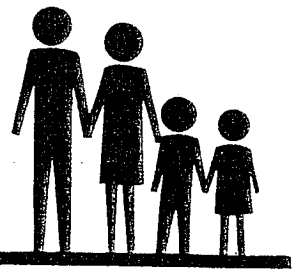


Family Law News



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IR-3 Visa: If a child enters the U.S. on an IR-3 visa, adoption considered final the year the authority in the foreign country enters decree of adoption.

IR-4 or other IR Visa: Only treated as final in the year in which a court of the state in which the child and parents reside enters a final decree of adoption or re-adoption.

CHILDREN WITH SPECIAL NEEDS

Children who receive a *state adoption subsidy* because of their special needs or because they are considered hard to place receive the *maximum* credit and exclusion, subject to the income and tax liability limits. In other words, if you adopt a child with a *subsidy*, you can receive a tax credit for the full \$12,150.00 even if you did not have those expenses. This limit is reduced or eliminated if you are over the income levels (\$182,180-222,180). Additionally, you can not take a credit for more than you pay in federal income tax but you may spread the credit over five years.

Stanton Phillips received the 2006 Congressional Angel in Adoption Award. He has assisted the Virginia Legislature in drafting the adoption statutes in 1995, 1999, 2006 and 2007.

COLLATERAL CONSEQUENCES OF THE "SIMPLE" DOMESTIC ASSAULT AND BATTERY

By Craig Sampson, Chesterfield

Family law practitioners may find themselves lured into the world of criminal law when a family law client is charged with misdemeanor domestic assault and battery. The assault may be relatively minor, which generally means that there were no weapons used or injuries sustained. A family law practitioner may feel confident that the client will not serve active jail time. Counsel may even feel confident that the charge will be taken under advisement pursuant to Virginia Code §18.2-57.3 to be ultimately dismissed after the client meets certain terms of probation.



While the criminal proceedings themselves may be simple and the immediate punishment mild, the collateral consequences can be severe. Even when the charge is ultimately dismissed pursuant to §18.2-57.3, the collateral penalties can be significant.

This article will point out some of the potential consequences of a domestic assault charge that may not be readily apparent to the family law practitioner. This article will begin with a brief overview of domestic assault and then address the potential consequences to persons who wish to have their criminal records expunged, gun owners, military personnel, immigrants, and those seeking certain types of employment.

OVERVIEW OF DOMESTIC ASSAULT

Assault and battery is a common law crime. In simplest terms, a battery is an offensive touching. An assault is causing someone to believe that a battery is imminent. Domestic assault and battery, codified in Virginia Code §18.2-57.2, is an assault and battery that is committed against a "family or household member." "Family or household member" is defined in rather lengthy fashion by Virginia Code §16.1-228, and basically means a spouse, former spouse, immediate family or step-family member, immediate in-law who resides in the same household as the defendant, person with a child in common with the defendant, and a person who has cohabited with the defendant in the past twelve months! Va. Code §16.2-228.

A violation of §18.2-57.2 is a Class 1 misdemeanor punishable by up to twelve months in jail and/or up to a \$2,500.00 fine. Va. Code §§18.2-57.2 and 18.2-11. However, a third or subsequent violation

of §18.2-57.2 within a *twenty year* period is a Class VI felony punishable by a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$2,500, either or both. Va. Code §§18.2-57.2 and 18.2-10.

A first time domestic assault offender can request that a court proceed against him pursuant to Virginia Code §18.2-57.3, which allows the offender an opportunity to ultimately have his charge dismissed. A court, *upon finding that the facts are sufficient* to find a violation of §18.2-57.2, may defer entering a final conviction and take the matter under advisement. If the defendant successfully completes all probation, education and treatment programs that are required of him by the court and keeps the peace for a period of not less than two years, then the domestic assault and battery charge will be dismissed.

If the offender fails to satisfactorily meet the requirements of his probation or keep the peace, the court may enter a finding of guilty and proceed with sentencing. The offender, if he has not done so prior to the trial date, must submit to having his fingerprints taken by law enforcement. Va. Code §18.2-57.3.

EXPUNGEMENT OF CRIMINAL RECORD

A record of any arrest experienced by a person in the Commonwealth of Virginia will be placed on that person's criminal record and can be discovered during a criminal background check. The record of that arrest will remain on that person's criminal record even if the charge was later

dismissed by the prosecution and even if the court specifically finds the person not guilty. Virginia Code §19.2-392.1 et. seq. provides a mechanism whereby a person can petition a circuit court to expunge (i.e. erase) the record of a dismissed or nolle prossed charge. Guilty findings are not eligible for expungement under Virginia Code §19.2-392.1.

