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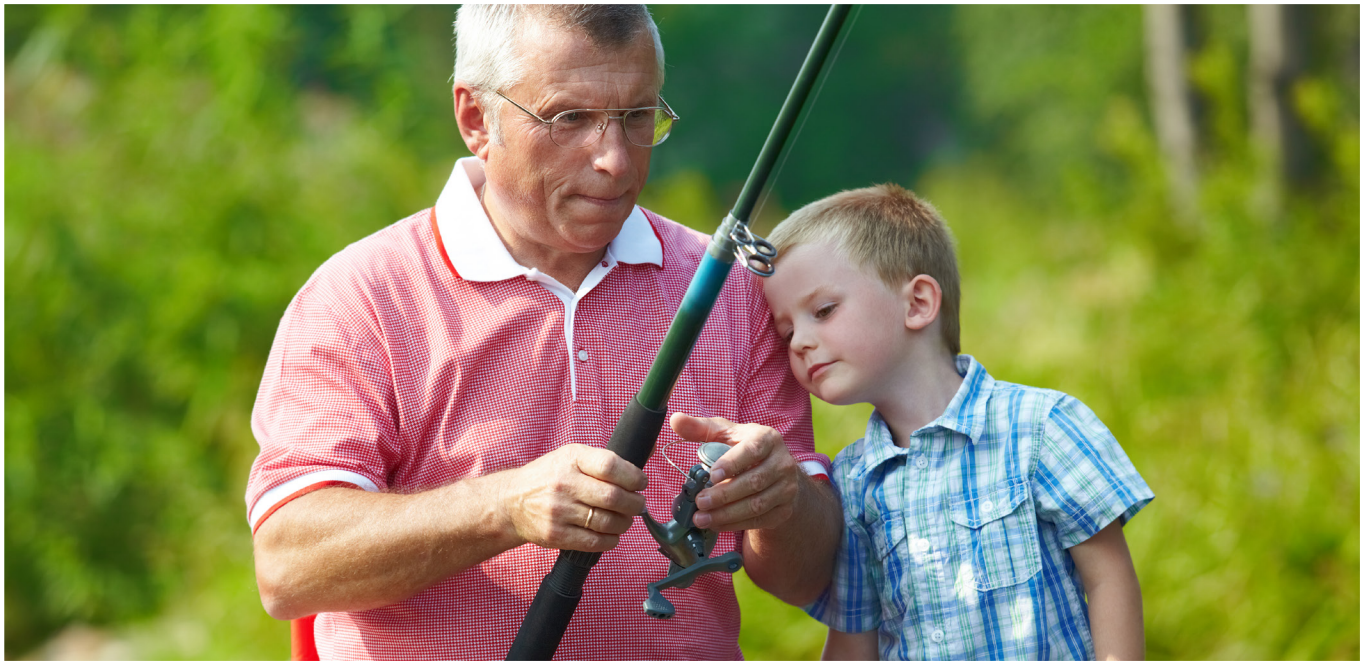
FAMILY LAW

A SUPPLEMENT TO VIRGINIA LAWYERS WEEKLY



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Which type of ADR is best in a family law case?

By A. Brakke Campfield and Christopher Macturk

There you sit with your client, Jane. Her husband, Bob, recently told her he wants a divorce. Bob claimed the long hours working in his family's business have taken a toll on him. He never wanted to work for his father and brothers in the first place. Bob complained he'd never been in charge of his own life – his father always told him what to do. Jane then learned Bob had wanted to marry another woman he met years ago in college but his father wouldn't allow it. Bob has never forgotten her and has recently connected with her via social media. They haven't met in person – "nothing's happened" – but he wants to see where that relationship may lead.

Bob claims he's taking a stand against his father's lifelong control and, even though he's now 52 years old, he wants to start his life over and be with this other woman. Bob believes that Jane is probably not surprised as clearly they have not been happy in their marriage. He claims Jane drinks too much and spends too much money – didn't she see these were signs of just how unhappy she really is? Didn't she agree it would be best if they were no longer married? Wouldn't she be happier, too? Bob tries to reassure her by reminding her about the money his family's business has been able to generate for them over the years – they have plenty of money and other investments. She and the children will be taken care of and everyone will be happier. He just wants to come up with an agreement between them and have a lawyer write it up, the sooner the better.

Jane is devastated.

Bob and Jane have three children, two in high school and one a freshman in college.

The last thing Jane wants is a divorce and she certainly doesn't want a full-out court battle over money and the kids. She feels Bob will take care of the family financially. He always has. But she is concerned about his future at his family's business as she is aware of how his father treats him there. She tells you Bob was given some shares in the business but purchased more shares with Jane's help during the marriage. Also, who is this woman he's reconnected with? What's her role going to be in the children's lives? Will Jane have to go back to work? It's been over 15 years since she worked full time as a CPA and has only gone back recently part-time to help a friend start her own bookkeeping business.

