

LAWYERS WEEKLY

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Two Sections

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Important Opinions

NEGLIGENCE

Legal Malpractice – Associate Attorney

An associate at a law firm may not defend against a legal malpractice action by claiming that she was not in privity of contract with the client, whose legal contract was with the firm.

Va.Cir.Ct., VLW 004-8-050p. 12

CONTRACT

Home Construction – Reconveyance From Builder

A builder breached his contract to build a house for plaintiff couple on the lot they had conveyed to him in a contract that required the builder to reconvey the property to plaintiffs after construction of the new home; although plaintiffs informed the builder the husband had lost his job and the couple shortly thereafter moved to Utah, they did not repudiate the contract, and the builder should not have proceeded to make significant changes to the house plan and then sell it to another couple.

Va.Cir.Ct., VLW 004-8-052p. 12

REAL ESTATE

Taking – Housing Authority

Where city-council-approved maps showed, over a 24-year period, defendant redevelopment authority's plans to

No Lawyer Fee Award for Support Hike

BY DEBORAH ELKINS

Even though a wife won an increase in spousal support after a final divorce decree, she could not collect her attorney's fees for that effort, a Fairfax Circuit judge has ruled.

After increasing the wife's support award by \$300 per month, the trial judge also ordered the husband to pay \$18,000 of her attorney's fees, according to Fairfax lawyer Michael K. Murphy, who represented the husband.

But the judge took another look at the case and changed his mind.

The wording of the couple's property settlement agreement prompted the judge to grant the husband's motion to reconsider and set aside the fee award.

The parties' PSA, signed and filed before entry of the final decree, allowed fees for the wife's costs in filing the bill of complaint and in the event of a breach of the PSA.

But the agreement was silent as to whether the wife would get fees for her successful bid for a support increase after the decree was entered.

In the face of that silence, the judge said that Virginia Code § 20-109(C) controlled and prevented the judge from awarding any kind of relief that was inconsistent with the parties' contract.

The decision may surprise some family law attorneys, who count on invoking a court's general equity power in order to re-

Stalemate in the Assembly Leaves 2 Open Judgeships *Circuit Seats in Hampton, Alexandria Unfilled*

BY MATTHEW PHILIPS

A stalemate in the 2004 General Assembly has left circuit judgeships in Hampton and Alexandria unfilled.

The seats remained vacant when the legislature closed its regular business on March 13 and turned to the budget impasse. A three-day extension for budget negotiations was fruitless, prompting Gov. Mark R. Warner to call for a special session devoted to budget matters.

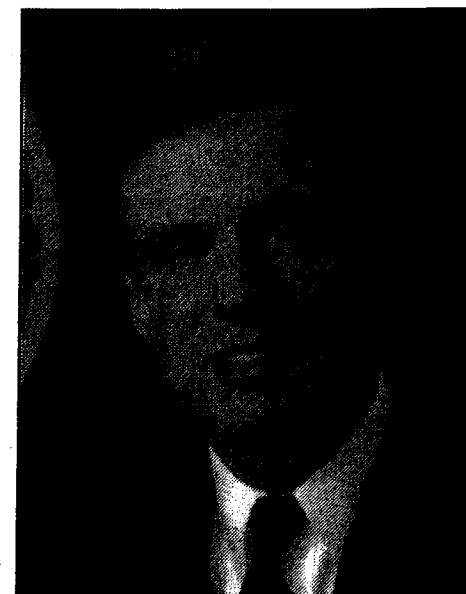
As a result of the lack of legislative action, Warner will have the opportunity to fill the judgeships. His appointees would serve until the 2005 General Assembly convenes next January, and they would face reelection at that time.

Intra-party squabbles

Both vacancies stem from a dispute between the Senate and House Republican caucuses. At issue was whether legislators should stick to the traditional practice of relying upon the recommendations of local legislators concerning judicial appointments.

The Senate sought to re-elect Hampton Circuit Judge William C. Andrews III to the 8th Circuit judgeship he has held for the last eight years, while House Republicans sided with local legislator Del. Thomas D. Gear, R-Hampton, who does not support Andrews and instead nominated Sherrie Capotosto, an assistant U.S. attorney in Norfolk.

But for the Alexandria judgeship, the House leadership sought to ignore local



GOV. MARK R. WARNER
Will have opportunity

legislators – all Democrats. That seat has been open since the retirement last summer of Judge Alfred D. Swersky.

While the Senate was set to elect Juvenile and Domestic Relations Judge Nolan B. Dawkins, who had the support of Alexandria legislators and the local bar association, the House majority pressed for the selection of Alexandria lawyer Timothy J. Battle.

After it became clear towards the end of

Fee

(Cont'd from page 1)

quest attorney's fees for a post-decree motion, according to Murphy.

The new case is *Rutledge v. Rutledge* (VLW 004-8-065). The opinion was written by Judge Marcus D. Williams.

Parties' PSA

The couple entered into a Property Settlement Agreement (PSA) in March 1999, according to Williams' letter opinion. The court entered a final divorce decree incorporating that PSA in July 1999.

In July 2003, the wife filed a motion to modify spousal support based on a material change in the circumstances. After a January 2004 hearing, the trial judge ruled that the wife was entitled to an increase in spousal support. The judge also awarded the wife her attorney's fees.