A petition for expungement, however, *will not* be granted to a person whose domestic assault and battery charge was dismissed after being taken under advisement. Virginia Code §18.2-57.3 specifically states that "no charges dismissed pursuant to this section shall be eligible for expungement under §19.2-392.2." Presumably, a record of the dismissed charge must be maintained on the person's criminal record to ensure that the person does not avail himself of the first-offender provisions in §18.2-57.3 more than one time.

FIREARM RIGHTS

Immediately following arrest for domestic assault and battery, an emergency protective order will be entered for seventy-two hours which will restrict a person's right to purchase or transport a firearm during that time period. §18.2-57.2(C), §16.1-253.4 and §18.2-308:1:4. Note that the issuance of the emergency protective order is not required if the alleged victim is a minor. §16.1-253.4(B). A person subject to such a protective order shall, if he has one, surrender his concealed weapon permit to the court entering the order. §18.2-308.1:4. A person subject to such a protective order is also specifically prohibited from obtaining a concealed weapon permit. 18.2-308(E)(5). ~~If the protective order is~~ extended beyond seventy-two hours, the

firearm prohibitions will continue as long as the protective order is in place. A violation of this prohibition is a Class 1 misdemeanor. §18.2-308.1:4.

Once the protective orders are removed, however, the right to possess a firearm and concealed weapon under Virginia law is restored. There is no long-term or permanent loss of the right to possess a firearm *under Virginia law* associated with a conviction for domestic assault and battery.

However, note that Virginia Code § 18.2-57.3 specifically states that "whenever a court places an individual on probation upon terms and conditions pursuant to this section, such action shall be treated as a conviction for purposes of §18.2-308." In other words, a proceeding under §18.2-57.3 will result in the revocation of the person's right to carry a concealed weapon for a number of years and conceivably permanently. §18.2308(E) and §18.2-308(J).

Federal law, unlike Virginia law, *does* forever prohibit firearm possession by a person convicted of a domestic assault. 18 United States Code §922(g)(9) states that it is unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence" to possess any firearm or ammunition or to receive any firearm or ammunition. Violations of §922(g)(9) are felonies that carry a ten-year maximum sentence. 18 U.S.C. §924(a)(2).

It does not appear that a person would be subject to the criminal penalties found in 18 U.S.C. § 922(g)(9) if the charge were dismissed pursuant to Virginia Code §18.2-57.3. Such a person would not seem to have been "convicted in any court of a

misdemeanor crime of domestic violence.” However, no controlling federal case could be found on this point, so perhaps some level of risk of federal prosecution remains. *For further information on the interplay between family law cases and firearms law, see the article entitled “Domestic Relations Law, Criminal Law and Firearms,” in the Winter 2007 edition of the Virginia Family Law News.*

MILITARY CLIENTS

Given that a domestic assault charge affects the ability of a person to possess a firearm, such a charge can be a real problem for members of the military. Note that Virginia Code §18.2-57.4 requires disclosure to the military of a conviction by the court: “If any active duty member of the United States Armed Forces is found guilty of a violation of §18.2-57.2 or §18.2-57.3, the court shall report the conviction to family advocacy representatives of the United States Armed Forces.” A military person facing a domestic assault and battery charge needs not only a criminal lawyer, but a criminal lawyer with some knowledge of the military. Consultation with a current or former member of the Judge Advocate General Corps may be advisable.

IMMIGRATION CONSEQUENCES

Federal immigration law designates certain individuals as subject to deportation if they are convicted of certain types of crimes. A conviction for domestic assault may render a non-citizen immigrant deportable under 8 U.S.C. § 1227(a)(2)(E) if the facts reflect that the victim is a current spouse, former spouse, partner, or other one of the many kinds of person-protected-by-the-domestic-violence laws of Virginia.

The domestic assault charge may lead to deportation even when the matter is taken under advisement for ultimate dismissal. 8 U.S.C. §1101(a)(48)(A) defines “conviction” with respect to an alien to include when the alien “admitted facts sufficient to warrant a finding of guilt and the judge has ordered some form of punishment, penalty or restraint on the alien’s liberty to be imposed.” In other words, even when the matter is ultimately dismissed pursuant to the Virginia Code, the charge may be a deportable offense if the defendant admits that the facts were sufficient and the court placed conditions on the alien in order to have his charge dismissed.

If a lawyer identifies a potential immigration issue associated with any criminal charge, consultation with an immigration lawyer is strongly advised.

BACKGROUND CHECKS

The Virginia Code requires background checks for persons seeking certain types of employment, such as those seeking jobs in a “children’s residential facility” and those seeking employment in a “direct consumer care position.” The term “direct consumer care position” means “any position that includes responsibility for (i) treatment, case management, health, safety, development, or well-being of a consumer or (ii) immediately supervising a person in a position with this responsibility.” Virginia Code §37.2-416 and §37.2-506. The statutory provisions concerning background checks can have a direct impact upon an array of occupations such as nursing, home health care, teaching, coaching, social work, and counseling.

