
COMMENTS

THE PRICE OF PRIVILEGE:

IS VIRGINIA'S BAN ON MENTAL HEALTH PROFESSIONALS' PARTICIPATION IN CUSTODY DETERMINATIONS REALLY IN THE BEST INTERESTS OF THE CHILD?

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I. INTRODUCTION

In child custody determinations, which are “the most challenging area of family law for both practitioners and judges, parties are more likely to be inflexible and compromises more difficult to attain.”¹ In custody cases, it is not just a monetary interest on the line but rather a child.² These factors lead to difficulties in reaching agreements. When the parties cannot reach an agreement on their own, these very difficult decisions are left in the hands of judges. In determining child custody, numerous factors are taken into consideration that vary by jurisdiction and can lead the judge into a quagmire of issues that are not necessarily legal in nature. Since 2003, Virginia has not allowed a judge to take into consideration in custody decisions a mental healthcare professional’s testimony.³ The 2008 Virginia General Assembly has rectified this grave error in family law by repealing the 2003 ban.⁴ A judge is charged with the task of making a custody

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1. PETER N. SWISHER ET AL., VIRGINIA PRACTICE, FAMILY LAW: THEORY, PRACTICE, AND FORMS § 15:1, at 1051 (Thomson West 2008).

2. *See id.*

3. VA. CODE ANN. § 20-124.3:1 (Repl. Vol. 2004).

4. S.B. 330, Va. Gen. Assembly (Reg. Sess. 2008).

determination that is in the “best interests of the child,”⁵ but can an accurate assessment be made with incomplete information? Additionally, to comply with the statutory law of Virginia a judge *must* take into consideration a parent’s physical and mental capabilities when making custody determinations.⁶ However, due to the ban on therapist testimony, a judge is left to piece together the mental capabilities of the parents without the benefit of the input of mental health professionals.

This article examines the national treatment of mental health care professionals’ participation in custody determinations and compares these practices with Virginia’s ban. Furthermore, this article explores the rationale behind the ban on therapist testimony while weighing the pros and cons of allowing such evidence to be used. It then takes a closer look at the arguments for repealing the ban and the possible benefits which could result from the 2008 repeal.

II. NATIONAL TREATMENT OF THERAPIST TESTIMONY IN CUSTODY DETERMINATIONS

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) sets forth national standards in child custody law.⁷ The scope of the UCCJEA encompasses most child custody issues that arise.⁸ In custody determinations, a judge is called on to make “assessments of the respective parents’ fitness and their competence to be custodians of their children—a right and privilege that is rarely questioned outside the context of such proceedings.”⁹ The national standard used in making child custody determinations requires the court to make a decision that is in the “best interests of the child.”¹⁰ The exact meaning of the best interests of the child standard and its application varies from state to state.¹¹ Some states provide heavy-handed guidance enumerating specific statutory factors that a judge must take into consideration,¹² while others only offer vague parameters for the standard’s application and leave the bulk of the decision to the judge’s discretion.¹³ The Arkansas statute is an example of a vague statute that

5. VA. CODE ANN. § 20-124.3 (Repl. Vol. 2004).

6. *Id.* at § 20-124.3(3).

7. *See* SWISHER ET AL., *supra* note 1, § 15:5, at 1067.

8. *See id.* at 1069.

9. *Id.* at § 15:1, at 1052.

10. JOHN DEWITT GREGORY ET AL., UNDERSTANDING FAMILY LAW § 11.03, at 460 (LexisNexis 3d ed. 2005); *see, e.g.*, VA. CODE ANN. § 20-124.3 (Repl. Vol. 2004).

11. *See* GREGORY ET AL., *supra* note 10, § 11.03, at 460.

12. *See, e.g.*, MINN. STAT. ANN. §518.17 (West 2006 & Supp. 2008).

13. *See, e.g.*, ARK. CODE ANN. § 9-13-101 (Repl. Vol. 2008).

merely requires the custody determination “shall be made without regard to the sex of the parent but solely in accordance with the welfare and best interests of the children.”¹⁴ The Arkansas statute and others like it have faced criticism for leaving much to the discretion of the judge due to a lack of specificity in defining the best interests of the child.¹⁵

