

Children and Divorce

A. **Children.** Divorce proceedings are very emotional, and parties often use children to seek revenge. Try to keep the children out of this. If they must be involved, prepare them properly without poisoning their minds about your spouse. Obtain professional advice if you need it. Assure the children that the divorce is not their fault and that they will still have both parents.

Discuss support and property division with your spouse. Do not use the children as messengers. Make a special effort to spend time with your children during this difficult time. Give them your full attention. Reassure them that both parents love them, even if you believe your estranged spouse is not being fair. Give them extra love now -- they need it.

B. **Custody.** Despite the fact that Virginia law recognizes no preference between parents in a custody fight, the mother generally has an edge in custody litigation. Joint custody is often awarded. Disagreement over custody is almost guaranteed to put you right in the middle of a bitterly contested and expensive divorce. Custody cases are expensive in both emotional cost and in legal cost. The damage caused by winning a custody case is great; the damage caused by losing is terrifying. Few things give good and even great attorneys more pause than the possibility of losing a hotly contested custody case where the merits and equities are on your client's side. Perhaps the only comparable feeling is to have a criminal client convicted that you sincerely believed was innocent (both happen, and don't let anybody kid you that they don't).

The legal standard in deciding who will get custody is "what is in the best interest of the children". Every judge sees it differently. If the judge's father abandoned his family and the judge's mother slaved day and night to help her son through law school, then the judge might have a hard time understanding why a father should have custody. Some judges are more moderate, but there are no courts in Virginia where the father has the advantage in custody litigation. If the court takes custody away from the mother, it usually has to have a good reason to do so.

There are also certain doctrines and presumptions, both legal and psychological, which persist and influence the court in determining the best interest of the child:

Tender years - The old law was that children of tender years, below four or five years of age, should be with their mother. This law has been overturned in Virginia, and under the current law both parents are on an equal footing. Don't forget - old habits and customs die hard. The psychology is still with the mother.

Parental rights - Parents must be shown to be unfit before the children will be given to someone else, such as grandparents.

Continuity of placement - If children are doing well where they are, do not mess things up by moving them.

Children's preference - By law, a judge must consider the reasonable preferences of the child. The old rule of fourteen years old before the child will be listened to has been abolished. The key word is "reasonable". The judge may talk to the children in private. The judge is not bound by what the child wants.

Grandparent visitation - Virginia, as do most states, recognizes an independent suit by grandparents to get and enforce visitation. "The kids will never see YOUR parents again" is a hollow threat.

Other - The court can consider the custodian's age, health, wealth, religious beliefs, conduct, sexual orientation, type of home, psychological evaluations, the location of the residences of the child's siblings, the child's school performance, or anything else the court considers important.

If there is custody litigation, you must be able to show the judge that the child is better off with you. Photographs of you and your child having a good time doing things together is useful evidence. This is a good time to subscribe to publications such as Parents magazine. Buy some books about children, parenting and getting children through divorce. Attend seminars and keep the brochures and literature. The point is to do these things for your child and yourself, not just to impress the judge.

C. Child Support. In arriving at the amount of child support, to be paid by the non-custodial parent to the custodial parent of the child, Support Guidelines in the Virginia Code (20-108.2) are used absent an agreement between the parties. The guidelines are computed using the combined gross earnings from all sources of both parents and the non-custodial parent pays the custodial parent his or her percentage share of the total amounts allocated to child support expense. The amount of child support ordered can only be different from the guidelines when and if the judge is willing to make a written finding of the reasons for the deviation (which is not often).

The amounts due under the guidelines will surprise you - they are almost always higher than the payor expects. Specialty arrangements such as shared and split custody and children you support from prior marriages influence the guidelines and have to be computed on a case by case basis.

The court can order the non-custodial parent to pay child support and provide such things as life or health insurance. The court can require support of a normal child only until the age of 18 or if the child is a full time student until graduation from high school or age 19, whichever is first. You can provide for college, but you must do so by agreement, as the court cannot order it. Virginia does not require a parent to put a child through college. If you have a child with a mental or physical disability, be sure to let your attorney know, as it may be possible to have support continue after this child turns 18. If the children's needs or the parents' needs for and/or ability to pay support substantially and materially changes, then child support can be raised or lowered. Child support, and sometimes spousal support, can be ordered in certain circumstances by payroll deduction out of the paycheck of the person who is paying it, and sometimes it is ordered to be paid through the Division of Child Support Enforcement.

As with spousal support, child support must be reasonable. Enough can be too much. If the custodial parent is awarded enough child support, it may be too much for the non-custodial parent to be able to pay. If this happens, the burden becomes too heavy, and if the ties to the children and to the community are too weak, then the non-custodial parent will leave. Once a non-custodial parent has left the state, it becomes more difficult to enforce child support rulings.

The following anecdote of unknown origin illustrates the point. A woman was divorcing her biker husband, whom she had concluded was worthless -- even on his best day. As the attorney was going over the terms of the settlement in court, he got to child support and said, "Fifty dollars per month." The judge interrupted, "Fifty dollars is not much money. Wouldn't one hundred dollars a month be more reasonable? I can award that if you want me to." The woman responded, "I wish you wouldn't. I'm not going to get it anyway, and it only hurts half as much to not get fifty dollars a month as it would to not get one hundred a month."

D. Visitation. If the mother and father can agree on visitation, the court will usually approve the plan. A typical pattern is alternating weekends, a few weeks in the summer, and alternating holidays. If the parties live far apart, this pattern will not work. The pattern then calls for fewer but longer visitation periods. If the parties live very far apart, you must deal with who will provide or pay for transportation. The courts encourage visitation except in extraordinary circumstances.

Sometimes when parents fight about visitation, they are really upset about something else that they do not believe they can fight about. It may be because they feel angry at the other spouse for leaving, or it may be that they feel they gave up too much in the divorce agreement. But for whatever reasons, they are involved in an argument about the children. It is most often the mother wanting to restrict the father's visitation. This is normally not a good idea, because when the mother says to the father, "I don't want you to visit at this time," that immediately becomes the time that the father wants to visit with the child. In some cases the problem is that the mother wants the father to visit and he will not do it because she is trying to force him to visit with the children. The best thing to do if you do not want a parent to visit is tell that parent you want him/her to visit. Bury the other parent with visitation! Offer it! Remember in the back of your mind that you have a free babysitter. Also, you might remember that the parent who visits regularly tends to be the parent who pays support regularly.

Even if your situation is that the non-custodial parent is a jerk, and you do not think it is the best thing in the world for the kids to be around the jerk, you still need to encourage visitation. The children need to know that the non-custodial parent is a jerk, and the best way for them to know it is to let them see it with their own eyes on a regular basis. Withholding visitation from the children or the non-custodial parent pits you against the child's imagination. If the children do not see the jerk they soon forget what a jerk he or she is and begin to blame you for the non-custodial parent having left. The child's imagination is then on the other parent's side. The children dream about a perfect parent, and since they do not see the absent parent they do not see any flaws in that parent. You might win against many things, but you will lose against your child's imagination.

In Virginia, as in most states, grandparents can petition the court for visitation. The court is to grant that visitation that is in the best interests of the grandchildren.

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