

VERMONT BAR ASSOCIATION

VERMONT FAMILY LAW
PRACTICE MANUAL

2014 REVISED EDITION

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with
VBA Family Law Section Editors

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NOTE ON THE 2014 REVISED EDITION

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Welcome to the 2014 Revised Edition of the Vermont Bar Association's Vermont Family Law Practice Manual. Although family law nationwide is evolving rapidly, family law in Vermont is particularly dynamic, and Vermont has been in the forefront of change in many areas. Since the first edition of this manual was published in 2006, for instance, Vermont has adopted same-sex marriage, protected the rights of deployed military parents, and established special provisions for parental rights of children conceived as the result of sexual assault. This Revised Edition also highlights less dramatic changes, but changes that nevertheless have an important impact on the practice of family law in Vermont.

Lindsey Huddle and Jean Murray lovingly prepared the first edition of this incredible resource in 2006. To help us all keep up, the Family Law Section of the Vermont Bar Association has undertaken the task of bringing this manual up to date, leaving as much of Lindsey and Jean's practical wisdom intact as possible. The success of this Edition is due entirely to those who volunteered their time, expertise and effort to this project, and heartfelt thanks go out to all those who are listed below. But the person who drew up the list will not give herself the special credit she deserves, so I will. Cara Cookson is the mover and shaker who organized this project and the one who gently kept us all on task to get the job done—and she did it all with self-effacing competence and grace. Special thanks go out to Cara, without whom this Revised Edition would still be a work in progress.

We hope that you will find this Revised Edition to be a valuable resource for the practice of family law in Vermont. We also wish you well in your practice and hope that, in this small state where almost everyone in the bar knows almost everyone else, you will join us in the Family Law Section and have your say about where Vermont family law will go from here.

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INTRODUCTION

This manual will outline and emphasize divorce, separation, and annulment proceedings in Vermont, with reference to related topics such as post-judgment actions, abuse prevention, children in need of care or supervision, and adoption. The approach is basic. There is no presumption that the reader is experienced in family law practice. The fundamental requirements of initiating, managing, and concluding a divorce case will be the primary subject of this Manual's focus, e.g. the pleadings which must be filed; the statutory grounds for divorce, jurisdiction, case preparation and presentation, and other basics of divorce representation.

The manual will discuss, as much as possible, procedural and practical requirements as they would arise chronologically in an actual case. The discussion begins with the initial client interview and proceeds through the filing requirements, temporary and final hearings, child support hearings, and post-judgment problems. Every effort has been made to update this Manual, but readers are cautioned that this document is not intended to supplant careful study of all relevant sources of law, including Title 15 and 33, the Vermont Rules of Family Procedure (“V.R.F.P.”), and related cases. This Manual does not represent the views of the Vermont Bar Association or the Family Law Section as a whole.

Although divorce representation is "civil" litigation, it differs markedly from other types of civil litigation, because of the emotional, social, and economic implications arise in a very personal context. Each divorce has its own unique set of features. The family dynamics and background will guide your clients' needs and will be reflected in their initial demands. There can be issues of abuse and safety, which require knowledge of relief from abuse procedures, as well as other sources of support for your client. There may be issues of jurisdiction if one of the parties lives out of the county, state, or country. Take care to explore this background in order to tailor your proposed solutions to each particular case.

The divorce process has serious psychological, social, and economic consequences for your clients. In many cases a divorce is a death of hopes, expectations, and identity for your client. It can be a period of incredible stress, especially at the beginning. Depending on how long the relationship has been dissolving and how prepared your client may be for the divorce, there may be changes in what he or she may need or want from the process. As the divorce case moves toward resolution, your initial approach may no longer be appropriate. Do not hesitate to backtrack, sidestep, or even change strategies as you move along.

It is important to keep the client informed and well educated as to the applicable rules, statutes, and case law. It may be desirable to reduce the plan of action to writing so that you and your client will have a common understanding. Constantly check to make sure that you and your client are on the same wavelength. Stress and feeling out of control of the case when he or she may feel that his or her whole future depends on it can contribute to fears and confusion about the process and about you, the attorney.

Do not hesitate to point out to your client that his or her demands are unrealistic and/or unreasonable. If you are unsure of the merits of any particular demand, contact more experienced counsel and sound them out. You may want to recommend that your client have a consultation with another attorney so that he or she feels more confident in the approach you have advised. In Vermont, we pride ourselves in the collegiality of our bar, and you will find many family law colleagues eager to offer advice and assistance.

Vermont Rule of Civil Procedure 11 is ever present:

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleadings, summons, writ, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by the existing law or a good faith argument for extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

V.R.C.P. 11. Keep this in mind, especially when working with clients who have unrealistic expectations or desperate motives.

MEETING THE CLIENT

Your first contact with a prospective client may be over the telephone. This is an opportunity for you to introduce yourself and to learn initial information about each other. It is important for an attorney in private practice to refrain from giving advice over the telephone to someone with whom he or she has no attorney-client relationship. The purpose of this telephone call is to determine if the person wishes to make an appointment with you and for you to see if, at least initially, it appears that you can provide services for him or her. If you charge a fee for an initial consultation, be sure to mention that during this conversation, along with your hourly rate, so that neither of you is surprised by the client being unprepared after his or her first appointment. Generally, you will want to reserve judgment about representation until the first appointment.

Your goals during the initial consultation should be to:

1. Acquire a thorough understanding of the problem that brings the client to your office. Is it something that you can handle and want to handle?
2. Decide whether you are the attorney for the person sitting in front of you. Can the two of you work productively together? Do you see red flags which cause you concern? For example, has this prospective client had difficulty working with two or three previous attorneys about whom he or she has many complaints?
3. Establish of a relationship between the new client and yourself.

You and the client should discuss fees, payment schedules, and office procedures.

The potential client should have a chance to become comfortable with you. Do not forget that it is difficult for a stranger to sit down opposite you and reveal the painful details of a failed marriage. The new client comes to you seeking someone that he or she can trust and wants you to be sympathetic. The client may have unrealistic expectations for an outcome to the case. These expectations can be deadly if not addressed at the initial meeting.

There are at least two approaches to handling the initial consultation.

Approach #1: Some attorneys use the initial consultation only to determine if they are interested in working with the prospective client and handling his case. The time will also be used to give the prospective client a sense of the law applicable to case, the court process and office procedure; who will be available to answer questions; if there are preferred times for the client to call; and an outline of the sorts of matters that are appropriately handled by the attorney's office. This initial consultation may last from twenty- to forty-five minutes.

During this initial consultation, the client will provide minimum intake information that is necessary to file a cover sheet, summons and complaint, health department form, and if appropriate, affidavits.

The second meeting with the new client, after you receive the retainer fee and the client signs the retainer agreement, will focus upon those issues outlined below under Approach #2.

Approach #2: Some attorneys spend one to two hours or more with the prospective client discussing the initial legal issues and procedures. The issues reviewed for the benefit of the prospective client will include the divorce process; the time frames involved; law office procedure; the variables of judicial discretion; and the reasonable expectations in the case after the prospective client has had an opportunity to provide a detailed description of present circumstances and some overview of the marital history. The attorney will probably give handouts, detailed divorce information questionnaires, and net worth and cash flow information questionnaires for completion prior to the next office conference.

The attorney will try to discover if the prospective client has filed prior actions and the results of those actions, the marital history of the client, the status of the children of the marriage, the level of current animosity between the parties, the current living arrangements, and client's present goals and concerns.

The attorney will discuss his or her fee and the terms of his or her employment thoroughly with the prospective client. Give the client a retainer agreement/letter to read and consider.

In each approach the attorney must discuss the fee and the terms of employment thoroughly with the prospective client. Give the client a retainer agreement/letter to read and consider. It is important that the client knows that the attorney cannot file any documents with the court or begin work on the case until a retainer has been paid or acceptable fee arrangements have been made, and a fee agreement has been signed.

FEES

Estimating the total fees for representation, at the beginning of a case, is a difficult task. Even if your client and the client's spouse have worked out a comprehensive settlement before you enter your appearance and there appears to be little for you to do, the settlement may subsequently unravel. As a result, your initial estimate of fees will be inaccurate. When making a fee estimate, emphasize that it is a minimum estimate, for only when the case is concluded will you know the total expense.

Some attorneys have responded to the problem of fee estimation by setting a substantial flat fee that assures, in most instances, that the office will be paid for all expenses and services at the beginning of the case. Others feel that this is "overkill" and that the fee should be determined with attention to the needs of the individual case. For example, there will be greater demands on the attorneys when children are involved than when the couple has no children. Similarly, difficulties seem to increase in geometric proportion to an increase in disputed items of property. While a client may not be able to pay a large retainer at the beginning, he or she may pay in installments or pay for services on a monthly basis. As members of the bar, attorneys will also want to take the occasional case on a *pro bono* or discounted fee basis.

It is a good idea to determine a reasonable fee as a retainer. Fees vary around Vermont, so talk to family law practitioners in your area to assess the fees charged. Advise your client whether you will be charging by the hour for services and how to be paid as you bill your client. Jay G. Foonberg's book, HOW TO BUILD A LAW PRACTICE, offers much good advice with regard to setting and collecting fees. Before establishing a system for setting and collecting fees for your practice, make sure that you meet all current ethical requirements. A large percentage of fee complaints and other complaints made to the Professional Conduct Board are from domestic relations cases.

Some clients want to contact your office to discuss in minute detail any and all problems, e.g., their desire to have two sets of sheets returned to them. You must make a judgment as to whether or not your participation in that sort of discussion is appropriate, and you should remind clients that you will bill them for all contacts if that is your policy. Frequent calls can cause fees to mount quickly. The attorney would be wise in such a case to request a second retainer when such billings have used up the first one. Be sure to keep accurate records your time spent and activities performed on a case so you can support your bill.

JURISDICTION AND VENUE

JURISDICTION

Jurisdiction for divorce actions exists in the Family Division of the county where either of the parties resides. 15 V.S.A. §§ 591, 593(a); 4 V.S.A. § 33. Moving from the county does not defeat jurisdiction, for the party need only have resided there at the time of the filing. *Morse v. Morse*, 126 Vt. 290, 293 (1967).

Residency within the county is jurisdictional and cannot be waived. The complaint must be filed in the county where at least one of the parties resides, *Conolly v. Conolly*, 132 Vt. 65 (1973), *Gerdel v. Gerdel*, 132 Vt. 58 (1973), thus granting the court *in rem* jurisdiction over the divorce.

Personal jurisdiction over out-of-state defendants and *in rem* jurisdiction over property, when personal service is not made within the state, are more complicated, and you should research the matters carefully if either issue arises.

RESIDENCY AND DOMICILE

To bring a complaint for divorce or annulment, 15 V.S.A. § 592 requires that one of the parties reside in the state for six months prior to filing. The Vermont Supreme Court has upheld the constitutionality of the six-month and one-year rules. *Place v. Place*, 129 Vt. 326 (1971). However, residency, "...for purposes of divorce jurisdiction is more than mere presence within the state." *Conley v. Crisafulli*, 2010 VT 38, ¶5 quoting *Duval v. Duval*, 149 Vt. 506, 509 (1988). Necessarily, residency "is encompassed within the legal definition of domicile." *Id.* The two elements of domicile are residence and intention. In order to change domicile, "there must be a move to the new residence and dwelling there, coupled with an intention of remaining there indefinitely. Neither residence alone, nor intention, without more, is enough." *Walker v. Walker*, 124 Vt. 172, 174 (1964). "An essential ingredient of the intent to acquire a new domicile is the intent to give up the old domicile." *Id.*

Determining a party's domicile is a question of fact for the Court. *Conley* at ¶4. Certain facts can be determinative such as where the individual: (1) is licensed to drive; (2) registers his or her car; (3) owns property; and (4) is employed. *Id.* at ¶9. Voter registration and payment of taxes are also relevant facts. *Id.* at ¶11.

The reason for a change in domicile does not matter as long as the intent to establish the new domicile is valid. *Id.* at ¶10. Intent may be proven by both the acts and the words of the person involved. *Id.* at ¶8, citing *Bonneau v. Russell*, 117 Vt. 134, 137 (1952).

In *Conley*, the Supreme Court found no error in the trial court's finding that the wife gave up her New York domicile with the intent to remain in Vermont indefinitely, even though the wife's sole motivation for moving was to take advantage of Vermont's no-fault divorce law. *Id.* at ¶11. Even so, the Court recognized that motive could bear on the validity of the intent to assume the new domicile. *Id.* at ¶10. In *Conley*, however, the wife's circumstances and her testimony supported a finding that she intended to remain domiciled in Vermont and to remain a Vermont resident. *Id.* at 11-12.

Residency is not required for filing a counterclaim, nor to be heard in defense of a counterclaim. Once service is perfected in a foreign jurisdiction the defendant has the right to answer and counterclaim, and to have the counterclaim heard on the merits. *Lafko v. Lafko*, 127 Vt. 609 (1969).

Before the final hearing in an action for divorce, 15 V.S.A. § 592 requires that one of the parties have maintained residency in Vermont for one year prior to the final hearing. If residency is lost, the family court's jurisdiction over the pending divorce is also lost.

LOSS OF RESIDENCY

The loss of residency prior to the final hearing is a common problem. Many parties move from the state after filing and expect that they can return for the final hearing. To maintain residency a party must have the intention to return to live in Vermont and will need to show present ties to Vermont as evidence of this intention. *Taylor v. Taylor*, 95 Vt. 94 (1921).

If loss of residency is an issue, 15 V.S.A. § 592(a) sets out specific conditions allowing a party to be physically outside the state without losing residency for purposes of the final divorce hearing. Generally, any temporary absence does not jeopardize residency. The statute specifically enumerates absence for: (1) illness; (2) employment; (3) duty in the armed services; and (4) other legitimate or bona fide causes. If it can be shown that the party has an intent to return, residency is not lost.

If the six-month residency has not been maintained or is an issue, relief may be obtained for support issues under either the Uniform Interstate Family Support Act (1996), 15B V.S.A. §§ 101-904 or the Uniform Desertion and Nonsupport Act. 15 V.S.A. §§ 201-210. These two sections provide for the issuance of support orders but contain no residency precondition. UIFSA is an interstate support enforcement mechanism which replaces the former enforcement statutes known as URESA. Anyone to whom a duty of support is owed as defined by the act may bring an action. Jurisdiction over the obligor depends upon the actions of the obligor within the state

and the long-arm provisions of the act and/or the two-state registration provisions of the act. The initiation of a UIFSA action does not require a preexisting order for support.

VENUE

Pursuant to 4 V.S.A. § 458, Family Division trials must occur in the county in which one of the parties resides, if one party resides within the state. If no party resides within the state, the place of trial may be in any county. If actions for divorce are commenced in different counties V.R.F.P. 4(i) provides that the action first filed shall be disposed of first. If the defendant resides in a county where the family court is more convenient for the plaintiff than the family court for the county where the plaintiff resides, the plaintiff may file the divorce action in the family court for the defendant's county of residence.

GROUND FOR DIVORCE

Vermont requires a stated ground for divorce. Although all the various fault grounds for divorce still exist (i.e. adultery), they are rarely used as the basis for the granting of a divorce. Present divorce practice relies almost exclusively upon the no-fault ground, i.e., living separate and apart for six consecutive months, as the foundation for the parties' divorce.

