NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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LETTER OPINION

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Re: *Teresa V. Jurczuk v. Jeffrey Dale Sessions*
Case No. CL-2009-7181 and CL-2009-15967

Dear Counsel:

This cause is before the Court on Plaintiff's Petition to exercise a reservation[1] for additional spousal support in accordance with the parties' property settlement agreement

[1] The statute describing what is meant by a "reservation" provides as follows:

("PSA" or the "Agreement"), which was incorporated into their Final Decree of Divorce and allowed a "reservation of spousal support for 60 months during which time" Plaintiff could file her request with the Court. The Petition presents the Court with threshold issues of consideration for the relief sought, namely: whether Plaintiff has the burden to show a material change in circumstances in the context of a contractual agreement allowing Plaintiff to invoke relief under a reservation of spousal support; whether such burden may be met solely by showing an increase in Defendant's ability to pay; whether Plaintiff's alleged deficiencies in making efforts to habilitate a lifestyle commensurate to that which she enjoyed during marriage is a proper consideration in awarding her additional support in the context of a reservation that is product of an agreement; what the limiting principle is for the Court's exercise of its discretion to grant additional spousal support in the context of the contractual reservation clause; and whether the scope of the reservation is contractually limited to sixty months in duration. For the reasons as more fully stated herein the Court holds as follows: (1) No material change in circumstances need be proven as a prerequisite for the Court to consider exercise of a reservation of spousal support by Plaintiff; (2) If there were a requirement for material change in circumstances, the Court finds that the Defendant's inordinate increase in ability to pay, coupled with the Plaintiff's demonstrated history of inability to obtain self-sustaining employment, are both

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> In addition to or in lieu of an award pursuant to subsection C, the court may *reserve* the right of a party to receive support in the future. In any case in which the right to support is so *reserved*, there shall be a rebuttable presumption that the *reservation* will continue for a period equal to 50 percent of the length of time between the date of the marriage and the date of separation. Once granted, the duration of such a *reservation* shall not be subject to modification.

Va. Code § 20-107.1(D) (emphasis added).

material changes in circumstances which allow the Court to reach the merits of the claim under the reservation, where the interplay between need and ability to pay dictate the award of additional spousal support, if any, that the Court may make; and (3) The intention of the parties in their PSA was to limit the period for payment of any additional spousal support to sixty months in duration, to be exercised within five years of the expiration of the initial award of spousal support, for the Agreement contained two periods of stepped down support over the nine years subsequent to entry of the divorce decree, followed by a reservation of five years during which supplementary support could be awarded.

Consequently, the Court shall by separate order incorporating its ruling herein detail application of the factors in Virginia Code § 20-107.1(E) to the evidence adduced at trial in evaluation of Plaintiff's petition for additional spousal support pursuant to the reservation in the parties' PSA, and make such judgment as is proper consistent with this opinion.

BACKGROUND

The parties were married on May 5, 1988, and divorced by final order of this Court on July 13, 2010. Incorporated into the Final Decree of Divorce was the parties' Property and Support Settlement Agreement dated January 19, 2010. Pursuant to the Agreement, the Defendant ("Husband")[2] was required to pay spousal support to the Plaintiff ("Wife") as follows:

> Commencing on February 1, 2010, and continuing on the first day of each month thereafter for thirty (30) months, the Husband shall pay to the Wife

[2] The Court recognizes that the parties are divorced. The language "husband" and "wife" is merely for clarity in the Opinion to delineate the rights and obligations the parties possessed under the terms of the PSA.

> Six Thousand Two Hundred Fifty Dollars ($6,250.00) per month in spousal support.
>
> The parties agree that the spousal support payable between February 1, 2010, and July 1, 2012, shall be non-modifiable for any reason, and shall survive Wife's remarriage or cohabitation as set forth in Virginia Code Section 20-109, as amended.
>
> Commencing on August 1, 2011, and continuing on the first day of each month for thirty-six (36) months, the Husband shall pay to the Wife Four Thousand Five Hundred Dollars ($4,500) per month as spousal support. Commencing August 1, 2015, and continuing on the first day of each month for forty-two (42) months, the Husband shall pay to the Wife Four Thousand Dollars ($4,000) per month as spousal support.