Jane says she and Bob have never argued during their marriage. All of this comes as a complete surprise and is just too much to handle. She wants Bob to realize what he's doing to the family and to "get help."

You learn Bob has hired an attorney whom you know well and respect.

Jane has expressed an interest in staying away from court. What are some ADR "process" options to consider?

MEDIATION

Mediation could certainly help Jane.

The mediator can be chosen and agreed upon by the parties which may allow Jane to feel more connected and in control over the process. Nothing would happen without her agreeing to it first.

Choosing a mediator is probably more art than science and even if clients arrive on your doorstep with the name of a mediator, the lawyer should still brainstorm mediator options with the client. For example, we can consider certain basic traits a mediator may or may not have. Some mediators are retired judges like those at The McCammon Group and Juridical Solutions. Others are lawyers. Some are even non-lawyers, primarily from the healthcare field but some non-lawyer mediators also come from the financial sector. Do you need a retired judge? Not all but some retired judges who mediate will give an "opinion" if you ask for it, but only after all other options have been exhausted. Do you feel you will need that option? Or do you need someone from the healthcare field? Jane and Bob case present issues related to lingering adverse childhood experiences and possible substance abuse. Would a mediator with a counseling or therapy background be best suited? What about the financial issues presented by Bob's interest in his family company and Jane's qualification as a CPA but limited recent work experience?

Based on your good working relationship with Bob's lawyer, the probability is high that you will choose the right mediator for the job – one that has a sense of the family dynamic and has experience with the intricacies of the issues involved. For example, a business valuation appears likely. The mediator should appreciate the need for the valuation and have experience in receiving a report from a business valuation expert. The mediator could then assist the parties in having a conversation about aspects of that report and help them reach an agreement on the value of the business interest.

If the lawyers have experience with the mediator they can let their clients know what to expect as far as how he or she approaches the process of mediation. For example, some mediators keep the parties primarily in the same room. Can Jane and Bob be in the same room at the same time and still have civil, productive conversations? Some mediators prefer a "shuttle diplomacy" where the parties primarily remain in separate rooms while the mediator goes back and forth. Is this necessary or will one or both parties get frustrated waiting for the mediator to return and distrustful not knowing what's going on in the other room?

Mediation is a confidential and private process and Jane may want to keep their family dispute a relatively private matter.

It's also completely voluntary. The mediator makes no decisions but assists the parties in having a conversation in reaching their own agreement on the substantive issues. This can be done by the mediator's establishing certain ground rules for the discussions and the parties agreeing to that process. The mediator then ensures that the playing field is level and that one party does not overwhelm the other.

Jane didn't make the choice to separate but she can choose how she is going to separate which may be empowering to her. However, she may not know what she wants and will need more support throughout her separation, including in meetings with her husband, which is why Collaborative Law may be better suited for her matter.

COLLABORATIVE LAW

Not all clients are suited for Collaborative Law and screening

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for suitability is very important. But as a newer method of ADR, it should be considered.

Collaborative Law takes a "team approach" to dispute resolution. Lawyers, mental health counselors (called "coaches"), and neutral financial experts team up to support Jane and Bob and their children through the process of reaching a separation agreement which will include such far-ranging issues as to division of retirement accounts to where their children will be for Spring Break. Each team member applies their own area of expertise to the many issues faced by Jane and Bob and their children.

Coaches would work with Jane and Bob on communication and trust-building so that their future co-parenting is in the best shape it can be. How their children cope with the separation is primarily influenced by how well Jane and Bob interact with each other going forward as separated parents. Primary importance is placed on that future relationship. How they interact in the future will be colored by how they interacted in the past. For example, the fact that they never fought during the marriage may mean they never really communicated with each other or know how to express their needs and wants with the other person. If this aspect of their relationship goes unaddressed, things may continue to be unsaid and resentments may build. Misunderstandings and incorrect assumptions will then fill the void leading to an inability to work out even the simplest of things between them, all to the detriment of their children. Coaches can prove invaluable to parents to ensure this does not occur.

Neutral financial experts gather information on the family finances and provide advice and guidance on how best to make division of assets and debts as well as consider present and future income sources to meet expenses. This may not seem that important to Jane and Bob considering he works at his family's business and has always taken care of the family financially. We may assume he has a working knowledge of the family's finances. As former practicing CPA, Jane may have the financial wherewithal to consider the financial issues involved. However, disagreements can still arise, for example, over claimed expenses or division of certain assets. A "neutral" financial expert is just that – neutral. So, if Bob doesn't like an expense claimed by Jane in support discussions, the neutral can simply say, "Well, that's what your own books show and I've gone through them with a fine tooth comb." The discussion on that issue is no longer between spouses with accompanying the emotional effect, but between one party and the financial neutral where the relationship is purely professional. Taking the emotional sting out of a conversation is always helpful to reaching a reasoned and reasonable agreement.

