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Virginia Family Law Trial Handbook: Pleadings, Evidence, and Strategies

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Third Edition

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5.5 CUSTODY CASES

5.501 Legal Custody. The court needs to decide both legal custody and physical custody. Legal custody is decision-making authority, and is either sole legal custody or joint legal custody. Sole legal custody is where "one person retains responsibility for the care and control of a child and has primary authority to make decisions concerning the child."[15] This means that one parent may, without the consent or knowledge of the other party, make important decisions regarding the child's health, education, and development. Joint custody can be either

> (i) joint legal custody where both parents retain joint responsibility for the care and control of the child and joint authority to make decisions concerning the child even though the child's primary residence may be with only one parent, (ii) joint physical custody where both parents share physical and custodial care of the child, or (iii) any combination of joint legal and joint physical custody which the court deems to be in the best interest of the child.[16]

Joint legal custody can look very different with each situation, depending on the parties and the children. Sometimes, both parents go to each sick visit, each well visit, each back-to-school night, each parent-teacher conference, *etc.* Other times, one parent takes the lead in some, most, or all areas of the children's lives, but the parties are able to come together when a decision needs to be made, and can effectively make a decision together.

There has been a minor controversy with regard to whether a judge can order joint legal custody with one parent having final decision-making authority in one particular area if the parties cannot agree. For instance, if the parties cannot agree on health care or educational decisions, the court may give a parent final decision-making authority in that one particular area. Some judges believe that Virginia law does not allow for this, and, if they want to give final decision-making authority in one area, they have to order sole legal custody, thus giving one party final authority for all decisions without any carve outs. This can be an issue in your *ad damnum* request—whether to ask for joint legal custody with a carve out for one particular area, to ask for sole legal custody, or to plead both in the alternative. While there is no law directly

[15] Va. Code § 20-124.1.

[16] *Id.*

on point, it does appear that the Court of Appeals does not have an issue with joint legal custody where one party has final decision-making authority in one particular area.[17]

While there is no presumption regarding legal custody, there would seem to be a bias toward joint legal custody in Virginia Code section 20-124.2, which states that the court "shall assure minor children of frequent and continuing contact with both parents, when appropriate, and encourage parents to share in the responsibilities of rearing their children."[18] As a practical matter, most judges reserve sole legal custody for when the parties are unable to communicate and/or effectively make decisions concerning the child or there has been serious domestic violence. In cases where a child has special needs, a court is more likely to award sole legal custody if the parties have a history of difficult decision-making and care for the child was delayed.

5.502 Physical Custody. There is likewise no presumption regarding physical custody. However, Virginia Code section 20-124.2 would suggest that, when appropriate, a minor child should have a fair amount of contact with each parent. Childrearing has become more shared over the past 30 years and shared custody has become more common. This is reflected in more shared custody arrangements (where "shared" means each party has "custody or visitation of a child or children for more than 90 days of the year").[19] In recent years, shared custody seems to becoming more of the norm.

5.503 Statutory Factors and Evidence. If this is one of your first custody hearings, read and then re-read Virginia Code section 20-124.3 (Best Interests).[20] In all likelihood, the court is going to go through this Code section

[17] *See Powell v. Knoepfler-Powell*, No. 0853-22-4, 2023 Va. App. LEXIS 309, 2023 WL 3470090 (Va. Ct. App. May 16, 2023) (unpublished) (affirming the trial court's decision giving mother final decision-making authority over the child's health care).

[18] Va. Code § 20-124.2(B).

[19] Va. Code § 20-108.2(G)(3)(a).

[20] Va. Code § 20-124.3. Best interests of the child; visitation:

In determining best interests of a child for purposes of determining custody or visitation arrangements, including any pendente lite orders pursuant to § 20-103, the court shall consider the following:

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 each parent;

when ruling on both legal and physical custody. Make sure that your evidence fits into these factors. Also, give your client a copy of this Code section; it may spark some ideas on his or her part. Below is each factor under Code section 20-124.3 and some possible evidence which could be offered relevant to each factor:

A. Age and Health of Child. The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs;

> ***Possible Evidence:*** Testimony of health care providers if the child has a serious condition, especially mental health providers. (NB: Mental health providers sometimes do not like to discuss what went on in therapy with the child for fear that a parent might use the information against the child, thus destroying the therapeutic relationship.)

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;

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 (i) family abuse as that term is defined in § 16.1-228; (ii) sexual abuse; (iii) child abuse; or (iv) an act of violence, force, or threat as defined in § 19.2-152.7:1 that occurred no earlier than 10 years prior to the date a petition is filed. If the court finds such a history or act, the court may disregard the factors in subdivision 6; and

10. Such other factors as the court deems necessary and proper to the determination.

The judge shall communicate to the parties the basis of the decision either orally or in writing. Except in cases of consent orders for custody and visitation, this communication shall set forth the judge's findings regarding the relevant factors set forth in this section. At the request of either party, the court may order that the exchange of a child shall take place at an appropriate meeting place.