The Agreement also contained a reservation for additional spousal support.

> Commencing January 1, 2019, Wife shall have a reservation for support for sixty (60) months during which time she may petition the Court for additional spousal support. The power and jurisdiction of the Circuit Court of Fairfax County is specifically reserved and retained for this purpose.

On January 10, 2019, the Plaintiff filed her Petition and Motion for Additional Spousal Support Pursuant to a Reservation. Defendant posits Plaintiff is not entitled to supplementary support in exercise of the reservation because Plaintiff is now employed part-time in contrast to being unemployed at the time of divorce, and that her circumstances have therefore improved. Defendant maintains that there is thus no material change in circumstances that would permit this Court the discretion to provide for additional support. As a fallback position, Defendant maintains any additional support is limited by the parties' PSA to five years in duration. Plaintiff maintains she need not prove a material change in circumstances to invoke the reservation as a matter of law, and that the contractual language does not restrict the duration for which the Court may award added support. Plaintiff asks she be awarded spousal support for an additional period of fourteen years.

ANALYSIS

I. No showing of a material change in circumstances is required as a prerequisite for the Court to consider exercise of a reservation of spousal support.

In the instant case, the PSA is silent on the question of whether the parties intended Plaintiff satisfy there is a "material change in circumstances" as a precondition to the award of supplementary spousal support under the reservation included in the Agreement. Absent contractual limitation, a threshold issue in this cause is thus whether this Court must treat exercise by Plaintiff of the reservation of spousal support *de novo* under Virginia Code § 20-109, moving directly to evaluate the factors contained in Virginia Code § 20-107.1(E), or whether the law instead compels the Court first make a finding of a "material change in circumstances." Since the Plaintiff invokes the power of the Court to consider a reservation pursuant to the parties' PSA, which does not address the issue of material change, the Court must resort to determining the confines of power with which the Court is clothed by statute. The Court is empowered in a divorce to grant a reservation of spousal support, be it in supplement or in lieu of an award at the time of the original decree. The statute reads:

> In addition to or in lieu of an award pursuant to subsection C, the court may reserve the right of a party to receive support in the future. In any case in which the right to support is so reserved, there shall be a rebuttable presumption that the reservation will continue for a period equal to 50 percent of the length of time between the date of the marriage and the date of separation. Once granted, the duration of such a reservation shall not be subject to modification.

Va. Code § 20-107.1(D). The word "may" in the above statute is really a "shall" when a spouse requests a reservation be included in the final decree. "It is reversible error for a

court to fail to make such a reservation when expressly requested to do so by a party." *D'Auria v. D'Auria*, 1 Va. App. 455, 462, 340 S.E.2d 164, 168 (1986) (citing *Gagliano v. Gagliano*, 215 Va. 447, 452, 211 S.E.2d 62, 66 (1975)). Virginia Code § 20-109 governs modification of spousal support awards:

> A. Upon petition of either party the court may increase, decrease, or terminate the amount or duration of any spousal support and maintenance that may thereafter accrue, whether previously or hereafter awarded, as the circumstances may make proper....
>
> B. The court may consider a modification of an award of spousal support for a defined duration upon petition of either party filed within the time covered by the duration of the award.

The Defendant first relies on *Barton v. Barton*, 31 Va. 175, 522 S.E.2d 373 (1999), as controlling authority requiring Plaintiff prove a material change in circumstances before any additional support may be awarded under the reservation. *Barton*, however, involved a "motion to reduce spousal support" rather than exercise of a reservation to provide an additional period of support. *Id.*, 31 Va. App. at 177, 522 S.E.2d at 374. Thus, the modification language in *Barton* does not apply by context to the reservation case at bar.