Virginia Code § 37.2-408.1 requires children's residential facilities that are regulated by the Department of Mental Health, Mental Retardation and Substance Abuse Services to conduct criminal background checks on all employees. These background checks must also be done on all volunteers and those who provide contractual services to the facilities. §37.2-408.1(A). These criminal history background checks must be received prior to permitting the applicant to work with children. §37.2-408.1(A).

Virginia Code §37.2-408.1(A) further states that no children's residential facility regulated by the Department shall hire, allow to volunteer, or allow to provide contractual services, persons who have been convicted of or face charges for certain enumerated crimes. These enumerated crimes include "assault and bodily woundings" such as domestic assault under Virginia Code §18.2-57.2.

Virginia Code § 37.2-416 governs the hiring of persons for "direct consumer care positions." §37.2-416(A). Every licensed provider shall require any applicant who accepts employment in any direct consumer care position to submit to fingerprinting and a criminal history background check. The provider must not hire for any compensated employment any person who has been convicted of certain enumerated crimes, including domestic assault under §18.2-57.2. §37.2-416(B).

Virginia Code §37.2-506 governs the hiring of persons for "direct consumer care positions" by a local community services board. Community services boards must require applicants to submit fingerprints and submit to a criminal background check. The community services board shall not hire for compensated employment any person convicted of certain enumerated crimes which includes misdemeanor domestic assault and battery. §37.2-506(B).

However, there is an exception when a community services board seeks to hire an employee for an adult substance abuse program or adult mental health treatment program. Such a program may hire a person convicted of domestic assault if it "determines, based upon a screening assessment, that the criminal behavior was substantially related to the applicant's substance abuse or mental illness and that the person has been successfully rehabilitated and is not a risk to consumers based on his criminal history background and his substance abuse or mental illness history." §37.2-506(C). Even still, there are a number of stiff criteria that such an applicant must meet before employment can be offered. See §37.2-506(D).

Virginia Code §63.2-1726 provides that no children's residential facility regulated or operated by the Departments of Education; Mental Health, Mental Retardation and Substance Abuse Services; Military Affairs; or Social Services shall hire for compensated employment or allow to volunteer or provide contractual services persons who have been convicted of certain enumerated crimes including domestic assault and battery. §63.2-1726.

Note that there is a time limitation for the use of domestic assault and battery convictions to preclude employment under Virginia Code §§ 37.2-408.1, 37.2-416, 37.2-506 and 63.2-1726. Each of those Code sections provides that the applicant may be hired, allowed to volunteer or allowed to provide contractual services if the applicant has been convicted of not more than one misdemeanor offense under §18.2-57 or §18.2-57.2, and ten years have elapsed following the conviction. This statutory limitation does not apply,

however, if the person committed the offense while engaged in his employment, volunteer or contractual services.

In addition to the background checks specifically mandated by the Virginia Code, other governmental and private entities may have their own policies with respect to domestic assault and battery convictions that may adversely affect an applicant.

CONCLUSION: BEFORE YOU ADVISE GOING FOR SOME KIND OF HAPPY-SOUNDING "SUSPENDED IMPOSITION" —

There is no such thing as a "simple" domestic assault and battery case. A knowledgeable criminal practitioner is essential not only to assess the case in terms of the possible defenses and the direct criminal penalties, but to advise the client as to the potential collateral consequences as well. Unfortunately, many indicators point toward fighting tenaciously for a dismissal on acquittal when the facts warrant it. Criminal practitioners may need to consult other lawyers, such as immigration or military lawyers, when handling a domestic assault charge.



Submitting Articles and News

Family Law News encourages Section members to submit articles, information of a newsworthy nature, etc. for this newsletter. Articles should be typed, double-spaced, and of a length comparable to what you have seen in this newsletter in the past. If you can, send a computer disc, which identifies the computer format and word processing program used. Even better, e-mail it to lawyer@patriot.net, but tell us you are doing so, so that we don't mis it. Save as WP 5.1 or MSW 5.0 if using more advanced versions. Contents should be sent to the Editor, **Richard E. Crouch, 2101 Wilson Boulevard, Suite 950, Arlington, Virginia 22201**

We print four newsletters per year. We have have to move up the deadlines for all issues so that the Summer issue can be distributed at the Annual Meeting. Until further notice the deadlines for submission of copy are as follows:

Spring — February 10 | Summer — April 20

Fall — August 10 | Winter — November 10

Please remember that contents should be submitted well before the deadline to allow time for our working with the author on any needed revisions. Articles which come in nearest the deadline are subject to more arbitrary editing, or run more chance of being overset to the next issue. The Editor also actively solicits comments from Section members on what they would like to see in the newsletter, would rather see less of, etc. Do not expect to see these comments in print, however, as we do not have a letters column.