Collaborative lawyers represent their respective clients so Jane and Bob would each have their own lawyer. However, the lawyers will have received training in the Collaborative process and will counsel their clients against positional bargaining like that you may experience when buying a used car. Rather, they use interest-based techniques focused on joint problem-solving, so much so that should the Collaborative process terminate for any reason Jane and Bob would need to find new lawyers. The Collaborative lawyers aren't focused on anything else than the Collaborative process. They are not distracted by the possibility of going to court during settlement discussions. Legal advice is given freely to clients by their lawyer in the presence of the other spouse and their attorney. Much of the Collaborative process happens around the same conference room table. Trust, transparency and voluntary disclosure of assets are all paramount.

When you hear Jane's story, you may see several possible forks in the road where the case could divert onto a much rougher road thereby making resolution by mediation or Collaborative Law quite difficult. In that situation, other alternatives to traditional litigation could be considered, including arbitration and using a Judge Pro Tempore.

ARBITRATION

Arbitration is another form of alternate dispute resolution. Jane and Bob may pick arbitration as a private form of litigation which can keep issues between them confidential. Since Bob's father will certainly react negatively to disclosure of financial details related to the family business, this confidentially may be important in valuing Bob's interest in the family business while retaining Bob's position and ability to derive income from that business. Jane and Bob can actually agree as to rules of arbitration and further agree to exactly which specific issues will be arbitrated. Arbitration is binding and is therefore not appropriate for custody or support of their children. One advantage of arbitration is that it results on a final resolution of the case. The arbitration award is final and may be enforced by a court if necessary.

Many mediators will also arbitrate a case. Some mediators will agree to start with mediation and resolve as many issues as possible through an agreement. Then, if the parties are unable to resolve all issues submit the remaining issues to arbitration.

JUDGE *PRO TEMPORE*

You may tell Jane that if she and Bob cannot resolve complex valuation or tracing issues in their case through negotiation, mediation or collaboration, they may need multiple days to present their case to a court. In some jurisdictions, parties may be able to obtain a multi-day trial in a divorce case. Unfortunately, in others it may be difficult to schedule a hearing that will last more than a day.

Although not technically alternate dispute resolution, you may consider using a judge *pro tempore* where the issues are complex and the parties have sufficient funds to pay for this service. This process retains the case on the court's docket but allows the parties' lawyers to select a lawyer or retired judge to be appointed by the court to have the same authority as a judge for that specific case. Not only does this allow them extra time to present their case and provide ease of scheduling, but the lawyers can agree on an individual with the expertise, understanding, and experience to make well-reasoned decisions on their specific complex issues. A judge *pro tempore* is paid by the parties.

The judge *pro tempore* will conduct a formal trial and in all ways preside as a sitting judge. The judge *pro tempore's* findings of fact and conclusions of law are incorporated into an order which is final unless the case is appealed to the Court of Appeals.

Ann Brakke Campfield

has practiced law for more than 35 years; she has been with Barnes & Diehl since 2000. Her family law practice includes collaborative law and alternate dispute resolution. She is a member of the Virginia, Richmond and international collaborative professionals groups. She is a 1981 magna cum laude graduate of the Washington & Lee University law school, where she was a member of the Order of the Coif. She earned a master's degree in teaching from Lynchburg College and her undergraduate degree from Stratford College. A past president of the Metro Richmond Family Law Bar, Brakke is a member of the Virginia State Bar Family Law section and the Chesterfield County bar. She is listed in Virginia's Best Lawyers for Family Law. She has published numerous family law articles, including pieces for the Virginia Trial Lawyers Association and for the VSB.

Christopher H. Macturk

is a shareholder at Barnes & Diehl, where he has practiced law since 2000. He was a solo practitioner for four years before joining the firm. A 1991 graduate of the University of Richmond, he earned his law degree from the Cumberland School of Law at Samford University. Chris is a Fellow of the American Academy of Matrimonial Law, and he has taught law as an adjunct at the University of Richmond law school. He has been listed in Virginia Super Lawyers since 2014 and he was named to Virginia's "Legal Elite" in 2009 and 2013. He is A-V rated in Martindale Hubbell. He is a past president of the Henrico County and the Metro Richmond Family Law bar associations. He is a member of Collaborative Professionals of Richmond, Virginia Collaborative Professionals and the International Academy of Collaborative Professionals.

Cohabitation in a relationship analogous to marriage

What does this even mean anymore?

By Irene C. Delcamp

When seeking a modification of spousal support, one goal for payor former spouses may be proving that the other party is cohabiting in a relationship analogous to a marriage for over one year. For the practitioner, this task is often daunting with a lack of direct evidence. This presumptive termination trigger of Virginia Code § 20-109 (A) (2017) has been the subject of much discussion over recent years due to changes in society's views on marriage and relationships. The result is a broader applicability of the statute's provisions for termination.