The Defendant next relies on language in *Bacon v. Bacon*, 3 Va. App. 484, 351 S.E.2d 37 (1986). The syntax in that case superficially invites the concept that a "material change in circumstances" is a prerequisite for the exercise of a reservation of spousal support. The Court of Appeals stated, "Therefore, Mrs. Bacon was entitled to an award of spousal support to the extent the factors in Code 20-107.1 supported such an award *or* a reservation of right to receive support in the future if *her circumstances changed*." *Id.*, 3 Va. App. at 491, 351 S.E.2d at 41 (emphasis added). However, the factual context of this language is the situation where no support is awarded initially, but a reservation could be

ordered in contemplation of the circumstance where the payee's current *needs* might change in the future. It is axiomatic that support under a reservation will not be awarded where proper need is not shown in evaluation of the applicable statutory factors. *See* Va. Code § 20-107.1(E). Nowhere does the *Bacon* case speak of an additional test of "*material* change in circumstances." Importantly, the *Bacon* case, appears to be a case about awarding support or reservation terms, rather than about what happens when there is a later exercise of a previously granted reservation. Moreover, *Bacon* was decided before the original right to seek a reservation at common law was codified in its current form by the General Assembly in 1998.[3] 1998 Va. Acts, c. 604.

Defendant additionally cites as persuasive authority an instance in which a judge of this Court resorted to application of the material change test in determining whether to award support in exercise of a reservation. *See Thomas v. Wiese,* No. CH-2003-185175, 2006 WL 2844412 (Fairfax Cir. Ct. Sept. 28, 2006). It is unclear from that case, however, if the judge applying the "material change in circumstances" test in consideration of awarding support under the reservation ever considered *whether* such a test is applicable.

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[3] Prior to codification, the concept of a reservation was introduced in the common law as the trial court's ability to preserve the power to modify its decree by awarding alimony at a later time. The Supreme Court observed:

> In the absence of statute a court may expressly reserve the right to revise alimony provisions to meet changed conditions. But the reservation must be clear and explicit. *Brinn v. Brinn*, 147 Va. 277, 137 S.E. 503 (1927); *Capell v. Capell*, 164 Va. 45, 49, 178 S.E. 894, 896 (1935). *See also Perry v. Perry*, 202 Va. 849, 853, 120 S.E.2d 385, 388 (1961), where it was held that in a final divorce decree that was silent as to alimony the language 'with leave to either party to have the same reinstated for good cause shown' was not a sufficient reservation of power in the court to reinstate the cause to award alimony.

Losyk v. Losyk, 212 Va. 220, 222, 183 S.E.2d 135, 137 (1971).

That Court certainly did not mention such a controversy, so this Court infers the issue was simply not brought to the attention of the trial judge.

It appears to this Court the matter of the applicability of the "material change in circumstances" test to reservations of spousal support remains unsettled by lack of binding controlling precedent. When a legal practice becomes ingrained by mere acquiescence of litigants to what they assume is the law, rather than by a judicial determination of the question, the practice constitutes little more than "courthouse law," which does not dictate the future viability of the applied principle. *See Antigone v. Taustin*, 98 Va. Cir. 213, 2018 WL 6794671, at *3 (Fairfax Cir. Ct. Mar. 2, 2018) (rejecting Circuit Court deviations from statutory or appellate mooring). As others have wisely observed, prudent practice in analyzing a legal question is to query why a legal practice is postulated, until by such review of the law the fundament for the posited principle is fully answered.

> When construing a statute, [a court's] "primary objective," as always, is "to ascertain and give effect to legislative intent" from the words of the statute. In determining that intent, [courts] are to give those words "their ordinary meaning, unless it is apparent that the legislative intent is otherwise," and we "presume that the General Assembly chose, with care, the words that appear in a statute." Furthermore, the "plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction." [Courts] also presume that, in choosing the words of the statute, "the General Assembly acted with full knowledge of the law in the area in which it dealt."

