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**MEMO: TO VBA COALITION, FBA FAMILY LAW SECTION
VIRGINIA WOMENS ATTORNEYS ASSOCIATION**

FROM: Dick Byrd

DATE: January 17, 2006

**REVIEW OF PROPOSED DOMESTIC RELATIONS
LEGISLATION -- 2006 GENERAL ASSEMBLY**

Below is the first review, reasonably complete, but not exhaustive, of family law bills introduced in the Virginia General Assembly as of January 17, 2006. All bills may be reviewed and tracked at the General Assembly's web site: <http://leg1.state.va.us/cgi-bin/legp504.exe?061+sbj+020>

This recitation of proposed bills does not discuss the several bills that continue the proposed Amendment to the Virginia Constitution passed last year to outlaw the recognition of any gay marriage, or other union or partnership, in any form. See HB 101 and other bills on this subject.

CHILD SUPPORT REVIEW PANEL RECOMMENDATIONS

Larry Diehl and I were appointed by the Governor to serve on the Quadrennial Child Support Review Panel. This Panel has made some substantial proposals to revise to the Virginia Child Support Guideline which I believe are worthy of support by the VBA Coalition, the Family Law Section, and the VWAA. Before addressing the actual wording of the new proposed bills, I would like to give an overview of the Panel's child support proposals that made it into proposed legislation for 2006, then we can review the actual proposed bills. The full basis and derivations of some of these proposals are quite complex and a separate Addendum to this Memorandum is given to more fully explain these proposals.

1. Inflation-Adjustment to Guideline Table of Child Support:

A revision of the basic support guideline table is proposed for the first time since its passage in 1988. In the past 17 years, average incomes have inflated by 78%, and the average cost of goods and services has risen by 63%. There is some automatic adjustment for inflation built into the guideline table. As incomes rise, you go to a higher point on the guideline table and the corresponding support is higher. This automatic adjustment mechanism is relatively good at low incomes, but it is woefully insufficient at higher incomes. The new guideline table adjusts for the inflation in incomes and in costs over the past 17 years. See attachment to this Memorandum for more details on this.

2. Self Support Reserve:

The *Self-Support Reserve* lowers the amount of child support a parent is responsible for if that parent's income is very low, - under \$1,200 per month (\$14,400 per year). This is procedure built into the guideline, by which minimally employed parents are allowed to pay a very low or zero child support so that they have at least some bare minimum income to able to support themselves. This is based on the proposition that a person must have some incentive to earn a wage, and if his wages are mostly all taken by law and paid for child support, then that person is far less likely to continue in the job market. Several states use a self-support reserve for low-income wage-earners. Some self-support reserve methods simply truncate the support at some low wage level. Other states give self-support reserve relief only to the NCP, and several give such a break to both NCP's and to CPs.

The Panel adopted a self-support reserve method that applies to both the CP and to the NCP. This method uses the standard guideline table, and our normal *Income-Shares* method of calculating support, but adjusts low incomes to be even lower when used for calculating income-shares and in the guideline table. The support-break is given to both CPs and NCPs. The self-support reserve works as follows:

(1) The minimum support payable to the NCP remains at \$65 per month for all numbers of children, one to six.

(2) In calculating guideline child support, use an income of \$0 for a party whose income is less than \$800 per month.

(3) For a party whose income is more than \$800 per month, but less than \$1,200 per month, use actual gross income less \$400 per month.

(4) For incomes of \$1,200 per month and over, no self-support reserve adjustment is given.

(5) After adjustment of incomes as set forth above, the standard statutory calculations pursuant to §20-108.2 are used to determine the appropriate guideline support.

This self-support reserve does not give dramatic adjustments in support, but produces a slight bias in the support calculation in favor of the party with very low income. If it is the NCP whose income is very low, and the CPs income is not so low, then this method reduces the child support paid somewhat. If it is the CP whose income is very low, and the NCPs income is not so low, then the method slightly increases the child support paid.

3. Deviation Factors

There is a complete re-write of the §20-108.1 deviation factors, reducing the 18 factors to only 13. Many changes are merely to simplify the factors. The Panel concluded that some Deviation Factors are redundant since 108.2 covers an issue. There were some confusing areas, or where past changes to §20-108.2 were not accompanied by a corresponding change in §20-108.1. We revised the *imputed income* factor, and how one-time or nonrecurring income should be treated. These proposed changes are substantial changes in Virginia law. See attachment to this Memorandum for more details on this.

With the above discussion of the changes in the Virginia child support guideline in mind, and the more thorough discussion in the Attachment to this Memorandum, here are the following actual proposed bills.

I. CHILD SUPPORT LEGISLATION FOR 2006

Recommended by the 2005 Child Support Review Panel:

1. SB 220 & HB 733- Inflation Adjustment to Guideline: This is the new guideline table adjusted for inflation of the past 17 years. The new table of values goes to \$15,000 per month and then has two formulas for higher combined incomes. To make it easier to read and search through §20-108.2, paragraph topic headings have been added. The changes in the guideline table do not in themselves constitute a “change in circumstances” upon which a motion to change child support can be based.