B. Age and Health of Parents. The age and physical and mental condition of each parent;

> ***Possible Evidence:*** Testimony of a parent's health care providers if a parent has a serious mental health condition and the condition has affected or could affect the child. Note that situational depression or minor postpartum depression is rarely something a court will be concerned with. You might be able to do a Rule 4:10 evaluation if the behavior is truly concerning and has been previously undiagnosed. Subpoenaing health care records or pharmaceutical records can be very revealing, especially in cases of suspected substance abuse. Make sure to follow the statute when issuing subpoenas to health care providers.

C. Parent-Child Relationships. 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;

> ***Possible Evidence:*** This is an important factor. Evidence could include testimony regarding who first discovered a child's learning, mental health, or physical health issue; who located treating professionals; and each party's ability to support the child through the issue. Also consider who the child goes to for comfort, and how each parent supports the child with extracurricular activities or tutoring if the child has a special talent or educational need. A parent denying or minimizing that a child has a professionally diagnosed issue, or who is not complying with the professional's recommendation can also be powerful testimony. For instance, if the child is diagnosed with attention deficit disorder, but one of the parents refuses to administer prescribed medication to the child it could reflect poorly on such parent.

D. Needs of the Child. 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;

Possible Evidence: Includes whether friends live in a parent's neighborhood or nearby community, availability of and relationships with extended family, new siblings (do not refer to them as "half siblings"), and stepsiblings. It also encompasses the child's community, including the child's school and friendship groups.

E. Role of Each Parent. The role that each parent has played and will play in the future, in the upbringing and care of the child;

Possible Evidence: Includes a myriad of evidence, such as a parent helping with homework, attending parent-teacher conferences, other school involvement, coaching, coordinating with health care providers, tending to the child when in distress or ill, purchase of the child's clothing, planning birthday parties and vacations, *etc.* This also includes how much time the parents spend with the child and what each does when with the child, such as morning and nighttime routines.

F. Support of Child's Relationship with Other Parent. 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;

Possible Evidence: This factor is as close as Virginia ever gets to using the term "parental alienation." It includes the parties' ability (or inability) to communicate and treat each other with respect. Typical evidence consists of emails, texts, and voicemails between the parties and showing ability (or lack of ability) to cooperate when it comes to the child. It may also include a log book or testimony of how the other parent was inflexible about reasonable requests to modify the custody schedule, or his or her inability to inform your client of important events for the child, such as school plays, recitals, sports playoffs, *etc.* One parent listing a friend or other relative as the first emergency contact (as opposed to listing the other parent) is a pet peeve of many judges. Evidence and testimony can also be used to show your client's flexibility regarding the same.

G. Involvement with Child and Conflict Resolution. 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;

> ***Possible Evidence:*** There is overlap with this factor and others. It mainly involves the parties' historical involvement with the child, and the parties' ability to resolve conflicts regarding the child. If they are unable to effectively do so, then sole legal custody (vs. joint legal custody) becomes more likely.

H. Reasonable Preference of Child. 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;

> ***Possible Evidence:*** You can use a mental health therapist or the child for this factor. It often involves too much hearsay for your own client to respond to this issue directly. There is a discussion of "The Child as Witness" below regarding the pros and cons of calling the child to testify about his or her preference. A guardian *ad litem* cannot testify regarding this issue.[21]

I. History of Family Abuse. Any history of (i) family abuse as that term is defined in section 16.1-228; (ii) sexual abuse; (iii) child abuse; or (iv) an act of violence, force, or threat as defined in section 19.2-152.7:1 that occurred no earlier than 10 years prior to the date a petition is filed. If the court finds such a history or act, the court may disregard the factors in subdivision 6; and

> ***Possible Evidence:*** This can be a significant factor if it rises to the necessary level. The word "abuse" should not be used casually by counsel or witnesses, especially a parent, unless it can be substantiated. Clients sometimes tend to throw this term around offhandedly, such as verbal abuse, emotional abuse, *etc.* Some judges take umbrage at this since they have seen some truly horrific cases of physical and sexual abuse.

[21] According to the Introductory Comment to the Judicial Council of Virginia's *Standards to Govern the Performance of Guardians Ad Litem for Children* (2003), "The GAL acts as an attorney and not a witness, which means that he or she should not be cross-examined and, more importantly, should not testify."

J. Other Factors. Such other factors as the court deems necessary and proper to the determination.

> ***Possible Evidence:*** This is a catchall provision which allows you to present evidence unique to your client's situation which the court would find relevant.