Turner v. Commonwealth, 295 Va. 104, 108-09, 809 S.E.2d 679, 681 (2018), *cert. denied sub nom. Turner v. Virginia*, 139 S. Ct. 123, 202 L. Ed. 2d 77 (2018) (internal citations omitted). This Court is therefore compelled to proceed to its own analysis to determine

the intent of the General Assembly with respect to whether exercise of a reservation is subject to the requirement the Plaintiff show a material change in circumstances.

An initial inquiry is whether the grant of a reservation itself is subject to alteration. The authority expressed in Virginia Code § 20-109 appears to conflict with the restriction in Virginia Code § 20-107.1(D) which provides, "Once granted, the duration of such a reservation shall not be subject to modification."

> Under the rule of *ejusdem generis*, when a particular class of persons or things is enumerated in a statute and general words follow, the general words are to be restricted in their meaning to a sense analogous to the less general, particular words. Likewise, according to the maxim *noscitur a sociis* (associated words) when general and specific words are grouped, the general words are limited by the specific and will be construed to embrace only objects similar in nature to those things identified by the specific words.

Martin v. Commonwealth, 224 Va. 298, 301-02, 295 S.E.2d 890, 892-93 (1982) (internal citations omitted). It is thus clear in application of the above-stated principles of statutory construction that the more specific words of Virginia Code § 20-107.1(D) control the general in Virginia Code § 20-109. Thus, the Plaintiff's reservation of spousal support itself may not be modified out of existence and must at least be considered. It follows that to require reservations of spousal support to be treated as subject to the prerequisite of a finding of a material change in circumstances thwarts the legislative intent that once a reservation is granted it be considered on the merits upon future petition to do so.

In contrast, the General Assembly has expressed a different rule with respect to *modification* of ordered relief that was previously reached on the merits. The prerequisite of "material change in circumstances" in the Code of Virginia is generally a threshold that confers jurisdiction anew over revisiting a previously concluded matter affording specific relief. *See, e.g.,* Va. Code §§ 15.2-2316.2(L) (modification of transfer of development

rights), 16.1-283.2(I)5 (restoration of parental rights), 20-108 (revision and alteration of child custody or support decrees), 20-109(F) (modification of spousal support), 20-124.8 (rescinding delegation or provision of visitation rights of family members of deployed servicepersons), 63.2-1921(B) (Department of Child Support Enforcement authority to seek modification of child support). A reservation is not in and of itself a ruling of what the judge will do in exercise thereof, but instead merely reserves the prospect of a ruling on the merits for the future in consideration of then-existing need.

It is telling that the statutory requirements for modification of a spousal support decree are set forth separately from the right to invoke the inclusion of a reservation clause in a divorce decree. A "modification" is a "change to something; an alteration or amendment." *Modification*, Black's Law Dictionary (10th ed. 2014). A "reservation" may be defined as "[a] keeping back or withholding" or "[t]hat which is kept back or withheld." *Reservation*, Black's Law Dictionary (10th ed. 2014). In the invocation of her reservation of spousal support, the Plaintiff is not raising a modification of existing support, but rather is bringing forth consideration of the authority which the Court held back or *reserved* for consideration to another day to award additional support in derivation of the proceedings enacting the original final decree.

