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How to Take a Child Custody or Visitation Case to Court

How does child custody or visitation get ordered by a court?

Unless there's a court custody order, both parents of a child have equal rights to physical possession of a child. This is true whether the parties are married to each other or not. Virginia law gives no preference to either the mother or the father. A court can order child custody and visitation only after four things happen:

- Custody papers are filed with the court.
- Custody papers are served (legally delivered) on all the parties.
- A hearing is held before the court.
- A written child custody or visitation order is issued.

Who can file for child custody or visitation?

A mother, father, legal guardian, and any "party with a legitimate interest" can file for child custody or visitation. A "party with a legitimate interest" includes, but is not limited to, grandparents, stepparents, former stepparents, blood relatives, and family members. After parental rights have been terminated (ended) by a court, that parent and that parent's relatives have no custody or visitation rights with that child.

Where do I file for child custody or visitation?

It depends on whether there's a prior court order about the child's custody or visitation.

If there is no prior court order, <u>where</u> do I file for child custody or visitation?

If there is no prior court order about the same child's custody or visitation, you would file in the state and county or city that has "jurisdiction" to hear the case. In Virginia, you would file with the Court Services Unit of the Juvenile and Domestic Relations (J&DR) Court. If the child and all the parties involved live in the same county or city, and have lived there for more than six months, you would file in that county's or city's J&DR Court. If this is not the case, you'll need to follow the rules discussed below, which sometimes can be complicated.

What is "jurisdiction"?

Jurisdiction is the power or authority to hear and decide a legal case. In child custody and visitation cases, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) says which court has this power.

What is the UCCJEA?

Virginia and most other states have made the UCCJEA part of their laws. The UCCJEA determines which state gets to make the initial (first) child custody or visitation order. The UCCJEA also determines which state gets to change child custody or visitation after there is an order. There are two reasons a state gets to make the initial child custody or visitation order.

- The court has "home state" jurisdiction.
- The court has "significant connections" jurisdiction.

What is "home state" jurisdiction?

The "home state" is the state where the child last lived for six months in a row. If the child is less than six months of age, it is where the child was born. On the date the child custody or visitation case is filed, one of two things must be true.

- The state is the child's home state, or,
- The state was the child's home state within six months before the date the child custody case is filed and the child is absent from the state and a parent, or person acting as parent, still lives in that state.

This means a state can be the child's home state for six months after the child has left, as long as a parent, or person acting as parent, still lives in that state.

What is "significant connections" jurisdiction?

If there is no "home state" or if the "home state" has decided not to exercise jurisdiction, another state may have "significant connections" jurisdiction. On the date the child custody or visitation case is filed, two things must be true.

- The child and at least one parent, or person acting as parent, has a significant connection with the state apart from mere physical presence, and,
- Substantial evidence about the child's care, protection, training and personal relationships can be gotten in the state.

Under the UCCJEA, once there has been a child custody or visitation order entered by a judge, usually no other state may change that order. This is talked about later in this article.

If there is no prior court order, <u>what</u> do I file for child custody or visitation?

You would file a Petition for Custody and/or a Petition for Visitation. You file this with the Court Services Unit of the Juvenile and Domestic Relations (J&DR) Court.

What does it cost to file a Petition for Custody or Petition for Visitation?

The filing fee is $25 per petition per child. This applies only to a Petition for Custody, a Petition for Visitation, or a Petition for Relief of Custody filed by a Guardian (not Parent). It does not apply to any other J&DR Court petition or motion. It does not apply to these.

- Petition for Child Support.
- Petition for Spousal Support (alimony).
- Petition for Emergency Protective Order, Preliminary Protective Order, or Permanent Protective Order.
- Motion to Amend or Review Order.
- Motion for Show Cause Summons.

You may pay by cash, personal check, money order or credit card. You can't pay in installments.

What if I can't afford the filing fee?

If you can't afford the filing fee, ask the Clerk for the "Affidavit in Support of Application for Proceeding in Custody or Visitation Cases without Payment of Filing Fees." This also is called "Form DC-606." The Affidavit asks for this information.