Other states’ statutes are much more detailed in setting forth the guidelines the court should take into consideration in defining the best interests of the child.¹⁶ An example of a more detail-oriented statute is Minnesota’s, which lays out a specific list of factors the court must take into consideration.¹⁷ The Minnesota statute also prohibits the use of “one factor to the exclusion of all others... and requires detailed findings on each factor and an explanation of how the factors led to the court’s best interests determination.”¹⁸ The judge, however, is not required to specify the amount of weight given to each factor, just to take all factors into consideration in making the decision.¹⁹ In some states with more specific enumerations of factors, parental conduct is explicitly stated as a factor to be considered.²⁰ For example, the Minnesota statute explicitly requires courts to take parental conduct into consideration; however, there is a limitation stating “[t]he court shall not consider the conduct of a proposed custodian that does not affect the custodian’s relationship to the child.”²¹ Courts have found a wide variety of parental behaviors that affect the parental relationship with the child to be relevant in custody determinations.²²

The Uniform Marriage and Divorce Act provides a list of various factors a court shall take under advisement in making child custody determinations

14. GREGORY ET AL., *supra* note 10, § 11.03, at 460 (quoting ARK. CODE ANN. § 9-13-101 (Michie 1987)); *see also* ALA. CODE § 30-3-1 (Lexis Nexis Repl. Vol. 1998 & Supp. 2007) (providing that on divorce the court may give custody of the children of the marriage “to either father or mother, as may seem right and proper, having regard to the moral character and prudence of the parents and the age and sex of the children.”).

15. *See* GREGORY ET AL., *supra* note 10, § 11.03, at 461; SWISHER ET AL., *supra* note 1, § 15:1, at 1053.

16. GREGORY ET AL., *supra* note 10, § 11.03, at 460.

17. *Id.* at 460-61 (citing MINN. STAT. ANN. § 518.17 (West 1990)).

18. *Id.* at 461, n. 123.

19. *Id.* at 460-61, 461 n. 23.

20. *Id.* at 467.

21. *Id.* (quoting MINN. STAT. ANN. § 518.17 (West 1990)).

22. Among these factors are the sexuality of the parent, *see* *Roe v. Roe*, 228 Va. 722, 727, 324 S.E.2d 691, 694 (Va. 1985), the parent’s ability to prioritize the children over their work schedule, *see* *Peple v. Peple*, 5 Va. App. 414, 423, 364 S.E.2d 232, 238 (Va. Ct. App. 1988), and the parent’s ability to foster a healthy relationship with the other parent, *see* *Etter v. Etter*, No. 0506-97-4, 1998 WL 218204, at *1, *3 (Va. Ct. App. May 5, 1998).

in accordance with the best interests of the child.²³ One such factor is the “mental and physical health of all individuals involved.”²⁴ Therefore, a judge must take into account the mental health of the child’s parents, including the impact the parents’ mental health has on their abilities to provide for the best interests of the child. The admissibility of mental health testimony and records is an issue of privilege that is prohibited by most states in certain situations.²⁵ These state statutes were passed in the wake of the Supreme Court’s decision in *Jaffee v. Redmond*, where the Court first recognized a privilege of confidentiality between mental health care providers and patients.²⁶ The psychotherapist-patient privilege allows a mental health practitioner “to prevent the disclosure of a confidential communication made in the course of diagnosis or treatment of a mental or emotional condition.”²⁷ However, Virginia is the only state that prohibits evidence related to a parent’s mental health in custody cases.²⁸ This parental privilege created in the Virginia ban limits the judge’s access to information, and places a greater emphasis on protecting parental privacy than on the best interests of the child.²⁹

I believe the better reasoned approach is to permit the admission of therapist participation in custody determinations. This would allow for statutory compliance while ensuring the custody determination is in keeping with the state’s “best interests of the child” standard. The court cannot be expected to make a valid judgment in compliance with statutory requirements with incomplete information. A judge in a child custody case, while very capable, is still a stranger to the parties involved and needs as much information as possible to determine what is in the best interests of the child. In some cases, the participation of a parent’s mental health care provider might be the only way to gain access to evidence pertinent to the mental health of a parent and that parent’s ability to provide for the best interests of the child.

23. GREGORY ET AL., *supra* note 10, § 11.03, at 477.

24. *Id.* (quoting UNIF. MARRIAGE AND DIVORCE ACT, § 402(5), 9A U.L.A. 282 (1998)).

25. Courtney Waits, Comment, *The Use of Mental Health Records in Child Custody Proceedings*, 17 J. AM. ACAD. MATRIM. LAW. 159, 161 (2001).

26. 518 U.S. 1, 9-10 (1996).

27. BLACK’S LAW DICTIONARY 565 (3d. pocket ed. 2006).

28. *See* VA. CODE ANN. § 20-124.3:1 (Repl Vol. 2004).

