

Child Custody and Child Visitation

Frequently asked questions for parties without an attorney

Which parent has the right to custody of a child?

Usually, both parents of a child have equal rights to physical and legal custody of a child. Virginia law gives no preference to either parent, but requires regular contact of the child with both parents (when appropriate).

Know: This is NOT true for a parent with a history of violence or abuse against a family member.

When a court decides custody, it may order:

- sole or joint (shared) *physical* custody (who the child lives with);
- sole or joint (shared) *legal* custody (who makes decisions about the child).
- Visitation (or parenting time) with a parent who does not have physical custody, or with others

Know: If the court orders sole physical custody to one parent, it may also make an order as to parenting time (often called “visitation”) with the other parent.

Know: In any situation relating to child custody or visitation, the court must consider a child’s “best interests.”

How to file for custody or visitation?

A person — a parent or a “person with a legitimate interest” — seeking custody or visitation files a “petition” (form) with the Court Services Unit of the Juvenile and Domestic Relations District Court (“J&DR Court”) of the city or county where the child has lived for at least six months.

If there is a previous order of custody and/or visitation for this child, file a “Motion to Amend” form in the court where the previous order was issued.

- If the parents are not married: either one may file a petition to decide custody.
- If divorcing parents cannot agree on custody, one or both may petition for a child custody order from a J&DR Court, and then include that order with the divorce. If divorcing parents agree on their own custody arrangement, they do not need to go to JDR court, but may file the agreement with the Circuit Court when they file for divorce.

Know: Due to the on-going Covid-19 pandemic, many courts require an appointment before meeting with the Court Services Unit. Call the Clerk’s office before going to court.

Know: Both parents owe a duty of support to their child, no matter who the child lives with. Virginia has child support guidelines to help courts and parents decide who will pay for what. Learn more here: <https://www.vasupportcalc.com/virginia-child-support-calculator/>

Can someone who is not a parent file for custody?

Virginia allows some others—like a grandparent or other relative—to file for custody. A person who is not a parent who files for custody must be a “person with a legitimate interest” under the law. Grandparents or relatives caring for a child living in their home may file for custody to simplify things like school enrollment.

A parent may also file to share joint custody with a grandparent or relative so a child can live with that relative when a parent is undergoing treatment, or struggling with housing or other personal issues.

Know: The parent(s) may be required to pay child support to the party having custody of their child, or to the state (if the party caring for the child receives financial assistance from the state to help support the child).

What if a person filing for custody cannot afford the filing fees?

If a person cannot afford the filing fees, they may qualify to have the fees “waived” (not charged). You may fill out a form at the court, or use this link to fill out the form and bring it with you to court:

<https://www.valegalaid.org/resource/court-fee-waiver-form>

What happens after the petition is filed?

After a person files a petition for custody in the J&DR Court, the petition will be heard within a few weeks. Watch for court papers with the hearing date and time to be delivered to the addresses provided on the petition.

Know: At the first hearing, most often a judge will not allow evidence to be presented, but simply enter a temporary order. However, have evidence ready in case the judge decides to issue a permanent order at this hearing.

Know: The judge also will enter an order requiring a parenting class, with information about how to enroll.

The judge may appoint a special attorney, called a Guardian ad Litem (GAL), to make recommendations to the court about what is in the child’s best interests. The judge may also order a “Home Study” of one or both homes.

Know: The GAL and/or person doing a home study will interview parents, the child, teachers, counselors, and others. This information will greatly influence the judge’s decisions regarding custody and visitation.

What happens at a court hearing?

There are very strict rules in court: about who is allowed to speak when; and about evidence (the information that the court uses to make a decision).

- Many courts have rules against cellphones in court. If any of your evidence is on your phone, tell a bailiff (court officer) or sheriff’s deputy at the entrance to the court.
- To avoid breaking any rules, talk to the bailiff in the courtroom before your hearing begins.
- Always address the judge as “Your Honor.” Refer to other people present as “Mister” or “Ms.”
- The people asking the court to decide something are called the “parties.” The party who filed the petition is called the “petitioner” or the “plaintiff.” The other party is called the “respondent” or the “defendant.”
- Petitioners go first. They present their evidence during their portion of the case. When they are finished, the respondent presents the evidence for their portion of the case.
- Evidence includes “exhibits” (usually documents, like letters, emails, reports, bills, or photos) and “testimony” (people speaking in court under oath about things they have witnessed).

How is evidence given to the court?

- A party wishing to testify should inform the court they’d like to give testimony and be sworn in.
- Parties may call witnesses who can testify about things they have witnessed that are helpful to the case.
- If a party calls a witness to testify, the witness is “sworn in.” The party then asks questions of the witness: this is called “direct examination.” During direct examination, a witness can only be asked “non-leading” questions: that is, a question that does not suggest to the witness what the answer should be.
- After a witness finishes testifying, the other party may “cross-examine” (ask the witness more questions).
- The judge may ask a witness questions at any time.
- Parties may also present documents to help the court understand their side. These could be bills, letters, medical reports, photographs, text messages, videos, voice messages.