For some reason, the House bill leaves out the paragraph headings put in to make use of this statute easier.

2. HB 731, SB 167 - Revised Deviation Factors: This is the substantial revision to the “Deviation Factors” for the child support guideline. The Senate Bill also contains the revision regarding “one-time” receipts of income, and is the one that should be passed, since the one-time income provision in §20-108.2 is needed to make the deviation changes of §20-108.1 complete.

This legislation overrules *Antonelli v. Antonelli*, 242 VA 252 (1991) and modifies the holding in *Goldhammer v. Cohen*, 31 Va. App. 728 (2000).

3. HB 732 - The Self-Support Reserve: This bill contains the Panel’s proposals to adjust child support slightly to favor a low-income parent, CP or NCP, as described in much more detail above.

4. HB 742 – One-Time Income: This is part of the overhaul of the §20-108.1 Deviation Factors, It eliminates from gross income: “5. Any one-time, or very infrequent, receipt of money or value that is not expected to be repeated, as, for example, a capital gain, inheritance, gift, prize, or award.

Child Support Proposals, other than those recommended by the 2005 Child Support Review Panel:

5. HB 1108, SB 489 – Child Support Payable on First of Month: These bills make the “effective date” of all child support orders the *first of the month*. The House bill does not require that the actual payment due date of support to be on the First, but the Senate bill does so require. This may put a hardship on parties who are paid bi-weekly or weekly for whom a payment schedule in accord with their pay-schedule is most appropriate. This may make Income Deduction Orders more difficult, since an employer may have to withhold weekly, but pay monthly.

6. SB 300 – Quick CS Hearing for Reservists Called to Duty: Courts must give a hearing on an “expedited basis” to a petition of a reservist who is called to active duty. (Ques: - What about an expedited hearing for a petition of the other party in a case where the reservist is called to duty?)

7. HB 633 – Child-Care Costs for a CP in School: The court can order daycare costs to be paid by the NCP for a CP who is still in high school or in college. This is added into §20-108.1.

8. HB 401, HB 795- CS Paid by Incarcerated Persons: (1) Being incarcerated does NOT constitute voluntary unemployment. (2) An NCP in jail has a right to have his CS recalculated. (3) Incarcerated persons who have a CS obligation have a priority in getting into work-release programs. (4) Interest does not continue to run on the arrearage of an incarcerated person.

9. HB 840- You May Prepay Child Support: An obligor may prepay support. This sounds dumb for a new law, but it is not. This overrules the old presumption that an overpayment of CS is a *gift* to the CP (or to the Child).

10. SB 169 – Arrearages After Emancipation Shall be Paid at CS Rate: If there are arrearages after emancipation of the child and the cessation of CS, then the support shall continue at the old rate until the arrearages are paid in full. This is a change to the Notices in §20-60.3. (Question – Is a notice provision in §20-60.3 actually a substantive law?)

11. SB 168 - ICOs and Multiple Support Obligations: When an obligor has several support obligations to different CPs, the employer can pro-rate the withheld money under an Income Ded. Order to the different recipients.

12. HB 608 & HB170 - Giving an Bad Check for Child Support: Under HB 608, giving an Insufficient Funds check for CS is a Class 1 misdemeanor. Under HB 170 it is a misdemeanor if the check is less than \$200 but is a Class 6 Felony if it is \$200 or more.

II. CUSTODY/VISITATION LEGISLATION

13. SB 569 – Therapist Testimony in Custody Cases: This would substantially modify the legislation of two years ago that implemented a strong restriction of any therapist testifying in a custody/visitation proceeding. The new proposal empowers the court to compel such testimony by a psychologist, over the objection of a party or the psychologist, *for good cause shown* to the court. In addition, a therapist of the child, or a co-parenting counselor or family counselor may testify (without the need for a *good cause* showing).

14. SB 439 – Definitions of Sole and Joint Custody: This proposal gives some relatively standard definitions for sole custody and for joint custody, and it defines the situation of *Joint Legal-Sole Physical* custody.

15. SB 123 – Virtual Visitation: Yes, that really is the title of it! – *Virtual Visitation*. It is visitation by phone, mail, instant messaging, video conferencing and other technologies.

16. SB 301 – Crime of Withholding Visitation: This Bill slightly changes the definition of criminal withholding of visitation: “Any person who knowingly, *and* wrongfully ~~and intentionally engages in conduct that constitutes~~ *withholds a child from either of a child's parents or other legal guardian* in a clear ~~and significant~~ violation of a court order respecting the custody or visitation of a child is guilty of a Class 3 misdemeanor...”