Although not required, fault grounds may become a factor in the property distribution of that divorce, although certain fault grounds, such as adultery, are increasingly disfavored. Under subdivision (b) (12) of 15 V.S.A. § 751, fault is one of the factors that the trial court may consider in making an equitable distribution of property. *Lewis v. Lewis* 149 Vt. 19 (1987). A complaint may which cites adultery as a ground for the divorce, for example, may start the case with bitterness and recrimination. Alternately, the plaintiff may choose the no-fault grounds and still introduce evidence of adultery as a factor for the court to consider in awarding the plaintiff a greater portion of the marital property. The two most common grounds, adultery and living separate and apart, are discussed in greater detail here.

Adultery

In 1981, the Legislature repealed the statute that made adultery a crime. There is a great deal of Vermont case law on the evidence sufficient to sustain a finding of adultery. The common perception is that there are much simpler grounds available. The Supreme Court held in *Allen v. Allen*, 132 Vt. 182 (1974) and *Senesac v.*

Senesac, 135 Vt. 24 (1976) that fault is relevant in property division, but that fault and grounds are not the same thing.

Unless you actually intend to prove adultery, and have a definitive reason for desiring to prove it, you should not be plead it even though there might be some suspicion of it. Pleading adultery tends to prevent reasonable settlement discussions. Proof of marital infidelities can be influential in a property division and is often more effective when raised at trial. Adultery is given different weight by different judges and all attorneys must be careful to counsel their clients that despite the personal pain that adultery has caused, even with positive proof, some judges are not impressed.

Separate and Apart for Six Months

Grounds for divorce exist when a married person has lived apart from a spouse for six consecutive months and the resumption of marital relations is not reasonably probable. The biggest change brought about by this section is that living apart can be at the initiative of the plaintiff. The Vermont Supreme Court held that a six-month separation is a "no-fault" ground. *Boone v. Boone*, 133 Vt. 170 (1975). This of course deprives us of some titillating reading. In *Mandigo v. Mandigo*, 132 Vt. 446 (1970), the plaintiff stated that he thought the reason his wife left him was because of his illness when in fact it was because he was "selfish, arrogant, ill-tempered and over-domineering"

Living Apart: The six months of living apart need not have accumulated at the time of filing, but must have accumulated at the time of the final hearing. *Condosta v. Condosta*, 136 Vt. 360 (1970). This is important if the couple is still living together, for a divorce action may be brought on this ground and the six months begins to run as soon as one spouse or the other moves out of the family home. If the parties cannot live apart, usually due to financial circumstances, they can still be "separate and apart" for purposes of 15 V.S.A. § 551 (7) so long as they do not live as "husband and wife." Separate lives and not separate roofs is the test. *Buxton v. Buxton*, 148 Vt. 22 (1987).

COMMENCING AN ACTION

THE COMPLAINT

Prior to commencing an action, you should carefully review V.R.F.P. 4 (b)(1) and the model Summons and Complaint forms produced by the Family Division. (*See Web Resources.*) The plaintiff must sign and swear to the complaint unless the plaintiff is a minor or has a guardian, in which case the guardian may sign. All elements contained in the complaint are discussed below. It is important to draft the complaint with care, because receipt of the complaint may trigger an emotional reaction.

If any previous proceeding for divorce, annulment, or separate support has been brought, the complaint must also set forth and indicate whether any orders have been issued. A copy of any order issued should be filed with the complaint if available. V.R.F.P. 4(b)(1)(A).

If an abuse prevention action is pending in the Family Division at the time of the filing of the complaint for divorce, the plaintiff must so indicate in the complaint. V.R.F.P. 4(b)(1)(B). If a party to an abuse prevention action subsequently files a complaint for divorce or annulment, the court where the subsequent complaint is filed shall immediately consolidate the abuse prevention action with the divorce or annulment action. All orders in effect in the abuse prevention proceedings shall continue in effect after consolidation until expressly discharged or modified by the court. V.R.F.P. 4(n)(1).

Depending upon the case, the attorney may want to be fairly specific in listing the marital property of the parties as a means of informing the defendant and the court that there may be significant property to evaluate and divide, and that plaintiff has a claim to it. If the parties wish to limit public access to information about property and other assets, a more summary form of complaint is appropriate.

It is good form to request all that the plaintiff may want in the complaint, such as spousal maintenance. The decision about whether to request legal and physical parental rights and responsibilities should also be discussed in detail, because this decision can have emotional and procedural implications.

If you are filing a case that involves child custody, you will need to consider the UCCJEA. If the parties and children are Vermont residents, the complaint should so indicate. *See* 15 V.S.A. § 1079. Otherwise, if the Family Division's jurisdiction over a minor child could

be an issue, the complaint should recite allegations to assist in establishing jurisdiction. *Id.* Any existing out-of-state orders involving any of the minor children should be registered in accordance with the enforcement provisions of the UCCJEA. 15 V.S.A. § 1085.

V.R.F.P. 4(b)(1)(A) sets out the criterion for the complaint and the Vermont Department of Health form. All of the necessary forms beyond the complaint, of which there are several, are available at the courthouse and online. (*See Web Resources.*) There is no evidentiary requirement that the plaintiff prove the existence of the marriage by the filing of a certified copy of the marriage certificate.

If the defendant is accepting service, it is prudent to give the defendant a copy of all documents/pleadings required to be filed that the plaintiff has drafted and completed. Doing so will avoid confusion and misunderstandings and may promote communications.

You should obtain the filing fee from your client at the same time that you settle the financial arrangements and retainer. The best source for the most up-to-date filing fee totals is your local court clerk or the Vermont Judiciary website. Keep in mind that the filing fee is less if the parties have already reached a stipulation and are filing the complaint and seeking a final order at the same time. The court may also provide service where minor children are involved, which requires an additional fee. In forma pauperis status is also available to cover fees and costs in certain circumstances.

THE ANSWER

Be sure to file an answer or notice of appearance. If you represent the defendant be sure to file an answer to protect against voluntary dismissal by the plaintiff under V.R.C.P. 41 (a)(1)(I). If you do not file an answer, the plaintiff may dismiss the case as a matter of right. A default judgment could also be entered against your client with no notice if you file no responsive pleading of any form. At a minimum, you should file a Notice of Appearance to insure that you receive notice of any proceedings, which is discussed in a later section.

THE COUNTERCLAIM

V.R.F.P. 4(f) provides that a counterclaim may state any cause within the jurisdiction of the family court including a demand for divorce. It can be filed within the normal 20-day answer period or by leave of court at any time prior to judgment. If your client does not want the divorce, it is inappropriate to file a counterclaim. However, if later in the divorce process, your client changes his or her mind, you will, pursuant to V.R.C.P. 13(f) and

15(a), be able to amend the pleading to include the counterclaim at any time. If, upon meeting with your client, you discover the client does want the divorce, it is wise to counterclaim as a matter of course. The defendant can then be heard on the merits if the plaintiff is absent on the date of the final hearing and/or decides not to pursue the divorce, without you having to seek permission to file an untimely counterclaim.

MINORS AS PARTIES

Pursuant to V.R.F.P. 4(b)(2)(C)(iii), no guardian, next friend, or other fiduciary is required to represent a party who is a minor unless the court so orders. This is an exception to V.R.C.P. 17(b).

SERVICE

Service is governed by the Vermont Rules of Family Procedure and differs significantly from the Vermont Rules of Civil Procedure. Therefore, in order to avoid delay and expense, it is necessary to have a clear understanding of the procedure to be followed in particular actions.

V.R.F.P. 4(b)(2) [Commencement of Action; Service of the Complaint] provides **two** methods of service depending on whether the matter involves child(ren).

Cases **Not Involving Minor Children; V.R.F.P. 4 (b)(2)(A):**

If neither party is nor may be obligated to pay child support to the other or to the Office of Child Support, the plaintiff shall commence the action and make service in accordance with Rules 3 and 4 of the Vermont Rules of Civil Procedure.

Cases **Involving Minor Children; V.R.F.P. 4 (b)(2)(B):**

If either party is or may be obligated to pay child support to the other party or to the Office of Child Support, the plaintiff shall commence the action and make service as follows:

a. The complaint shall be filed and a hearing shall be scheduled before the complaint is served.

b. The family court clerk shall complete a notice of hearing and shall attempt to schedule the hearing for 15 to 30 days after the summons and complaint are filed, unless because of unavailability of magistrates or judges or

because of a subsequent failure to complete service it is not practical to do so.

c. After a hearing has been scheduled, the clerk, or upon request, the plaintiffs attorney, shall provide for prompt service upon the defendant.

d. Service may be made by personally serving the defendant with a summons and complaint and the notice of hearing signed by the clerk. **Note:** The court will require a deposit for personal service. The amount may vary from court to court.

If the defendant refuses certified mail, the clerk may serve the notice of hearing, summons, and complaint by mailing it to the defendant by ordinary first class mail and by certifying that such service has been made.

The clerk also may provide for service by mail pursuant to Vermont Rules of Civil Procedure 4(1).

3. **Service by Publication; V.R.C.P. 4 (g):**

At any time after the filing of the complaint, the court, on motion upon a showing made by verified complaint or affidavit duly filed that service cannot with due diligence be made by another method, shall order service by publication.

A prepared order should accompany the motion and the affidavit so that the judge can sign it. Arrangements should be made ahead of time for publication in a newspaper of general circulation in **the county where the action has been brought**. The first date of publication must not be more than 20 days after the date of the order. The publication must be for three, consecutive weeks. The courts will often accept publication in a smaller weekly paper and this can save your client significant costs of publication. The newspaper will then certify to the court that the notice has been published as directed. Though the rule specifically states that the plaintiff shall file an affidavit that the publication is complete, generally, the newspapers do this as a matter of course but check with them. In addition to the actual publication, the rule also calls for the mailing of the summons and complaint to the last known address of the defendant. Service by publication is complete 21 days after the first date of service.

Note: Service by publication does not confer personal jurisdiction over the defendant and as a result the court is limited in the issues it may address.

Post Judgment Service Procedure; V.R.F.P. 4(j):

Any proceeding for modification or enforcement of the judgment in an action for divorce, shall be on motion, supported by affidavit, except that any proceeding for modification or enforcement of child support shall be served according to the procedures for service set forth in subdivision (b) of the V .R.F.P. 4 and actions seeking wage withholding shall be governed by subdivision (o) of V.R.F.P. 4:

Copies of the motion and affidavit, together with the notice of hearing shall be served upon the party whether the party be within the state or not, either (I) by delivery in hand or (ii) by registered or certified mail, return receipt requested, with instructions to deliver to addressee only.

The court, on motion upon a showing that service cannot, with due diligence, be made by either of the methods prescribed above, may order service by ordinary mail or by publication or both.

Any proceeding for modification or enforcement of the judgment in an action for divorce other than a motion under V.R.C.P. 59 or 60 shall be served upon the parties; and not their attorneys, as a complaint and shall be governed by V .R.F.P. 4(j), except that actions seeking wage withholding shall be governed by V.R.F.P. 4(o).

Proceedings for modification or enforcement of child support, maintenance supplement, or parental rights and responsibilities shall be on motion supported by affidavit, copies of which, together with notice of hearing thereof, shall be served pursuant to V.R.F.P. 4(b)(2)(B).

Proceedings for modification or enforcement of maintenance, or for enforcement of property division, shall be commenced pursuant to V.R.F.P. 4(b)(2)(A).

Where a party seeks modification or enforcement of maintenance, or enforcement of property division, simultaneously with modification or enforcement of child support, maintenance supplement or parental rights and responsibilities, the proceeding shall be on motion, supported by affidavit, copies of which, together with the notice of hearing thereof, shall be served pursuant to V.R.F.P. 4(b)(2)(B).

Rule 4(g)(5). In any action under this rule in which parentage or child support is in issue, upon entry of an order each party shall file with the court information on location and identity of the party, including Social Security number, residential and mailing addresses, telephone number, driver's license number, and name, address, and telephone number of employer. Each party shall inform the court of any changes in the information provided. For good cause, the court may keep information provided under this paragraph confidential.

Rule 4(g)(5) is added to conform the Family Rules to recent amendments of the federal Social Security Act, 42 U.S.C. § 666(c)(2)(A)(I), requiring each party to a paternity or child support proceeding to file certain information with the State case registry upon the entry of an order and to update that information as appropriate.

Rule 4(j)(2)(c). ***Party's location unknown.*** In any child support enforcement proceeding under this subsection, upon sufficient showing that diligent effort has been made to ascertain the location of a party, the court may deem service sufficient if service has been made by delivery of copies of the motion, affidavit, and written notice of hearing to the most recent residential or employer address filed with the court pursuant to paragraph (g)(5) of this rule by one of the following methods: (1) service by mailing to the party by certified mail, return receipt requested and delivery restricted to the addressee, the expense being paid by the moving party; (2) service by mailing to the party by ordinary first class mail and by certifying that such service has been made.

This amendment is intended to conform the Family Rules to recent amendments of the federal Social Security Act, 42 U.S.C. § 666(c)(2)(A)(ii).

APPEARANCE AND WITHDRAWAL OF ATTORNEYS

GENERALLY

The Family Division's appearance rule applies to all proceedings under Family Rules 2, 3, 4 and 9. V.R.F.P. 15(a).

The appearance of an attorney for a party in a divorce, parentage, or other action under V.R.F.P. 4 constitutes the attorney's appearance for that party in all related matters in the Family Division, with some exceptions, or where the attorney expressly enters a limited appearance. V.R.F.P. 15(b).

The Family Rules requires the appearing attorney to provide his or her name, eCabinet registration number, and registering an e-mail address pursuant to Rule 3 of the Vermont Rules for Electronic Filing. V.R.F.P. 15(h)(4).

ABUSE PROTECTION ACTIONS

An attorney who has entered an appearance for any party in an abuse prevention action is not obligated under the Family Rules to appear in a subsequently filed divorce, parentage, or other action, unless the final hearing on the abuse prevention order is consolidated with a hearing for temporary relief. In the event of such a consolidation, the attorney must represent the party for all purposes at that hearing. After entry of the final order in the abuse prevention action, the attorney is not obligated to undertake further representation of the party, unless the attorney enters a separate appearance in that action. V.R.F.P. 15(c). Certain exceptions apply, so Rule 15 should be reviewed carefully. Keep in mind as well that the ethical rules set forth in the Vermont Rules of Professional Responsibility also govern your duties to your client.

CHILD SUPPORT ACTIONS

Unless the attorney has entered a limited appearance, an attorney who enters an appearance for any party in a divorce, parentage, or other Family Division action must participate in all child support hearings and comply with all provisions for the exchange and filing of required financial documents. In the discretion of the judge or magistrate, and for good cause shown, an attorney may be excused from attending a child support hearing, provided that within five days of the scheduled hearing date, the attorney files (1) all financial affidavits and other documentation; and (2) a joint waiver of representation, signed by attorney and client and setting forth that the client has affirmatively requested to appear *pro*

se at the child support hearing and understands the nature and scope of the hearing; and (3) parental rights and responsibilities are the subject of a court order or an existing written stipulation on file with the court. V.R.F.P. 15(d).

ENTRY/EFFECT

Just as in other litigated matters, when an attorney enters an appearance, he or she becomes the person designated to receive service and notices from the court on behalf of the party, except in those instances where the party must be personally served, such as an order. This designation remains in effect until the court enters an order allowing the attorney to withdraw or until a different attorney enters an appearance for a party who had previously appeared *pro se*. V.R.F.P. 15(a) (1)(B).