29. *See id.*

III. VIRGINIA'S TREATMENT OF THE ADMISSIBILITY OF MENTAL HEALTH EVIDENCE IN CHILD CUSTODY AND VISITATION PROCEEDINGS

A. Overview

Virginia custody law has shifted towards being facially gender neutral.³⁰ The law no longer takes into account antiquated ideas of the father having primary rights to the children.³¹ Virginia law also no longer gives weight to the “tender years presumption” that favors child custody being awarded to the mother.³² The rationale behind this presumption was that “[m]other love is a dominant trait in even the weakest of women, and as a general thing surpasses the paternal affection for the common offspring, and moreover, a child needs a mother’s care even more than a father’s.”³³ Today, a court begins with a clean slate and looks to statutorily enumerated factors to determine what is in the best interests of the child.³⁴ Virginia case law provides guidance for the relative weight a judge should assign to each given factor.³⁵ However, in the end, the determination is a balancing act performed by the judge, within his or her discretion. As long as the statutory factors are considered, the judge’s decision will rarely be disturbed.³⁶ This deference to initial custody determinations is but one

30. See SWISHER ET AL., *supra* note 1, § 15:1, at 1052-53.

31. At one time, there was such a presumption. *Id.* (citing *Latham v. Latham*, 71 Va. (30 Gratt) 307, 331, *available at* 1878 WL 5869 at *15 (Va. 1878) (“the father is the legal guardian of the infant; the law gives it to him against all the world”); *Myers v. Myers*, 83 Va. 806, 815-16, 6 S.E. 630, 635 (Va. 1887) (“[I]t is proper to say, by the common law, the father is the legal guardian of the infant.”); *Meyer v. Meyer*, 100 Va. 228, 229, 40 S.E. 1038, 1038 (Va. 1902) (“Ordinarily, the father is entitled to the care and custody of his infant child...”).

32. The tender years presumption was also once a part of Virginia’s common law. *Id.* (citing *Mullen v. Mullen*, 188 Va. 259, 270-71, 49 S.E.2d 349, 354 (Va. 1948) (“[T]he mother is the natural custodian of her child of tender years. . . .”); *Brooks v. Brooks*, 200 Va. 530, 539, 106 S.E.2d 611, 617-18 (Va. 1959) (“Generally, where the child is of tender years and will be equally well cared for by either the mother or father, the mother, in preference to the father, should be awarded its custody.”); *Moore v. Moore*, 212 Va. 153, 155, 183 S.E.2d 172, 174 (Va. 1971) (“The mother is universally recognized as the natural guardian and custodian of her children of tender years . . .”). *Contra Visikides v. Derr*, 3 Va. App. 69, 72, 348 S.E.2d 40,42 (1986) (“Use of [the tender years presumption] in determining what is in the best interests of the child is reversible error.”).

33. GREGORY ET AL., *supra* note 1, § 11.03, at 461-62 (quoting *Freeland v. Freeland*, 159 P. 698 (Wash. 1916)).

34. See SWISHER ET AL., *supra* note 1, § 15:1, at 1052-53; VA. CODE ANN. § 20-124.3.

35. See SWISHER ET AL., *supra* note 1, § 15:1, at 1053.

36. See *id.* at 1052-53 (citing *Venable v. Venable*, 2 Va. App. 178, 187, 342 S.E.2d 646, 651 (Va. Ct. App. 1986) (demonstrating that a trial court will be afforded discretion unless the decision is plainly wrong or without evidence to support it); *Robinson v. Robinson*, 5 Va. App. 222, 227, 361 S.E.2d 356,

reason why it is critical for the judge to have all the information necessary to make a well-informed decision from the beginning.

The UCCJEA was adopted by Virginia in 2001 to keep Virginia child custody law consistent with national standards.³⁷ Virginia adopted the UCCJEA to provide more uniform standards in the jurisdiction and enforcement of child custody determinations.³⁸ A child custody proceeding under the UCCJEA is “one in which legal custody, physical custody, or visitation with respect to a child is at issue, and is inclusive of a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, where such issues appear.”³⁹ The UCCJEA considers termination of parental rights cases in child custody proceedings,⁴⁰ and yet Virginia bans mental health professionals’ participation in custody determinations.⁴¹

For a judge to determine what will be in the best interests of the child between competing potential custodians, the court will “look to and consider the qualifications and fitness of the parents, their adaptability to the task of caring for the child, their ability to control and direct it, the age, sex and health of the child, its temporal and moral well-being, as well as the environment and circumstances of its proposed home, and influences likely to be exerted upon the child.”⁴²