This article focuses on interpreting the "cohabitation," termination provision of Virginia Code § 20-109 (A) (2017) and offers an examination of its recent treatment by the Courts. We will specifically focus on the term, "Analogous to Marriage," and whether the gender of the people involved and the level of intimacy present in the relationship impact the applicability of the termination provision. Further, we will review the level of commitment needed to qualify as actual "cohabitation."

1. Interpreting the statute and its treatment by the court

A review of developments on the subject of, "cohabiting with a person in a relationship analogous to a marriage for more than one year," leads us squarely to the Virginia Supreme Court case, *Luttrell v. Cucco,* 291 Va. 308; 784 S.E.2d 707 (2016). In *Luttrell,* the Supreme Court of Virginia focused on the meaning of the words, "cohabitation analogous to a marriage," as set forth by Virginia Code § 20-109 (A) (2016) in *Luttrell v. Cucco*, 291 Va. 308, at 312; 784 S.E.2d 707, at 709 (2016).

After 15 years of marriage, in 2007, Mr. Luttrell and Ms. Cucco separated. Ms. Cucco filed for divorce and the parties subsequently entered into a property settlement agreement. Their Final Decree of Divorce, which the Fairfax County Circuit Court entered in 2008, affirmed, ratified, and incorporated their property settlement agreement. The agreement required Mr. Luttrell to pay spousal support to Ms. Cucco for a term of eight years. The standard termination events of Virginia Code § 20-109(A) applied because the parties' agreement failed to explicitly name alternate termination events.

In July 2014, after approximately six years of spousal support payments to Ms. Cucco, Mr. Luttrell filed a motion to terminate spousal support in the Fairfax County Circuit Court. In the lower court, Mr. Luttrell claimed that Ms. Cucco was engaged and that she had been cohabiting with her fiancée for at least a year. Ms. Cucco acknowledged that she was engaged, but asserted that her relationship was with another woman; therefore, it was not what the Code intended as cohabitation in a relationship analogous to a marriage. *Luttrell v. Cucco,* Record No. 1768-14-4, 2015 Va. App. LEXIS 135 (Apr. 21, 2015). The lower court agreed with Ms. Cucco, and arrived at the conclusion that only opposite-sex couples could cohabit under § 20-109(A) – meaning that they had to have the ability to marry if they were to cohabit "analogous to a marriage." Id.

Mr. Luttrell appealed the trial court's ruling. The Court of Appeals examined the history of Virginia Code § 20-109.

Before 1997 Amendments: Spousal support terminates only upon the death or marriage of the spouse receiving support.

Since 1997 Amendments: The General Assembly amended the statute to permit the Court to terminate support where there is cohabitation, "in a relationship analogous to a marriage for one year or more." Virginia Code Section 20-109(A)

The Court of Appeals, in its history lesson, believed the phrase, "in a relationship analogous to a marriage," to be a status wherein a man and a woman live in a matter normally 'attendant with a marital relationship.' *Luttrell v. Cucco,* 2015 Va. App. LEXIS 135 (at pp 8-9)(Va. Ct. App., Apr. 21, 2015).

Mr. Luttrell appealed. In a pivotal decision, the Supreme Court of Virginia re-examined the history of § 20-109(A) and ruled on the meaning of person under § 20-109(A):

The language of 20-109.1(A) is gender neutral. The words spouse and person encompass individuals of either sex, and thus, the provision may be understood to apply to either same-sex or opposite-sex relationships. The Virginia General Assembly decided against utilizing the words "of the opposite sex."

Luttrell v. Cucco, 291 Va. 308, at 316; 784 S.E.2d 707, at 711 (2016).

The Supreme Court noted that the General Assembly was aware of the option of including restrictions for gender, which is a addressed in jurisprudence predating the amendment to § 20-109(A).[1] This deliberate choice signals the General Assembly's intent that the word "person" includes members of either sex.

Accordingly, the Supreme Court of Virginia reversed the Court of Appeals' decision and found the terminating event of cohabitation did exist in Ms. Cucco's relationship with another woman.

2. How much intimacy and contact is considered "cohabitating?"

The Virginia Court of Appeals held that the following factors in general are relevant to the cohabitation inquiry under § 20-109(A), P*elligrin v. Pelligrin,* 31 Va. App. 753, 525 S.E.2d 611(2000.)

1. Sharing a common residence.
2. Intimate or romantic involvement; *Note, the Court of Appeals specifically chose not to address the issue of same-sex vs. opposite-sex relationship in Pelligrin.
3. Provision of financial support.
4. Duration and continuity of the relationship/other indicia of permanency.

Pelligrin v. Pelligrin, 31 Va. App. 753, 764-66, S.E2d 611, 616-17 (2000.)