5.504 Essential Exhibits.

A. Photographs. Most people operate at a very visual level, so it is important that the court *sees* the child's world. Given today's technology, every phone is a camera and every computer is a darkroom. The court needs to see where the child lives, goes to school, and plays, as well as to know the child's relatives, friends, and neighbors. This means that a good exhibit notebook will include pictures of:

- The child's house, including, bedroom, play areas, and the outside of the house.
- The child engaging in sports, music, or other extracurricular activity.
- The child at birthday parties or playing with friends.
- The child celebrating holidays, whether at school, home, or elsewhere.
- The child on vacation.
- The child interacting with relatives.

It is important that some of the pictures be candid so the court sees the child relaxed instead of constantly posed. Include pictures of the child with other people or alone, but also have a number of pictures with the child interacting with your client and his or her siblings. If you are not sure whether to use a particular photo, show it to someone in your office who has not seen it to get their honest opinion.

B. Report Cards and School Records. Report cards are also important if you are trying to make the point that the child is doing well with your client or not so well in the care of the other parent. Counsel often agree to allow the report cards in evidence without any real foundation or over a

hearsay objection. Virginia Code section 8.01-390.1 (School records as evidence) allows copies of school records to "be received as evidence in any matter, provided that such copies are authenticated to be true and accurate copies by the custodian thereof, or by the person to whom the custodian reports if they are different." However, there are two important caveats when using this Code section. First, only the report card and letters sent to parents are admissible, "and subjective information, including observations, comments or opinions shall be redacted" by the Court.[22] Second, a party seeking introduction of such records must "deliver notice and a copy of such records to the other parties so that they are received not less than seven days prior to the introduction of such records."[23]

5.505 The Child as Witness.

A. Reasonable Preference of Child as to Custody. Whether to call a child as a witness is a perennial dilemma for practitioners. Virginia Code section 20-124.3(8) allows the trial court to consider 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." There have been four standard ways lawyers have tried to get this preference into evidence: (i) hearsay by one of the parties, (ii) testimony of the child's therapist, (iii) testimony of a guardian *ad litem*, and (iv) the child's direct testimony. All of these methods are inherently problematic.

A parent cannot testify that a child said he or she prefers living with that parent as that will constitute hearsay. The best a parent can do is to show reluctance by the child to spend time with the other parent. A therapist can formulate an opinion based upon the child's preference and even say that the child's preference was considered in the expert's recommendation, but the therapist cannot testify as to the child's preference. A common misconception (by both the bench and bar) is that a guardian *ad litem* may testify regarding a child's preference. The problem is that the guardian "acts as an attorney and not a witness, which means that he or she should not be cross-examined and, more importantly, should not testify."[24]

[22] *See* Va. Code § 8.01-390.1.

[23] *Id.*

[24] Judicial Council of Virginia, *Standards to Govern the Performance of Guardians Ad Litem for Children* (2003).

So, the remaining alternative is to decide whether the child should testify. If a child with a clear preference is not called to testify, the trial court will not have this information. If the child is called, the parent calling the child may be open to criticism by the judge or opposing counsel for involving the child in the parties' dispute. Many trial judges have often commented that if the child wants to go with Parent A and the court grants primary physical custody to Parent A, the child may be overly empowered. Conversely, if the court grants primary custody to Parent B, the child may feel powerless and may act out in other areas in response.

B. Guidelines as to Whether Child Should Testify. There often is no right or wrong answer in calling a child, but there are some general guidelines. First, the statute states that the child must be of "reasonable intelligence, understanding, age, and experience." So a young child should not testify. What is too young? Obviously, a five or six-year-old would most likely not be old enough, even for the most mature of children. It would be difficult to argue that a child 14 years or older is too young since a child 14 or older typically must consent to his or her own adoption.[25] The child should also be of "reasonable intelligence," which is often interpreted as the child doing well in school (both academically and behaviorally), having no serious emotional problems, and having no juvenile criminal record.

C. Testimony in Judge's Chambers. If the child does testify, it is customary that he or she do so *in camera* or in the judge's chambers. Virginia Code section 20-124.2:1 requires that, if the court conducts such an interview outside of the presence of the parties or counsel, that a record shall be created. Naturally, having a court reporter at trial is imperative; however, this requirement may be waived.[26] If the judge prefers counsel not be present or counsel has agreed to allow the child go back with the judge alone, it might be a good idea to ask if each side can prepare a few questions or areas of inquiry for the judge. It also may be a good idea for the judge to only allow a copy of the *in camera* testimony be transcribed with the consent of the court so a child is not later berated by an unhappy parent.

[25] *See* Va. Code § 63.2-1202(c)(3).

[26] Virginia Code section 20-124.2:1 provides that, if the child is interviewed *in camera*,

> a record of the interview shall be prepared, unless the parties otherwise agree. The record of the interview shall be made a part of the record in the case unless a decision is made by the court that doing so would endanger the safety of the child. The cost of creating the record shall be taxed as costs to the parties to the proceeding.