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Report From Counsel

Insights and Developments in the Law

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Divorce and Relocation



Alan Plevy

Divorce can be difficult, especially if one of the parties wants to move out of the area. The simple act of moving is c o m p l i c a t e d enough, but when you add children of

divorce to the mix, relocating can become a daunting task. Your move may have a big impact on your custody or visitation rights.

Laws on relocation vary from state to state but most states require each

parent to notify the other parent and the court, in writing, at least 30 days before moving residences. This notice should include information such as the proposed future address, date of relocation and telephone number, if available.

Alan Plevy, Co-founding Principal of SmolenPlevy, has had a significant impact on relocation cases in Virginia. In fact, *Virginia Lawyers Weekly* named two of Plevy's cases among its top five Family Law cases in the last 25 years in its article, "25 Cases that

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Continuation of Child Support for Severely and Permanently Disabled Adult Children

For the parents of a child who has disabilities, there are many challenges like managing medical and therapeutic expenses, coordinating with different service providers and ensuring that the child receives the best and most appropriate care and support.

When the parents are divorced, those challenges become more complicated with the payment of child support. Pursuant to the laws of Virginia, a parent's obligation to pay child support generally ceases when a child turns eighteen, unless the child is a

full-time high school student, not selfsupporting and still residing with the parent receiving support, in which case child support can be paid until the child reaches the age of nineteen.

While parents can voluntarily continue to support children, they generally cannot be compelled to do so. However, the Code of Virginia provides that if a child is (i)"severely and permanently mentally or physically disabled; (ii) unable to live inde-

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Jason Smolen & Alan Plevy Receive Esteemed AV Preeminent Rating

Jason Smolen and Alan Plevy have once again been selected by their peers as AV Preeminent rated attorneys. The Martindale-Hubbell AV Peer Review Ratings, which identifies lawyers with the highest rating in legal ability and ethical standards, is a reflection of expertise, experience, integrity and overall professional excellence.

Criminal Background Checks on Employees

It is not a new development in employment law that many employers take into account an applicant's or employee's criminal history information, including arrests or convictions, when making employment decisions. Nor is it unprecedented for the federal Equal Employment Opportunity Commission (EEOC) to come out with policies and guidance on the subject.

The EEOC has recently issued an updated Guidance on employers' use of criminal background checks in employment decisions under Title VII of the Civil Rights Act of 1964.

But in light of technological changes that have made criminal background checks easier to do, the passage of the Civil Rights Act of 1991, which codified the "disparate impact" theory of liability, and even some prodding from a federal court of appeals, the EEOC has recently issued an updated Guidance on employers' use of criminal background checks in employment decisions under Title VII of the Civil Rights Act of 1964.

Title VII does not directly regulate or speak to the acquisition of criminal history information. (Some state employment discrimination laws, however, give protections to individuals concerning inquiries by employers about criminal histories.) Still, there are two ways in which an employer's use of criminal history information can violate Title VII.

The first theory, called "disparate treatment" discrimination, occurs when an employer treats job applicants with the same criminal records differently because of one of the prohibited bases for discrimination in Title VII: race, color, religion, sex, or national origin.

The second concept, known as "disparate impact" discrimination, refers to the situation in which an employer applies criminal record information to its employment decisions uniformly, but the exclusions still operate to disproportionately exclude people of a particular race or national origin. Under this second theory, the employer can be found liable for discrimination unless it can show that the application of the criminal history information is "job related and consistent with business necessity" for the position in question.

The new Guidance is the culmination of the EEOC's examination of a wide array of information. However, there are no substantial changes in the EEOC's positions on the fundamental issues raised by employer use of criminal background data. These EEOC policies are unchanged:

- (1) An arrest alone does not establish that criminal conduct has occurred, although an employer may act based on evidence of conduct that disqualifies an individual for a particular job.
- (2) Convictions, on the other hand, are considered reliable evidence that a crime was committed.
- (3) Nationally, studies show that exclusions from employment due to

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Lottery Winnings and Gift Taxes

If records were kept about such things, Tonda Lynn, a waitress at a pancake house, may have received the largest tip in history when a customer gave her a lottery ticket that turned out to be worth \$10 million. As the U.S. Tax Court put it in a heading in its opinion resolving gift tax issues arising from subsequent events, suddenly "She's Got a Ticket to Ride."

From the start, Tonda Lynn knew she wanted to share her good fortune with her family. With no shortage of advice and guidance, especially from her father, she settled on setting up a corporation that would claim the lottery proceeds. She and her spouse owned 49% of the stock, with family members owning the remaining 51%.

Similar arrangements, some set up before a lottery win and some after, are commonly made to share lottery winnings while trying to avoid gift taxes. However, the IRS will scrutinize shared lottery arrangements and assert gift taxes when such arrangements do not pass muster. Tonda Lynn and her relatives found this out when the IRS, backed up by the Tax Court, ruled that there had been no binding contract to share the lottery proceeds and that there was a taxable gift as to the 51% of the winnings that went to family members.

In principle, there was nothing wrong with what Tonda Lynn was trying to do after her big win. The problem was that the purported contract among the family members was too vague and indefinite to enforce under state law, and thus her contribution of the winning ticket to the newly formed corporation constituted a taxable, indirect gift to the family members.

The court focused on these factors: There was no requirement for each family member to buy lottery tickets, no established pattern of buying lottery tickets, no pooling of money, no predetermined sharing percentages, and no

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Child Support

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pendently and support himself, and (iii) resides in the home of the parent seeking or receiving child support", the court can continue an existing child support obligation.

The permanent disability must preclude an adult child from being able to live independently and support himself. While each child's circumstances will be reviewed individually, the Court of Appeals found sufficient evidence, based on testimony from medical professionals, that an adult child's cerebral palsy, cognitive impairment, as well as a stroke which limited vision out of his left eye and resulted in the inability to use his left hand to continue child support.