In response, the husband filed a motion to reconsider, arguing that the wife was not eligible to receive fees under Virginia Code § 20-109(C) because the parties' PSA did not specifically provide for fees attendant to a request for support modification.

According to the parties' PSA, attorney's fees could be awarded only in two specific instances: The husband was to pay the wife \$3,000 for fees that arose from her filing of the bill of complaint for divorce, and either side could get a fee award in the event of a breach of the parties' PSA.

But the wife did not seek an increase in spousal support as a result of any "breach"

of the PSA, the court observed. And although the PSA itself allowed a modification of support, it did "not provide for an award of attorney's fees associated with such modification," Williams wrote.

The wife argued that the court's inherent equitable power allowed the judge to award fees in support modification cases filed pursuant to subsection (A) of Code § 20-109.

Pursuant to Code § 20-109(C), the judge said, "if a contract signed by the party to whom such relief might otherwise be awarded is filed before entry of a final decree, the Court may not enter a decree or order directing the payment of support and maintenance for the spouse, suit money, or counsel fees or establishing or imposing any other condition or consideration, monetary or nonmonetary except in accordance with that contract."

The statute "specifically prohibits the Court from awarding counsel fees, except in accordance with the parties' contract," Williams concluded.

In the 19th Circuit, at least, "parties had better be sure of what they put into [their] separation agreement with respect to whether or not either of them may be able to receive their counsel fees associated with any post-divorce petition to modify spousal support because unless the PSA language allows for such an award — and it rarely does currently — Code § 20-109(C) will bar such an award," Murphy said.

Fairfax lawyer Jennifer E. Mandell, who represented the wife, could not be reached for comment.

detention, electronic monitoring and additional drug treatment.

Illinois wants to develop halfway houses where people on parole and probation can go instead of prison, and legislation in Washington state would cap at 60 days the prison time a parolee could get on a technical violation. A New Jersey panel has recommended a similar move.

The Virginia study is part of the Criminal Sentencing Commission's 2003 Annual Report and is the first time since the state abolished parole that the commission has closely analyzed violations by people on probation or who have been released from prison.

The full text of the Criminal Sentencing Commission report is available

throughout the peninsula. The opposition can be summed up in two words: Tom Gear."

Speculation that Warner will appoint Andrews to a one-year interim term appears less certain than his apparent support for Dawkins. Even so, it remains likely that should Andrews receive the governor's appointment, he would face opposition to his reelection again next year.

Restorative

(Cont'd from page 1)

Re-framing crime

"A crime is a violation of people and relationships," said CVRJ coordinator Dave Saunier. "We think this program has real value ... We see [crime] as a tear in the fabric of community and it's our obligation to mend that tear."

Saunier first learned about the "healing" concept of restorative justice in detail while attending graduate courses in Conflict Transformation at Eastern Mennonite University in Harrisonburg, where he was taught by the widely regarded "godfather" of restorative justice philosophy, Professor Howard Zehr, author of the seminal book, *Changing Lenses*.

"One thing I like about it is that the victims have a sense of being paid back directly," added Saunier. "By organizing conferences between the offender, the victim, and other family members, we re-frame the issue ... It's much harder for a first time, juvenile offender to face their victim directly than it is for them to simply pay a fine to a clerk and maybe feel as if they are fighting 'The System' or 'The Man.'"

Saunier mentioned a recent example of some kids who tried to pass off a fake \$20 bill at a local mall. After both parties voluntarily accepted the terms of the conference, the boys were required to work off their punishment with mall security guards. Afterwards, their records remained clean of any crime.

Mirroring mediation

The largest of Virginia's programs is based in Prince William County, Saunier

said. While still under the radar, so to speak, the restorative justice movement in Virginia was inspired by the success of ADR programs of the late 1980s. Those involved believe restorative justice is not a "fly-by-night" phenomenon, that the effects are tangible and supported by statistics.

When ADR concepts were first applied to criminal offenses, the concept of "therapeutic justice" was born, the idea being to find and fix underlying causes of crime pertaining to the defendant. Virginia's successful drug courts are a good example.

This soon gave rise to the restorative justice movement, which brings the victim into the equation. The movement has now attracted the interest of many attorneys and specialists once involved in mediation.

In Fauquier County, home of another large restorative justice program, a recent two-year old study showed a 5 percent recidivism rate for juveniles who went through the restorative justice program, compared to a county rate of 45 percent and a national rate of around 80 percent for juveniles who did not experience a similar program, according to Lawrie Parker, executive director of the Piedmont Dispute Resolution Center in Warrenton.

While leaders of a coalition called the Restorative Justice Association of Virginia hope to eventually see legislation on the books concerning restorative justice, they are still working out the parameters, as some existing programs expand into handling adult cases.

Leaders of the RJAV coalition are presenting their findings concerning the concept of restorative justice to the Supreme Court's Judicial Council this Monday, March 22.

Probation

(Cont'd from page 6)

Led by Texas, states recently have been paring back the number of imprisoned technical violators before prison growth becomes unmanageable.

"There's a lot of innovation either under way or in development across the country," Travis said. "It's really because of the fiscal crisis states are facing. The bottom line is, it's really, really difficult to pay for prisons."

A study last year in California found that two-thirds of that state's parolees end up back in prison. Calif.

Get hard-to-find Circuit Court cases