1980

Post Office Box 1431
Martinsville 24114
District: (276) 632-7022
Capitol: (804) 698-1010
Del_Armstrong@house.state.va.us

HOUSE OF DELEGATES

Clifford L. "Clay" Athey Jr.
R-18th
Napier Pond Athey & Athey PC
University of Dayton School of Law, Ohio
Admitted 1994

35 North Royal Avenue
Front Royal 22630
District: (540) 635-7917
Capitol: (804) 698-1018
Del_Athey@house.state.va.us

HOUSE OF DELEGATES

William K. "Bill" Barlow
D-64th
Barlow & Riddick PC
University of Virginia
Admitted 1965

Post Office Box 240
Smithfield 23431
District: (757) 357-9720
Capitol: (804) 698-1064
Del_Barlow@house.state.va.us

HOUSE OF DELEGATES

Robert B. "Rob" Bell III
R-58th
Cattano Law Offices
University of Virginia
Admitted 1995

2 Boar's Head Place,
Suite 100
Charlottesville 22903
District: (434) 245-8900
Capitol: (804) 698-1058
Del_Bell@house.state.va.us

HOUSE OF DELEGATES

Richard H. "Dick" Black
R-32nd
Richard H. Black, Attorney
at Law
University of Florida
Admitted 1997

20978 Flatboat Court
Sterling 20165
District: (703) 406-2951
Capitol: (804) 698-1032
Del_Black@house.state.va.us

HOUSE OF DELEGATES

Robert H. "Bob" Brink
D-48th
Legislative Consultant
EB&T Strategy Group
College of William and Mary
Admitted 1978

Post Office Box 7668
Arlington 22207
District: (703) 243-5778
Capitol: (804) 698-1048
Del_Brink@house.state.va.us

HOUSE OF DELEGATES

William H. Fralin Jr.
R-17th
Medical Facilities of America
University of Richmond
Admitted 1989

Post Office Box 20363
Roanoke 24018
District: (540) 772-7600
Capitol: (804) 698-1017
Del_Fralin@house.state.va.us

HOUSE OF DELEGATES

H. Morgan Griffith
R-8th
H. Morgan Griffith
Washington and Lee
University
Admitted 1983

Post Office Box 1250
Salem 24153
District: (540) 389-4498
Capitol: (804) 698-6310
Del_Griffith@house.state.va.us

HOUSE OF DELEGATES

Franklin P. "Frank" Hall
D-69th
Hall & Hall PLC
American University Law School, Washington, D.C.
Admitted 1966

Post Office Box 3407
Richmond 23235
District: (804) 897-5900
Capitol: (804) 698-1069
Del_Hall@house.state.va.us

HOUSE OF DELEGATES

William J. "Bill" Howell
R-28th
William J. Howell
University of Virginia
Admitted 1967

Post Office Box 8296
Fredericksburg 22404
District: (540) 371-1612
Capitol: (804) 698-1028
Del_Howell@house.state.va.us

HOUSE OF DELEGATES

Robert Hurt
R-16th
H. Victor Millner Jr. PC
Mississippi College School of Law
Admitted 1995

Post Office Box 2
Chatham 24531
District: (434) 432-4600
Capitol: (804) 698-1016
Del_Hurt@house.state.va.us

HOUSE OF DELEGATES

William R. "Bill" Janis
R-56th
Kane, Jeffries, Cooper & Janis
University of Virginia
Admitted 1999

Post Office Box 3703
Glen Allen 23058
District: (804) 301-7489
Capitol: (804) 698-1056
Del_Janis.house.state.va.us

HOUSE OF DELEGATES

Johnny S. Joannou
D-79th
Joannou, Knowles & Associates
University of Richmond
Admitted 1969

709 Court Street
Portsmouth 23704
District: (757) 399-1700
Capitol: (804) 698-1079
No e-mail

HOUSE OF DELEGATES

Joseph P. "Joe" Johnson Jr.
D-4th
Johnson & Johnson PC
University of Richmond
Admitted 1960

164 East Valley Street
Abingdon 24210
District: (276) 628-9940
Capitol: (804) 698-1004
Del_Johnson@house.state.va.us

HOUSE OF DELEGATES

Terry G. Kilgore
R-1st
Wolfe, Williams &
Rutherford PC
College of William and Mary
Admitted 1988

Post Office Box 669
Gate City 24251
District: (276) 386-7701
Capitol: (804) 698-1001
Del_Kilgore@house.state.va.us

HOUSE OF DELEGATES

Lynwood W. Lewis Jr.
D-100th
Vincent, Northam & Lewis
University of Richmond
Admitted 1988

Post Office Box 760
Accomac 23301
District: (757) 787-1094
Capitol: (804) 698-1000
Del_Lewis@house.state.va.us

HOUSE OF DELEGATES

Bradley P. "Brad" Marrs
R-68th
Meyer, Goergen & Marrs PC
University of Virginia
Admitted 1985

Post Office Box 3941
Richmond 23235
District: (804) 323-1454
Capitol: (804) 698-1068
Del_Marrs@house.state.va.us

HOUSE OF DELEGATES

Robert F. "Bob" McDonnell
R-84th
Huff, Poole & Mahoney PC
Regent University
Admitted 1989

Post Office Box 62244
Virginia Beach 23466
District: (757) 552-6010
Capitol: (804) 698-1084
Del_McDonnell@house.state.va.us

HOUSE OF DELEGATES

Ryan T. McDougle
R-97th
The McDougle Law Firm PC
College of William and Mary
Admitted 1996