- If there are documents that relate to a witness's testimony, these must first be shown to the other party.
- The bailiff brings documents to the judge's bench, after showing them first to the other party. Before accepting the exhibits, the court will ask if there's an objection. Each party may object to the other party's evidence, but must have a good reason for the objection.
- One reason for an objection is "hearsay." Hearsay is when people testify to things they heard someone else say, rather than things they observed. Some kinds of hearsay are allowed. The judge decides if it is allowed.
- Generally, if a person is in court, or if they are on the other side of the case, something they said out of court is not considered hearsay.
- Some documents may be hearsay. For example, letters or documents from someone not present to testify.
- Do not get into an argument with a witness or any person in the courtroom. If you have an objection to testimony or evidence, raise your hand and state your objection to the judge.
- Never argue or talk back to the judge. If you disagree with the judge's ruling simply say "I object." Then, you may appeal the final ruling in the clerk's office.

Finally: when all the evidence has been presented, the court makes a decision.

How does the judge decide who gets custody?

Judges look at many factors in deciding child custody between parents. The role that each parent has played in the child's life is very important. The judge also will look at the following things:

- The age and mental condition of the child
- The age and mental condition of each parent
- The relationship between each parent and the child
- The needs of the child
- The best interests of the child
- The willingness of each parent to actively support the child's contact with the other parent
- The willingness of each parent to keep a close relationship with the child
- The willingness of each parent to cooperate and resolve disputes
- A history of family abuse, sexual abuse, child abuse, or other acts of violence, force, or threat

What else does the judge look at when deciding custody?

Some factors can hurt a party's chances for custody, including:

- Substance abuse: including marijuana, prescription drugs, or alcohol
- Criminal convictions, especially if violence was involved
- Founded Child Protective Services (CPS) complaints
- Mental health issues, especially if untreated
- Other issues that may affect a person's ability to care for a child

Know: *Leaving the state—even temporarily—with the child, or otherwise depriving the child with contact with the other parent; or abandoning the child, even temporarily, may hurt a parent's chance for custody.*

Know: *a court may order a party seeking custody or visitation to take a drug test if impaired parenting is a concern.*

Does the judge consider what the child wants?

It depends on the child's age. Children over 7 are sometimes asked what they want (the GAL may tell the court what the child wants) but the judge does not need to follow this. Children 14 and older must be asked what they want; their preference usually is given great weight, unless it is unreasonable.

How does the Judge decide about parenting time (or visitation)?

Virginia law requires a judge to assure regular and frequent contact of the child with both parents when appropriate. If the court issues sole physical custody to one parent, it will usually also order parenting time, or visitation, with the other parent (if appropriate). How much, and when, depends on many things.

If the court issues custody to a non-parent “person with a legitimate interest,” it should also order visitation with one or both parents, if it deems this appropriate. This may be supervised or unsupervised, depending on the recommendation of the GAL, and any of the “factors” above.

Know: *The court should appoint a GAL for a parent who is incarcerated or involuntarily committed to a hospital or treatment facility, since they cannot come to court to argue their own interests. A judge will decide if such parent may have visitation via phone, teleconference, or in person. Check facility rules regarding visitation for children.*

Can a parent be kept from a child completely?

In rare cases, if a parent may be a danger to the child, or there is a court order prohibiting contact, their visitation may be denied temporarily or permanently. Or, visitation may be ordered to be supervised by a responsible adult or a local government agency (there may be a cost for supervised visitation). If a parent’s parental rights have been terminated (ended) by a court, they will typically not be allowed visitation.

Can a J&DR court custody or visitation order be appealed?

A final order can be appealed from J&DR Court to the Circuit Court in the same jurisdiction. File the appeal in writing in the Clerk’s office of the J&DR Court before ten days after entry of the order. The J&DR clerk will tell you how to schedule your appeal once it has been filed. The J&DR Court order is in effect during the appeal.

How do I enforce a custody or visitation order?

If a custody order is not obeyed, a person seeking enforcement of the order may file a “Motion for Show Cause Summons” in the court that issued the last order (unless it was transferred; if so, file with the new court). The party filing the summons must have evidence to prove the violation.

How can a custody or visitation order be changed?

Once child custody or visitation has been ordered, it can’t be changed unless there has been a “material” (meaning “important”) change in circumstances or events. If so, file a “Motion to Amend” in the court that entered the existing order.

What if a grandparent files for visitation?

Virginia law allows parents to make decisions about who can and cannot spend time with their child. If both parents agree that a grandparent cannot spend time with their child, a court will not order visitation unless the grandparent has evidence proving this may harm the child. If only one parent is against grandparent visitation, then the grandparents only need evidence proving the visitation is in the child’s best interests.

Know: *If one parent is dead, a court may grant grandparent visitation over parental objection in some circumstances. The grandparent must have evidence proving it would harm the child without such visitation; or present evidence that the dead parent wanted them to have visitation.*

VIRGINIA POVERTY LAW CENTER