An attorney's signature to a pleading or motion constitutes an appearance. Otherwise an attorney who wishes to participate in any action must appear in open court, or file notice of appearance with the clerk. Appearances entered in open court must be confirmed in writing by filing with the court and serving on the opposing party within five days. An appearance, whether by pleading, motion, or by formal written appearance, must be signed by an attorney in the attorney's individual name and shall state the attorney's office address. V.R.F.P. 15(a)(2); *see also* V.R.F.P. 15(h) for eCabinet requirements.

Where a case has multiple parties on one or the other side, an appearance for the plaintiffs or the defendants, as the case may be, is deemed an appearance for all, unless stated to be for one or more only. V.R.F.P. 15(a)(3).

CONTINUANCES TO SECURE COUNSEL

Except as provided in V.R.F.P. 9(h), when no attorney has entered an appearance for a party by the date of a scheduled hearing, the hearing shall not be continued to enable that party to secure counsel, unless that party has not had reasonable opportunity to secure counsel, or unless an appropriate order for temporary relief is entered. V.R.F.P. 15(a)(5). Note that courts often waive this Rule.

WITHDRAWAL

Unless otherwise ordered, an attorney is deemed withdrawn once final judgment is entered and the time for taking an appeal has passed. Otherwise, an attorney who has entered an appearance may withdraw only by seeking leave of court. V.R.F.P. 15(f)(1)(A). Where a represented party files a written *pro se* appearance or another attorney enters an appearance for such a party, notice and a hearing prior to withdrawal may not be necessary. The court may grant appointed counsel leave to withdraw on motion without notice and hearing only when the ground for withdrawal is a conflict of interest. V.R.F.P. 15(f)(2).

In any case where withdrawal is not automatic, withdrawal requires a motion filed by the attorney showing good cause for withdrawal, and the court must provide notice and a hearing prior to issuing an order allowing the attorney to withdraw, unless the attorney cannot locate the party. V.R.F.P. 15(f)(3). In any event, the motion must include the party's last known address. V.R.F.P. 15(f)(4).

LIMITED APPEARANCE

The Family Rules allow attorneys to act on behalf of clients on a limited basis pursuant to an agreement for limited representation that complies with the Vermont Rules of Professional Conduct, in the following instances:

- (A) Filing a complaint or other pleading;
- (B) Conducting one or more specific discovery procedures;
- (C) Participating in a case management or status conference, an alternative dispute resolution or parent coordination proceeding, or a proceeding before a property or visitation master;
- (D) Acting as counsel for a particular hearing or court event;
- (E) Filing a notice of appeal from a decision of a family court magistrate or judge and taking any subsequent actions concerning the record, briefing, or argument in connection with an appeal;
- (F) With leave of court, for a specific issue or a specific portion of a hearing.

V.R.F.P.15(h). You should file a notice of limited appearance with the court as soon as possible, explaining the purpose and scope of representation and follow the rules governing withdrawal should you need to terminate representation prior to the completion of the work for which you were engaged.

TEMPORARY RELIEF

INTRODUCTION

The court has the same power to order temporary relief as it does in the final hearing, except that it may not change title of real property or personal property without the consent of the parties, except upon good cause shown. *See* 15 V.S.A. § 594a and V.R.F.P. 4(c)(1). It used to be that courts did not order a transfer of title to property because the rules prohibited property transfers. The new rule has relaxed the prohibition and courts will order the transfer of title when it appears appropriate, e.g., to protect the interests of family members. A party's equity interest need not be settled or raised but, instead, can be reserved for a final hearing.

Whether you want a hearing to be set at the beginning of the divorce process depends on need and strategy. Sometimes an agreement can best be worked out through quiet negotiations, whereas some attorneys and/or clients must have a date set before they will start negotiations. The changes in federal law that precipitated formation of the family court and the changes in child support law have caused courts, in every case that involves children, to automatically schedule a hearing for the determination of parental rights and responsibilities, parent child contact, and child support. *See* V.R.F.P. 4(b)(2)(B). Unless the parties reach agreement prior to the filing of the complaint, there no longer is a need to file in every case, along with the complaint, a motion requesting temporary relief. On the other hand, if, for example, there are no children involved and there is a dispute about the possession of the marital residence, it is usually wise to serve a Notice of Hearing with the complaint. Alternatively, you may move for a temporary hearing immediately after having been served, if you represent the defendant.

Remember that contested hearings may create more problems than they solve. Statements can be made in court, which cause anger and distress for both parties. While a decision may be made, it is important to remember that it may come at a high price. On the other hand, there are simply times when the parties cannot agree. A temporary hearing can set the rules for the family regarding custody, possession of the marital home and temporary support.

When negotiating the provisions of the temporary order, review with your client the client's present needs with regard to the children and the monthly budget. The long term effect of actions taken and agreements made in the early days of a divorce cannot be underestimated, for the maintenance of the *status quo* is at the heart of divorce practice. If rights and responsibilities of the children are disputed, remember that it may take more than a year

before a final hearing is scheduled. The circumstances established by the temporary order are not apt to change after such a long period has elapsed. The criteria for a parental rights and responsibility order stress the importance of stability and the child's relationship with the primary care giver. Therefore, your client should not agree to something at the early stages of the matter that the client is not prepared to live with permanently. Keep in mind, however, that the substance of a contact schedule, for example, is more important than the label placed upon it. If the parties agree to a 50/50 division of time for the children, the label of primary parent may have little meaning. **Do not miss the forest for the trees.**

PROCEDURE

Setting A Temporary Hearing

At the time the complaint is prepared and **filed**, it is common to file a Motion for Temporary Relief. The clerk at the court will issue a notice of hearing or case manager conference and serve it with the complaint in accordance with 15 V.S.A. § 594a and V.R.F.P. 4(c).

The court will issue an **INTERIM DOMESTIC ORDER** upon the filing of the complaint. The purpose of this order is to prevent a party from selling or hiding marital assets, removing another party from insurance policies, running up an unreasonable amount of debt with the expectation that the payment will come from marital assets, or taking the children out of state without the consent of the other party before a temporary hearing can be held. This Interim Order may be modified by subsequent Temporary Orders.

Temporary Hearing and Case Manager Conference

Where the parties have minor children, many courts will require the parties to appear for a case manager conference prior to noticing a temporary hearing. Case manager conferences may also occur (by telephone where both parties are represented by counsel) during the pendency of a divorce to determine the status of the case and set schedules for hearings or trials. At an initial case manager conference, the parties should come to court with any proposed PRR/PCC schedules and completed Form 813A and 813B and accompanying documents. A Case Manager will review the status of the case and attempt to resolve any of the temporary issues that can be settled without a temporary hearing. Otherwise, and in all other cases, a temporary hearing will be set.

THE STIPULATION

If you have a temporary or final stipulation you should draft a proposed Temporary Order, have it approved as to form and forward it to the court for the judge's signature. Upon its return from the court, serve it on the opposing party. You can use an Acceptance of Service Form rather than asking the sheriff to serve the order in most cases where both parties have signed a stipulation. In most cases today, the court will send an acceptance of service form to the parties' attorneys for completion and return, or in the case of a *pro se* party on the other side, attempt to obtain service before he or she leaves the court house. In either case, the service form must be filed with the court

PREPARING FOR A TEMPORARY HEARING

If you did not cover this information in your first interview, or if there is a significant delay between your first comprehensive interview and the time in which you are going to file for a temporary hearing, it is imperative that you meet with your client to determine the appropriate goals of the hearing and the issues to be addressed. These issues and goals may include:

- The amount of child support and whether to ask for a maintenance supplement or to deviate from the guidelines;
- The temporary disposition of property;
- The initial parental rights and responsibilities order/contact schedule;
- Insurance policies and their continuation;
- Payment of monthly expenses and debts;
- Operation of a business or farm during the interim;
- Spousal maintenance.

A temporary hearing is necessary only if disputes arise. Forcing a hearing too soon and forcing negotiations immediately after a separation can be both traumatic and counterproductive. On the other hand, the existence of a threat of abuse or child snatching or actual financial need necessitates the filing of a motion for temporary relief, even though the responding party may be reluctant to participate. Often, the parties settle into what for them is the right solution because the threat and/or the pressure of a hearing is not hovering over them. If your client has what the client wants in the present and generally in the long run, then insisting on getting it in writing may only serve to disrupt the situation, though an oral agreement is not as enforceable as a temporary order.

If PRR and PCC are in dispute, you should think about:

- The timing of the hearing;
- The appointment of a guardian ad litem;
- The need to request a forensic evaluation;
- Who the available experts are;
- The resources available to pay for the evaluation and expert;
- The ages of the children;
- The preference of the children and need to appoint an attorney for them.
- The appointment of a Parent Coordinator.

Interview your client and thoroughly prepare her or him. Carefully choose your witnesses and also thoroughly prepare them. Prepare all necessary exhibits.

The best advice concerning temporary hearings is to be prepared and to treat them seriously, for the outcome may set the terms and conditions that become the terms and conditions of the final order. Carefully list your evidence and requests so you can make a comprehensive request that is both reasonable and supportable under the circumstances.

TEMPORARY RESTRAINING ORDERS

IN CONJUNCTION WITH DIVORCE - PROTECTION OF PROPERTY

As part of the temporary relief sought, V.R.F.P. 4(c)(2), you may seek a temporary restraining order that prevents the other party from disposing of or removing property from the jurisdiction of the family court.

If you have reason to believe that the other party may attempt to remove, destroy; convey, and/or hide marital property prior to notice and a hearing and the impending injury, damage, or loss would be irreparable, you may request the court, by appropriate application, to issue an *ex-parte* temporary restraining order which will be more specific and provide more protection for your client than the Interim Domestic Order. For example, you may want an order, which provides that the other party shall not enter the marital home.

Although not a prerequisite, if you are not seeking an *ex parte* temporary restraining order and you know that an attorney is about to enter an appearance on behalf of the opposing party, it is a professional courtesy to inform that attorney that you are seeking a temporary restraining order.

If you are seeking an *ex-parte* temporary restraining order, you should prepare the motion, the proposed order and the supporting affidavit and bring them to the family court. The documents will be presented to any available judge for review and signature.

You may obtain the *ex-parte* order after a short wait and a hearing will be set within a short period of time. You must serve the Temporary Restraining Order in accordance with V.R.C.P. 5(a) and the Notice of Hearing as soon as possible to achieve the protection requested.

Note that V.R.C.P. 65 does not apply to proceedings under V.R.F.P. 4(c). Although the procedure to follow is not clearly identified the court, relying upon its extensive equitable power to protect the marital estate, will, in most cases, read the provisions in V.R.F.P. 4(c)(1) and (2) broadly.

Once you obtain the order, you must serve it and file/record it in the appropriate place, depending upon the nature of the property to be conserved, (e.g., bank, town clerk's office, offices of the corporation, etc.). If the restraining order prevents a party from entering the property, you should file it with the local police department to insure action, if necessary.

Without an order on file, the police are loathe to interfere in family disputes that do not rise to the level of abuse or domestic violence.

ABUSE PREVENTION—PROTECTION OF PARTIES AND CHILDREN

The Abuse Prevention Act, 15 V.S.A. §§ 1101-1115, V.R.F.P. 4(m) and (n), and V.F.R.P. 9 govern orders relative to the abuse of family or household members.

“Household members” for the purposes of this statute are “persons who, for any period of time, are living or have lived together, are sharing or have shared occupancy of a dwelling, are engaged in or have engaged in a sexual relationship, or minors or adults who are dating or who have dated.” *See* 15 V.S.A. § 1101(2).

“Abuse” is defined in § 1101(1) as the occurrence of one or more of the following acts between family or household members:

- (A) attempting to cause or causing physical harm.
- (B) placing another in fear of imminent serious physical harm.
- (C) abuse to children (*see* Title 33)
- (D) stalking as defined in 12 V.S.A. § 5131(6).
- (E) sexual assault as defined in 12 V.S.A. § 5131(5).

Although jurisdiction lies with the Family Division, emergency orders under 15 V.S.A. § 1104 may be issued by a judge of the Civil, Criminal, or Family Divisions of the Superior Court. If a party subsequently files for divorce, the Family Division has jurisdiction and the prior abuse case must be consolidated with the new divorce action.

Any family or household member may petition the court for relief. A petitioner may request the following relief per 15 V.S.A § 1103:

- (A) an order that the defendant refrain from abusing and interfering with the personal liberty of the plaintiff and/or the children, including restrictions on the defendant's ability to contact the plaintiff or the children in person, by phone, or by mail and restrictions prohibiting the defendant from coming within a fixed distance of the plaintiff, the children, the plaintiff's residence, or other designated locations where the plaintiff or children are likely to spend time;
- (B) an order that the defendant immediately vacate the household and that the plaintiff be awarded sole possession of the residence;
- (C) a temporary award of parental rights and responsibilities to the plaintiff, pursuant to 15 V.S.A. § 665;
- (D) an order for parent-child contact under such conditions as are necessary to protect the child and/or the plaintiff from abuse, including if

necessary conditions under which the plaintiff may deny parent-child contact pending further order of the court;

(E) if the defendant has a duty to support the plaintiff, an order that the defendant pay the plaintiff's living expenses for up to three months;

(F) if the defendant has a duty to support the children, an order requiring the defendant to pay child support for up to three months;

(G) an order concerning the possession, care, and control of any animal owned by either party or a minor child residing in the household;

(H) an order that the defendant return any personal documentation in his or her possession pertaining to the plaintiff and/or the children, including immigration documentation, birth certificates, and identification cards.

The Family Division can grant this relief only after notice to the defendant and a hearing, unless there is an emergency, as further detailed below. The order is effective for a fixed period, after which time the court may extend the order upon motion of the plaintiff. The court may extend the order regardless of whether abuse occurred during the pendency of the order. The court may modify its order upon motion by any party, after a showing of substantial change in circumstances.

EMERGENCY RELIEF

An *ex parte* order may issue without notice to the defendant if, upon motion with supporting affidavit, the court finds that the defendant abused the plaintiff, the children, or both. *See* 15 V.S.A. § 1104 and V.R.F.P. 9(c). If you represent the plaintiff, be sure that the affidavit specifies the facts supporting a finding of abuse and the reasons why there is a substantial likelihood that abuse will recur. If your client seeks possession of the family home, state why the plaintiff should have possession (e.g., no other place to go).

An emergency order must include a hearing date when the defendant may appear to contest or request modification or discharge of the order. The hearing must be scheduled as soon as reasonably possible, but in no event more than ten days from the date of the order, unless continued. The order may be served on the defendant by any law enforcement officer.

If, at the scheduled hearing, the defendant appears and contests the order, the court may either discharge, modify or extend the order for a fixed period.

A common problem at hearing is the lack of completed service on the defendant. The court can extend the order and continue the hearing upon request of the plaintiff for such additional time as it deems necessary to achieve service on the defendant. If the court does not have time to hear the case, the order can be extended. If you plan to bring several witnesses, it is good practice to contact the court in advance.

THE EFFECT OF AN ABUSE PREVENTION ORDER

Custody Orders

Evidence of abuse is among the factors the court will consider when making an order concerning parental rights and responsibilities and determining the best interests of the child. Section 665(b)(9) of Title 15 mandates consideration of “evidence of abuse . . . and the impact of the abuse on the child and on the relationship between the child and the abusing parent.”