The original grant of a reservation of prospective spousal support must be by agreement or if opposed, by product of court order adequately anchored in the statutory factors of application as determined by analysis at the time of the divorce decree. "In contested cases in the circuit courts, any order granting, *reserving* or denying a request for *spousal support* shall be accompanied by written findings and conclusions of the court identifying the factors in subsection E which support the court's order." Va. Code § 20-

107.1(F) (emphasis added). In requiring a "material change in circumstances" for modification of spousal support, the General Assembly limited the requirement to "an action for the *increase*, decrease, or termination of spousal support," never including reference to "reservations." Va. Code § 20-109(F) (emphasis added). Moreover, where support is merely being modified or terminated, "the court *may* consider the factors set forth in subsection E of § 20-107.1 and *shall* consider" additional factors as set forth in Virginia Code § 20-109(F) not of consideration for *de novo* support. *Id.* (emphasis added). Some of those factors suggest Virginia Code § 20-109(F) contemplates only the situation where changed terms of existing support are sought, given reference to consideration of whether retirement was contemplated at the time of the original award, and the duration and amount of support already paid. *Id.* This further suggests the General Assembly never intended Virginia Code § 20-109(F) apply to an exercise of a granted reservation of support since it stands independent of initial support awarded, if any.

Spousal support conferred in exercise of a "reservation" is not an "increase" of spousal support, but rather imposition of a new term of support. It makes no difference whether support was originally awarded to be followed by a reservation, or whether support is merely reserved for future consideration. Unlike in the case of the award of spousal support, at the time a period of reservation is granted, the court does not reach the merits of a monetary award, which instead are considered later during the exercise of such reservation. The legislative intent is thus clear that "reservations" are not subject to the requirement of a "material change in circumstances" extant for "modifications" of support in Virginia Code § 20-109(F).

The Code simply has two lanes when it comes to changing or adding spousal support to the terms of a previous decree. Where no reservation is granted in the original decree, modification of spousal support may only occur upon a showing of a "material change in circumstances." Where a reservation is included in the decree, the Code does not contemplate itself be the keeper of the gate as to whether circumstances have changed sufficiently to warrant consideration of an award. The test for exercise of the Court's discretion is simply one of need of the party seeking support when scaled against the payor's ability to pay.[4] *See* Va. Code § 20-107.1(E).

This Court thus finds Plaintiff need not show a material change in circumstances to have her prayer for spousal support considered under the bargained-for reservation.

II. Even if showing of a material change in circumstances were required to exercise a reservation of spousal support, Plaintiff has met such condition alleged applicable by Defendant.

Defendant maintains the Court is compelled before awarding Plaintiff support under the reservation to determine if there is an unforeseeable material change in circumstances. A trial court may increase, decrease or terminate an award of spousal support upon the finding that "there has been a material change in the circumstances of the parties, not reasonably in the contemplation of the parties when the award was made ...." Va. Code § 20-109(B). The Court is to make such a finding with reference to the factors set forth in Virginia Code § 20-107.1(E). *Id.* Such factors include among others

[4] In a case where a reservation of spousal support was included in the original decree of divorce without a then-present award, only the corollary test would apply whether the spouse has developed a statutory factored need by the time of the exercise of the reservation, so that such support would have been awarded had such need existed at the time of the decree, and subject to the further limitation of whether the payor spouse has the present ability to pay for all or any part of such need.

"[t]he obligations, needs and financial resources of the parties", "the standard of living established during the marriage," and "[t]he earning capacity ... of the parties and the present employment opportunities for persons possessing such earning capacity." Va. Code § 20-107.1(E). A modification of support is warranted when it "'bear[s] upon the financial needs of the dependent spouse or the ability of the supporting spouse to pay.'" *Moreno v.* Moreno, 24 Va. App.190, 195, 480 S.E.2d 792, 795 (1997) (quoting *Hollowell v. Hollowell*, 6 Va. App.417, 419, 369 S.E.2d 451, 452 (1988)).

Defendant's reading that the foreseeability requirement in Virginia Code § 20-109(B) applies to invocation of the reservation of spousal support is defeated by resort to that very statutory clause. The General Assembly made clear such provision applies only to "modification of *an award* of spousal support for a *defined duration*," and thus not to the exercise of a reservation. *See id.* (emphasis added). In the case at bar, the Plaintiff is not requesting modification of the original award of defined duration, but rather is praying for a supplementary period of support under the reservation. Therefore, the statutory foreseeability requirement cited by Defendant is simply not applicable in this instance. Nevertheless, if such requirement were to apply, the Court finds Plaintiff has proven an unforeseen material change in circumstances justifying the exercise of her reservation.