- Whether you get Medicaid, Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), or Supplemental Nutrition Assistance Program (SNAP).
- Your take home pay and other income.
- Your assets, such as money in a bank account, cash, homeownership, *etc*.
- Unusual expenses, such as medical, court ordered child & spousal support & child care.
- Number of people you support.
- Number of people you live with.

You must be a Virginia resident to file this form. You must file a separate form for each Petition. Only the Judge can grant your request to proceed without paying filing fees. The Judge must grant or deny your request within one business day. If you file more than one request, the Judge may grant some requests and deny others.

If there is a prior court order, <u>where</u> do I file for child custody or visitation?

Generally, you must file in the state and county or city that issued the last custody or visitation order. Under the UCCJEA, once there has been a child custody or visitation order, usually no other state may change that order. There is a limited exception to this rule. Another

state may change the prior order if the new state has "home state" or "significant connections" jurisdiction and one of three things is true.

• The court that issued the prior order determines it no longer has jurisdiction, or,
• The court that issued the prior order determines the new state would be an easier place to hear the case, or,
• The court that issued the prior order, or a court in the new state, determines that neither the child, the child's parents, nor any person acting as a parent now lives in the state that issued the prior order.

Where do I file if the prior court order is not from Virginia?

Once a court in another state has issued a custody or visitation order – and the child, a parent, or a person acting as a parent still lives in the state – you must file in the same court that entered the prior order. This is true even if you live very far from that court. You may file in Virginia only if the child, all the child's parents, and everyone acting as a parent, no longer lives in the state that issued the prior order.

Where do I file if the prior court order is from Virginia?

Generally, you must file in the Virginia court that issued the last custody or visitation order. This could be a Virginia J&DR Court. This also could be a Virginia Circuit Court.

If the prior court order is from a Virginia Circuit Court, where do I file?

This depends on what the prior Virginia Circuit Court order says. If the order refers or transfers back the issue of custody and visitation to a Virginia J&DR Court, you would file in the J&DR Court. Otherwise, you would have to file in the Circuit Court one of two things.

• A Motion to Amend or Review Order or • A Motion to Transfer to J&DR Court.

You may be able to do this without a lawyer, but it is not recommended. You may lose valuable custody or visitation rights if you don't know the law. You probably will need a lawyer to file in Circuit Court. Procedures in the Circuit Court are complicated.

If the prior court order is from, or referred back to, a Virginia J&DR Court, where do I file?

You would file in that J&DR Court.

If the prior court order is from, or referred back to, a Virginia J&DR Court, what do I file?

You would file a Motion to Amend or Review Order. You file this with the Clerk's office of the Juvenile and Domestic Relations (J&DR) Court.

What does it cost to file a Motion to Amend or Review Order?

Nothing. There is no filing fee to file a Motion to Amend or Review Order.

When can I file a Motion to Amend or Review Order?

You may file this at any time after the prior court order. However, you must have a material or important change in circumstances or events since the prior court order was entered. Without this, the court is not very likely to amend or change the last order.

What should I bring when I file court papers for custody or visitation?

When you go to file court papers for custody or visitation, take as much of the following information as you can.

• The child's full name, date of birth, Social Security number, present address, and addresses for the past five years.
• Your name, Social Security number and present address.
• The name, Social Security number and present address (physical address and mailing address) of the mother, father, any other party, and any person who presently has the child.
• The current marital status of the mother and the father.
• Any divorce decree or order for the child's parents.
• Any prior child custody and child visitation orders for the child.
• Any prior child support orders, both court orders and administrative orders, for the child.
• Any paternity acknowledgements, determinations or orders.
• Any separation agreements that deal with the child.
• Any Protective Orders about either parent, any party in the case, or the child.
• Any presently pending court papers about the child.

What happens after I file court papers?

The court papers must be served (legally delivered) on all other parties. The papers tell all parties the date, time, and place of the first court hearing. This hearing may be the only chance for the parties to dispute child custody or visitation.

How do the court papers get served?

Court papers may be served on a party in Virginia in three different ways.