The main tenet of Virginia custody law is the same as the national standard, which seeks to promote “the best interests of the child.”⁴³ The Virginia law lists various factors a trial court must consider when deciding the best interests of the child in custody and visitation cases.⁴⁴ These factors are not suggestions, they are mandated; therefore the court *must* consider all factors.⁴⁵ Section 20-124.3 of the Virginia Code “specifies the factors a court ‘shall consider’ in determining the ‘best interests of a child

358-59 (Va. Ct. App. 1987) (holding that trial courts must consider the enumerated factors provided by the General Assembly)). The factors previously set forth in VA CODE ANN. § 20-107.2 are now found in VA. CODE ANN. § 20-124.3, with amendments. *Id.*, § 15.1, at 1053 n.9.

37. *Id.*, § 15.5, at 1067.

38. *Id.* at 1067-68.

39. *Id.* at 1069.

40. *See id.*

41. *See* Va Code Ann. § 20-124.3:1 (Repl. Vol. 2004) (limiting the application of this statutory provision to child custody & visitation cases under Va. Code Ann. § 20-124.2).

42. SWISHER ET AL., *supra* note 1, § 15:8, at 1092 (quoting Campbell v. Campbell, 203 Va. 61, 63, 122 S.E.2d 658, 660 (Va 1961)).

43. VA. CODE ANN. § 20-124.3; GREGORY ET AL., *supra* note 10, § 11.03, at 460.

44. *See* VA. CODE ANN. § 20-124.3 for a full list of factors.

45. *See id.*; Brown v. Brown, 30 Va. App. 532, 538; 518 S.E.2d 336, 338 (Va. Ct. App. 1999).

for... custody or visitation.”⁴⁶

A factor of particular relevance is fitness of the parent, “a threshold determination in every custody case.”⁴⁷ A parent in a custody case must establish fitness, by clear and convincing evidence.⁴⁸ Factors found to be relevant when evaluating a parent’s fitness include sexual misconduct in the form of cohabitation with a member of the opposite sex,⁴⁹ adultery,⁵⁰ homosexual conduct,⁵¹ and abuse allegations or findings.⁵² However, there is case law indicating many of these are not *per se* evidence of unfitness.⁵³ This seemingly conflicting case law reflects the totality of the circumstances approach that judges use to weigh the factors that indicate a parent is capable of providing for the best interests of the child.⁵⁴

Virginia law recognizes the psychotherapist-patient privilege in civil actions; however, “the privilege is inapplicable ‘if the physical or mental condition of the patient is at issue in a civil action.’”⁵⁵ This exception to the psychotherapist-patient privilege has historically played an important role in custody disputes in Virginia.⁵⁶ However, Virginia’s 2003 ban on the use of mental health records or testimony against a parent in a child custody proceeding greatly altered the application of this exception.⁵⁷ It states, in relevant part, that “in any case in which custody or visitation of a minor child is at issue pursuant to [Virginia Code section] 20-124.2... the records concerning a parent, kept by any licensed mental health care provider and any information obtained during or from therapy shall be privileged and confidential.”⁵⁸

There is an exception that allows admission of mental health evidence by

46. *Brown v. Brown*, 30 Va. App. at 538; 518 S.E.2d at 338 (emphasis added).

47. SWISHER ET AL., *supra* note 1, § 15:8, at 1106 (citing *Leisge v. Leisge*, 223 Va. 688, 693; 292 S.E.2d 352, 354 (1982)). Despite the court’s reference to the outdated tender years presumption, the rationale for awarding custody to one parent based on the other parent’s unfitness remains relevant. *Id.* at 1106 n.28.

48. *Id.* at 1106 (citing *Moore v. Moore*, 212 Va. 153, 156, 183 S.E.2d 172, 174 (Va. 1971)).

49. *Id.* (citing *Brown v. Brown*, 218 Va. 196, 200, 237 S.E.2d 89, 92 (Va. 1977)).

50. *Id.* at 1106-07 (citing *Rowlee v. Rowlee*, 211 Va. 689, 690-91; 179 S.E.2d 461, 462-63 (Va. 1971)).

51. *Id.* at 1110-12 (citing *Doe v. Doe*, 222 Va. 736, 747; 284 S.E.2d 799, 805 (Va. 1981); *Bottoms v. Bottoms*, 249 Va. 410, 420, 457 S.E.2d 102, 108 (Va. 1995)).