Prohibition on Possession of Firearms

Pursuant to 18 U.S.C. § 922(g), it is illegal for the subject of a final abuse prevention order to ship, transport, possess or receive firearms or ammunition. For this statute to apply, the order must:

Restrain defendant from *either* (a) harassing, stalking or threatening the “intimate partner”/child, *or* (b) engaging in other conduct that would place one in reasonable fear of bodily injury

AND

Contain *either* (a) a finding that defendant represents a credible threat to the physical safety of “intimate partner” or child, *or* (b) an explicit prohibition against the use, attempted use or threatened use of physical force against the “intimate partner”/child that would reasonably be expected to cause bodily injury.

For the purposes of the federal statute, an “intimate partner” means, “the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person.” 18 U.S.C. § 921(a)(32).

PRACTICE TIPS

Even though V.R.F.P. 4(n) requires consolidation of the existing abuse order into any temporary or final divorce order, law enforcement personnel require you to present them with an abuse order on the preprinted abuse order forms to insure that they respond appropriately and that your client is protected.

Counseling and additional support (i.e. housing, transportation, economic services, support groups) are available through local domestic violence support agencies. You can locate the nearest agency on the Vermont Network Against Domestic and Sexual Violence website: www.vtnetwork.org/get-help/member-programs. You may also want to provide your client with the toll-free statewide hotline, which offers 24-hour assistance to victims of abuse: 1-

800-228-7395 (for domestic violence) and 1-800-489-7273 (for sexual assault).

Many parties, both plaintiffs and defendants, are unaware that the subject of a final order will have his or her name sent by the F.B.I. to all licensed gun dealers. Both parties should be aware of this effect of the order. On July 15, 2014, H. 735 went into effect, which requires the subject of a final order to relinquish firearms in his or her possession to a cooperative law enforcement agency or an approved federally licensed firearms dealer, unless the court orders an alternate arrangement.

DISCOVERY

Discovery should be done early, thoroughly, and with an understanding of what is needed and why it is needed. Discovery is governed by V.R.F.P. 4(g)(2) and may be taken in accordance with the Vermont Rules of Civil Procedure, with certain limitations on the form, timing, and use. V.R.C.P. 26(h) details the procedure to be followed if the other party does not respond to discovery requests. Production of documents and things from a nonparty is made through V.R.C.P. 45 (Subpoena) with notice to the other party.

DEPOSITIONS, PHYSICAL AND MENTAL EXAMINATIONS

Depositions, physical examinations, and mental examinations may be taken only by order for good cause shown, and subject to V.R.C.P. 5, except that depositions may be taken without court order on issues of support, maintenance, and property division as in civil actions. V.R.F.P. 4(g)(2)(A).

INTERROGATORIES, REQUESTS TO ADMIT, AND REQUESTS TO PRODUCE

Many Vermont practitioners work together to simplify the discovery process by exchanging Form 813s (A and B) completed by the parties, regardless of whether the parties have minor children. Only where the 813s are incomplete or do not yield necessary information does formal written discovery become necessary. For example, in a more complex case, a party may require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions as to which the expert is expected to testify and a summary of the grounds for each opinion.

A party may not serve upon any other party more than 25 interrogatories, including all discrete subparts, without leave of court or written stipulation. Leave to serve a greater number of interrogatories may be granted only with respect to information that was not, or could not, have been included in a timely filed Form 813 and to the extent consistent with the principles of V.R.C.P. 26(b)(1). V.R.F.P. 4(g)(2)(B)(i).

On issues of infidelity, physical abuse, sexual abuse, or child abuse, neglect, or parental unfitness (as defined in 33 V.S.A. § 4912) a party may only seek discovery through interrogatories, requests to admit, and requests to produce **by order for good cause shown**. V.R.F.P. 4(g)(2)(B)(ii). In most cases, discovery is not done on non-economic issues because the client usually knows more of the details than s/he cares to know already. You can obtain better evidence through witnesses, without alerting the other side to your litigation strategy.

GENETIC TESTING - PARENTAGE PROCEEDINGS

On motion of a party, the court shall require the child, the defendant and any acknowledged parent to submit to appropriate genetic testing for the determination of parentage. A party shall be exempt from genetic testing for good cause shown. V.R.F.P. 4(g)(2)(c) and 15 V.S.A. § 304(a).

FINANCIAL STATEMENTS

The affidavit of income and assets (Form 813A and B), where required by 15 V.S.A. § 662 because a party is or may be obligated to pay child support to the other party or the Office of Child Support, must be filed on or before the date of the case management conference and at least 5 working days before the date of the first scheduled hearing before the Magistrate Judge. V.R.F.P. 4(g)(2)(D)(i).

In all cases, the parties must certify (certification typically appears in stipulated agreements) they have disclosed to each other all financial information, including, but not limited to, income, assets, and liabilities. The court also may order the parties to file financial affidavits.

The Form 813A (Income and Expenses) must be accompanied by pay stubs for the four most recent pay periods or equivalent documents covering the period following a self-employed person's last filed income tax return. The family rules also require the parties to exchange tax returns. *See* V.R.F.P. 4(g)(2)(D)(iii). Standard orders issued by the Family Division providing notice of the first case manager's conference typically also require parties to bring information about any health insurance plans available to them.

DISCOVERY BY THE COURT

The court may order discovery of any matter discoverable under V.R.F.P. 4(g), whether or not a party has requested such discovery. V.R.F.P. 4(g)(2)(E).

SANCTIONS

The provisions of V.R.C.P. 26(h) govern sanctions. The parties' attorneys are obligated to make good faith efforts to resolve or reduce discovery disputes and to avoid filing unnecessary motions. Motions for sanctions pursuant to V.R.C.P. 26 or 37 are not allowed

unless the attorney making the motion has conferred with opposing counsel or has attempted to confer in detail about the discovery issues in a good faith effort to eliminate or reduce the area of controversy and to arrive at a mutually satisfactory resolution. Where conferring with counsel with the opposing party is not successful, the attorney for the moving party must file an affidavit with the court certifying compliance with V.R.C.P. 26(h). When the motion is based upon the production of documents pursuant to V.R.C.P. 37(d), a discovery motion must contain a concise statement of the nature of the case and a specific verbatim listing of each of the items of discovery sought or opposed. Immediately following each specification the motion shall set forth the reason why that item should be allowed or disallowed.

CHILD SUPPORT SANCTIONS

Failure to provide the income information in a child support case creates a presumption that the noncomplying party's gross income is 150 percent of the most recently available annual average covered wage for all employment, as calculated by the Department of Employment and Training or the gross income indicated by the evidence. *See* 15 V.S.A. § 662. Currently, the presumed amount is over \$60,000.00.

POST-JUDGEMENT DISCOVERY OF FINANCIAL INFORMATION

When the parties have minor children, entry of final judgment of divorce triggers a final child support hearing, which in turn requires the parties to exchange 813 Forms. When a motion to modify is filed, the parties are required to exchange 813 Forms as well, regardless of prior information disclosures during the calendar year

PROTECTION OF SENSITIVE FINANCIAL AND TAX INFORMATION

A party may request that tax records or other private information be sealed by filing a motion for protective order pursuant to V.R.F.P. 4(g)(3) and V.R.C.P. 26(c).

PROPERTY DIVISION

Negotiating a good property settlement requires thorough information gathering, which must begin from the moment you meet your client. There are two basic sources of information: your client and your client's spouse. Ideally, you will gather a financial inventory and identify necessary documents within your first or second meeting with your client. When children are involved, your client must fill out the Family Division's Forms 813A and B, but many practitioners routinely use the "813" Forms to short-circuit more formal discovery even where the parties do not have children.

Attempting negotiations without complete and accurate financial information for both parties is a potential pitfall. It is not unusual for one spouse to be unaware of the couple's assets and liabilities as well as the other spouse's income. Clients may tell you that they do not want you to pursue discovery because it will alienate their spouse, but to engage in settlement negotiations without a balance sheet can create an unfair result for your client. The client may blame you later if assets are uncovered, even though he or she did not want you to push for the information.

Vermont is an "equitable distribution" state. Marital property is defined at 15 V.S.A. § 751: "All property owned by either or both of the parties, however and whenever acquired, shall be subject to the jurisdiction of the court. Title to the property, whether in the names of either or, both parties, or a nominee, shall be immaterial, except where equitable distribution can be made without disturbing separate property."

The statute provides twelve factors the court may consider when making a property settlement. As you begin to work on the case, you may want to copy the statute for your client, so that he or she can understand his or her position and assist you in obtaining relevant information.

Unlike community property states, Vermont defines marital property broadly. In other states, for example, funds one party accumulated prior to the marriage and kept in his or her own name are not subject to distribution. The same is not the case in Vermont. See *Condosta v. Condosta*, 142 Vt. 117, 123 (1982) (court can distribute an asset "in whatever manner it finds just and equitable, regardless of its prior owner"); *Lynch v. Lynch*, 147 Vt. 574, 577 (1987) (property in a trust created by one spouse who retains a power of revocation is part of the marital estate). Further, according to the Court, § 751 "is broad enough to cover property acquired after the parties have separated . . ." *Nuse v. Nuse*, 158 Vt. 637, 638 (1991); see also *Bero v. Bero*, 134 Vt. 533, 535 (1976) (marital property includes tort settlement one party received soon after divorce proceedings commenced). Marital property also includes the cash value of a life insurance policy, a business owned by the parties, real estate, vehicles, jewelry, retirement accounts, stocks and employee stock options.

In 2013, the legislature amended the statute to clarify that courts can consider “expectations of gifts or an inheritance” in analyzing “the opportunity of each [party] for further acquisition of capital assets and income.” 15 V.S.A. § 751(b)(8)(A). However, at that time, the legislature also made clear that, “[a] party’s interest in an inheritance that has not yet vested and is capable of modification or divestment shall not be included in the marital estate.” 15 V.S.A. § 751(b)(8)(B).

Do not hesitate to seek the assistance of a financial professional where substantial assets are involved. Different assets that appear to have the same value may in reality have very different values, due to implications involving capital gains taxes, income taxes, depreciation, and different valuation methods. \$100,000 in cash, \$100,000 worth of equity in the marital home, \$100,000 in a Roth IRA, \$100,000 in a traditional IRA, \$100,000 in a defined benefit pension plan, and \$100,000 in a stock account can, in reality, have very different values and financial implications.

For example, deposits into a traditional IRA are tax deductible. However, the owner will pay income tax on withdrawals. By contrast, deposits into a Roth IRA are not tax deductible, and the owner will generally not have to pay income taxes on withdrawals. Further, with regard to capital gains, when property is transferred in a divorce, the cost basis of the asset is transferred along with the asset itself. Stocks that are valued at \$100,000 today but were purchased for \$20,000 are going to have a big capital gains tax bill upon sale. The same may be true for real estate.

It is also important to keep in mind the difference between liquid and illiquid assets. When one party keeps the marital home, he or she cannot use the equity to pay bills. Thus, \$100,000 in a checking account has very different implications than \$100,000 in house equity. Clients should also keep in mind the amount of money it costs to maintain a home, as well as costs and realtor commissions and potential capital gains taxes that will be incurred upon sale.

If retirement accounts are involved, part of the settlement negotiations will be to determine how to divide the accounts and possibly determine a cut off date for the contributions. Where a defined benefit plan is involved, the issues are more complex, and it will likely be necessary to consult with a financial professional to determine the “present value” of the pension.

There are specific rules for and tax implications of dividing and/or transferring retirement accounts pursuant to a divorce. A Qualified Domestic Relations Order (QDRO) is required by federal law to transfer an employer-sponsored retirement plan, otherwise known as a qualified plan, such as a 401(k), a 403(b), or a defined benefit pension plan. A QDRO is not required to transfer an individual retirement account (IRA). A QDRO is a legal

document that tells the plan administrator how to divide the account. Some plan administrators have model QDROs that will assist in your understanding of the retirement benefit and the requirements for drafting a valid QDRO. Drafting QDROs can be very complicated, depending upon the nuances of the plan. The United States Department of Labor has an excellent publication explaining different types of plans, QDROs, and how to draft them.

In sum, before settlement negotiations can begin, you must be aware of all of the property that comprises the marital estate, as well as the total value of the estate. The more information you have at the outset, the easier it will be to negotiate a solid final agreement that is in your client's best interests.

SPOUSAL MAINTENANCE

ESTABLISHMENT

In Vermont, “alimony” is called “spousal maintenance” or “spousal support.” Maintenance allows the recipient spouse to meet his or her reasonable needs post-separation. 15 V.S.A. § 752, *Taylor v. Taylor*, 175 Vt. 32, 36 (2002). The Family Division must find that the spouse seeking maintenance:

- (1) lacks sufficient income, property, or both, including property apportioned in accordance with section 751 of Title 15, to provide for his or her reasonable needs; and
- (2) is unable to support himself or herself through appropriate employment at the standard of living established during the civil marriage or is the custodian of a child of the parties.

15 V.S.A. § 752(a).

Maintenance is used to rectify inequalities in the parties’ independent financial positions that result from divorce. *Poston v. Poston*, 160 Vt. 1, 7 (1993). The length of the marriage, the role the parties played in the marriage, and the parties’ income disparities going forward are the “most critical” factors; however, the property division award is also important. *Delozier v. Delozier*, 161 Vt. 377, 382-84 (1994).

As fact-finder, the Family Division has broad discretion in determining the amount and duration of the award. *Chaker v. Chaker*, 155 Vt. 20, 25 (1990) (courts have discretion to make orders retroactive and establish arrearages). Reasonable needs are relative to the lifestyle of the parties during marriage, but not absolute. *Clapp v. Clapp*, 163 Vt. 15, 19 (1994).

Section 752 provides a non-exclusive list of relevant factors for the Family Division to consider:

- (1) the financial resources of the party seeking maintenance, the property apportioned to the party, the party’s ability to meet his or her needs independently, and the extent to which a provision for support of a child living with the party contains a sum for that party as custodian;
- (2) the time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

- (3) the standard of living established during the civil marriage;
- (4) the duration of the civil marriage;
- (5) the age and the physical and emotional condition of each spouse;
- (6) the ability of the spouse from whom maintenance is sought to meet his or her reasonable needs while meeting those of the spouse seeking maintenance; and
- (7) inflation with relation to the cost of living.

15 V.S.A. § 752(b).

Although Section 752 passed in 1981, it was not until Justice Dooley more thoroughly analyzed the factors by applying them in *Klein v. Klein* that family courts were emboldened to be much more generous in awarding maintenance. *Klein v. Klein*, 150 Vt. 466, 473-74, 555 A.2d 382, 387 (1988) (Klein I). By 1994, permanent maintenance was routinely awarded in long-term marriages, defined as fifteen years or more. *Delozier*, 161 Vt. at 383; *see also Wall v. Moore*, No. 96-448 (Vt. Oct. 24, 1997) (mem.) (taking into consideration cohabitation prior to marriage for purposes of determining length of marriage).

There are two types of maintenance awards: rehabilitative or permanent. 15 V.S.A. § 752(a). Permanent maintenance seeks to compensate a party who would never earn sufficient income to individually sustain the lifestyle established during the marriage because his or her role in the marriage was to make non-compensated contributions as a homemaker. *Delozier*, 161 Vt. at 382-84. Permanent maintenance is defined as until the death of the paying spouse; however, the parties are free to go beyond that point and bind their estate. In practice, permanent maintenance is commonly viewed as lasting until the paying spouse reaches retirement age or the Social Security retirement age. *Justis v. Rist*, 159 Vt. 240, 242 (1992).

