

Third Party Visitation & Relocation

I. Relocation

Relocation is a hot topic in a military area such as this. The appellate court generally has required a showing of actual benefit to the child by the move not just to the parent. Judges have not been buying that the child will benefit from the father or mother's improved education or standard of living or job opportunities in a new area if the move will interfere with contact with the other parent.

The Court of Appeals apparently thinks that we should already know this, so the recent opinions on the issue of relocation have been unpublished.

Masters v. Sutton, Record No. 2379-06-4 (April 3, 2007) (unpublished). Mother filed a motion for modification of custody and visitation, stating that she was relocating to Pennsylvania. Father filed a petition for a change of custody. The move was approved. The father was unable to provide stability and structure because of his own mental health issues. The move was only three hours away, and so it would not interfere unduly with the father's visitation with the child.

Shaw v. Shaw, Record No. 2022-05-4 (June 6, 2006) (unpublished). Petition to relocate denied. Wanted to move to parent's home in Arizona where mother had extended family and free housing so she could go to college. The move would have a negative impact on the children's relationship with the father.

Priest v. Credle, Record No. 1072-06-1 (March 20, 2007) (unpublished). Father wanted to move to Florida. "Father contends that the trial court erred by not considering that the advantage accruing to father from relocating to Florida would also benefit the children."

II. Third Party Visitation

Virginia Code Section 20-124.2B provides:

In determining custody, the court shall give primary consideration to the best interests of the child. 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. As between the parents, there shall be no presumption or inference of law in favor of either. The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest. The court may award joint custody or sole custody.

The most recent and arguably the most bizarre visitation defense case of recent times must be *O' Rourke v. Vuturo*, 49 Va. App. 139, 638, S.E 2d 124 (2006).

Facts:

- Vuturo marries Tammy in 1995. O' Rourke is the best man.
- Tammy has an affair with O' Rourke starting in 1998 and conceives O'Rourke's child.
- O' Rourke wants Tammy to have an abortion and offers to pay for it.

-Tammy tells Vurturo that she's pregnant with O' Rourke's child. They decide to continue the marriage, consult a lawyer about how to keep O' Rourke out of the baby's life; put Vuturo on the birth certificate and tell everyone that Vuturo is the father...for three years.

-In 2004, Vuturo goes out of town on a business trip. Tammy leaves Virginia with the child, moves in with O' Rourke in Maryland. Tammy marries O' Rourke after divorcing Vuturo and changes the child's last name. They tell the child that Vurturo is "bad" and throw away pictures of him.

The lawyers at trial actually argued:

-That Vuturo should not have visitation with the child.

-That the court did not have jurisdiction because Vuturo who was the child's parent for the first three years of its life is not a "parent or person acting as a parent" under the statutes.

-That in his initial pleadings Vuturo asked for "custody" rather than using the term "legal custody."

-That it was error for the trial court to appoint an independent evaluator even though they agreed to this appointment and endorsed the person who was selected to be the evaluator.

-That the psychological evaluators could not testify as to the harm to the child of not having contact with Vuturo because they were not medical doctors.

Needless to say the Court of Appeals upheld the trial court's award of visitation to Vuturo and found that "O' Rourke's case presented numerous questions that were not supported by law or evidence". The case was remanded for an award of attorney's fees and costs.

In the old days, before mental health professionals even came into courts we had the naïve belief that children benefited from love and attention of virtually anyone- but especially grandparents, step-parents, aunts and uncles. Then came issues like the constitutional rights of parents. (Before that, In Re Gault was the only time that the Constitution had come to J & DR Court.)

The rules certainly changed with *Troxel v. Granville*, 530 U.S. 57 (2000)(liberty interest of parents in caring for their children) and *Williams v. Williams*, 24 Va.App. 778, 485 S.E.2d 651 (1997) aff'd as modified 256 Va. 19, 501 S.E.2d 417 (1998) (grandparent visitation over parents' objection). In *Williams*, after meeting with a "Counselor", the parents announced to the grandparents that they were withdrawing from their relationship with them. The grandparents petitioned for visitation and were granted it in the J & DR Court. The Circuit Court found that the grandparents should have visitation. The case was appealed to the Court of Appeals. The parents argued that Virginia Code Section 20-124.2 (B) was unconstitutional as it relates to non-parent visitation.

The Virginia Court of Appeals held that:

The parents' right to autonomy in child rearing is a fundamental right protected by the Fourteenth Amendment of the United States Constitution and that state interference with that right must be justified by a compelling state interest. Accordingly, we further hold that the language of Code 20-124.2(B) the "[t]he court shall give due regard to the primacy of the parent-child relationship" requires proof that harm or detriment to the welfare of the child would result without visitation, before visitation may be ordered over

the united opposition of the child's parents. Finding that the trial court failed to determine if harm or detriment would result to Leslie's health or welfare if visitation was not ordered, we reverse and remand for reconsideration of visitation consistent with the holdings of this opinion.

The Court first must find that there will be no harm to the child if there is no visitation. Only after finding that there will be harm to the health or welfare of the child will the court then look at the best interests standard.

This only applies if there is an objection by both parents to the visitation.

Who is the person with a legitimate interest?

In *Surles v. Mayer*, 48 Va. App. 146, 628 S.E. 2d 563 (2006) Mother's boyfriend lived in the household for almost four years as a member of the family. He acted as a surrogate father for the child during that time. The Court of Appeals found that he did have standing to petition for visitation, but his victory was pyrrhic. Even though he had standing, he was unable to prove by clear and convincing evidence that the child would suffer actual harm in the absence of visitation, citing *Williams, et al.*

Surles also argued that the actual harm standard should not apply to this case because the biological father did not appear to contest his visitation- So there was no unified front like in *Williams*. The Court held that the standard did apply because the father non-appearance was not the equivalent of consent.

