



# LEGAL FRAMEWORK FOR VIRGINIA CHILD CUSTODY CASES

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# Presentation Roadmap



## **CASE INITIATION**

- Jurisdiction and Venue
- Case Processing
- Court Referrals and Orders



## **CUSTODY & VISITATION ARRANGEMENTS**

- Best Interests of the Child
- Third-Party Custody Cases
- Disposition



## **POST-TRIAL REMEDIES**

- Appeal
- Modification

# JURISDICTION

## SUBJECT MATTER JURISDICTION

- Va. Code § 16.1-241
- Juvenile and Domestic Relations District Courts
- Exclusive original jurisdiction
- Custody, visitation, support, control or disposition of a child

## CONCURRENT JURISDICTION

- Va. Code § 16.1-244
- Circuit Courts
- Habeas corpus
- Custody, guardianship, visitation, support
- Incidental to the determination of pending causes
- Divorce cases

## UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (UCCJEA)

- Virginia must be child's home state

# VENUE

- ❑ Va. Code § 16.1-243. Original venue in cases involving custody or visitation shall be commenced in the city or county which, in order of priority:
  1. Is the home of the child at the time of the filing of the petition, or had been the home of the child within 6 months before the filing of the petition and the child is absent from the city or county because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as a parent continues to live in the city of county;
  2. Has significant connection with the child and in which there is substantial evidence concerning the child's presence or future care, protection, training and personal relationships;
  3. Is where the child is physically present and the child has been abandoned or it is necessary in an emergency to protect the child because he has been subjected to, or threatened with mistreatment or abuse or is otherwise neglected or dependent; or
  4. It is in the best interest of the child for the court to assume jurisdiction as no other city or county is an appropriate venue

# CASE INITIATION

- ☐ Va. Code §§ 16.1-260 – 16.1-265. Juvenile Court Service Unit intake, petitions, investigation, summonses.
  - a. Self-represented individual files petition (one per child) and supporting documents with intake; attorneys may file directly with clerk and motions in the case may be filed with the clerk
  - b. The petition is sworn to and includes:
    - i. The child's name, age, date of birth, and address
    - ii. Mother's name and address
    - iii. Father's name and address
    - iv. Current custodian's name and address
    - v. Specific facts that bring the child into the court's jurisdiction

# CASE INITIATION

- c. Supporting documents filed with the petition
  - i. Va. Code §§ 16.1-146.1 – 16.1-146.38 – UCCJEA affidavit
    - Are there other state proceedings or prior court orders concerning the child?
    - Where has the child lived for the past 5 years?
    - Are there pending proceedings in other states?
    - Establish Virginia as the child's home state
  - ii. Va. Code § 8.01-15.2 – Servicemember's Civil Relief Act affidavit
    - Is a party to the proceedings in the military service?
  - iii. Agreement or stipulation (optional)
  - iv. Va. Code § 16.1-69.48:5 – Filing fee (\$25)
    - One fee for one or multiple children
    - Petitioner may apply for waiver on account of poverty as provided in Va. Code § 17.1-606

# CASE INITIATION

## ❑ Va. Code § 16.1-241 Party with a Legitimate Interest

The authority of the juvenile court to adjudicate matters involving the custody, visitation, support, control or disposition of a child shall not be limited to the consideration of petitions filed by a mother, father or legal guardian but shall include petitions filed at any time by any party with a legitimate interest therein.

A party with a legitimate interest shall be broadly construed and shall include, but not be limited to, grandparents, step-grandparents, stepparents, former stepparents, blood relatives and family members.

A party with a legitimate interest shall not include any person (i) whose parental rights have been terminated by court order, either voluntarily or involuntarily, (ii) whose interest in the child derives from or through a person whose parental rights have been terminated by court order, either voluntarily or involuntarily, including, but not limited to, grandparents, stepparents, former stepparents, blood relatives and family members, if the child subsequently has been legally adopted, except where a final order of adoption is entered pursuant to § 63.2-1241 [stepparent adoption], or (iii) who has been convicted of a violation of subsection A of § 18.1-61 [rape], § 18.2-63 [carnal knowledge of a child between 13 and 15 years of age], subsection B of § 18.2-366 [incest], or an equivalent offense of another state, in the United States, or any foreign jurisdiction, when the child is the subject of the petition was conceived as a result of such violation.

The authority of the juvenile court to consider a petition involving the custody of a child shall not be proscribed or limited where the child has previously been awarded to the custody of a local board of social services. Va. Code § 16.1-241 (A); see also Va. Code §§ 16.1-278.15; 20-124.1 (definition of “person with a legitimate interest”).

# CASE PROCESSING AND APPOINTMENTS

## ☐ Va. Code §§ 16.1-263, 16.1-264

- Summonses issued by the clerk to:
  - the parents, guardian, legal custodian or other persons standing in loco parentis
  - such other persons as appear to the court to be proper or necessary parties to the proceedings, and
  - the child, if 12 years of age or older.
- Subpoenas for witnesses will be made at the request of any party.

## ☐ Va. Code § 16.1-266 – Appointment of counsel.

- No right to counsel for parties
- GAL may be appointed.



# COURT REFERRALS AND ORDERS

- ❑ Some courts may schedule a pre-trial hearing or control date prior to the hearing on the merits of the case. The court may order a *pendent lite* order providing for temporary custody of the child pending the final determination. Va. Code § 20-103.
- ❑ Va. Code § 20-103(A) – Parent education seminar in contested cases (includes “any person with a legitimate interest”) See also Va. Code § 16.1-278.15.
- ❑ Va. Code § 20-124.4 – Mediation. In any appropriate case the court shall refer the parents or persons with a legitimate interest to a dispute resolution orientation session.
- ❑ Va. Code § 16.1-278.15 – custody or psychological evaluations, drug-testing, etc.

# CUSTODY AND VISITATION ARRANGEMENTS



*“In determining custody, the court shall give primary consideration to the best interests of the child.”* Va. Code § 20-124.2.

- No presumption in favor of any form of custody or either parent
  - Assure children of contact with both parents
  - Encourage parents to share in child-rearing responsibilities
  - Court shall give due regard to the primacy of the parent-child relationship
- Modification cases
- Material or substantial change in circumstances since the last order
  - Best interests of the child



# CUSTODY AND VISITATION ARRANGEMENTS

- ❑ Nonparent/third party – When a third party, such as a grandparent, is seeking custody or visitation with a child, the court cannot merely apply a best interests of the child inquiry. They must consider the fundamental liberty interests of the parents in the care, custody, and control of their children, which the United States Supreme Court has said is “*perhaps the oldest of the fundamental liberty interests recognized by the Court.*” Troxel v. Granville, 530 U.S. 57, 65 (2000).

Must first prove:

- Parental unfitness
- Previous order granting custody to a nonparent
- Voluntary relinquishment by the parents
- Abandonment
- Special facts and circumstances constituting an extraordinary reason for taking a child from his parent or parents

Then must prove:

- Custody or visitation given to third party would be in the best interests of the child.

# CUSTODY AND VISITATION ARRANGEMENTS

## ☐ Va. Code § 20-124.3 - Best Interests of the Child.

1. The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs;
2. The age and physical and mental condition of the each parent;
3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child;
4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members;
5. The role that each parent has played and will play in the future, in the upbringing and care of the child;

# CUSTODY AND VISITATION ARRANGEMENTS

- ❑ Va. Code § 20-124.3 - Best Interests of the Child (continued) -
  6. The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child.
  7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child;
  8. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference;
  9. Any history of family abuse as that term is defined in § 16.1-228 or sexual abuse. If the court finds such a history, the court may disregard the factors in subdivisions 6; and
  10. Such other factors as the court deems necessary and proper to the determination.

# DEFINITIONS

- ❑ Va. Code § 16.1-228 – “Legal Custody” means
  - i. A legal status created by court order which vests in a custodian the right to have physical custody of the child, to determine and redetermine where and with whom he shall live, the right and duty to protect, train and discipline him and to provide him with food, shelter, education and ordinary medical care, all subject to any residual parental rights and responsibilities, or
  - ii. The legal status created by court order of joint custody...

# DEFINITIONS

- ❑ Va. Code § 16.1-228 – “Residual parental rights and responsibilities” means all rights and responsibilities remaining with the parent after the transfer of legal custody or guardianship of the person, including but not limited to:
  - The right of visitation
  - Consent to adoption
  - The right to determine religious affiliation
  - The responsibility for support

# POST-TRIAL

- ❑ Va. Code 16.1-296 – Appeals of juvenile and domestic relations district court orders are made to the circuit court for a *de novo* hearing in which the case is reheard in its entirety by the circuit court judge.
  - The same factors and considerations that judges in the juvenile and domestic relations district courts must make in custody and visitation cases apply to the circuit court judge’s hearing of the case.
  - The circuit court “shall have all the powers and authority granted by the chapter to the juvenile and domestic relations district court. Unless otherwise specifically provided by this Code, the circuit court judge shall have the authority to appoint counsel for the parties and compensate such counsel” in accordance with the statutory provisions governing appointment of counsel in Title 16.1.
- ❑ Va. Code § 20-108 – Revision of decrees in custody and visitation – child custody is always modifiable.





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