Due to the length of most marriages, the most common type of maintenance is limited in duration or is “rehabilitative.” This type of maintenance provides the recipient with a time period in which to gain employment skills and become self-supporting. *Id.* Rehabilitative maintenance need not be fixed in amount and can decline every year. *Tracey v. Gaboriault*, 166 Vt. 269, 273 (1997) (affirming declining award over a seven-year period due to wife’s prospective ability to increase her income). The Family Division can also award nominal maintenance to preserve a spouse’s right to modification in cases where the paying spouse is retired but may return to the workforce. *Felis v. Felis*, 193 Vt. 555, 571 (2013).

Not surprisingly, the subject of much litigation involves identifying and classifying the parties’ income sources. The Family Division will consider the opportunities available to one party to earn a higher income in the future either by growing a business or starting a

new one. *Gravel v. Gravel*, 186 Vt. 250, 261 (2009); *Tracey*, 166 Vt. at 272-74. The Family Division will also consider a party's past earnings both to impute current income and predict future income, especially when a party voluntarily quit or is underemployed. *Kohut v. Kohut*, 164 Vt. 40, 44 (1995). Unemployment benefits and pensions are also sources of income; even though the term of unemployment benefits is uncertain and pensions are assets awarded in the property division. *Mayville v. Mayville*, 189 Vt. 1, 7-14 (2010).

The Family Division aspires to fashion maintenance awards that account for non-compensable contributions to the marriage. *Klein v. Klein*, 150 Vt. 466, 474 (1988) (seeking to compensate a homemaker's contributions to the family's well-being made during the marriage which were not already accounted for); *Strauss v. Strauss*, 160 Vt. 335, 339 (1993) (accounting for a party's relocation to further the other spouse's career where the other spouse's career suffered). Any maintenance award should provide a cost of living increase, pursuant to Section 752(b)(7).

Two factors commonly misunderstood to be relevant are: 1) fault in the marriage; and 2) that maintenance automatically ends when the recipient spouse remarries. *Naumann v. Kurz*, 152 Vt. 355, 361 (1989); *Johnson v. Johnson*, 155 Vt. 36, 42 (1990) (stating recipient spouse's remarriage does not necessarily improve that party's financial condition). Furthermore, the Family Division will not try to reconcile a lifestyle established during the marriage in divorce where the parties lived beyond their means. *Kohut*, 164 Vt. 43.

To provide some sense of finality for the litigants, an award will stand on appeal absent an abuse of discretion or where no reasonable basis for support exists. *Chaker v. Chaker*, 155 Vt. 20, 25 (1990). The maintenance and property awards are interrelated, which means that when maintenance awards are remanded for consideration, the property award must be reopened. *Semprebon v. Semprebon*, 157 Vt. 209, 216 (1991).

Perhaps the biggest recent change relevant to the subject of maintenance is the widespread use of the draft alimony guidelines (similar to, although less complicated than the Child Support Guidelines), which have not been incorporated into law but were marked up in 2012 by the Family Division Oversight Committee. A copy of the draft is included here. The draft provides a framework from which litigants might work; however, their influence and use remains speculative. The draft guidelines consider the length of the marriage and the difference in the parties' incomes; however, they neglect the complexities unique to each case. Some of these complexities may be a divorcing client's main concern, such as: 1) one party is not a W-2 wage earner; 2) a party is or has been voluntarily unemployed or underemployed entirely; 3) one party receives considerable fringe benefits; or 4) a party has or will receive some other form of income such as third-party payment of personal expenses, receipt or availability of overtime pay, or stock options.

MODIFICATION

Maintenance orders by necessity require some degree of predicting future circumstances. Therefore, maintenance awards are not final and can be modified regardless of whether they were based on an agreement or a court order. *Taylor*, 175 Vt. at 39; 15 V.S.A. §758. Maintenance awards can be retroactive, but they must be preserved in the final decree of divorce for the Family Division to be able to modify an award in the future. *Chaker*, 155 Vt. at 25; *Arbuckle v. Ciccotelli*, 177 Vt. 104 (2004) (stating rehabilitative maintenance cannot be modified after the award's term ends).

Perhaps the most common reason for a modification is a substantial reduction in the paying spouse's income, although the expected duration and intent behind an employment choice resulting in a substantially lower income will be considered. *Lowery v. Lowery*, 156 Vt. 268, 273 (1991) (family court should consider requiring payor spouse to report income and employment status where lower income reported); *Golden v. Cooper-Ellis*, 181 Vt. 359, 382 (2007).

The Family Division acquires jurisdiction to modify a maintenance award only where it determines that there has been a real, substantial, and unanticipated change in circumstances. *Taylor*, 175 Vt. at 36. There are no fixed standards to determine whether a change is substantial, but that the conclusion must be made in the context of the surrounding circumstances. *Id.* (threshold inquiry is within court discretion and will not be overturned unless, given the evidence, discretion "exercised erroneously, upon unfounded considerations, or to an extent clearly unreasonable"). Changes in circumstances should be raised at the time they occur. *Mayville v. Mayville*, 189 Vt. 1, 13 (2010).

To meet the threshold burden, moving parties face a "moving target" due to the discretionary nature of "changed circumstances." While some decisions are straightforward, most decisions are not. *Herring v. Herring*, 190 Vt. 19, 22-23 (2011) (unanticipated incarceration is a change in circumstance where decree anticipated husband would be earning income); *cf. Miller v. Miller*, 179 Vt. 147, 153-54 (2005) (abuse of discretion where family court decided wife's new partner should contribute a certain amount to household expenses). Vermont does not subscribe to a *per se* rule that remarriage of the recipient spouse is a change of circumstances. Nonetheless, the Vermont Supreme Court has indicated that such a factor becomes relevant where remarriage substantially improves the recipient spouse's financial position. *Miller*, 179 Vt. at 153-54. The earnings of a party's new spouse may be considered where those earnings impact the party's ability to meet his or her reasonable needs. *Mayville*, 189 Vt. 10-11. A motion to modify can be denied without hearing. *Miller*, 179 Vt. at 162.

Once ordered, the Family Division retains sole jurisdiction to enforce maintenance orders

and may use wage assignment as a method of recoupment. *Chaker*, 155 Vt. at 32 (affirming assignment to enforce payment of wife's maintenance and attorneys' fees). Furthermore, out-of-state maintenance orders are given full faith and credit for purposes of modification and can be modified in Vermont if the law of the issuing state provides for modification. *Lowery*, 156 Vt. at 273.

CHILD CUSTODY

PARENTAL RIGHTS AND RESPONSIBILITIES AND PARENT-CHILD CONTACT

In enacting 15 V.S.A. § 664, the legislature nearly wrote the words “custody” and “visitation” out of Vermont’s domestic relations statutes. Rather, courts refer to “parental rights and responsibilities” and “parent child contact.” Rather than the old custody statutes that often used a “winner take all” approach to parental rights and responsibilities, this statute provides a flexible scheme for parents to share or divide rights and responsibilities, as well as contact.

Parental rights and responsibilities (PRR) are “the rights and responsibilities related to a child’s physical living arrangements, parent child contact, education, medical and dental care, religion, travel and any other matter involving a child’s welfare and upbringing.” 15 V.S.A. § 664(1). Parent child contact (PCC) is “the right of a parent who does not have physical responsibility to have visitation with the child.” 15 V.S.A. § 664(2).

There are two types of PRR: legal and physical. Each may be shared (joint) or held solely (sole) by one parent. 15 V.S.A. § 664(1)(A)–(B). Physical responsibility includes the “routine daily care and control of the child” subject to the other parent’s parent child contact. 15 V.S.A. § 664(1)(B). Legal responsibility affords the parent or parents, “the rights and responsibilities to determine and control various matters affecting a child’s welfare and upbringing” 15 V.S.A. § 664(1)(A). In other words, legal responsibility includes rights and responsibilities other than physical responsibility, such as education, medical care, religion, and travel arrangements. *Id.* Legal PRR encompasses the “big picture” decisions, while physical PRR includes the more “day-to-day” decision-making.

PARTIES

Generally, the only parties with standing to establish, modify, or enforce parental rights and responsibilities or parent child contact are the legal parents of the minor child. For example, the court does not issue visitation with grandparents or other family members, but permits a grandparent to commence an action with the child’s custodian as defendant. *See* 15 V.S.A. §§ 1011–13.

While not a party to the action, the court may appoint a Guardian Ad Litem (GAL) in a parental rights and responsibilities matter to represent the child’s best interests. 15 V.S.A. § 669. GALs and attorney representation of children is explained in greater detail in a separate section.

ESTABLISHMENT

If parents are not married, one parent must first file a parentage action in the Vermont family court to establish court-ordered PRR and PCC. *See* 15 V.S.A. § 302 *et seq.* If the parents are married or entered into a civil union, either party may establish PRR/PCC by filing a divorce, dissolution, or legal separation action in court. The parties to legal marriage are the presumed parents of a child born during the marriage. *See* 15 V.S.A. § 308(4).

The Statutory Factors

Vermont’s domestic relations statutes provide flexibility for the parties to reach an agreement— or for the court to issue an order—guided by the best interests of the child, given the individual child and family. Section 650 provides:

The legislature finds and declares as public policy that after parents have separated or dissolved their civil marriage, it is in the best interests of their minor child to have the opportunity for maximum continuing physical and emotional contact with both parents, unless direct physical harm or significant emotional harm to the child or a parent is likely to result from such contact

15 V.S.A. § 650. Section 665 sets for the statutory criteria for a court’s parental rights and responsibilities order. If the parties agree, the court can order shared or divided PRR—so long as shared or divided PRR is in the best interests of the child. When parents can cooperate and respect each other during and after separation, shared parental rights and responsibilities can work well for both the children and the parents. A noncustodial parent is less likely to feel like a second-class parent, and the children know their parents are making decisions together for their well-being.

However, attorneys should avoid the temptation to push shared parental rights and responsibilities on couples who cannot agree or treat each other with trust or respect. Those couples are more likely to return to court with post-judgment motions, and only prolong angst for the child. At the same time, even though one parent may be using his or her “veto” power only in the context of another element of the divorce (i.e. property settlement or maintenance), but the parties may still be able to co-parent.

The court cannot order joint or shared custody absent an agreement between the parties. Vermont does not have a statutory presumption that joint custody is in the child’s best interests. If the parties do not agree, the court will hold a contested hearing and issue an order awarding PRR “primarily or solely” to one parent. 15 V.S.A. § 665(a). The best interests of the child, as well as all factors set forth in § 665(b)(1)–(9) guide the court’s

decision. Any attorney practicing domestic relations law in Vermont must be thoroughly familiar with the underlying bases for, and current understanding of the factors.

Attorneys representing parties in contested custody matters must be prepared to address all nine factors and present evidence regarding the child's best interests. *See Moreau v. Sylvester*, 2014 VT 31, ¶ 81 (describing Vermont court's best interests of children analysis as "multi-factorial" and on a "case-by-case analysis"). While not deemed a presumption, the primary care provider criterion is generally entitled to "great weight." That "weight . . . depends upon evidence 'of the likely effect of the change of custodian on the child.'" *Hanson-Metayer v. Hanson-Metayer*, 2013 VT 29, ¶ 21 (quoting *Harris v. Harris*, 149 Vt. 410, 419 (1988)). This factor "allows the court to give due consideration to the primary custodian in evaluating the child's best interests." *Nickerson v. Nickerson*, 158 Vt. 75, 88 (1992) (citing *Harris*, 149 Vt. at 418–19). However, it becomes a difficult contested issue when both parents work relatively equal amounts of time outside of the home. *See Hanson-Metayer*, 2013 VT at ¶ 21.

Parent-Child Contact

Parental contact with the minor children of the divorce is one of the most important issues that the attorneys and the parties face. Parties often take out their individual frustrations created by the divorce and divorce process by fighting through their children about parent child contact. Depending upon the degree of hostility between the parties, it might be useful to have them jointly establish a set of ground rules for the continued exchange of the children. Flexibility by both parties is extremely important because the children eventually assume lives of their own, which often conflict with the desires of the parties for continued contact. Research has shown that one of the significant factors that has a negative effect on the children of divorced parents is continued animosity between their parents.

Unless you have the qualifications, patience, and endurance to settle post-divorce disputes, you should encourage your clients to obtain counseling from professionals to learn how to deal with the facts of divorce and the resulting and necessary ongoing relationship with the other party. It is also a good idea to include a mediation provision for post judgment problems in the final stipulation/separation agreement in an attempt to keep the parties/family out of the adversarial system. This provision is mandatory in a shared or split parental rights and responsibilities situation, but could be part of a settlement that provides sole physical and legal rights and responsibilities to one party and contact to the other. *See* 15 V.S.A. § 666(b)(7).

There are times when the party granted sole physical rights and responsibilities will seek specific restrictions on the other party's contact with the children. This may stem from such alleged misconduct on the part of the non-custodial parent including but not limited to intoxication, spousal abuse, child abuse, incarceration, failure to exercise parent child

contact to such an extent that the child no longer feels comfortable with the plan in the order, failure to protect or derogatory remarks about the custodial parent. The motion could come from continued conflict between the parents and their unresolved differences. It is clear that the one who seeks restrictions on the present contact situation/schedule has the burden of proving why visitation should be less than at reasonable times and places.

The court also has discretion to deny visitation altogether in certain extreme circumstances. *See* 15 V.S.A. § 1115.

MEDIATION PROVISIONS

If the parties share parental rights and responsibilities, the agreement must include a mediation clause. If one party has sole parental rights and responsibilities, the agreement may include a mediation clause.

Today, most agreements and orders include a mandatory mediation clause. In other words, the parties agree or are ordered to attempt to resolve issues regarding the child(ren) in mediation before filing a motion with the court. While this may not be possible in highly contested cases, the court encourages parties to work together on resolving parent-child issues in the best interests of their child(ren).

ENFORCEMENT

If one parent fails to honor the visitation agreed-upon or ordered schedule, the other parent may file a motion to enforce and the court must schedule a hearing within 30 days of service. The court must enforce visitation unless it finds good cause for the failure, or that a modification of visitation is in the child's best interests. 15 V.S.A. § 668a(c).

No matter what, a parent cannot withhold parent child contact from the other parent when the other parent is the obligor in a child support order. 15 V.S.A. § 668a(a). Likewise, the obligor parent cannot withhold child support if the obligee parent fails to honor the visitation agreement or order. 15 V.S.A. § 668a(b). In other words, parents cannot use their children as collateral for financial or other issues not related to the best interests of the children. In extreme cases, a parent's custodial interference could result in criminal charges pursuant to 13 V.S.A. § 2451.

MODIFICATION

The court recognizes that circumstances change and that modification of parental rights and responsibilities or parent child contact may be necessary. To meet the statutory standard for modification pursuant to 15 V.S.A. § 668, the moving party must prove not only that

the modification is in the child’s best interests, but there has also been a change to warrant the modification that is:

Real + Substantial + Unanticipated

It is very important that the changed circumstances were unanticipated at the time of the current order. For example, future changes expected at the time of divorce do not constitute “unanticipated” changes. *Hoover v. Hoover*, 171 Vt. 256, 258 n.2 (2000).