52. SWISHER ET AL., *supra* note 1, § 15:8, at 1115 (referencing VA. CODE ANN. § 20-124.3(9) (Repl. Vol. 2004)).

53. *See id.* at 1118-19.

54. *See id.*

55. VA. CODE ANN. § 8.01-400.2 (Repl. Vol. 2007).

56. Katherine C. Dewart, Note, *A Privilege for “Mommy Dearest”? Criticizing Virginia’s Mental Health Records Privilege in Custody Disputes and the Court’s Application in Schwartz v. Schwartz*, 13 GEO. MASON L. REV. 1341, 1341 (2006) (quoting VA. CODE ANN. § 8.01-399(B) (Supp. 2005)).

57. *See id.* at 1341-42.

58. VA. CODE ANN. § 20-124.3:1(A) (Repl. Vol. 2004).

court order in cases involving suspicions of an abused or neglected child.⁵⁹ The ban does not supersede the mandatory reporting requirements regarding abused or neglected children.⁶⁰ The purpose of these exceptions is to further promote the best interests of the child,⁶¹ however critics argue they are not broad enough to fully encompass that tenet.⁶² Another way in which therapist testimony can be admitted is if the parent in therapy provides advance written consent.⁶³ In consent cases, the testimony is still “limited to the custody and or visitation case in question, but in such event the provider’s records and notes regarding that parent are made admissible.”⁶⁴ Ironically, however, the likelihood of the patient-parent giving consent is decreased in cases where disclosure may be the most necessary.

B. Disadvantages of Allowing Therapist Testimony

1. Compromising the Therapy Process

Critics of repealing the ban contend that any information disclosed during therapy sessions should not be admissible in a court proceeding because allowing such information to be disclosed in court abuses the therapy process:⁶⁵ “[P]sychologist Thomas DeMaio said repealing the law would undermine the trust that clients must have in their psychotherapists.”⁶⁶ Dr. DeMaio also distinguished therapy from judicial determinations, noting that “treating psychologists are eliciting information that will help change the behavior of the client, a very different effort than evaluating the client’s fitness as a parent.”⁶⁷ Dr. DeMaio’s argument is flawed. First, he seems to suggest therapists counsel their clients to change their behaviors in a manner inconsistent with being a parent capable of

59. VA. CODE ANN. § 20-124.3:1(B) (Repl. Vol. 2004); *see also* VA. CODE ANN. § 63.2-100 (Repl. Vol. 2007).

60. VA. CODE ANN. § 20-124.3:1(C) (Repl. Vol. 2007); *see also id.* § 63.2-1509 (Repl. Vol. 2007).

61. *See* VA CODE ANN. § 20-124.3 (listing various factors a trial court should consider when deciding the best interests of the child in a custody and visitation case).

62. *See* Alan Cooper, *Law Barring Therapist’s Testimony Is Extended*, VA. LAW WKLY., Jan. 8, 2007, at 1, 18 [hereinafter Cooper, *Law Extended*]. Parental behavior that does not rise to the level of abuse or neglect can still reflect on a parent’s ability to promote the best interests of the child and yet can go unreported. *See* Alan Cooper, *Ban on Therapist Testimony in Custody Cases Remains: Bill to Repeal 2002 Law Fails*, VA. LAW. WKLY., Jan. 29, 2007 at 1, 22 [hereinafter Cooper, *Ban Remains*].

63. SWISHER ET AL., *supra* note 1, § 15:8, at 1095 (referencing VA. CODE ANN. § 20-124.3:1 (Repl. Vol. 2007)).

64. *Id.*

65. *See* Cooper, *Ban Remains*, *supra* note 62, at 22.

66. *Id.*

67. *Id.*

providing for the best interests of the child. Second, Dr. DeMaio presumes the parent's interest in confidentiality is more important than a proper determination of the best interests of the child.

The basis of the confidentiality argument points out the purpose of therapy is to develop a trusting relationship with a therapist, thereby allowing the patient to feel safe to make any necessary disclosures without fear of this information being later released.⁶⁸ Some therapists fear if the ban is repealed, it will impact their ability to properly treat their patients.⁶⁹ Accordingly, ninety-eight percent of the Virginia Society of Clinical Psychologists continue to support the ban:⁷⁰ “[if] you’re a mental health therapist, confidentiality and the trust that goes with it are essential in the treatment of your clients.”⁷¹ However, this objection also presupposes that a parent's right to confidentiality takes precedence over determining the best interests of the child. These arguments clearly demonstrate the tension between the mental health care professionals responsible for enacting this ban and domestic relations attorneys who wish to present all the evidence possible “to help a judge decide what type of custody is in the best interests of a child.”⁷²