In *Pelligrin*, the Court of Appeals ordered that a court may use its discretion in assigning weight to each factor above. For instance, to prove cohabitation, the relationship does not have to involve the sexual intimacy of factor 2, above, but must involve a generous portion of other key factors. In an unpublished opinion, the court found that the former wife was cohabiting in a relationship analogous to a marriage though sexual intimacy was not proven. See *Brennan v. Albertson,* Record No. 2042-11-4 (July 24, 2012.) The following factors were apparently enough to support cohabitation:

A. Functioning together as a family unit.
B. Routinely sharing meals.
C. Vacationing together every year.
D. Attending one another's family reunions.
E. Attending church together.
F. Attending each other's children's activities
G. Sharing a residence for a period of years
H. Financially interdependent (specifically, with respect to funding childcare.)
I. Being present at the time of the birth of the other person's child(ren) and providing childcare from the time of the child's birth.

Brennan v. Albertson, 2012 Va. App. LEXIS 240 (pp 3-5).

Proof of the above specific list of actions, which were traits of a relationship analogous to marriage, reduced the need for proof of sexual intimacy in Brennan. Per the court's rulings in Pelligrin, the court has discretion to put different emphasis on each factor, depending on the circumstances of the case.

As noted by the Court of Appeals in Brennan, the concept that sexual intimacy is not required to prove that a marriage is a bona fide marriage is not new to the Virginia Supreme Court and Virginia's lower courts. The Supreme Court of Virginia has assessed the necessity of sexual intimacy when assessing a desertion claim. Petachenko v. Petachenko, 232 Va. 296, 299, 350 S.E.2d 600, 602 (1986). There, the court ruled that the refusal of sexual intimacy or romance is not a valid basis for desertion. Likewise, sexual intimacy alone would not constitute a resumption of the marriage and end to desertion. Id. Therefore, the court has past ruled that sexual intimacy is not a distinguishing trait of a valid marriage. Therefore, it follows suit that cohabitation in a relationship analogous to a marriage would not require sexual intimacy as an absolute condition. Now, when looking at the factors above, and assessing whether or not we have a strong case for cohabitation, it often becomes a question of "how much." How often must two individuals spend the night together in the same residence to signal cohabitation in a relationship analogous to a marriage? In *Cranwell v. Cranwell,* 59 Va. App. 155; 717 S.E.2d 797 (2011) the Court of Appeals ruled that proof of the following conditions failed to establish cohabitation: a romantic involvement for a number of years, the parties' families' knowledge of relationship, frequent visitation even though one person lived in Virginia and the other person lived primarily in California, and maintaining separate finances. Cranwell is an example of time together being too tenuous due to distance; therefore, the court held that it was not a relationship analogous to a marriage under Virginia Code § 20-109(A) (2017.)

The gender of the person involved in the relationship and the presence of sexual intimacy are not dispositive factors for the termination of support under § 20-10(A.) The focus by the courts instead has been the presence of a financially interdependent family unit that is intertwined in multiple areas of life. The regular interaction involved in actually sharing a household together is also still necessary.

Practice pointers for the Virginia family lawyer:

When a client hires us for the purpose of petitioning the court for his or her support payments to cease, we need to begin with examining what we can actually prove. Do we have time-stamped photos to help establish the one-year time frame? Do we have reliable witnesses who have documented their observations? Do we have sufficient evidence to demonstrate there is one household? If suit has been filed, we can subpoena DMV records and household bills. Has social media provided useful clues? These are all avenues worth pursuing in your quest to prove cohabitation in a relationship analogous to a marriage. The search for proof need not end upon realizing a same sex relationship is involved or upon realizing that the relationship involves seemingly platonic friends who live with one another. Case law prompts us to examine further.

[1] *The Court of Appeals examined separation agreements which were hand-crafted to expand the statute's termination events, such as the separation agreement in Frey v. Frey, 14 Va. App. at 270, 275, 416 S.E.2d 40, at 43, which clearly stated, "cohabitation, analogous to a marriage, with another man." Frey predated the 1997 amendment, in which the General Assembly decided against inserting additional words such as "other man," or "opposite-sex."*

Irene Delcamp
is a shareholder at Barnes & Diehl, where she has practiced family law for more than 10 years. She serves on the Domestic Relations Council of the Virginia Bar Association for her eighth consecutive year. An active member of the Chesterfield Bar Association, she currently serves on the Domestic Relations Subcommittee of the Bench Bar. She has also served on the Board of the Metropolitan Richmond Women's Bar Association for two consecutive years (2012-2014.) She has published several pieces, to include Support for Baby Boomers, a Primer, which was published by Virginia Lawyers Weekly, and also, Is It Time For an Estate Planning Check-Up?, which as published by Chesterfield Living and West End's Best. She has been named a Rising Star for Virginia Super Lawyers for 2009-2017. A proud Wahoo, she graduated in 2002 from the University of Virginia and in 2005 from the University of Richmond School of Law.