On the other hand, there are “no fixed standards to determine what constitutes a substantial change in material circumstances.” *Wells v. Wells*, 150 Vt. 1, 4 (1988) (quoting *Gerety v. Gerety*, 131 Vt. 396, 402 (1973)). The court is guided by the welfare and best interests of the children. *Sundstrom v. Sundstrom*, 2004 VT 106, ¶ 29. This requires an attorney to prepare to present evidence supporting the factors set forth in § 665(b)(1)–(9) in a modification hearing.

One parent’s relocation often triggers a motion to modify parental rights and responsibilities or parent child contact. However, relocation, by itself, does not automatically satisfy the “real, substantial, and unanticipated” threshold to justify a modification. *Hawkes v. Spence*, 2005 VT 57, ¶ 9. The court may grant a motion to modify parent child contact to resolve the “logistical dilemmas” relocation presents. *Adamson v. Dodge*, 2006 VT 89, ¶ 7. In a motion to modify parental rights and responsibilities, the court reviews the surrounding circumstances, “keeping in mind that the effect on the child is what makes a change substantial.” *Hawkes*, 2005 VT at ¶ 10. This becomes particularly difficult when parents share parental rights and responsibilities. *Rogers v. Parrish*, 2007 VT 35, ¶ 8.

OTHER CONSIDERATIONS

Jurisdiction is limited by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), designed to promote uniformity in interstate custody and visitation cases. *See* 15 V.S.A. § 1061 et seq. Thus, it is important to carefully review the UCCJEA whenever a case presents interstate issues, including emergency circumstances.

The Military Parents’ Rights Act, § 681 et seq., affords service member parents and their children different statutory standards and criteria to “minimize the loss of parental contact and disruption of the family” as a result of a parent’s military duty. *See* Legislative Findings, No. 69 (Vt. Adj. Sess. 2009), § 1(3). It is important to understand your client or the other party’s military status and the circumstances of his or her military order.

In circumstances of domestic violence, a representing attorney must present evidence of abuse and its impact on the child and the child’s relationship with the abusing parent

pursuant to factor § 665(b)(9). Depending on the circumstances and/or victims of the abuse, the court may make additional provisions in a parent child contact order to protect the child. *See* 15 V.S.A. § 665a.

For tax purposes (and unless otherwise agreed), the custodial parent claims the child as a dependent, so long as the child lived with that parent for more than half of the year. Parties may not share equal time with the child but agree to alternate claiming the child on their taxes. If so, the custodial parent must complete IRS Form 8332. *See* IRS.gov, *Form 8332: Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent*, <http://www.irs.gov>. If the child spends equal time with each parent, the IRS considers the parent with the higher adjusted gross income (AGI) the custodial parent. *See* IRS.gov, *Publication 17: Personal Exemptions and Dependents*, <http://www.irs.gov/publications/p17/ch03.html>.

MILITARY PARENTS' RIGHTS ACT

In 2009, the Vermont legislature passed into law a new subchapter of Title 15 addressing the unique needs of military families in parentage, divorce, and child custody matters. 15 V.S.A. § 681 *et seq.* The law is intended to provide greater flexibility for service members to access the family court and to minimize disruptions to parent-child contact as a result of military deployment or mobilization.

Because military deployments and mobilizations can happen on short-notice and impede regular parent-child contact schedules, the MPRA allows for “temporary modifications” of existing child custody orders without the ordinary showing of a real, substantial, and unanticipated change in circumstances. 15 V.S.A. § 683(a). Either parent can move for a temporary modification of an existing order when the military parent receives notice that a deployment or mobilization will occur “in the near future” that will have a “material effect” on the military parent’s ability to exercise his or her parental rights and responsibilities or parent-child contact. *Id.* Absent certain circumstances, the original child custody order resumes after the deployment ends. 15 V.S.A. § 683(c). The statute directs the family court to hear motions filed under the MPRA as expeditiously as possible. 15 V.S.A. § 683(b).

Temporary orders must include: a “transition schedule” to ease the child back into the pre-deployment schedule when the deployment ends (15 V.S.A. § 683 (c)(2)) and provisions for parental rights and responsibilities and parent child contact during the military parent’s leave periods in the child’s best interests (15 V.S.A. § 683(e)). The temporary order may include special provisions, such as requiring the nondeploying parent to make the child available during leave periods, or provisions regarding telephone and electronic communication. 15 V.S.A. § 683(f). The nondeploying parent must provide thirty days advance notice of any changes in address or telephone number to the deploying parent and

the court. 15 V.S.A. § 683(g). The parties are encouraged to cooperate and provide information necessary to facilitate agreement. 15 V.S.A. § 687. With reasonable notice and good cause shown, the family court must allow the military parent to provide telephone or electronic testimony or evidence at a regularly scheduled hearing when deployment prevents the military parent from appearing in person. 15 V.S.A. § 685.

If there is no existing order for parental rights and parent-child contact, the statute provides for an expedited hearing to establish an order to ensure that the deploying parent will have access to the child. 15 V.S.A. § 686. At the same time, the court may issue orders to ensure the disclosure of information, to provide for other rights and duties related to parenting, and to provide for other appropriate relief. *Id.* Notably, in both initial orders and modifications, the MPRA gives the family court authority to delegate parent-child contact to a deploying parent's family member, to a person with whom the deploying parent cohabits, or to another person with a "close and substantial relationship to the minor child," in the best interests of the child. 15 V.S.A. § 683(d).

Absence or possible future deployments cannot serve as the sole factor for finding a real, substantial, and unanticipated change of circumstances necessary to permanently modify an existing child custody order. 15 V.S.A. § 684(b). The family court cannot conclude that a military parent has failed to exercise his or her parent-child contact based upon periods during which the military parent's duties had a material effect on his or her ability to do so. 15 V.S.A. § 688. Conversely, the MPRA provides for expedited, emergency modification where compliance with the temporary order upon the military parent's return might result in immediate danger to the child. 15 V.S.A. § 684(a).

Finally, the statute provides a rare attorney's fees provision for failure to comply with certain provisions of the statute. 15 V.S.A. § 689.

CHILD CUSTODY JURISDICTION

In any instance where a minor child has not lived in Vermont for a majority of his or her life, you should consider whether jurisdiction might be implicated in your case. This is one of the most complicated areas of family law. Unless you deal frequently in interstate child custody matters, it is worth reviewing the relevant statutes every time a jurisdictional issue arises. Keep in mind that this Section, like the rest of this Manual, is only intended to serve as a summary highlighting some of the most frequent and important issues.

Until 2011, when the Legislature adopted the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), Vermont was one of the last states still operating under its predecessor, the UCCJA. The adoption of the UCCJEA decreases the complexity of these

matters somewhat because it interplays more seamlessly with the statutes of other states that may be implicated by your case.

Fundamentally, the purpose of the UCCJEA, and the federal compliment—the PKPA—is to ensure that child custody orders are given full faith and credit and enforced in a manner that does not incentivize parental kidnapping or forum shopping. In doing so, the UCCJEA also seeks to have the court best situated to adjudicate matters related to child custody—due to the location of the parties, evidence, witnesses, and the physical presence of the child—assume jurisdiction and ensure a swift result with the best available information.

The first issue to consider is whether your case seeks to establish a PRR/PCC order where no order exists elsewhere, or whether you are attempting to modify or enforce an existing order from another state.

Enforcement of an out-of-state order (as opposed to a foreign order) is the least complex to matter to address relative to other interstate custody matters. The UCCJEA makes clear that Vermont courts have a duty to give full faith and credit to an out-of-state order and have the authority to do so. 15 V.S.A. §§ 1083, 1084. The out-of state order should be registered by obtaining certified copies and preparing an affidavit in accordance with 15 V.S.A. § 1085.

For establishment and modification, Subchapter 2 of Chapter 20 should be reviewed in its entirety. First and foremost, the physical presence of a child in Vermont is not enough, absent other circumstances, for a Vermont court to assume jurisdiction over a child custody matter. In an establishment situation, (which only exists where no other child custody orders have been issued elsewhere,) the first question is whether Vermont is the “home state” of the child AND the court of another state does not have jurisdiction. 15 V.S.A. § 1071. Section 1071 provides the factors to be considered to determine whether “home state” jurisdiction exists. Once a Vermont court assumes jurisdiction, the Vermont court continues to have exclusive, continuing jurisdiction until or unless one of the circumstances in 15 V.S.A. § 1072 is present. This provision is reciprocated in all of the other states that have adopted the UCCJEA, and therefore, in order to modify an order of another state, the case must meet the requirements set forth at 15 V.S.A. § 1073.

Temporary emergency jurisdiction is also available in extenuating circumstances. 15 V.S.A. § 1074.

Other important policies underlie the UCCJEA are the emphasis on communication between courts, 15 V.S.A. §§ 1068 and 1070, and to avoid simultaneous proceedings that

might result in inconsistent results. *See* 15 V.S.A. § 1076. The Vermont court has express authority to communicate with the court of another state, should an issue arise as to which court is best suited to assert jurisdiction. 15 V.S.A. § 1068.

If the court of another state could possibly have involvement in your matter, (i.e. the opposing party filed in the other state immediately before or after your filing), at the very least, you should consider transmitting copies of whatever you have filed in the Vermont court to the clerk's office of the out-of-state court to alert them to the Vermont matter. You should also recite §1068 in your pleadings and request that the Vermont court initiate communication with the out-of-state court. Otherwise, if the out-of-state matter persists, your client may need to hire out-of-state counsel.

The UCCJEA also has a rare attorney's fees provision. *See* 15 V.S.A. § 1091.

CHILD SUPPORT

As if resolving the issues relating to children, spousal support, and property division were not burdensome enough, the parties usually must march on and resolve child support. Child support matters are heard by the Magistrate Judge in a separate proceeding, absent agreement by the parties. V.R.F.P. 8. Whenever a parent-child contact schedule is established or modified, the Family Division *sua sponte* sets a child support hearing.

A parent-child contact schedule is necessary to enter into a meaningful child support discussion, although parent-child contact and child support are separate and distinct determinations. 15 V.S.A. § 668(a). Interference with parent-child contact for failure to pay child support may subject the custodial parent to sanctions, including contempt. 15 V.S.A. § 668(a)(d).

Child support is awarded on the basis of a Guideline formula. The law requires a child support amount that reflects the true cost of raising children at the approximate standard of living of the child's presumptive, intact family. 15 V.S.A. § 650; 15 V.S.A. § 658. The total support obligation is determined by a calculation, which is presumed to be the correct amount of support needed by the child. 15 V.S.A. § 655. This amount is based on the idea that all children in Vermont should receive the same proportion of parental income after separation or divorce as they would receive if the family remained intact. It follows that even when the parties agree to a specific amount of child support, the Magistrate must review and approve the proposed order and determine it to be fair and adequate. 15 V.S.A. § 655. The parties must justify any deviation from the Guideline amount with proposed findings.

The easiest way to use the Guidelines is to download free software from the Vermont Office of Child Support. (*See Web Resources*). The program must be updated regularly, and you can consult the instructions online. (*See Web Resources*).

The two most significant Guideline factors are: 1) the number of overnights in a two-week period that the child spends with the non-custodial parent (used to determine an overall percentage of time); and 2) the parties' gross monthly incomes. 15 V.S.A. § 654; 15 V.S.A. § 657. The parties must exchange financial documentation (if they have not already done so) as provided in the Form 813A and 813B affidavit and failure to provide complete income information may result in the court imputing a standard amount. 15 V.S.A. § 662. Even in cases where an obligor legitimately has no income, a nominal amount of child support should be ordered. *Viskup v. Visкуп*, 150 Vt. 208, 210 (1988).

A child is considered in the Guideline calculation until he or she turns eighteen and has graduated from high school. An order remains in effect until modified, regardless of

whether a child has reached majority. *Morancy v. Morancy*, 173 Vt. 609, 611 (2001).

Although the Guideline amount is presumed correct, the Family Division has discretion to grant a deviation or provide a maintenance supplement. 15 V.S.A. § 659 (a); 15 V.S.A. § 661(a). The Guidelines do not account for all of the variables that arise, and deviations are commonly allowed for child care costs, extraordinary medical or educational costs, additional dependents, and extraordinary transportation expenses. 15 V.S.A. § 653(2)(4). Definitions of some of these variables are provided at 15 V.S.A. § 653. For example, an obligee's additional dependents may raise his or her overall child support amount. 15 V.S.A. § 656(a).

A deviation can be entered when the support amount is unfair to the child or to any of the parties, per 15 V.S.A. § 659(a). Factors include:

- the financial resources of the child;
- the presumptive standard of living the child would have had the marriage continued;
- the child's educational needs;
- the child's physical and emotional condition;
- the custodial parent's financial resources;
- the non-custodial parent's financial resources and needs;
- inflation;
- the education costs needed by either parent to increase their earning capacity; any extra-ordinary related travel expenses incurred in order to exercise parent-child contact; and
- any other factors the court find relevant.

15 V.S.A. 659 (a) (emphasis added).

If a deviation is granted, the court must make explicit findings to that effect. *Ainsworth v. Ainsworth*, 154 Vt. 1 (1990); 15 V.S.A. § 659(a)(1)-(10). Additionally, if either party is saving for college, this amount can be included in the order, by agreement only. 15 V.S.A. § 659(b).

The Family Division may also order a maintenance supplement to adjust any financial disparities between the parties, should the court find that the child will have a lower standard of living with the obligee than the child would have living with the noncustodial parent. 15 V.S.A. § 661(a). Any supplement is considered in light of any spousal maintenance obligation and can be modified either upon a real, substantial, and unanticipated change in circumstances or if the proportion; or amount of gross income varies in excess of 15%. 15 V.S.A. § 661(b)-(c).

OFFICE OF CHILD SUPPORT AND REACH-UP

OCS services are available to all parties, even if neither party receives state benefits. Many child support orders include wage-withholding provisions, a service provided by OCS for a nominal fee. This option results in the parties not having to deal with each other directly and provides accurate documentation of payments and arrearages.

Additionally, OCS will file for establishment of parentage and enforcement or modification of child support in cases where the obligee receives government benefits. Vermont's receipt of federal welfare subsidies is conditioned on an effective child support collection program and requires Reach-Up recipients to assign her/his rights to collect child support. OCS does not represent obligees or obligors in court, and they do not get involved in divorce, parental rights establishment, or child custody. Even if OCS is in case, an attorney for the party working with OCS must appear at hearings. V.R.F.P. 15(d).

Tax implications post-separation or divorce can be significant. For example, the Guidelines assume that the custodial parent will get the child income tax deduction for the children, even though the parties can split or alternate the deductions. Furthermore, the I.R.S. has different rules, which need to be followed. For example, the "custodial parent" is entitled to the deduction, defined as the parent with the higher amount of overnights in a calendar year. Absent the custodial parent's execution of Form 8332 granting permission, the non-custodial parent will have problems claiming the child regardless of any agreement to that effect.

Before any court proceeding, it is important to communicate with your client and get all the essential information needed to run calculations. This information includes the following: 1) the cost of health insurance available to either party; 2) the amount of any childcare-related expenses, annualized, and divided by month; 3) both parties' financial information via Forms 813A and 813B, two years of tax returns, four recent paystubs or, if self-employed, monthly financial statements; 4) if they have additional dependents, other child support orders, or orders of spousal support; 5) work and educational background. After compiling this information, prepare a sample order with calculations printed to bring to a hearing or conference. Case management conferences are great venues for reaching an agreement on a child support amount, especially when an opposing party is *pro se*.