• Given in person, usually by a Deputy Sheriff, or,
• Given to a member of the household, usually by a Deputy Sheriff. The household member must be 16 or older. The person serving the court papers must explain what they are, or,
• Posted on the front door and then mailed to the party by first class mail.

Court papers can be legally served on you, even if you never actually get them. If they were properly given to a household member who didn't tell you about them, you still were legally served. If they were properly posted and mailed to you but you never saw them, you still were legally served. Both these things are unusual, but they do happen. You should tell household members to pay attention to court papers, and you should pay attention yourself.

If a party does not live in Virginia, how do the papers get served?

Generally, court papers are served on a party outside Virginia in two different ways.

• Mailed by the court clerk by certified mail, return receipt requested. If the party signs and returns the green return receipt, the court papers have been served, or,
• Given in person, usually by a Deputy Sheriff in the other state.

If a party is in jail or prison, how do the papers get served?

If a party is jailed, court papers still can be served on the party in the usual ways. However, if a party is jailed, under the age of 18, in a mental hospital, or legally not competent, another step is needed. Custody or visitation can't be ordered unless the court appoints an attorney for that party. This attorney is called a Guardian *ad litem*. The attorney's fees usually have to be paid by the person filing the case.

If a party's whereabouts are not known, how do the papers get served?

If a party can't be found, the court papers can be served by publishing in the newspaper. This generally costs at least $300.00. The costs usually have to be paid by the person filing the case. In some cases, the judge may decide it's not necessary to publish the notice in the newspaper, and will have the notice posted in the courthouse instead. This approach avoids the costs of paying the newspaper to publish the notice.

What usually happens at the first court hearing?

At the first court hearing, the Judge may do any or all of these things.

• Approve an "agreement" worked out by the parties.
• Send the parties to a "mandatory mediation conference."
• Order the parties to take a "parent education seminar."
• Appoint a "Guardian *ad litem*" for the child.
• Appoint a "Court Appointed Special Advocate (CASA)."
• Order a "home study" on the parties.
• Order a "psychological evaluation" on the parties.
• Enter a "temporary custody or visitation order."
• Determine the issues before the court.
• Determine how certain documents will be introduced into evidence at the trial.

What is an "agreement"?

An agreement is a legally binding arrangement between the parties. It is like a contract. This can be in writing or it can be oral. If an agreement is in writing and you sign it, that means you read it, understood it, and agreed with it. This usually is true even if you have not or could not read it. This usually is true even if you were physically or mentally impaired. If you do not understand an agreement, get individual legal advice before you sign.

If an agreement is oral, the Judge will put it in writing in a court order. Be sure to get a copy of the court order right away. If the court order is not the same as your agreement, let the court know as soon as you can.

What is a "mandatory mediation conference"?

Mediation is when a trained outside person (a mediator) helps the parties talk to each other, and try to understand and solve their dispute. A mediator does not decide anything or force a solution. It is up to the Judge whether to refer a case for mediation. Usually mediation is not used when there has been domestic violence or family abuse. The parties do not have to pay for mediation. If an agreement is not reached by mediation, the Judge will hear the case.

What is a "parent education seminar"?

In Virginia, as part of the initial (first) case about custody or visitation for a child, the parents must attend a parent education seminar. This is a class that teaches parents about the effects of separation or divorce on children, the duties of parents, how to solve disputes, and the parents' financial obligations. The class must be at least four hours long. The parties must go to the class within 45 days of the first court hearing, or have gone within 12 months before the first court hearing. The parties are charged up to $50 for the class, with the fee based on ability to pay. The court may excuse attending the class only for a good reason. Everything in the class is private, except for statements about crimes, child abuse, or child neglect.

What is a "Guardian *ad litem*"?

The Judge may appoint an attorney for your child. This attorney is called a Guardian *ad litem* (GAL). The GAL's job is to meet with your child and tell the Judge what the GAL believes is best for your child. The GAL is allowed to look at and copy any government, school or medical records about your child. The GAL acts as an attorney and not a witness. The GAL should not be cross-examined and, more importantly, should not testify. You should cooperate with the GAL by answering the GAL's questions and letting the GAL visit with you or your child. The GAL represents the best interests of your child. The GAL does not represent you. The parties do not have to pay for the GAL.