In another instance, the Court of Appeals found sufficient evidence to continue child support for a child whose mother gave undisputed testimony regarding the details of his multiple hereditary exostosis including the existence of least 22 bone tumors, the need for at least four additional surgeries and testimony that the adult child's right arm was permanently disabled.

It is not enough that the parents agree that the child is disabled. In a case where both parents agreed that an adult child had a physical disability, the Court of Appeals found a medical professional's testimony that the child "likely should not live alone" was insufficient to conclude that the child's disability prevented her from living independently and the evidence presented regarding speculative and uncertain future medical expenses was not sufficient to prove that the adult child would be unable to financially support herself.

Parents seeking a continuation of child support for a permanently disabled child must pay attention to when they initiate their action to continue the support obligation. A Fairfax County Circuit Court Judge held that the court lacked jurisdiction to order an award of support for a permanently disabled adult child because the previous support obligation had terminated before the filing of the request for continued support. The Judge held that the statute only allowed the continuance of an existing child support obligation for a permanently disabled adult child, not the institution of a new obligation.

In order to preserve the ability to ask the Court to continue an award of child support for a permanently disabled adult child, the parent seeking the continuation of the award should file and serve the appropriate pleadings prior to the expiration of the existing support award.

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Background Checks

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criminal histories have a disparate impact on the basis of race and national origin, prompting the EEOC to investigate charges of this kind.

(4) A blanket policy of excluding every person with a criminal record from employment, unless such exclusion is required by other federal law, will not satisfy Title VII's requirement that the application of criminal history information be job related and consistent with business necessity.

The legality of an employer's use of criminal histories is highly dependent on the facts of a particular decision, making it difficult to generalize. Still, the Guidance includes the following nonexhaustive list of some "best practices" for employers considering criminal record information when making employment decisions:

 Eliminate policies or practices that exclude people from employment based on any criminal record.

- Train managers, hiring officials, and decision makers about Title VII and its prohibition on employment discrimination.
- Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct.
- Identify essential job requirements and the actual circumstances under which the jobs are performed.
- Determine the specific offenses that may demonstrate unfitness for performing such jobs.
- When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.
- Keep information about applicants' and employees' criminal records confidential. Use it only for the purpose for which it was intended.

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

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Changed Law Practice in Virginia." Northern Virginia Magazine also named him to its list of top lawyers in the state.

In one of the cases, Sullivan v. Jones (2004), Plevy represented a divorced mother who remarried and wanted to move out-of-state so that, among other things, her current husband could be closer to his son from a prior marriage. The child of her prior marriage spent most of her nights with the mother.

"It is very difficult for the other parent to see the child on a daily or weekly basis if the child moves across the country or even within the state if there are multiple hours between homes," Plevy explains. This may mean that the non-custodial parent will not see the child in person, except on holidays, three-day weekends and during the summer, though the parents can use technology to ensure regular communications.

There are many reasons for relocation:

- a parent cannot find a job in their current geographic area
- relocation by an employer
- escalating cost of living issues
- military assignments
- to be closer to extended family or other support systems

"In my experience these cases are difficult because no matter what the outcome in court, the children will no longer have regular personal contact with one of their parents," adds Kyung (Kathryn) Dickerson, principal and



Kathryn Dickerson

Family Law attorney at Smolen-Plevy. "It is best if the parents can come to an agreement. Unfortunately, all too often these cases are resolved by the court."

The court will consider factors such as the child's relationship with each parent, the child's stability at home and school, and the economic factors present. It is not sufficient that a parent argues that the move is in the best interest of the parent seeking to move—the focus is what is best for the child. While relocation that provides a parent with a job has benefits for the child, those benefits are not the sole or primary consideration in evaluating the impact on the child. Each relocation situation is factually different and seeking legal advice prior to relocating with a child is prudent.

Commonly, when courts rule in favor of relocation or if the non-custodial

parent agrees to relocation, they are granted the larger blocks of vacation time during a school year and a greater portion of the summer.

In the end, the decision in Sullivan v. Jones ended up in Plevy's client's favor. The case was brought before the Court of Appeals twice, and the court upheld the mother's out-of-state move finding it to be in the best interests of the child.

Alan Plevy and Kyung (Kathryn) Dickerson can be contacted for legal counsel through the SmolenPlevy law office by calling (703) 790-1900. Alan can also be reached at *abplevy@smolenplevy.com*. Kathryn is at *kndickerson@smolenplevy.com*.

Lottery

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definition as to the meaning of "substantial" winnings to which the agreement would apply. In addition, who was party to the agreement was unclear, and the agreement was essentially imposed by the taxpayer's father rather than arrived at by family discussion. All in all, the arrangement was not a joint effort.

In Tonda Lynn's loss may be found some lessons for other regular players in lotteries who want to achieve what she set out to do, should their ship come in. These elements may help avoid the fate of Tonda Lynn's effort to share the wealth without gift taxes taking a big chunk of it:

- regular and consistent purchases of lottery tickets;
- a clear agreement to share winnings;
- common knowledge of the ticket purchases on the part of all participants; and
- joint decision-making about what to do with winnings.

In fact, the Tax Court that ruled against Tonda Lynn cited a successful sharing arrangement from another case in which the evidence established the existence of an agreement between two men to share equally in the proceeds of any winning lottery ticket, in view of a long-standing course of conduct in which the men would jointly purchase tickets and jointly "scratch" them to reveal any winnings. The mutual promise exchanged by the two men to share in the proceeds of a winning lottery ticket amounted to adequate consideration for a valid contract.



For more information on SmolenPlevy, scan here.