The exponential increase in the Defendant's income and consequent ability to pay support is of itself a material change in circumstance which requires this Court at least to consider Plaintiff's claim.[5] The inordinate degree of financial success of Defendant post-

[5] A qualifying principle is, however, that mere material change in the income of the Defendant does not mean the payee will be awarded increased support on the merits in a modification context. *Bibb v. Bibb*, No. 1918-97-4, 1998 WL 60917, at *1-2 (Va. App. Feb. 17, 1998). Similarly, in the reservation context, income of the payor merely informs of his ability to meet the needs of the payee. Thereafter the matching

divorce, a product of his hard work and skill, was never in the parties' contemplation at the time they entered into their PSA. The Defendant's already then-handsome income has increased over seventeen-fold since that time. What was also not in full contemplation of the parties at the time they entered their PSA was that the Plaintiff would have such difficulty reaching a self-sustaining level of employment during the period of limited duration support. While Plaintiff earns a marginal amount of income as a home healthcare aide at present compared to the time when support first began while she was unemployed, she has also been unable to secure entry-level jobs in the service industry. In the past she held one job for a number of years at a thrift shop but was terminated for reasons not fully developed by evidence. Defendant questions the efforts Plaintiff made to secure adequate employment, as more fully detailed in the trial record. Nevertheless, Plaintiff's demonstrated inability to secure even low-skilled employment is another material change in circumstances not envisioned at the time of the original decree. Though this is not necessarily what Defendant sought, the effect of the parties' marital arrangement, where Plaintiff did not pursue higher education beyond her high school equivalency diploma or a career, caused her to become habituated to some extent to a role of financial dependence from which she has had difficulty escaping.

Though having an extensive PSA, the parties never delineated therein what efforts, if any, in which Plaintiff had to engage to secure sustainable employment. Thus, in the absence of willfully thwarting contemplated contractual conditions, this Court cannot infer Plaintiff's current financial circumstances and inability to provide for herself financially

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of payee's needs to payor's ability to pay determine the level of support awarded, if any, in consideration of the factors in Virginia Code § 20-107.1(E).

were envisioned by the parties. In enforcing the terms of the parties' divorce decree, this Court is compelled to consider supplementary support under exercise of the reservation by the intent of the parties as expressed through their PSA. *See White v. White*, 257 Va. 139, 144, 509 S.E.2d 323, 325 (1999). This Court finds those contractual terms merely to be that Plaintiff is entitled to have her request for supplementary support under a reservation considered, in contemplated application of the legal factors detailed in Virginia Code § 20-107.1(E).

The Court has already concluded that no material change in circumstances need be proven for Plaintiff to have her right to exercise the bargained-for reservation considered. However, even if such a requirement were found to exist, this Court finds Plaintiff has met such test as already delineated herein-above.

III. The parties intended, as is demonstrated by the four corners of the PSA, to limit the period of additional spousal support timely exercised under the reservation to sixty months in duration.

The parties present different understandings of the reservation clause in their negotiated PSA. Plaintiff posits it should be read to mean a reservation to be exercised within sixty months, during which the Court may impose support for a greater period of time, limited only by its discretion in application of the requisite statutory factors. Defendant argues the clause means at most that limited additional support may be granted, the duration of which is a maximum of sixty months.

The confines of the Court's statutory authority in the instant case is restrained by the intention of the parties expressed in their PSA. "In Virginia property settlement agreements are contracts and subject to the same rules of formation, validity and

interpretation as other contracts." *Smith v. Smith*, 3 Va. App. 510, 513, 351 S.E.2d, 593, 595 (1986) (citing *Tiffany v. Tiffany*, 1 Va. App. 11, 15, 332 S.E.2d 796, 799 (1985)).