In *Dotson v. Hylton*, 29 Va. App. 635, 513 S.E. 2d 901 (1999), the mother and father divorced. Father went to the penitentiary for 10 years. The father's mother wanted visitation. The child's mother objected. The mother argued that the actual harm test should be applied, but *Williams* did not apply because the father wanted the grandmother to have visitation. The best interests test should be used. Grandmother was granted visitation. Even if the father was incarcerated, his consent counted.

Same Sex Couples- Interested Third Parties?

Usually one person in the same-sex couple adopts, gives birth to or is awarded custody of a child. The other person in the relationship assists in fulfilling parental duties and develops a bond with the child but has no legal rights. Despite this, the "legal parent" promises that even if their relationship comes to an end, he/she will never prevent the other from seeing the child. Of course, when the break-up occurs, contact with the child is first to go. This is such a prevalent problem that even it has been the subject of a "Law & Order" episode.

Other than moving to Vermont (a la Miller-Jenkins) what can be done to ensure a right to visitation? Would a former partner qualify as an interested party? If so, would the actual harm test of *Williams* be used? If the harm hurdle was satisfied, would the "negative" approved by *Bottoms v. Bottoms*, 249 Va. 410, 457 S.E.2d 102 (1995) and its predecessors still be valid in light of *Lawrence v. Texas*, 539 U.S. 558 (2003)? The recent Virginia Court of Appeals decision in *Damon* proves that bad cases make bad law.

Damon was involved with the mother for a very short time and maintained no significant contact with the child, yet sought visitation after the break-up. The Court of Appeals

denied visitation using the Defense of Marriage Act.

Who Determines If There is Actual Harm?

If you try like Mr. Surles to convince the court yourself, without expert testimony, that the child will really miss you and will really suffer from your absence, it appears that you will not meet your burden, which is proof by clear and convincing evidence.

If, on the other hand, you hire an expert who has become a bit too well-known so that his impartiality is open to question, as did the O'Rourkes, you will receive very little benefit for a great deal of money.

Expert testimony, in most cases, will be necessary from a child specialist.

In *Griffin v. Griffin*, 41 Va. App. 77, 581 S.E.2d 899 (2003), a paternity test showed that the estranged husband was not the father of the child with whom he was having weekly visitation. "Father/Husband" did believe that he was "the" father. After the paternity test, mother stopped the visitation. "The" father testified that he did not want a relationship with the child. An expert called by the mother testified that since there was so much hostility between mother and husband that it would be better for the child to have no contact with husband. She testified that it only compounded the hostility for husband to play the role of "de facto father". Husband called a family counselor to testify that the child had formed an emotional attachment to husband and that the child would be hurt by the loss of contact. The trial court awarded visitation over mother's objection. Mother appealed. The trial court was reversed. Husband's evidence did not satisfy his burden of proof in that "the evidence must establish more than the obvious observation that the child would benefit from the continuing emotional attachment with the non-parent. No doubt that losing such a relationship would cause some measure of sadness and a sense of loss which, in theory, 'could be' emotionally harmful." Like Surles, the biological father played no role, so his vote was not counted.

III. Ethical Issues

A. Relocation

I. Your client wants to relocate to Georgia to live with her parents where she can go back to college tuition-free. She plans to take her two children with her. She gives her ex-husband the required thirty days advance notice of her plans to move. He files for custody based on her planned move. You know that the judge whom the case is assigned has a past history of disapproving such moves for children. Before the case is heard-

-Do you tell your client to go ahead and move because the court is less likely to make the kids come back once they are established in Georgia?

-Do you have Mom convince Dad to let the kids spend the summer break with the grandparents in Georgia and then send the notice of relocation while leaving the kids there?

-If it violates a visitation order?

-Are there ethical issues with this?

B. Duty to Report Child Abuse

You represent the mother of a child in a contested custody case. You suspect that she has been abusing the child.

- Is there a duty to report this?
- What if you know that there is abuse?
- Are you prohibited from reporting this based on attorney-client privilege and/or confidentiality?
- Should you try to block mediation since mediators are mandated reporters?
- Should you try to block the appointment of a guardian ad litem who may discover your client's "secret" even though the discovery may protect the child?
- What if you are the guardian ad litem and the child has asked you not to reveal what is happening?
- Do you have a duty to counsel your client or refer her for an appropriate treatment or counseling even though this may raise red flags?
- What if you know that she is going to commit perjury if asked about the abuse?
- Should you withdraw from representation?
- Do you owe any duty to the child?

C.Hired Guns

- Are there ethical issues in hiring expert witnesses whom you "know" will espouse any position for a fee?
- If you know that the expert has intentionally omitted information from his report...that he knows and the other party may not?

Notes: The American Academy of Matrimonial Lawyers has developed Standards of Conduct. Standards of Conduct 2:26 provides that "[a]n attorney should disclose evidence of a substantial risk of physical or sexual abuse of a child by the attorney's client," Whether this could be done would depend on whether the state rules permitted this to be done.

Rules of Professional Conduct

Rule 1.6 (a) A lawyer shall not reveal information protected by attorney-client privilege under applicable law on other information gained in the professional relationships that the client has requested to be held inviolate on the disclosure of which would be likely to be determined to the client....© A lawyer shall promptly reveal:

(1) The intention of a client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, were feasible advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel.