The Divorce Agreement Newsletter

Wednesday, June 7, 2017

Bringing Virginia Divorce Law into the 21st Century

The 2017 amendments to Secs. 20-124.2 & 16.1-278.15 of the Virginia Code downgrading the term "visitation" may tell us that the time has come to bring Virginia family law more fully into the 21st century. Some of the needed updating requires legislation or changes in rules of court, while the rest can be done in CLE courses or simply in practice. Here's a checklist of some changes that need to be considered:

1. **Downgrading the term "custody."** This is also an outmoded, misleading and insulting term. The new one-sentence "visitation" amendment was brilliant. It simply created the authority to treat "parenting time" as synonymous. For "custody," the synonym is "parenting plan." Most mental health professionals who deal with children of divorce dislike both old terms. Approximately one-third of American states (including West Virginia) have already eliminated or downgraded both of those terms. The synonym strategy should eliminate any problem of terminology with the UCCJA.

2. **Styling divorce cases *in rem*.** Since around 90% of all divorce cases are resolved by agreement, and since the divorce even in most litigated cases is ultimately based upon separation grounds, it makes no sense to have them styled in an adversarial format. The domestic relations docket is often separate in any event. Such a change would not affect the criteria for spousal support and equitable distribution determinations. Let's just make the captions "In Re the Marriage of [Husband] and [Wife]." Around 15 states have already made this change.

3. **Eliminating the old fault grounds of divorce.** In recent years, the old fault grounds of adultery, cruelty and desertion are seldom used for the actual divorce. A majority of American states have eliminated them as formal grounds for divorce. To the extent that these issues are relevant to the criteria for spousal support and equitable distribution, they are already covered in the Code and case law (with perhaps a few tweaks). Is some valid social purpose really served by figuratively sewing the scarlet letter "A" on someone's lapel?

4. **Creating a new action for legal separation.** If someone needs access to a court before there are valid separation grounds, there are three options: (a) filing in the JDR court if there are support or custody issues; (b) fluffing up fault grounds; or (c) using the old and amorphous action of separate maintenance. There are problems with each of these approaches. Why not just create a legal separation, as some other states have done? Proof of separation would not have to be established, since the existing *pendent lite* law could be

applied. The action could then be converted into divorce by a simple motion at a later date. Jurisdiction would be in the Circuit Courts.

5. **Setting up some special rules for family law discovery.** The civil discovery rules need to be somewhat revised to be more effective in divorce cases. Let's consider a two-step process. First, a basic financial worksheet that can be filled out in either Excel or Word, to be required at the outset of each filed contested case, and available for use in negotiated cases. Second, a standard checklist (with forms) for the further information and documents that either party may request as relevant to that particular case. Examples of each are attached. This could be done in an experimental manner as a local rule of court.

6. **Changing the focus from litigation to negotiation.** It's time to focus more CLE programs on what family lawyers actually spend most of their time doing, namely negotiating divorce agreements. There needs to be more communication and sharing among conventional family law practitioners, collaborative practice attorneys, and those lawyers who mediate. This would allow more focus on the aspects of substantive law that negotiating attorneys need, on future-directed planning as well as on litigation-based options, and on ADR skills. The effective and tested conflict resolution strategies that have been developed in ADR over the past 35-40 years deserve better coverage in CLE programs.

7. **It's time for 21st century drafting of divorce agreements.** It's shocking that even some of the more respected family law firms use form files for their agreements that haven't been revised in decades. Too many family lawyers still use these archaic and constipated form files. Divorce agreements must be clear and understandable. If the parties are identified by their names rather than "Husband" and "Wife," their agreement is more readable, especially when they are no longer married to each other. Every manual on good legal drafting counsels using an active voice and avoiding long sentences and paragraphs. Technical terms should always be translated. If a provision for a hypothetical that is unlikely to occur takes two or three pages, consider an alternative such as an arbitration clause. A date of origin should be attached to each provision and revision in every office agreement form file.

8. **Other more sensitive issues.** Some other changes may be desirable, but are perhaps a bit more controversial. These include: (1) treating retirement at a reasonable retirement age as a material change in circumstances for spousal support purposes; (2) establishing presumptions as to time-limits on spousal support (as was done in the first draft of the 1998 amendments); and (3) creating a rebuttable presumption of joint parental decisions and shared parenting time. These are matters to keep in mind for a later time.