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 strongly dislike both old terms. Approximately one-third of American states (including our neighboring states of West Virginia and Tennessee) have already eliminated or downgraded both of those terms. The synonym strategy should eliminate the 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 most divorces even in most litigated cases is ultimately based upon separation grounds, it makes no sense to have them styled in an adversarial format. In many Circuit Courts 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 divorce grounds, there are three options: (a) filing in the JDR court if there are support or custody issues; (b) fluffing up fault grounds under § 20-95; or (c) using the old and amorphous action of separate maintenance. There are problems with each of these approaches. Why not just create an action for legal separation, as some other states have done? Proof of separation would not have to be established, since the existing *pendente lite* motions law could be used. 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. This might be done in an experimental manner as a local rule of court. The Memorandum that coveys this article includes cites for a proposed Excel spreadsheet and a checklist in Word.

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. See my article "What ADR Professionals Can Learn from Litigating Divorce Lawyers" in the Fall 2017 issue of the *Virginia Family Law Quarterly*. I also present the other side of the case, "Using ADR Ideas to Negotiate Divorce Agreements," online at https://www.mediate.com//articles/GaughanL7.cfm.

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. See my article, "It's High Time to Draft ALL Divorce Agreements in 21st Century English" in the Fall 2013 issue of VSB's *Family Law News*.

8. **Eliminating the requirement of corroboration for no-fault uncontested divorces based upon an agreement.** The requirement of corroboration for separation divorce grounds dates from the days in which the legal system was framed to discourage and limit divorces. It hasn't served any useful social purpose for decades. See the excellent article on this subject by Jennifer Bradley in the Spring 2017 issue of the *Virginia Family Law Quarterly*.

9. **Treating retirement at a reasonable retirement age as a material change in circumstances for spousal support purposes.** Many of the Circuit Courts are effectively doing this, despite the fact that it results in a voluntary decrease in the payor's income. This is a fair and appropriate principle, because it still leaves room for discretion as to whether some spousal support should continue, and if so, in what amount. While the application of the principle is up to the particular Circuit Court judge, the existence of the principle should not be. A presumptive reasonable retirement age might be the Social Security age for benefits that are not reduced for early retirement.

10. **Establishing certain presumptions for spousal support.** The first draft of the 1998 amendments to the Virginia spousal support statute contained two presumptions that did not make it into the final draft. The first was that (1) in marriages of twenty or more years it would be presumed that spousal support would not be time-limited; (2) in marriages of ten years or less it would be presumed to be time-limited; and (3) in between there would be no presumption either way. If no. 2 above is raised to 15 years, these presumptions are very much within the range of what most Circuit Courts are actually doing.

The second presumption was that if spousal support is to be time-limited, it should be presumed to be for one year for every two years of the marriage. This is also more or less what the Circuit Courts have been doing, but in the interest of uniformity it should have a statutory basis.

A third possible issue is whether there should be presumptive set of formulas for permanent spousal support. There are arguments both ways for this. Many of us have been in more than one hearing on permanent spousal support where the judge announced a figure exactly consistent with the interim formula (usually Fairfax County's), but using the criteria of § 20-107.1. The interim formulas are often cited in settlement negotiations, but the problem is that the issues as to permanent spousal support raised somewhat different issues. Any proposed set of formulas would need careful study.

11. **Creating a rebuttable presumption in favor of joint parental decisions and shared parenting time.** At least in Northern Virginia, and probably in many other places in the Commonwealth, it is quite difficult to talk a judge out of joint legal custody. Not only is this issue treated as if there was a presumption, but in practice it seems like a strong presumption.

Shared parenting time is a bit more controversial. At the present time, one could argue that such a presumption might be a good idea if "shared" is defined the same way as the threshold for the shared custody child support guidelines. At least in Northern Virginia this would be more descriptive of what is already being done by the courts and in many agreements. It is probably premature to presume equal time, but this appears to be a trend in other states. Kentucky is the most recent state to move to an equal time presumption.