2. Latent Gender Discrimination

Proponents of the ban argue repealing it inadvertently discriminates against mothers “because women seek therapy three or four times as often as men.”⁷³ While it is important Virginia custody law is facially gender neutral, there is simply no hard evidence to support this fear of gender discrimination. The fact that mothers are more likely to seek therapy than fathers does not necessarily imply a mother will make damning statements about her ability to parent in therapy. Additionally, these statistics do not show women are more likely to be mentally ill, just that they are more likely to seek counseling.⁷⁴ An assumption that women are more likely to be mentally ill seems to be gender discrimination.

During the 2007 committee sessions discussing proposed Senate Bill 737, Benjamin M. Schutz, a forensic psychologist, stated that “he knows of nothing other than speculation to suggest that parents don’t get mental

68. See Cooper, *Ban Remains*, *supra* note 62, at 1, 22.

69. See *id.* at 22.

70. *Id.*

71. *Id.* at 1.

72. *Id.*

73. *Id.* at 22.

74. See *id.*

health treatment because they fear that... their therapy records will be used against them in custody proceedings.”⁷⁵ Dr. Schutz posits, if anything, “the opposite is true. A parent who has a problem and is getting treated for it looks better to a judge than one who is in denial.”⁷⁶ A parent who seeks therapy and exhibits a desire to address any issues he or she might have illustrates a self-awareness and desire to be the best possible parent.⁷⁷ In fact, many attorneys and experts advise their clients to seek counseling whether it be to learn how to effectively co-parent or to have someone with whom to discuss the divorce process.⁷⁸

3. Possible recrimination

Others argue a parent-patient should be open in therapy without fear of things said being later held against him or her during court proceedings.⁷⁹ Proponents of the ban “also argue that therapy for the parent is beneficial to the family as a whole.”⁸⁰ They argue, if potential disclosure of information gained in therapy during court proceedings “discourages the parent from seeking mental health treatment, the children, as well as the parents, are injured by the lack of a privilege.”⁸¹ Proponents ironically point to the Virginia Code’s requirement that a court must consider a parent’s mental health as evidence therapy could be held against a parent in a custody proceeding.⁸² However, this argument is flawed because the statute codifies the basic principle that the parent who can best provide for the best interests of the child should be awarded custody.⁸³ A parent’s mental health is a valid factor, relevant in Virginia custody law, to determine if that parent is capable of providing for a child’s best interests.⁸⁴ Consideration of this factor is not recrimination against the parent but rather recognition that the child’s best interests are paramount to a parent’s privilege of confidentiality.

75. *Id.*

76. *Id.*

77. *See id.*

78. NICHOLAS LONG & REX FOREHAND, MAKING DIVORCE EASIER ON YOUR CHILD: 50 EFFECTIVE WAYS TO HELP CHILDREN ADJUST 192-93 (McGraw-Hill 2002); JUDITH S. WALLERSTEIN AND SANDRA BLAKESLEE, WHAT ABOUT THE KIDS? RAISING YOUR CHILDREN BEFORE, DURING, AND AFTER DIVORCE 166, 200, 211-12, 256 (Hyperion Books 1st ed. 2003).

79. *See Cooper, Ban Remains, supra note 62, at 22.*

80. Dewart, *supra note 56, at 1346* (citing Marjorie Fine Knowles & Caroline Chunn McCarthy, *Parents, Psychologists and Child Custody Disputes: Protecting the Privilege and the Children*, 37 ALA. L. REV. 391, 411 (1986)).

81. *Id.*

82. VA. CODE ANN. § 20-124.3 (Repl. Vol. 2004).

83. *Id.*; *see also* SWISHER ET AL., *supra note 1, § 15:1, at 1053.*

84. VA. CODE ANN. § 20-124.3; *see also* SWISHER ET AL., *supra note 1, § 15:1, at 1053.*

4. Probative value of evidence obtained

Another argument supporting the ban concerns the evidence's probative value.⁸⁵ It is argued that "because patients may be suffering from severe mental health diseases, they often have a distorted sense of reality, and the revelations they make to their therapists may be inaccurate," thereby calling into question this evidence's probative value to the court.⁸⁶ This argument is flawed because it assumes patients lie to their therapists while in the same breath proposing that the therapy process is a sanctuary for honesty. Additionally, if the therapist believes that the patient is lying, either intentionally or due to a skewed perception of the world, the therapist would have the opportunity to testify to this fact. The judge would be able to make a decision in the best interests of the child based on all of the information.