What is a "Court Appointed Special Advocate (CASA)"?

The Judge also may appoint a Court Appointed Special Advocate (CASA) for your child. The CASA is a trained volunteer meets with you and your child, as well as others involved in the

case. The CASA reports to the Judge about how your child is doing and what the CASA believes is best for your child. You should cooperate with the CASA by answering the CASA's questions and letting the CASA visit with you or your child. The CASA may not call or question witnesses, but may testify if called as a witness. The parties do not have to pay for the CASA.

What is a "home study"?

The Judge may order the proper local Department of Social Services (DSS) to investigate the home and other conditions about the child and the parties to the case. This written report is called a home study. It tells the Judge facts about the parties, such as:

- Who lives in the household.
- Age, sex, education, and marital status of household members.
- Family history.
- Employment history.
- Income, expenses, assets and debts.
- Relationships with the child.
- Physical and mental health of the parties and the child.
- Description of the home and housekeeping standards.
- Description of the neighborhood and schools.
- References from friends and neighbors.
- Alcohol abuse or illegal drug use.
- Any history of domestic violence or family abuse.
- Any history of child abuse or child neglect.
- Any criminal history.

The home study usually is done by a DSS social worker. You should cooperate with DSS by answering DSS's questions and letting DSS visit with you or your child. DSS will make at least one, and often several visits to your home. DSS's report must be filed with the court at least five days before a hearing. The court must give a copy of the report to all attorneys in the case, and to any party who does not have an attorney. The report may not be copied. The parties are charged for the cost of doing the home study, with the fee based on ability to pay.

What is a "psychological evaluation"?

The Judge also may order a psychologist to examine the child and/or the parties to the case. The psychologist may work for the court or be in outside practice. The psychologist will assess your mental health, and your history as, and ability to be, a parent. You need to cooperate with the psychologist and attend all appointments. A report will be filed with the court at least five days before a hearing. The parties are charged for the cost of doing the exam, with the fee based on ability to pay.

What is a "temporary custody or visitation order"?

The Judge rarely makes a final decision on custody or visitation at the first hearing. Instead, the Judge will issue a temporary custody and visitation order. This stays in effect until

the case is ready for a final decision. A case is ready for a final decision only after the parties have attended the parent education seminar, and all studies and exams have been done. At the first hearing, the Judge will hear a small amount of evidence to learn where the child is living and whether that is a fit place. Usually, the temporary order will not change where the child is living unless the child would be in danger there. The temporary order does not suggest how the Judge will rule on the final decision.

Will the court appoint an attorney for me?

No. In most cases, the court will not appoint an attorney for a party in a child custody or visitation case.

When will my case come to trial?

This depends on the nature of the case, how many studies and exams are ordered, and where the parties live. It also differs from court to court and from case to case. In general, it takes from one to three months from the first court hearing to the trial.

How long will the trial be?

This also depends on the nature of the case, and differs from court to court and from case to case. Sometimes the order from the first court hearing sets a time limit for the trial. This can range from 15 minutes to several hours. If there is a time limit, the trial needs to stay within that limit. Even if a time limit has not been set, the Judge usually wants the trial to take only as much time as needed to reach a fair decision. This also can range from 15 minutes to several hours.

How should I prepare for trial?

When you go to court for trial, get prepared in advance. Bring papers and witnesses that support your case. These are some of the papers you might want to bring.

- Any divorce decree or order for the child's parents.
- Any prior child custody and child visitation orders for the child.
- Any prior child support orders, both court orders and administrative orders, for the child.
- Any paternity acknowledgements, determinations or orders.
- Any separation agreements that deal with the child.
- Any Protective Orders about either parent, any party in the case, or the child.
- Any presently pending court papers about the child.
- The child's report card and medical records.

If a witness doesn't want to come to court, you can ask the Clerk to subpoena the witness. A subpoena is a court order that says a witness must come to court. You need the full name and current physical address (not a Post Office box) for each witness. You must give this information to the Clerk at least 10 days before the trial date.