> It is the function of the court to construe the contract made by the parties, not to make a contract for them. The question for the court is what did the parties agree to as evidenced by their contract. The guiding light in the construction of a contract is the intention of the parties as expressed by them in the words they have used, and courts are bound to say that the parties intended what the written instrument plainly declares.

W.F. Magann Corp. v. Virginia-Carolina Elec. Works, Inc., 203 Va. 259, 264, 123 S.E.2d 377, 381 (1962). A threshold question for the Court in construing the PSA is whether the terms are ambiguous. "An ambiguity exists when language admits of being understood in more than one way or refers to two or more things at the same time." *Smith*, 3 Va. App. at 513, 351 S.E.2d at 595 (quoting *Renner Plumbing v. Renner,* 225 Va. 508, 515, 303 S.E.2d 894, 898 (1983)). "The fact that the parties attribute to the same terms variant meanings does not necessarily imply the existence of ambiguity where there otherwise is none." *Id.*, 3 Va. App. at 513-14, 351 S.E.2d at 595 (citing *Wilson v. Holyfield,* 227 Va. 184, 187, 313 S.E.2d 396, 398 (1984)).

The operative language of the PSA respecting the grant of a reservation read in isolation, though not conclusive on its own, suggests open-ended support could not be awarded by the Court during the reservation period. The provision states, "Wife shall have a reservation for support for sixty (60) months during which time she may petition the Court for additional spousal support." If the reservation is to be interpreted as Plaintiff would have it, that is, to allow this Court to order supplementary support of more than five years, then the phrase "during which time she may petition the Court for additional spousal support" must be considered surplusage. Plaintiff posits that the second clause

merely restates a requirement already contained within the first clause, for when the Court states a period of reservation it is just stating that period during which it has jurisdiction to order supplementary support. However, courts are not permitted to "make uncertain that which is certain, and they cannot make contracts for the parties." *Kennard v. Travelers' Protective Ass'n of Am.,* 157 Va. 153, 157, 160 S.E. 38, 39 (1931). "Words matter, and words in a contract, when clear, supersede unarticulated intentions." *Sweely Holdings v. Sun Trust Bank,* 296 Va. 367, 378, 820 S.E.2d 596, 602 (2018) (citation omitted). Thus, giving meaning to every word the parties chose makes it likely the parties intended the first clause to pertain to the duration of support awarded and the second clause to delineate the period during which such support could be invoked.

The Court does not, however, limit its analysis in enforcement of the parties' PSA solely to one contractual phrase. "The process of accepting or rejecting contractual interpretations under the surplusage canon must focus on 'the entire instrument' and not 'detached portions,' and should avoid placing too much '"emphasis on isolated terms" wrenched from the larger contractual context.'" *Sweely Holdings,* 296 Va. at 381, 820 S.E.2d at 604 (quoting *Babcock & Wilcox Co.*, 292 Va. 165, 180 & n.8, 788 S.E.2d 237 (2016)). The Court is guided by clear principles of contract law in determining whether the PSA reservation term is ambiguous. First, the Agreement must be read as a whole and singular provisions cannot be read in a vacuum. *See Hale v. Hale*, 42 Va. App. 27, 31, 590 S.E.2d 66, 68 (2003) ("The contract must be read as a single document. Its meaning is to be gathered from all its associated parts assembled as the unitary expression of the agreement of the parties."). Further, terms of the Agreement should be harmonized and

read in context such that one provision is guided by the interpretation of others. *See Virginian Ry. Co. v. Hood*, 152 Va. 254, 258, 146 S.E. 284, 285 (1929).