C. Advantages of Allowing Therapist Testimony

The Virginia ban has been at the center of much debate.⁸⁷ The ban was codified in 2003 after a big lobbying push by mental health professionals.⁸⁸ The 2007 Virginia General Assembly defeated a proposed bill to repeal the ban and allow therapist participation.⁸⁹ However, Senator Frank Quayle proposed an identical bill to the 2008 General Assembly, which passed and repealed the ban.⁹⁰

Repealing the ban will help to resolve current conflicting case law that reflects the difficulty Virginia courts have experienced in applying the ban. In *Bullano v. Bullano*, the Virginia Court of Appeals allowed testimony of a therapist against a party in an equitable determination hearing; however, the decision did not extend the application of this exception to custody disputes.⁹¹ Virginia is an equitable distribution state, so when parties divorce, the court divides property between the parties based upon the concept "both spouses contribute to the economic status of a marriage by

85. See DEWART, *supra* note 56, at 1346.

86. *Id.* (citing Catharina J.H. Dubbelday, Comment, *The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved*, 34 EMORY L.J. 777, 802-03 (1985)).

87. See Cooper, *Ban Remains*, *supra* note 62, at 1, 22.

88. Cooper, *Law Extended*, *supra* note 62, at 1.

89. See Legislative Information Services, Bill Tracking: SB737, 2007 Session, <http://leg1.state.va.us/cgi-bin/legp504.exe?071+sum+SB737> (last visited March 14, 2008). See S.B. 569, Va. Gen. Assembly (Reg. Sess. 2008).

90. S.B. 330, Va. Gen. Assembly (Reg. Sess. 2008).

91. *Bullano v. Bullano*, No. 5077-06-2, 2007 WL 216331, at *3 (Va. Ct. App. Jan., 30, 2007); see also Deborah Elkins, *Therapist Testimony Can Come in for ED, Support*, VA. LAW. WKLY., Feb. 5, 2007, at 1, 22.

monetary contributions or non-monetary contributions such as homemaking services.”⁹² Allowing therapist testimony in the determination of other domestic relations issues, such as equitable distribution, but not in custody cases, presents an unfair contradiction. A judge has the benefit of taking all factors into consideration when dealing with property in an equitable distribution situation, and yet in a custody case, the judge has limited knowledge. Can it truly be said limited knowledge is acceptable when determining the best interests of the child?

Another troubling case is *Woodell v. Amherst County Department of Social Services*, in which the court held expert therapist testimony was properly admitted because the ban was only applicable in custody cases, not in those cases having to do with the termination of parental rights.⁹³ Allowing therapist testimony in termination of parental rights cases allows a judge to have all of the information to determine the best interests of the child, rather than placing a greater value on a parent’s right to confidentiality.

Virginia courts repeatedly restate the principle “the welfare of the infant is the primary, paramount, and controlling consideration of the court in all controversies between parents over the custody of their minor children. All other matters are subordinate.”⁹⁴ Therefore, the confidentiality of a parent’s relationship with a therapist should be subordinate to the best interests of the child.

To add to the confusion, in the recent case of *Rice v. Rice*, the court held the ban was extended to exclude testimony about the child.⁹⁵ This ruling was in conjunction with *Schwartz v. Schwartz*.⁹⁶ Not only is relevant testimony related to the parent’s capability of providing for the best interests of the child excluded, but also any insight a therapist has about the child.⁹⁷ In *Rice*, the court did not allow the therapist’s testimony, holding, under *Schwartz*, section 20-124.3:1 of the Virginia Code bans the therapist testimony in this case because she “was hired by the mother and called to

92. SWISHER ET AL., *supra* note 1, §11:1, at 553.

93. *Woodell v. Amherst Co. Dept. of Soc. Serv.*, CH5010240, 2005 Va. Cir. LEXIS 269, at *7 (Va. Cir. Ct. 2005).

94. SWISHER ET AL., *supra* note 1, § 15:8, at 1092 (quoting *Mullen v. Mullen*, 188 Va. 259, 269, 49 S.E. 2d 349, 354 (Va. 1948)). This standard has been applied to child custody cases repeatedly by the Supreme Court and the Court of Appeals. *See e.g.*, *Keel v. Keel*, 225 Va. 606, 610, 303 S.E.2d 917, 920 (Va. 1983) (holding that the welfare of the child is of primary importance); *Rowlee v. Rowlee*, 211 Va. 689,690, 179 S.E.2d 461, 462 (Va. 1971) (noting that the controlling consideration is welfare of children); *Campbell v. Campbell*, 203 Va. 61, 63, 122 S.E.2d 658, 660 (Va. 1961).