If someone has a paper but doesn't want to bring it to court, you can ask the Clerk to subpoena the papers. This is called a subpoena *duces tecum*. This is a court order that says a person must bring the papers to court. You need the full name and current physical address (not a Post Office box) for the person who has the papers. You must give the name and address of the person who has the papers, and a description of the papers you want, to the Clerk at least 15 days before the trial date.

You must pay $12.00 for the subpoena or the subpoena *duces tecum*. If you don't have enough money to pay this (or any other) fee, ask the Clerk for the "Affidavit in Support of Application for Proceeding in Custody or Visitation Cases without Payment of Filing Fees." This also is called "Form DC-606." You must be a Virginia resident to file this form. Only the Judge can grant your request to proceed without paying fees. The Judge must grant or deny your request within one business day.

For custody and visitation cases, you should have two visitation plans prepared before you go to court. The first visitation plan should tell the judge what visitation you are willing to give to the other party if you should get custody. The second visitation plan should tell the judge what visitation you want if the other party should get custody. They do not have to be the same.

You should decide how often visitation is to occur, how you propose to handle the major holidays and the summer, where you plan to meet to exchange the child for visits, and any other important issues.

Can I call, write to, or talk with the Judge outside of court?

No. You may not call, write to, or talk with the Judge about your case outside of court. The decision must be based only on the evidence the Judge hears in the case. The Judge may hear this evidence only in court, after all parties have had notice and a chance for a hearing.

What happens at trial?

You must get to court on time. If you're not there on time, the case could be dismissed or a court order could be entered against you. In addition, the Judge could issue a show cause order for your arrest if you do not appear in court.

Remember always to be polite when talking to the Judge. Address the Judge as "Sir" or "Ma'am" or "Your Honor." Never interrupt the Judge when the Judge is speaking. If you are not sure if you can say anything, wait until the Judge has stopped talking, and ask the Judge if you may say something.

At trial, the Judge wants to hear your side of the story and the other party's side. To explain how this is done, let's assume you are the petitioner – the person who filed for custody or visitation. If you are the other party, read this explanation as if you are the respondent.

Both parties are given a chance to give a very short summary of what they are going to prove. This is called an "opening statement." The petitioner goes first. Then the respondent

gives an opening statement.

After the opening statements, you, as the petitioner, put on evidence and tell your side of the story. Evidence is testimony by sworn witnesses, papers, and anything else that you want to show the Judge to help explain why you should get the custody or visitation you are asking for. Asking yourself what would convince you – if you didn't know anything at all about the case – often is a good way to help decide what evidence to offer.

When you tell your side of the story, you and your witnesses must swear or affirm to tell the truth. You also should show the Judge, and the other party, any papers that back up your story or would help the Judge decide the case, and can be admitted into evidence. Papers and records kept in the course of business usually can be admitted into evidence. However, letters, statements and affidavits from those not a party generally can't be admitted into evidence.

After you have told your side of the story, the respondent can "cross-examine" you by asking you questions about what you have just said. The Judge also may ask you questions.

You can have your witnesses testify in any order you wish. After each of your witnesses has testified, the respondent has the right to "cross-examine" that witness by asking the witness questions about what he or she has just said. The Judge also may ask your witnesses questions.

Many judges prefer that no more than three or four witnesses testify for each side, so pick your best witnesses. The best witnesses are those who know you and your child the best. The most impartial (unbiased) witness is someone who is related to the other side, but is willing to testify on your behalf. The next best witness is someone not related to any of the parties.

After you and all your witnesses have given evidence, the respondent puts on his or her evidence. The respondent and his or her witnesses tell their side of the story. The respondent also may present any papers that can be admitted into evidence which back up his or her side of the story. You have a right to cross-examine the respondent and his or her witnesses by asking them questions about what they have just said. The Judge also may ask questions.

After both sides have presented all their evidence, each side has the right to make a short statement summarizing the case. This is called a "closing statement." In the closing statement, you should explain to the Judge in a general way why you should win. Stress how it is in the "best interests" of the child for you to have custody or visitation. If the other party's evidence doesn't make any sense, this is your chance to point that out. In his or her closing statement, the other party can point out any weaknesses in your position.