Post Office Box 187
Mechanicsville 23111
District: (804) 730-1026
Capitol: (804) 698-1097
Del_McDougle@house.state.va.us

HOUSE OF DELEGATES

Kenneth R. "Ken" Melvin
D-80th
Melvin and Bullock
Georgetown University,
Washington, D.C.
Admitted 1977

801 Water Street, Suite 300
Portsmouth 23704
District: (757) 397-2800
Capitol: (804) 698-1080
Del_Melvin@house.state.va.us

HOUSE OF DELEGATES

Brian J. Moran
D-46th
The Law Offices of
Brian J. Moran
Catholic University of
America, Washington, D.C.
Admitted 1989

4154 Duke Street
Alexandria 22304
District: (703) 370-4154
Capitol: (804) 698-1046
Del_Moran@house.state.va.us

HOUSE OF DELEGATES

J. Chapman "Chap" Petersen
D-37th
Bracewell & Patterson LLP
University of Virginia
Admitted 1994

Post Office Box 887
Fairfax 22030
District: (703) 591-5133
Capitol: (804) 698-1037
Del_Petersen@house.state.va.us

HOUSE OF DELEGATES

Clarence E. "Bud" Phillips
D-2nd
Clarence E. Phillips PC
Virginia Law Reader Program
Admitted 1988

Post Office Box 36
Castlewood 24224
District: (276) 762-9758
Capitol: (804) 698-1002
Del_Phillips@house.state.va.us

HOUSE OF DELEGATES

Lacey E. Putney
I-19th
Putney and Putney
Washington and Lee
University
Admitted 1957

Post Office Box 127
Bedford 24523
District: (540) 586-0080
Capitol: (804) 698-1019
Del_Putney@house.state.va.us

HOUSE OF DELEGATES

Gary A. Reese
R-67th
Patterson & Reese
University of Virginia
Admitted 1969

11928 Bennett Road
Oak Hill 20171
District: (703) 476-4505
Capitol: (804) 698-1067
Del_Reese@house.state.va.us

HOUSE OF DELEGATES

Stephen C. "Steve" Shannon
D-35th
Odin, Feldman &
Pittleman PC
University of Virginia
Admitted 1999

Post Office Box 1143
Vienna 22183
District: (703) 281-5200
Capitol: (804) 698-1035
Del_Shannon@house.state.va.us

HOUSE OF DELEGATES

Onzlee Ware
D-11th
Ware, Cargill & Hill PC
North Carolina Central University
Admitted 1988

Post Office Box 1745
Roanoke 24008
District: (540) 344-7410
Capitol: (804) 698-1011
Del_OWare@house.state.va.us

SENATE

Kenneth T. "Ken" Cuccinelli II
R-37th
Gura & Day LLC
George Mason University
Admitted 1996

Post Office Box 684
Centreville 20122
District: (703) 766-0635
Capitol: (804) 698-7537
District37@sov.state.va.us

SENATE

R. Creigh Deeds
D-25th
R. Creigh Deeds PC
Wake Forest University, North Carolina
Admitted 1984

Post Office Box 5462
Charlottesville 22905
District: (434) 296-5491
Capitol: (804) 698-7525
District25@sov.state.va.us

SENATE

John S. Edwards
D-21st
Law Office of
John S. Edwards
University of Virginia
Admitted 1970

Post Office Box 1179
Roanoke 24006
District: (540) 985-8690
Capitol: (804) 698-7521
District21@sov.state.va.us

SENATE

Henry L. Marsh III
D-16th
Hill, Tucker, Marsh & Jackson PLLC
Howard University
Admitted 1961

600 East Broad Street,
Suite 201
Richmond 23219
District: (804) 648-9073
Capitol: (804) 698-7516
District16@sov.state.va.us

SENATE

William C. "Bill" Mims
R-33rd
Mims, Atwill & Leigh PC
George Washington University, Washington, D.C.
Admitted 1984

Post Office Box 741
Leesburg 20178
District: (703) 779-1888
Capitol: (804) 698-7533
District33@sov.state.va.us

SENATE

Thomas K. Norment Jr.
R-3rd
Kaufman & Canoles PC
College of William and Mary
Admitted 1973

Post Office Box 1697
Williamsburg 23187
District: (757) 259-7810
Capitol: (804) 698-7503
District03@sov.state.va.us

SENATE

Mark D. Obenshain
R-26th
Keeler Obenshain PC
Washington and Lee University
Admitted 1987

Post Office Box 555
Harrisonburg 22803
District: (540) 437-3126
Capitol: (804) 698-7526
District26@sov.state.va.us

SENATE

Frederick M. Quayle
R-13th
Lawyers Title of Chesapeake Inc.
University of Richmond
Admitted 1966

3808 Poplar Hill Road, Suite E
Chesapeake 23321
District: (757) 483-9173
Capitol: (804) 698-7513
District13@sov.state.va.us

SENATE

William Roscoe Reynolds
D-20
Stone, Worthy & Reynolds PC
Washington and Lee University
Admitted 1967

Post Office Box 404
Martinsville 24114
District: (276) 638-2315
Capitol: (804) 698-7520
District20@sov.state.va.us

SENATE

Kenneth W. Stolle
R-8th
Kaufman & Canoles PC
Virginia Law Reader Program
Admitted 1983

2101 Parks Avenue, Suite 700
Virginia Beach 23451
District: (757) 486-5700
Capitol: (804) 698-7508
District08@sov.state.va.us

Photos courtesy of the Senate Clerk's Office, House Clerk's Office and David Bailey Associates.