Applying the aforesaid principles to the instant case, this Court holds that the language of the reservation provision containing the two clauses already analyzed herein-above, when read in context with the provisions setting out the initial spousal support award, reflects the parties' intent to limit the time for which the Plaintiff can receive additional support. Section 4 of the PSA provides a defined duration of the first three series of support obligation periods over nine years. That the support was stated in declining amounts implies the parties contemplated the Plaintiff agreed she would need less support over time. It would be inconsistent with the apparent intent of the parties for this Court to find, given the limited and stepped down duration of support expressed in that Section *by contract*, that the parties intended the Plaintiff receive indefinite support (or even the fourteen years prayed for by Plaintiff) after the period of her initial award concluded, irrespective of what may be a wider power residing with the decreeing judge when acting without the restraint of the stepped down support agreement.[6] The parties contracted Plaintiff would have support for one hundred and eight months, i.e., nine years, decreasing in two step down periods, with the potential of a supplementary support period

[6] This Court does not imply the Code of Virginia limits the ability of this Court, when not restricted by the agreement of the parties, to enact spousal support that extends in duration, upon timely exercise, for a period beyond the amount of years of the reservation. In the absence of the contractual limits imposed on the Court by the intention of the parties in the instant case, the Court would not be limited in this instance to the five years of additional spousal support in enacting its own order, except by the abuse of discretion standard in evaluation of the need of the recipient and the ability to pay of the payor. The period of the reservation is simply that block of time during which the Court may exercise the discretion to award spousal support. Absent contractual limitation or restricting language the Court places on the duration of any support to be awarded in exercise of a reservation, the Court's authority to determine the amount and duration of support at the time the reservation is invoked, is no less than it had at the time of entry of the divorce decree.

exercised during the window provided by the reservation, which is circumscribed only by need. The Court finds by the language of the PSA read as a whole that the parties contracted the period of spousal support exercised under the reservation could not exceed five years in duration.

CONCLUSION

The Court has considered Plaintiff's Petition to exercise a reservation for additional spousal support in accordance with the parties' PSA which was incorporated into their Final Decree of Divorce and allowed a "reservation of spousal support for 60 months during which time" Plaintiff could file her request with the Court. The Petition presents the Court with threshold issues of consideration for the relief sought, namely: whether Plaintiff has the burden to show a material change in circumstances in the context of a contractual agreement allowing Plaintiff to invoke relief under a reservation of spousal support; whether such burden may be met solely by showing an increase in Defendant's ability to pay; whether Plaintiff's alleged deficiencies in making efforts to habilitate a lifestyle commensurate to that which she enjoyed during marriage is a proper consideration in awarding her additional support in the context of a reservation that is product of an agreement; what the limiting principle is for the Court's exercise of its discretion to grant additional spousal support in the context of the contractual reservation clause; and whether the scope of the reservation is contractually limited to sixty months in duration. For the reasons as more fully stated herein the Court holds as follows: (1) No material change in circumstances need be proven as a prerequisite for the Court to consider exercise of a reservation of spousal support by Plaintiff; (2) Even if there were a

requirement for material change in circumstances, the Court finds that the Defendant's inordinate increase in ability to pay, coupled with the Plaintiff's demonstrated history of inability to obtain self-sustaining employment, are both material changes in circumstances which allow the Court to reach the merits of the claim under the reservation, where the interplay between need and ability to pay dictate the award of additional spousal support, if any, that the Court may make; and (3) The Court finds the intention of the parties in their PSA was to limit the period for payment of any additional spousal support to sixty months in duration, to be exercised within five years of the expiration of the initial award of spousal support, for the Agreement contained two periods of stepped down support over the nine years subsequent to entry of the divorce decree, followed by a reservation of five years during which supplementary support could be awarded.

Consequently, the Court shall by separate order incorporating its ruling herein detail application of the factors in Virginia Code § 20-107.1(E) to the evidence adduced at trial in evaluation of Plaintiff's petition for additional spousal support pursuant to the reservation in the parties' PSA, and make such judgment as is proper consistent with this opinion, and until such time, THIS CAUSE CONTINUES.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court