After both sides have finished closing statements, the Judge will make a decision as to custody and visitation. Usually the Judge will tell you right then what that decision is.

How does the Judge decide about custody?

Judges look at many factors in deciding child custody. The most important factor is the role that you have played in the past upbringing of the child, and the role that you will play in the future upbringing of the child. 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.
• Willingness of each parent to actively support the child's contact with the other parent.
• Willingness of each parent to keep a close relationship with the child.
• Willingness of each parent to cooperate and resolve disputes.
• Any history of family abuse.

What else does the Judge look at when deciding custody or visitation?

Certain factors can be extremely harmful in a party's petition for custody or visitation. Among these are the following things.

• Alcohol abuse.
• Illegal drug use.
• Prescription drug abuse.
• Adultery and/or living in a sexual relationship with a person who is not your legal spouse. (Common law marriage is not legal in Virginia.)
• Criminal convictions.
• Founded Child Protective Services (CPS) complaints.
• Civil commitment and/or mental health hospitalizations.
• Physical or mental impairments that would affect your ability to care for a child.

Does the Judge take into account what the child wants?

The preference of the child can be a factor, depending on the child's age. Children under the age 7 generally are not asked what they want. If they are, it often is given little weight. Children between 7 and 13 sometimes are asked what they want. Their preference sometimes is given weight, depending on the age and maturity of the child. Children 14 and older must be asked what they want. Their preference usually is given great weight, unless it is unreasonable.

If the Judge wants to hear from a child, this usually is done in the Judge's chamber or office, without the parties or their attorneys being present. Never ask the child any questions about anything that was said in the Judge's chamber! Never coach a child about what to say to the Judge or anyone else about custody or visitation.

How does the Judge decide about visitation?

Virginia law requires a Judge to assure regular and frequent contact of the child with both parents. If you don't get child custody, the Judge almost always will give you child visitation. If you can work things out with the other party, you may be given "liberal and reasonable visitation." If you can't work things out with the other party, you may be given visitation at

specific times. This depends on many things, such as how far you live from the other party, and how much contact you've had with the child in the past.

Can I be kept from my child completely?

You can't be kept from your child completely unless your parental rights have been terminated (ended) by a court. However, if you're an unfit parent or would be a danger to your child, the Judge can order that DSS, or some responsible adult, supervise your visitation.

What happens after trial?

After both sides have finished closing statements, the Judge makes a decision as to custody and visitation. Usually the Judge tells you right then what that decision is. The Judge also issues a written order. This may be a *pendente lite* order if the Judge plans to hear or review the case in the future. This also may be a final order. Get a copy of the Judge's written order.

Can I appeal a J&DR court custody or visitation order?

Only a final order can be appealed from J&DR Court. You must file the appeal in writing. The appeal must be filed within ten days after the final order is entered. If the tenth day falls on a Saturday, Sunday, or legal holiday, the appeal can be filed on the next business day. You must file the appeal in the Clerk's office of the J&DR Court that heard your case. The appeal will be tried again in the Circuit Court as though the case had not been tried in J&DR Court. Unless changed by a Judge, the J&DR Court order stays in effect during the appeal.

How do I enforce a J&DR court custody or visitation order?

If a court order is not being obeyed, you may go to court to ask the Judge to enforce the order that is being disobeyed. You do this by filing a Motion for Show Cause Summons. You file this with the court that issued the last order. However, if the court that issued the last order referred or transferred the case to another court, you would file with the new court.

How do I change a J&DR court custody or visitation order?

Once child custody or visitation has been set, it can't be changed unless there has been a material or important change in circumstances or events since the prior court order. Without this, the court is not very likely to amend or change the last order. You can't bring up things that happened at or before the last court hearing. You only can bring up things that happened since the last court hearing. Only a Judge can change a court order. The Judge does this by issuing a new order. If there has been an important change since the prior court order, you would file a Motion to Amend or Review Order. You file this with the court that issued the last order. However, if the court that issued the last order referred or transferred the case to another court, you would file with the new court.