MODIFICATION

There are various ways a moving party can modify child support. Movants can either: 1) show a real, substantial, and unanticipated change in circumstances; or 2) that the support order has not been modified for three years; or 3) that a new calculation varies more than ten percent from current order. 15 V.S.A. § 660(a), 2(b). Receipt of the following events qualify as a change in circumstances a: workers' compensation award, disability benefits,

means-tested public assistance benefits, unanticipated unemployment compensation, or incarceration for more than ninety days. 15 V.S.A. § 660(2)(c). If the obligor received money or income the motion requires an affidavit and calculation; and could be granted without hearing unless either party requests a hearing within 15 days of service. 15 V.S.A. § 660(2)(d).

The change in circumstances requirement for child support modification and the Guidelines themselves assume that separating spouses or parents voluntarily and regularly supply each other with their personal financial information, which sometimes requires extensive discovery and/or court intervention. V.R.F.P. 4(g)(2)(F). Section 662(a) requires both parties to an action to file an Forms 813A and 813B prior to the case manager's conference or five days prior to the hearing. Either party can request the 813s' supporting documentation. 15 V.S.A. § 662(a). If a party does not comply with a request for disclosure, a motion may be filed requesting relief, which could involve an economic penalty or an imputation of income. 15 V.S.A. § 662(a).

Modifications of child support are only effective for obligations after the motion is filed; therefore, even though a child aged out, or a party became unemployed, or there is an oral agreement to pay otherwise, the order remains in effect until modified. *See Sundstrom v. Sundstrom*, 177 Vt. 577 (2004), 15 V.S.A. § 660 (e). Often a psychological soft spot for litigants, disclosure of financial documents can be hard to obtain.

ENFORCEMENT

A motion to enforce child support seeks court intervention in collecting payments. 15 V.S.A. § 606(a) (providing other grounds for enforcement action, including suit money, which under *Willey v. Willey*, 180 Vt. 421, 431 (2006), can include attorneys' fees. An order requiring the Obligor to pay his/her arrearages has the ability to create a judgment for the current amount due and establish a second payment towards that amount. 15 V.S.A. § 606(a). A judgment for child support arrearages has the legal effect of any other civil judgment. *Desrochers v. Desrochers*, 173 Vt. 312, 315-16 (2001).

Any enforcement action should include all costs borne by the moving party caused by the non-complying party's delinquency and could include attorney's fees. Either party can seek enforcement through counsel or the Office of Child Support. The court which issued the original judgment retains jurisdiction over motions to enforce, regardless of where the parties lived when the motion is filed. 15 V.S.A. § 606(a).

The most popular method of enforcement is wage withholding, which technically should be ordered unless the court finds good cause not to order immediate wage withholding, or the parties have entered into an alternative arrangement by written agreement stated in the order. 15 V.S.A. § 781 (a); 15 V.S.A. §§ 782 and 783. Wage withholding requires that the

employer pay all child support directly to the Child Support Registry, which will account and distribute the payment to the obligee for a fee. 15 V.S.A. § 787(a). Other methods of enforcement include: arrearage judgment liens, 15 V.S.A. § 791; lottery offset, 15 V.S.A. § 792; credit reporting, 15 V.S.A. § 793; tax offset, 15 V.S.A. § 794; licenses and governmental contracts, 15 V.S.A. § 795; holding assets in escrow, 15 V.S.A. § 796; civil penalties, 15 V.S.A. § 797; suspension of driver's licenses, 15 V.S.A. § 798 (access to Dept. of Motor Vehicle records by OCS through 33 V.S.A. § 4107); employment, education, or training orders, 15 V.S.A. § 658(d); action to recover maintenance, child support, and suit money: sanction for noncompliance, 15 V.S.A. § 606 (15 V.S.A. § 606, which is directly linked to 15 V.S.A. § 798, provides a statute limitations of six (6) years for child support judgments).

CONTEMPT AS A METHOD OF ENFORCEMENT

Parties can be subjected to civil contempt proceedings under 12 V.S.A. § 122 for both financial and non-financial obligations. 15 V.S.A. § 603(a)(b). Parties subject to contempt must be given notice that the matter is set for a hearing to show cause as to why the party should not be held in contempt. 15 V.S.A. § 603(d).

To hold a party in contempt the court must issue findings that: 1) the person had notice of the order or reasonably should have known; and 2) there was a willful violation. 15 V.S.A. § 603(f), (g). The violation must be clear and substantial, but will not be overturned absent abuse of discretion. V.R.F.P. 16(b)(1), (5); *Krochmalny v. Mills*, 186 Vt. 645, 647 (2009). A party in contempt is subject to various sanctions, which vary in degree. 15 V.S.A. § 603(h). These sanctions can condition incarceration upon a variety of events such as a failure to sign up for services with OCS or the Office of Employment and Training or failure to purge themselves of the violation condition where the party is given time to pay and has the ability. 15 V.S.A. § 603 (i). In *Root v. Root*, the mother was found in contempt for a non-financial obligation where she directly violated the Final Order's mediation provision and relocated, obstructing the father's right to visitation. *Root v. Root*, 178 Vt. 634, 636 (2005).

For financial obligations, a party is presumed to have an ability to pay when there is a court order issued with notice to pay child support, spousal maintenance, or a lump sum property settlement. 15 V.S.A. § 603(b), (e). A party can overcome this presumption by showing an inability to comply with the court order due to no fault of his or her own. 15 V.S.A. § 603(e). Discovery of financial documents to show actual income and reasonable expenses is crucial.

Service of the original order is a fundamental requirement set out in the general contempt statute; therefore, parties should routinely ensure that final orders are served. Upon receipt of an order, family courts are increasingly making sure that parties sign an acceptance of

service. However, it is up to the litigants to ensure that the file has proof of service for both parties. If an order was not served, the moving party can still bring an action for enforcement under § 606 but cannot move for contempt and may be limited in the type of relief available. The service requirements for post-judgment motions are stated in V.R.F.P. 4(g).

The purpose of civil contempt is coercive rather than punitive and incarceration will not be ordered for non-payment when the party lacks the ability to pay. *Krochmalny*, 186 Vt. at 647. Courts have created a lot of hurdles to avoid finding a party in contempt, and this method of enforcement should only be sought in the most extreme of circumstances.

REPRESENTING CHILDREN

CHILDREN WHO ARE SUBJECT OF PROCEEDINGS UNDER RULES 4 AND 9

The Vermont Supreme Court recently promulgated Rules 7 and 7.1 of the Vermont Rules of Family Procedure to reflect the emphasis on the best interests of a child, rather than the state's adversarial interest in juvenile disposition hearings or in proceedings regarding the guardianship of a minor. *See* V.R.F.P. 6, 6.1.

Rule 7 applies when a child is a subject of a Rule 4 or Rule 9 proceeding. V.R.F.P. 7(a). Rule 4 governs divorce, annulment and legal separation, and abuse prevention as related to a Rule 4 proceeding. *See also* 15 V.S.A. § 594(a) ("The court may appoint an attorney to represent the interest of a minor or dependent child with respect to child support and the allocation of parental rights and responsibilities."). Rule 9 governs abuse prevention proceedings.

THE GUARDIAN AD LITEM

The court may appoint a Guardian ad Litem (GAL) upon request of a party or upon its own determination. The appointment of a GAL requires parental rights and responsibilities and/or parent child contact be considered a "substantial issue" before the court. The recently revised rule added parent child contact issues to the applicable proceedings. V.R.F.P. 7, Reporter's Notes.

The revised rule also clarifies that the GAL's role is not to advocate for the child. *Id.* The GAL's role in the proceeding is "to *assist* the child in understanding the process" and "to *provide* the parties and their attorneys with *information that can assist* the parties in reaching an outcome that is in the best interest of the child." V.R.F.P. 7(b) (emphasis added).

The court issues an order of appointment and specifies "activities to be carried out" by the GAL, such as familiarizing himself or herself with the case, speaking with the parties and the child, observing the child with each party, understanding the child's position, recommending whether the child should be represented by an attorney, and any other duties as set forth by the court. V.R.F.P. 7(e). While the GAL may be an attorney, an attorney appointed as a GAL does not serve as the child's attorney. V.R.F.P. 7(b).

The GAL's participation in proceedings differs between pretrial proceedings and evidentiary hearings. The content of the GAL's statement is not evidence, *Gilbert v. Gilbert*, 163 Vt. 549, 549 (1995), unless called and sworn to testify as a witness. V.R.F.P. 7(f)(2)(B). As the GAL, a party's attorney, or the child's attorney, it is important to

understand the expectations and limitations of the GAL participation as set forth within the rule and by the court’s instruction. *See* V.R.F.P. 7(f).

Visit the Vermont Judiciary website for more information regarding the Guardian Ad Litem programs, training, and policies. Vermont Judiciary, *Family Division: Guardian ad Litem (GAL) Program*, <https://www.vermontjudiciary.org/gtc/Family/GAL.aspx>.

Sometimes clients will come to you demanding the appointment of a GAL with the perception that a GAL can be persuaded to serve as an ally in his or her case. You may need to manage your client’s expectations in this regard and help your client find other resources, such as a family or child therapist who can serve as a neutral source of support.

ATTORNEY FOR THE CHILD

The appointment of an attorney under these proceedings requires contested issues related to the child and either a recommendation of appointment by the GAL or the court’s independent decision to appoint an attorney. V.R.F.P. 7(c).

If the GAL recommends the appointment of an attorney, the court must appoint an attorney for the child so long as there are “sufficient resources” and the appointment “will not cause undue delay.” *Id.* The court may order either or both parties to pay reasonable attorney’s fees for the child. *Id.*

CHILD’S TESTIMONY

If a party intends to call the child as a witness in a Rule 4 or Rule 9 proceeding, the court must hold a hearing. The purpose of the hearing is to determine whether to allow the child’s testimony, pursuant to factors set forth in Rule 7(d)(2) and 15 V.S.A. § 594(b). In order to make that determination in a Rule 4 proceeding, the court must appoint a GAL and attorney for the child. In a Rule 9 proceeding, the court may (but is not required) to appoint a GAL and/or an attorney for the child. V.R.F.P. 7(d)(1). The court may also impose conditions on a child’s testimony “deem[ed] appropriate to protect the child.” V.R.F.P. 7(d)(2).

CHILD WITNESSES NOT SUBJECT TO RULE 4 OR RULE 9 PROCEEDINGS

Rule 7.1 applies when a child is a witness—but not a subject of—a Rule 4 or Rule 9 proceeding. V.R.F.P. 7.1(a).

A party must request permission to call a child as a witness. If the court permits the child’s testimony, it may also appoint a GAL or an attorney for the child if “deem[ed] appropriate to protect the child.” V.R.F.P. 7.1(b). When the child is not a subject of the proceeding, 15

V.S.A. § 594(b) does not apply, so the court proceeds with balancing the need for the child's testimony and its relevance with the child's competency.

ETHICAL CONSIDERATIONS

Rule 1.14 of the Vermont Rules of Professional Conduct sets forth the standards for attorneys to follow when representing a client with diminished capacity, such as a child. *See* V.R.P.C. 1.14.

In domestic relations cases, confidentiality conflicts arise when a child says to his or her attorney, "You can't tell anyone but . . ." You must try to get the evidence elsewhere. If unsuccessful, you must balance the effect of disclosure and nondisclosure with the possible outcome of the case.

Additionally, financial compensation cannot, in any way, affect your representation. Sometimes parties share the cost of a child's attorney. Sometimes one parent bears the financial burden. A child's attorney represents the child, regardless of the source(s) of financial compensation.

CONSIDERATIONS AS A CHILD'S ATTORNEY

On the other hand, an attorney appointed to represent the child *is* the child's advocate. In a sense, the role comes more naturally to an attorney than representation of a child solely because the child may be called to testify.

The first step is to meeting with the GAL (if there is one) and the family. Meet with your client, the child, often enough to discuss things that have come up in other interviews. It is also important to make the child feel you are accessible by telephone, e-mail, or in person. It is not easy for a child to take the initiative to reach out to an attorney. You should also try to control your client's expectations. The child must understand that he or she may not get everything he or she "wants". Explain the importance and inevitability of compromise towards the resolution of a contested case.

Undoubtedly, each party will provide you with a list of people he or she recommends you speak with. It is up to you to decide how much interviewing is necessary. Generally, teachers, coaches, day care providers, grandparents, and other relatives are most helpful. Cut down the list to people who know the child best to avoid getting overwhelmed.

Reach out to the parties' attorneys once you have a comprehensive understanding of the issues, the parties' positions, your client's desires, and the child's overall environment. Things may not be as difficult as they seem. If you find speaking with the attorneys unhelpful, send a letter report to the court stating generally what you have found and what

will come out in court. There is no point in ambushing either party (or attorney) in court—these are fragile relationships and even little surprises in court can explode into bigger problems down the road.

If you and the parties' attorneys cannot settle, you must prepare for trial. You are an attorney in court. You cannot give your opinion, and assume the child will not testify. You must present a case to the court showing why the court should order in favor of your client's position. Your preparation includes cross-examination of the parties and their witnesses, and direct-examination of the witnesses you intend to call. Much of your work may be completed by a party's attorney because inevitably that party will agree with the child and will advocate in support of the child's position.

CONSIDERATIONS AS A PARTY'S ATTORNEY WHEN THE COURT APPOINTS AN ATTORNEY FOR THE CHILD

There are two considerations to keep in mind when requesting appointment of an attorney or a GAL. First, the choice between the two can be extremely important. Consider carefully the age of the child, the child's maturity, and whether or not testimony by a child is even a possibility. It is also useful to discuss with your client the difference between the respective responsibilities of the two appointments, to be sure your client's expectations are consistent with the responsibilities of whichever representative you request for the child. In some situations, both representatives (an attorney and a GAL) may be appropriate.

Second, the issue of money eventually arises. It is essential to clarify with your client, the court, and the other party exactly who will pay, when, and how much.

THE FINAL ORDER

NEGOTIATING A SETTLEMENT

The great majority of divorce cases are settled by negotiation. The settlement can come early in the case, even prior to filing the complaint or it can come at the last minute before hearing. While each client has different needs, it is usually to the benefit of the family, both emotionally and financially, to settle the case if possible. Of course, in some cases one or both of the parties has a position, which cannot be compromised and that party will need to be heard by the court. It is best to recognize this situation early in the process.

Either a stipulation or an agreement will be interpreted as a contract between the parties, which can be changed only on a showing of fraud, duress, unconscionable advantage or hampering circumstances intervening beyond the expectation of the parties. *Hudson v. Hudson*, 130 Vt 225 (1972). Any agreement should explicitly provide for circumstances and the conditions under which the agreement may be modified. *Id.*

Vermont offers a robust set of options for parties intent on resolving matters out of court. The Vermont Judiciary maintains a list of trained family law mediators who can tailor mediation services to the parties' unique needs. Vermont also has a growing collaborative divorce community. Collaborative divorce practitioners work with financial professionals and mental health practitioners on a "team" to help the parties resolve their case in a manner that best meets the needs of all involved and can result in a settlement that the parties can be proud of for years to come.

