Motions

Motions commonly used in family law cases

by John H. Kitzmann

The procedures involved in preparing, filing, and litigating a motion in a family law case are identical to those used in other civil actions. In addition, family law practitioners use the same motions to compel, motions to continue, and other motions commonly used in civil litigation. There are, however, a number of motions that are unique to family law.

At any time after a divorce case is filed, Code § 20-103 permits a party to file a motion for pendente lite relief. This statute allows a litigant to ask the court for, among other things, an order a) that one spouse pay the other spouse any sum necessary for maintenance and support, b) that a spouse provide health insurance to the other spouse, c) that a spouse pay secured or unsecured debts incurred jointly or separately, d) that one spouse pay the other a sum to be used for attorney's fees to carry on the suit, e) awarding a spouse custody and/or visitation of children, f) awarding a spouse child support, g) giving a spouse exclusive use of the family residence, or h) enjoining the use of accounts or assets owned by either party. A litigant can request pendente lite relief in the complaint for divorce or in a separate motion.

If the court allows, a litigant can schedule a pendente lite hearing immediately after the complaint for divorce is filed. If the party seeking the divorce has prepared in advance for the divorce, and the responding party is taken by surprise by the filing, a pendente lite hearing early in the case can give the moving party a tremendous tactical advantage. Because a pendente lite hearing can be scheduled before discovery is conducted, the responding party may be unable to effectively refute allegations about income, parenting, and other important issues. The responding party can find himself or herself ejected from the family residence and looking for a place to live; ordered to pay not only support but the mortgage, utilities and other family bills; or enjoined from using bank accounts and other assets.

If a party does not wish the details of the divorce case to be public, he or she may file a motion pursuant to Code § 20-124 asking that the record be sealed. If that relief is ordered, the record is only open to the parties and their attorneys; others must demonstrate a "proper interest" to obtain access.

Because assets are valued as of the date of the divorce trial, a litigant may wish to ask the court, pursuant to Code § 20-107.3, to value the asset as of a different date. For instance, the husband may have had a 401K with a balance of $100,000 as of

the beginning of the divorce case. In the months leading to trial, the husband cashes out and spends the entire 401K. As of the date of the trial, the 401K is worth $0. If the wife fails to file a motion, at least 21 days before the trial date, asking the court to use the earlier $100,000 value, the trial court will be required to value the 401K at $0.

A party wishing to obtain a divorce quickly can ask, under Code § 20-107.3, to have the divorce bifurcated. If the court finds the bifurcation to be "clearly necessary," as required under the statute, the court can grant the divorce immediately and adjudicate issues of property and debt (equitable distribution) later.

After the divorce is granted, the trial court retains jurisdiction over child custody, child visitation, child support, and in some situations, spousal support.

The terms of a final order of divorce relating to the custody or visitation of a child may be modified following a divorce under Code § 20-108. A motion seeking modification must be filed in the same court that issued the final order of divorce. There are limits to the court's authority to modify a prior custody determination. In particular, under the test set forth by the Supreme Court in *Keel v. Keel*, 225 Va. 606, 611 (1983), "[F]irst, has there been a change in circumstances since the most recent custody award; second, would a change in custody be in the best interests of the children."

Code § 20-108 also permits a party to file a motion seeking modification of the child support provisions of a final order of divorce. Code § 20-108 does not specify exactly what circumstances will justify a modification of a child support award. But the Court of Appeals of Virginia, in *Kaplan v. Kaplan*, 21 Va. App. 542, 547 (1996), specified that the petitioning party must first establish, by a preponderance of the evidence, a material change in circumstances; then the court must consider whether that change justifies a modification of the child support award.

Code § 20-109 authorizes courts, upon petition of either party, and provided an agreement between the parties does not prohibit modification, to "increase, decrease, or terminate the amount or duration of any spousal support . . . as the circumstances may make proper." Where spousal support was originally awarded for an indefinite period, the "moving party in a petition for modification of support is required to prove both a material change in circumstances and that this change warrants a modification of support." *Moreno v. Moreno*, 24 Va. App. 190, 195 (1997). Where spousal support was originally awarded for a specific time period, the moving party must show the occurrence of a material change in the circumstances of the parties and that the change was not reasonably in the contemplation of the parties when the award was made. Code § 20-109 also allows for a complete termination of spousal support "upon clear and convincing evidence that the spouse receiving support has been habitually cohabiting with another person in a relationship analogous to a marriage for more than one year".

It is important for practitioners, before delving into a family law case, to become intimately familiar with these and other motions used in family law cases.

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