Third-party custody and visitation present challenges

By Melissa VanZile

Third-party custody and visitation are among the more challenging custody issues for family law practitioners and courts, as they involve people who may not be a child's parent but a person who has usually played an active role in the child's life and wants to continue to be able to do so.

However, the continuing relationship with the non-parent and the child must also be considered in light of a parent's fundamental and constitutional right to make decisions for his or her own child, including who that child spends time with.

As family law attorneys, we see on a daily basis that every family we help has a different make-up. A child's immediate family may or may not consist of two biological parents and it may involve grandparents, stepparents and other family members. The unique makeup of each family and the people involved in those children's lives pose a unique set of facts and legal issues in custody and visitation cases, some of which are outlined below.

In custody and visitation cases determined by the court, "the court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest." Virginia Code § 20-124.2(B).

Pursuant to Virginia Code § 20-124.1, a "person with a legitimate interest" has standing to seek custody and visitation rights. This term has been interpreted broadly to include but not be limited to grandparents, stepparents, step-grandparents, former stepparents, blood relatives, and family members. It excludes any person whose parental rights have been terminated, any person whose interest derives from or through a person whose parental rights have been terminated, and any person who has been convicted of certain criminal sexual offenses when the child who is the subject of the petition was conceived as a result of such violation. Va. Code § 20-124.1.

Virginia has long recognized the preference of natural parents over third parties in custody disputes. "[A] fit parent with a suitable home has the right to the custody of his child superior to the rights of others the law presumes that the child's best interests will be served when in custody of its parents." *Judd v. Van Horn,* 195 Va. 988 (1954). This parental preference is in line with decisions of the Supreme Court of the United States, such as *Troxel v. Granville,* 530 U.S. 57 (2000), which held a Washington state third-party statute unconstitutional and determined that a fit biological parent had a right to determine visitation of the paternal grandparents.

To take physical custody of a child from his or her natural parent, a third party must prove by clear and convincing evidence an extraordinary reason for depriving the natural parent of custody. The *Bailes* case lays out the five scenarios which rebut the legal presumption in favor of natural parents: parental unfitness, a previous order of divestiture; voluntary relinquishment; abandonment; and a finding of special facts and circumstances constituting an extraordinary reason for taking a child from its parent. *Bailes v. Sours,* 231 Va. 96 (1986). If the third party can meet this burden of proof, then both parties stand equally before the court, with no presumption in favor of either. *Brown v. Burch,* 30 Va. App. 670 (1999).

Once custody has been determined and a visitation order entered giving visitation rights to a third party, if the custodial party then seeks to terminate and/or reduce visitation, he or she must show that denying visitation with the third party who has court ordered visitation would be in the best interest of the child. *Albert v. Ramirez,* 45 Va. App. 799 (2005). In *Albert,* the court considered whether it was necessary to apply the presumption in favor of awarding child custody to a natural parent where petitioner, stepfather, and respondent, mother, had entered into an order granting the parties joint legal custody and physical custody of the child.

The appellate court found that the trial court had erred in awarding mother the modification of visitation to stepfather since mother had failed to show a material change in circumstances or that denying visitation would be in the best interests of the child. Importantly, the court discussed that it should not be the third party's burden to show actual harm if the child no longer enjoys visitation with that individual. The Court of Appeals in *Rhodes v. Lange,* 66 Va. App. 702 (2016) also held that the actual harm standard did not apply where the mother sought to modify an existing visitation order giving visitation rights to the child's grandparents. The court applied the two pronged-test of *Keel v. Keel,* 225 Va. 606 (1983) to first determine if there had been a material change in circumstances since the current visitation order and if so to then determine if the change would be in the best interests of the child. In Rhodes, the court found that though there had been an agreed upon change in circumstances, that modifying the current visitation order granting visitation to the grandparents was not in the child's best interest.

The court's ruling in *Denise v. Tencer,* 46 Va. App. 372 (2005), further affirmed that the court must remain focused on the best interest of the child when dealing with individuals who have a legitimate interest in custody. The court held that "the actual harm standard does not apply where one parent objects to the third party's request for visitation, but the other parent affirmatively requests that the third party be allowed visitation." *Yopp v. Hodges*, 43 Va. App. 427 (2004); *Dotson v. Hylton,* 29 Va. App. 635 (1999).

The Court of Appeals addressed the actual harm standard in *Griffin v. Griffin*, a non-parent visitation case. *Griffin v. Griffin*, 41 Va. App. 77 (2003). The petitioner seeking visitation with the child was the husband but not the biological father of a child born into his marriage. The trial court granted visitation over the mother's objections and the appellate court reversed. The Court of Appeals held that the "actual harm standard must be understood as conceptually different from, and significantly weightier than, the best-interests test, and that it is irrelevant, to this constitutional analysis that it might, in many instances be 'better' or 'desirable' for a child to have visitation with a non-parent." Thus, without a demonstration of actual harm to the child if there is not visitation, the court will not apply the best-interests test.