THE AGREEMENT

(Custody, Parent child contact, Child Support, Property Division, and Alimony)

You have a stipulation: If there is a stipulation, it will already have been filed but your cl: should identify it and should state for the record that it is the agreed stipulation. Some judges req1 background information, such as whether the spouse is employed and the spouse's earning capacity, so· the judge can be sure that the stipulation fair.

You do not have a stipulation: If there is no stipulation and the matter is not contested, your client will have to put in the facts as to her desires concerning custody, support visitation, and property division, division of debt and spousal maintenance. There usually is little problem if the defendant does not appear, except

when your client seeks child or spousal support. You should introduce evidence of the financial capacity of the defendant, including occupation, normal salary scale and ability to pay. If you seek restrictions on visitation, you should carefully develop and present the reasons for restrictions.

MANDATORY SIX MONTHS DELAY IF CHILD CUSTODY IS INVOLVED

V.R.F.P. 4(h) states that the divorce may not be heard until six months after service upon the defendant where custody of children of either party is involved, i.e., where there are any minor children. This does not apply to adult offspring. A case might be set within six months of filing but not service, you should watch out for this.

Exceptions theoretically exist in extraordinary circumstances that the statute does not cover but leaves to the attorney's imagination and the court's discretion. You should file a motion supported by affidavit if you are going to request the exception.

CONTESTED FINAL HEARING

Trying a contested divorce case can be difficult and challenging, but there are times when there is no possibility for a reasonable settlement and the case must be tried. It is important to recognize that a case may be headed for a merits hearing early on so that you have time to prepare.

If your case is contested, you should carefully consider the following:

- Know the law regarding the contested issues. If you are really prepared, you will have proposed findings of fact and a memorandum of law for the Judge prior to hearing. By preparing this document, you will organize your arguments and evidence.
- Use the most objective witness. Although family and close friends may have had the most opportunity to observe the client's situation, it is best to obtain the most unbiased witnesses available, such as neighbors or former mutual friends of the parties. If you have a financial case, have appropriate witnesses such as accountants who can educate the court understand your position regarding the assets. If it is a custody case, teachers, day care providers, coaches, doctors, and counselors may be your best witnesses.
- Prepare your client. It is important for your client to behave in an appropriate manner throughout the proceedings, whether or not he or she is on the witness stand. The court will be observing him or her as a

part of hearing the case. It is important for your client to be able to clearly state the facts which he or she feels support her legal position with regard to property, parental rights and responsibilities, division of debt and support.

- Reduce your case to exhibits and tables.
- Divorce cases are not jury trials and the judge will not be impressed with theatrics. Reduce all property, income and expense statements to exhibits so that your client is not testifying to every monthly expense item and every piece of personal property. You can have these tables marked, identified by the client, and admitted into evidence, thus saving time for yourself and obtaining good will for your client from the judge. This is also clearly the best way to preserve the evidence for the judge to consider after the hearing has concluded. Keep in mind it could be weeks and sometime months later, so your exhibits can be crucial.
- Never put a child in the place where he or she must choose between parents.

NAME CHANGES

RESUMPTION OF MAIDEN NAME

Though a woman may resume the use of her maiden name without an order of the court, 15 V.S.A. § 558 allows for resumption of a maiden name as a result of a divorce. Upon granting a divorce, absent a showing of good cause to the contrary, the court may allow a woman to resume her maiden name or the name of a former husband. This is a matter of right, and the court cannot refuse it without a positive showing that harm will result from allowing it.

In the event that a woman wishes to resume the use of her maiden name following a divorce, it is important to include a provision either in the stipulation or proposed final order providing the full name that she will use. This provision will allow for an easier transition. She may take a copy of the Final Order to the Social Security Administration, the bank, and to the Division of Motor Vehicles office when she has to fill out the required forms.

NAMES OF CHILDREN

The court may also order the names of the children to change as part of the divorce. 15 V.S.A. § 559, although it is not commonly done. The courts would undoubtedly require a substantial reason and would be reluctant to make the change over a party's objection. The Supreme Court held in *Wilson v. Wilson*, 93-240 (1994) that the standard of review for a name change petition regarding minor children in Vermont is whether the change is in the best interests of the minor children, not whether it is the custodial parent's preference.

NAME CHANGES AFTER DIVORCE

Under common law, one can choose any name for oneself so long as the purpose of using that name is not to perpetrate a fraud. One may accomplish legal name changes through the Probate Division pursuant to 15 V.S.A. §§ 811 - 816. Normally, a person does not require legal representation to effectuate a name change, but you might direct your client to the Probate Division to accomplish this goal.

THE NISI PERIOD

Unless the parties stipulate and the court orders a waiver, a divorce order is not final or a "decree nisi" until three months after the final order is entered. 15 V.S.A. § 554.

Effective July 1, 1996, the legislature amended 15 V.S.A. § 554 to provide that if one of the parties to a divorce dies during the nisi period, the decree of divorce is deemed absolute immediately prior to the party's death. The divorce is not abated and any court order dividing property not terminated.

SAME-SEX MARRIAGES AND CIVIL UNIONS: DISSOLUTION AND DIVORCE

In 2000, in response to the landmark case *Baker v. State*, the Vermont Legislature passed civil union legislation. As a matter of Vermont law, parties to a civil union have all the benefits, protections, and responsibilities that derive from statute, administrative or court rule, policy, common law, or any other source of civil law, as are granted to spouses in a civil marriage. 15 V.S.A. § 1204. In 2009, Vermont became the first state to extend full marriage rights to same-sex couples by legislation. Civil unions that pre-date the 2009 law remain intact and are still available to same-sex couples. 15 V.S.A. § 1202.

So long as the parties can meet the jurisdictional requirements of 15 V.S.A. § 592(a) (divorce) or 15 V.S.A. § 1206(a) (civil union dissolution) a same-sex divorce or a civil union dissolution in Vermont is governed by the same procedures and the same laws that would govern any other Vermont divorce. Practitioners should keep in mind, however, that while recent developments in the U.S. Supreme Court (*United States v. Windsor* and *Hollingsworth v. Perry*) have changed the federal law landscape, other states' laws continue to vary and may pose challenges where property and child custody cross state lines. Practitioners should also be aware that some couples may be joined in a civil union as well as a marriage and both must be legally dissolved in order to fully sever the parties' relationship.

In 2011, the Vermont Legislature also adopted legislation to address the hardship that can occur when same-sex couples obtain a civil union or marriage in Vermont and return to states that do not recognize their union for purposes of obtaining a civil union dissolution or divorce. Under 15 V.S.A. § 592(b) and 1206(b), nonresident couples can invoke the Vermont family court's jurisdiction, but only under a limited set of circumstances: 1) the marriage or civil union must have been established in Vermont; 2) neither party can reside in a state that would grant the couple a civil union dissolution or divorce; 3) no minor children were born or adopted during the marriage; and 4) the parties resolve all issues by stipulation filed with the family court.

Fundamentally, nonresident dissolution and divorce is only available where the court is not put in a position to take jurisdiction over children outside Vermont, (which would be contrary to the UCCJEA,) or where the parties have disputed issues to be resolved by the court. The new statute also allows the parties to waive the final hearing, or obtain a "divorce by mail." 15 V.S.A. § 592(c). The parties should provide affidavits tracking the language of the relevant nonresident jurisdiction statute to ensure that the court grants the relief requested. The place for filing will be the county where the marriage certificate or civil union certificate was *filed*. 15 V.S.A. § 593(b).

PARENTING CHECK LIST

At the initial interview, ask questions to find out what your client's involvement is and has been with the children. Fill out one questionnaire for each child.

1. What is/are the name(s) and age(s) if the child(ren)?
2. What is the child's level of education?
3. What are the names and ages of any step-siblings?
4. What subjects is the child studying in school and what grades did he or she receive?
5. What was the last book the child read?
6. What are the names of the child's friends, teachers, doctors and coaches?
7. What sports or hobbies or after school activities is the child involved in?
8. Does the child attend religion class and, if so when and where?
9. What size clothing, shoes, etc., does the child wear?
10. What is the child's favorite color, food, movie, TV show?
11. What is the child's favorite store to shop in?
12. Does the child have any special needs and, if so, who takes care of those needs?
13. When is the child's bedtime and does it change on weekends?

PARENT'S ROLE

1. Who historically has provided care giving and who does so currently?
Explain any change and the basis.
2. Who purchases clothing, makes buying decisions, and shops with the children?
3. Who makes school-placement decisions, assists with homework, stays in contact with teachers.
4. Who brought the child to the most recent medical appointment and who generally does.
5. Who makes health care decisions?
6. Who assists with baths and bedtime rituals?
7. To whom do children go when ill, with a question, for comfort?
8. Does the client involve the other parent in child rearing decisions and does he or she respect the other parents position as a co-parent? Give Examples.
9. Does one parent derogate or undermine the other parent?
10. Are there religious differences between parents or issues in conflict, such as whether to enroll the children in parochial school?
11. What are the work hours and travel schedules of each parent?
12. What about families of origin of each parent? Are there problems or positive attributes that impact the children?
What kinds of relationships do the children have with grandparents or other extended family members?
13. Is either parent planning to relocate with the children? If so, what are the benefits or detriments of such a move on the children?

CUSTODY FACTS

1. Are there any prior court orders?
 - D Date of the order
 - D Jurisdictional basis of prior order (UCCJA/UCCJEA/ PKPA)
2. To what extent has it been observed?
3. Are there any informal arrangements regarding custody?
 - D Duration of such arrangements?
4. Has the child previously been in regular care of a non-parent for a significant period of time?
 - D With whom?
 - D Why?
 - D When and for how long?
5. Why does the client seek custody?
6. Does the opposing party seek custody and, if so, why?
7. Is anyone else seeking custody or visitation rights?
 - D Why?
 - D What is the basis for the claim?
8. What are the parties' understanding of joint versus sole legal custody (decision making)?
9. What are the parties' understanding of joint versus sole physical custody (time allocation)?
10. What are the parties' attitudes toward joint legal custody? Their agreement or lack of agreement on:
 - D Education?
 - D Religion?
 - D Discipline?
 - D Moral values?
 - D Health care?
 - D Summer camp, extracurricular and social activities?
 - D Other major issues relating to the child?

11. What is the quality of each parent's relationship with the child? (Is the child more likely to turn to one parent for help in problem situations?)
12. What is each parent's available time for the child?
 - D Demands and flexibility of work schedules?
 - D Travel Obligations?
 - D Recent change in the amount of time either parent spends with the child?
 - D Any changes likely to be necessitated by the divorce (i.e., non working parent getting a job?)
13. What are each parent's career goals?
14. What is the nature, quality, and reliability of current and past child-care arrangements?
15. Which parent oversees and arranges for child care?
 - D Interviewing the caregiver?
 - D Contacting references?
 - D Instructing and supervising the caregiver?
16. Who disciplines the child and in what way?
17. How have the parties been educated to parent (i.e., through books, classes, family members, friends)?
18. What is the quality of the child's relationship with significant others, such as:
 - D Brothers and sisters?
 - D Stepparents?
19. Are there step-siblings?
20. What role, if any, do the parents' friends, particularly significant others, live-in friends, or roommates play in terms of the child?
 - D Grandparents?
 - D Aunts, uncles, cousins, and other extended family?
21. Is the sexual conduct of one (or both) parents at issue? If so:
 - D Is the child aware of the conduct?
 - D How many sexual partners has the parent had and in period of time?
 - D How many of those partners has the child met?
 - D Has the child witnessed sexual conduct?

- D Has the child been in the same living unit when sexual activities occurred?
 - D Has the child objected to or seemed to be made uncomfortable by such conduct?
 - D Is there evidence of harm to the child?
 - D Does the parent plan to marry the partner at issue?
22. What is the custody preference of the child?
- D Basis for preference?
 - D Strength of preference?
 - D Amount of time the child has held preference?
 - D Is it a change of preference?
23. What are each parent's plans for the child, regarding home, education, religion, and general development?
24. What is the physical health of each parent?
25. What is the mental health of each parent?
- D Any diagnosed disorders?
 - D Is either parent in therapy?
 - D Are privilege claims abrogated due to the custody dispute?
26. Is fault an issue in the divorce?
27. What other factors do the parties think are significant?
28. Who are potential witnesses?
- D Neighbors?
 - D Child-care providers (including evening sitters)?
 - D Teachers, coaches, etc.?
 - D Physicians, dentists, and mental-health counselors?
 - D Clergy?
 - D Friends?
 - D Relatives?

PRIMARY CARETAKER CHECKLIST

In assessing which parent serves as primary caretaker, consider the following tasks:

- D Preparing and planning meals
- D Bathing, grooming, and dressing the child D
Purchasing, cleaning, and caring for clothes
- D Arranging for medical and dental care
- D Caring for sick child
- D Arranging for social interaction
- D Arranging for alternative care D
Putting child to bed at night;
waking child each morning
- D Disciplining child
- D Educating-social, religious, school skills
- D To whom does the child turn for help-including on social, educational, athletic, and religious issues?

BEST
INTERESTS
CHECKLISTS

Factors to consider in assessing best interests of a child:

- D Parents' service as primary caretaker
- D Child's relationship with other family members
- D Child's preferences
- D Parents sexual conduct-impact on child
- D Mental health of the parties
- D Alienation of child from one parent by the other
- D Domestic violence
- D Alcohol and drug problems
- D Illegal activities
- D Physical disability (that materially affects ability to care for child)
- D Ability to meet child's education needs (particularly if child has special education needs or is gifted)
- D Ability to meet child's medical needs
- D Failure to pay child support
- D Plans to move out of state
- D Frequent changes of residence (may reflect instability)
- D Religious training of child as a positive factor (promoting continuity to meet child's religious needs)

- D Religious training as a negative factor (religious conflict between parents or religious practices that have caused demonstrable harm to child)
- D Placing undue pressure on the child, including in connection with the custody or visitation dispute

WEB RESOURCES

GENERAL

Vermont Bar Association

www.vtbar.org

Vermont Judiciary

www.vermontjudiciary.org

Vermont Supreme Court Opinions

<http://libraries.vermont.gov/law/supct>

Vermont Statutes

<http://www.leg.state.vt.us/statutesmain.cfm>

American Academy of Matrimonial Lawyers

www.aaml.org

American College of Family Trial Lawyers

www.acftl.com

CHILD CUSTODY

Custody Planning Resources

www.ourfamilywizard.com

Google Calendars

www.google.com/calendar

Vermont Coalition of Supervised Visitation Programs

www.safevisitsvt.com

DOMESTIC AND SEXUAL VIOLENCE

Vermont Network Against Domestic and Sexual Violence

www.vtnetwork.org

QDROs

U.S. Department of Labor Information Page

<http://www.dol.gov/ebsa/publications/qdros.html>

CHILD SUPPORT

DCF Guidelines Calculator

http://dcf.vermont.gov/ocs/parents/guidelines_calculator.

DCF Guidelines Information

<http://dcf.vermont.gov/sites/DCF/files/pdf/ocs/GuidelinesSoleandSplit.pdf>.

COLLABORATIVE LAW

Chittenden County Collaborative Law Practice Group

www.chittendencountycollaborativelaw.com

International Academy of Collaborative Professionals

www.collaborativepractice.com

Central Vermont Collaborative Law Practice Group

www.centralvermontcollaborativelaw.com