17. HB 728 – Putative Father Registry: Very long and complex. This adds an entire Article to §63.2. The proposal redefines the presumptions regarding paternity, §20-49.1B.4. As far as I can figure out, a *putative father* in this statute is a man who does not admit to paternity, but wants notification if the kid is being put up for adoption. I like the notice provision that states that “any man who has engaged in sexual intercourse is deemed to be on legal notice that a child might be conceived.” That has to be one of the loosest notice provision in Virginia law! Help – Somebody please figure out this proposed legislation for me.

III. EQUITABLE DISTRIBUTION

18. HB 723 – All Separate and All Marital Investments Count in E.D.:

The case of *Fowlkes v. Fowlks*, 42 Va. App. 1(2003) showed a severe flaw in §20-107.3. The C/A determined that Husband's separate contributions to the wife's separately-owned home, pre- and post-marriage, did **not** create any interest of the husband which could be addressed by the court in E.D. The rationale seemed to be that a *separate* investment into the *separate* property of the other was not within the purview of the statute. This result was certainly not the intent of the statute, and it creates very difficult questions and issues in situations that occur with high frequency.

It would appear now that any investment into property is NOT counted in E.D. if it is done before marriage. In addition, there is no category of property in §20-107.3 for *separate-into-separate*. For example, if a couple buys a house two weeks before the marriage and the wife puts in \$50,000 of her separate money and the husband puts in \$5,000 of his separate money, the *Fowlkes* case indicates that this property may NOT be able to be equitably distributed at all. It is simply not covered by our statute. Or even if it can be equitably distributed, the wife's significant separate contribution pre-marriage must be ignored. This is wrong and needs to be fixed!

Larry Diehl and I originally drafted this legislation for the VBA Coalition last year. The Coalition considered the proposal at its last meeting in 2005, but decided to defer all legislative proposals to concentrate only the Family Court issue. I got Del. Michele McQuigg to patron this legislation because of its importance. The revised §20-107.3 does the following:

(1) Specifies that hybrid property that the court can equitably distribute is not only created by the contribution of marital property to separate property or by the contribution of separate property to marital property, BUT it is also created by the contribution of the separate property of one party to the separate property of the other party. Under the new proposed provision, if the wife contributes \$50,000 of her separate money into a house that the husband owned from before the marriage, then the court can E.D. this property and can account for the **wife's** separate investment.

(2) Specifies that marital or separate contributions are to be considered by the court whenever made. So that contributions of marital or separate property made pre-marriage, or post-separation, are counted just as much as a contribution made during the marriage and before the separation.

A further explanation of the issues brought about by the *Fowlkes* decision are discussed in the Memorandum attached hereto. I encourage everyone to support this needed change to §20-107.3.

III. PRIVACY LEGISLATION

19. SB 445 – Don’t Need SSNs in Divorce Decrees: This drops the requirement for the Social Security Numbers of the parties to be in a Final Decree of Divorce. This would eliminate the need for a Private Addendum in 40% of divorce decrees – those without child or spousal support!! - Good!

20. SB 369 – Private Addendum is to be incorporated into Order: This requires that any Private Addendum used for SSNs or account numbers does need to be incorporated by reference into the underlying order or decree.

IV. MARRIAGE & DIVORCE

21. SB 444 – Illegal Aliens Cannot Get married in Virginia: No marriage license shall be issued without proof of U.S citizenship or legal residence.

22. HB 764 & SB 41– Six-Month Divorce Agreement Can be Oral: The agreement upon which a six-month separation is based can be either a written or an oral agreement. No discussion of the elements of proof are set forth.

23. HB 197 – Another variation on the perennial contract marriage. When a couple applies for a marriage license, they can get “a license with grounds for divorce” or they can get “a license without grounds for divorce.” If they get the former, they can only divorce on the grounds of adultery, convicted of a felony, or cruelty. If they opt for a license with grounds for divorce, they can get a divorce on any grounds. Good Grief!

V. OTHER FAMILY LAW LEGISLATION

23. SB 120 – Protective Orders – Can Not Cut-Off Utilities: This allows the court to enjoin a party subject to a Protective Order from terminating the utilities on a property for which the other party has been given exclusive possession. Also, allows the court to require the party to pay for any needed reconnection fees if he did discontinue the utilities.

24. SB 118 – Cannot Evict Tenant for Domestic Violence Disturbances: A tenant cannot be held responsible by a landlord for lease violations caused by

other persons where such conduct constitutes domestic violence and the victim is the tenant.

25. HB 1301 – Removes Life Insurance From Automatic Revocation on Divorce: Since 1993, under §20-111.1, a divorce is an automatic revocation of beneficiary status of the divorced spouse for a life insurance death benefit, unless the parties otherwise agree. This new provision would eliminate *life insurance* from the list of automatic revocations, but keeps in the death benefit of an annuity. I have no idea as to why this legislation is being put forward.

Certainly, all proposals for 2006 have not yet been submitted and we will have to watch daily for the next arrow to be shot. Keep Alert!!

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[Editorial Comments are Dick Byrd's only and should not be attributed to the VBA Coalition, or the Fairfax Bar Association, or the VWAA]