"Courts may grant visitation to a non-parent in contravention of a fit parent's expressed wishes only when justified by a compelling state interest." *Williams v. Williams*, 24 Va. App. At 783, 485 S.E.2d at 654. The burden of proof is on the moving party requesting visitation to show by clear and convincing evidence that both actual harm would occur to the child's health or welfare without such visitation and then that the visitation is in the child's best interest.

"To justify a finding of actual harm under the clear and convincing burden of proof, the evidence must establish more than the obvious observation that the child would benefit from the continuing emotional attachment with the non-parent. No doubt losing such a relationship would cause some measure of sadness and a sense of loss which, in theory, "could be" emotionally harmful. But that is not what we meant by "actual harm to the child's health or welfare." *Stradter v. Siperko,* 52 Va. App. 81 (2008).

If your client is a third party who is seeking visitation of a child, you should evaluate the case to first to determine if this person falls within the definition of a person with a legitimate interest. It should then be determined if the actual harm standard will apply to your case.

If one of the parents will support the visitation with their child and the third party, it will be necessary to ensure that person testifies at the hearing to testify that he or she affirmatively requests visitation with his or her child and the third party. A parent's silence or absence is not sufficient.

The parent must come to court to affirmatively request the visitation with the non-parent. Having a fit parent as a witness requesting the third party visitation will eliminate the need to prove actual harm to the child if the visitation with the third party does not occur and the standard is what is in the best interest of the child.

If the facts of your case require you to prove by clear and convincing evidence that there would be actual harm to the child if the visitation does not occur with the child and your client, it is important to determine at the outset of the case what evidence can be presented to the court to prove actual harm including the use of expert testimony.

As the case law bears out, many of these cases turn on whether there was a mental health expert, who had seen the child, testify that actual harm would occur to the child if visitation with the third party did not occur.

Melissa VanZile

joined Barnes & Diehl in 2013, after nine years as a lawyer at another Richmond-area family law practice. A 2001 graduate of Mary Washington College, she earned her law degree from the University of Richmond in 2004. She has served as president of the Metropolitan Richmond Women's Bar Association and a past board member of the Metro Richmond Family Law Bar. She is a member of the Richmond, Henrico County and Chesterfield County bar associations. She has been listed in Virginia Super Lawyers since 2012; for her first two years, she was tabbed a Rising Star. In 2016, she was selected as a Leader in the Law by Virginia Lawyers Weekly. This year, she was listed in Best Lawyers in America under Family Law. Melissa has written and lectured extensively on family law, including presentations to the Virginia Bench-Bar Conference.

Path to getting court to seal record not always clear

By Erik Baines

Statutes and the common law govern the court's authority to seal (or sequester) its record. See generally *Shenandoah Pub. House, Inc. v. Fanning,* 235 Va. 25 (1988). The common law has long-recognized a public right to access to court records. Id. This right has been codified. Id.; Virginia Code § 17.1-208 ("Except as otherwise provided by law," records maintained by the circuit court clerk "shall be open to inspection by any person and the clerk shall, when requested, furnish copies thereof…"); see also *Daily Press, Inc. v. Commonwealth,* 285 Va. 447 (2013) (right of access codified in Code § 17.1-208 is coextensive with constitutional right of access in a criminal case).

In order to overcome the rebuttable presumption of openness, the movant "must bear the burden of establishing an interest so compelling that it cannot be protected reasonably by some measure other than a protective order." Shenandoah, 235 Va. at 259. This presumption is "subject to statutory exceptions…" Id. at 258. In all cases, the movant must show more than "the desire of litigants" or "risks of damage to professional reputation, emotional damage, or financial harm, stated in the abstract…" Id. at 259.

Several civil statutes specifically permit a court to seal its record: Virginia Code § 20-124 (divorce cases); § 8.01-576.10 (dispute resolutions); § 8.01-581.22 (mediation proceedings and resulting settlements). In a divorce, "[u]pon motion of a party to any suit under this chapter, the court may order the record thereof or any agreement of the parties, filed therein, to be sealed and withheld from public inspection and thereafter the same shall only be opened to the parties, their respective attorneys, and to such other persons as the judge of such court at his discretion decides have a proper interest therein." Code § 20-124. At first blush, the statute seems broad enough to allow the court the broad discretion to seal the record in a divorce suit. However, the Court of Appeals held that, with the exception of confidential information such as social security numbers, a litigant must still rebut the presumption of openness. *Shiembob v. Shiembob,* 55 Va. App. 234, 244 and n. 2 (2009) (finding that father's "concern for his professional reputation does not rebut the presumption…"). Id. at 244. What facts justify sealing a court record is not clear. If it is to protect the "welfare of children," then the presumption is likely rebutted. Id. (citing *In re Berg,* 152 N.H. 658). Discovery materials submitted to the court (or lodged there in the first instance) are not "judicial records" subject to the public's right of access. *In re Worrell Enterprises, Inc.,* 14 Va. App. 671, 682 (1992) ("Whether the documents are filed with or in the custody of the court is not dispositive as to whether they are 'judicial records'" subject to the public rights of access and stating that, since discovery documents had not been offered into evidence, they were not judicial records).