95. *Rice v. Rice*, 49 Va. App. 192, 195, 200, 638 S.E.2d 702, 704, 706 (Va. Ct. App. 2006).

96. 46 Va. App. 145, 616 S.E.2d 59 (2005); *see Rice*, 49 Va. App. at 200, 638 S.E.2d at 706.

97. *Rice*, 49 Va. App. at 200, 638 S.E.2d at 706.

testify by the grandparents... on behalf of or against one or other of the parents or an adult relative of either parent (i.e. the grandparents), since they are all parties to the dispute.”⁹⁸ The *Rice* court pointed out nothing in the language of the statutory ban required the parent must have been a patient in order to invoke the privilege.⁹⁹ However, the dissent felt the court was misapplying the ban, stating the law “prohibits a mental health care provider who has been engaged to counsel a child from testifying about the child’s parents and their adult relatives, but not from testifying about the child him-or herself.”¹⁰⁰ In *Rice*, the therapist’s testimony consisted of information strictly regarding the diagnosis and progress of the minor child and “would not have included statements about the parents or their adult relatives.”¹⁰¹ *Rice* extended the application of the ban, further limiting the amount of information a judge can access in making custody determinations.

Psychologists who act as custody evaluators perform a valuable service to judges in custody disputes.¹⁰² Attorneys and psychologists alike agree custody evaluators are an important resource:

Psychology is in a position to make significant contributions to child custody decisions. Psychological data and expertise, gained through a child custody evaluation, can provide an additional source of information and an additional perspective not otherwise readily available to the court on what appears to be in a child’s best interests, and thus can increase the fairness of the determination the court must make.¹⁰³

If a strict interpretation of the ban is used, these valuable experts could be prohibited from testifying in any manner that provided negative feedback about a parent.

Lastly, Virginia law lists the mental health of a parent as a factor a judge must consider in deciding custody.¹⁰⁴ Proponents of repealing the ban and child advocates point to the Virginia Code itself for support:

Robert E. Shepherd, a retired University of Richmond law professor and a longtime advocate for the rights of children, emphasized that state law lists the mental health of a parent as one of the factors a judge must

98. *Id.* at 199-200, 638 S.E.2d at 706.

99. *Id.*

100. *Id.* at 207, 638 S.E.2d at 710 (Clements, J., dissenting).

101. *Id.* at 209, 638 S.E.2d at 711 (Clements, J., dissenting).

102. *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 49 AM. PSYCHOLOGIST 677, 677 (1994).

103. *Id.*

104. VA. CODE ANN. § 20-124.3:1 (Repl. Vol. 2004).

consider in deciding custody. It makes no sense for another law to make that information inadmissible.¹⁰⁵

The ban is disliked by many practicing attorneys who feel it limits their ability to present a complete case. Lawrence D. Diehl,¹⁰⁶ a noted Virginia attorney, has stated “[j]udges need all the evidence they can get to determine just what is in the best interests of a child during custody and visitation disputes... [since k]eeping information from judges does not help in that effort.”¹⁰⁷ Practicing attorneys need to present the evidence that best supports their case, including testimony of mental health professionals. By tying the hands of family law practitioners, the ban keeps them from providing the best representation possible to their clients.

IV. CONCLUSION

In conclusion, the ban on therapist testimony in custody determinations is flawed and has few redeeming qualities. The ban is not in keeping with Virginia’s best interests of the child standard. The objections to repealing the ban are misguided because they conflict with the prime objective of custody determinations—promoting the best interests of the child. Proponents of the ban seek more to protect a parents’ right to privacy, mental health professionals from liability, or the integrity of the therapy process. These interests are secondary to the best interests of the child in custody determinations. It is clearly stated in Virginia law that the mental health of the parent is a factor that judges *must* take into consideration in making custody determinations; accordingly, judges should have access to mental health professionals to aid them in making these decisions. The 2008 General Assembly has taken a large step in Virginia custody law towards achieving a more inclusive approach at determining what constitutes the best interests of the child by allowing all information, including therapist testimony, to be taken into consideration.

105. Cooper, *Ban Remains*, *supra* note 62, at 1, 22.

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107. Cooper, *Law Extended*, *supra* note 62, at 18.