Health records submitted into evidence may not be subject to sequestration if such records are admitted into evidence or otherwise must be submitted to the court for its consideration. For example, in *Libron v. Branch*, 2009 Va. App. LEXIS 371, Record No. 0261-09-02 (Va. Ct. App. August 18, 2009), the father made a motion to the Court of Appeals requesting that certain medical records of the child be sealed because (1) Code § 32.1-127.1:03 (health records privacy) and (2) they would "damage and defame his character" if not placed under seal.

The court, however, held that Code § 32.1-127.1:03 does not apply to a minor's record and that the father failed to otherwise state a sufficient reason to seal the judicial records. See also *Lotz v. Commonwealth,* 277 Va. 345 (2009) (stating that the Code § 32.1-127.1:03 does not apply where the records are otherwise required to be disclosed by statute).

Settlement agreements submitted to the court for approval or for entry of an order are judicial records that may be subject to the public's right of access. This includes such agreements reached in mediation despite the protection provided in Code § 8.01-58.22. *Perrault v. Free Lance-Star,* 276 Va. 375 (2008). In Perrault, the trial court required parties, petitioning the court for approval of a wrongful death settlement, to provide the financial terms of an agreement reached in mediation despite the prohibition contained in Code § 8.01-58.22. The wrongful death compromise statute, Code § 8.01-55, required a petition stating the settlement's "terms and the reason therefor."

The public had a right of access because "the settling parties were required to obtain court approval of the mediated settlements…" Id. at 388.

Any agreements of the parties must be submitted to a court for entry of an order prior to becoming enforceable as a decree in a divorce suit. Code § 20-109.1; see e.g. *Shoosmith v. Scott*, 217 Va. 789 (1977) (a contract approved by, but not incorporated into, a divorce decree may not be enforced by contempt).

As an agreement must be submitted to the court and the court "may" ratify its terms, such an agreement would, as in a wrongful death settlement, be subject to approval prior to becoming enforceable as an order. Therefore, a custody, visitation, child support, or spousal support agreement entered in relation to a divorce suit will be a public record unless a reason is given beyond the "desire of the litigants" or more than "risks of damage to professional reputation, emotional damage, or financial harm, stated in the abstract…"

There is a paucity of Virginia appellate case law as to what is sufficient evidence to justify sealing a court record. Resort to case law of our sister states may be helpful. See *Foley v. Commonwealth,* 8 Va. App. 149, 161 (1989) (where a precise issues has not been considered by a Virginia court, the court will "look to our sister states for guidance"); see Shiembob, supra. (Citing sister state cases).

The Fairfax Circuit Court held that documents contained in a county employee grievance dispute contained documents protected by the attorney-client privilege and attorney work product doctrine. *Tianti v. Rohrer,* 91 Va. Cir. 111 (2015). To the extent the documents contained the privileged information, the documents were sealed. Id.

As to Juvenile and Domestic Relations Court, "[a]ll juvenile case files shall be filed separately from adult files and records of the court and shall be open for inspection only to" the persons enumerated. Code § 16.1-305. JDR records in custody and visitation matters are regularly maintained in a juvenile case file.

On appeal, "[e]very circuit court shall keep a separate docket, index, and, for entry of its orders, a separate order book or file for cases on appeal… except… cases involving support pursuant to § 20-61 or subdivisions A 3, F or L of § 16.1-241…." Code § 16.1-302. Notably, Code § 16.1-241.1 A 3 involves the disposition of a child "[w]hose custody, visitation or support is a subject of controversy or requires determination." See also Code § 17.1-124 (regular circuit court procedures regarding the order book control under this section where in conflict with Code § 16.1-302).

Depending on the locality, an order may be necessary to seal a custody, visitation, or child support matter that is appealed from JDR court to circuit court.

Erik D. Baines
has been an associate with Barnes & Diehl since 2014. He served as a law clerk for the Richmond Circuit Court for a year following his graduation from the University of Richmond law school in 2012. He earned his undergraduate degree in 2002 from Virginia Military Institute, where he was First Standing Graduate in the History curriculum; he was selected as a member of the Marshall Table (Omicron Delta Kappa). Erik was named a Rising Star by Virginia Super Lawyers last year. He serves on the board of directors of Fishburne Military School Alumni Association. He has been an adjunct faculty member at Virginia Commonwealth University.