

## Cases regarding MODIFICATION of orders with nonparents:

### Albert v. Ramirez, 45 Va. App. 799 (Va. Ct. App. 2005)

In *Albert*, the mother filed a petition to modify an agreed custody order, in which the parties had agreed that stepfather would share joint custody. The basis of the modification was that mother had moved. The Juvenile and Domestic Relations Court declined to change physical custody, but did modify visitation. The Circuit Court found that step-father was a nonparent and therefore applied the "actual harm" standard.

The Virginia Court of Appeals found that the Circuit Court improperly applied the "actual harm" analysis. The case was remanded back to the Circuit Court, "for reconsideration in order to apply the proper standard for modification of a custody and visitation decree."

Since this was a modification case, Mother had the burden to prove, "that a material change of circumstances had occurred since the entry of the consent order and that a change in visitation would be in the best interests of the child. By placing the burdens of proof and of going forward with the evidence upon husband to demonstrate that 'actual harm' to the child would result by his not being granted custody or visitation rights, the court placed the burdens of proof and production of evidence on the wrong party and applied an incorrect standard. "

Further, the court found that, "To allow a natural parent to unilaterally rescind a judicially sanctioned consent decree establishing the custodial rights of the parties involved would render all such custody decrees void and unenforceable. Such decrees are daily entered in the courts throughout this Commonwealth and are not violative of the principles established in *Troxel* or *Griffin*."

This case is distinguished from *Troxel* because it does not involve an initial petition filed by a third party, but rather "an attempt on the part of a natural parent to terminate custody granted to a stepparent pursuant to a final valid consent decree."

### Denise v. Tencer, 617 S.E.2d 413 (Va, 2005)

In this case, the court affirmed the trial court's decision to grant joint custody to Father and Grandfather, with primary custody to Father. The court affirmed that the trial court was correct in using the "best interest test" since Father and Grandfather had previously entered into an agreed custody order.

After Mother was diagnosed with terminal cancer, the parties entered into an agreed custody order. The order stated that the mother would remain the custodial parent of the child until her death. Upon the death of the mother, the parties agreed to a joint custody arrangement for the minor child with the child primarily residing with grandfather and the goal to unite the child and father.

The court stated that, “Presumptively acting in the child’s best interests, the father agreed that the child’s best interests were served by placing custody in grandfather. He also implicitly and necessarily agreed that grandfather, as custodian, was acting and would continue to act in the child’s best interests.”

The court reaffirmed *Albert* in finding that, “father was not clothed in parental presumption after court of competent jurisdiction made a judicial determination reflected in valid order.”

Therefore, the court concluded that, “the trial court properly applied the best interest test to determine the child’s custody in this case.”

**Rhodes v. Lang, 66 Va. App. 702, 708-09 (Va. Ct. App. 2016)**

Like in *Alberts*, this case concerned a natural parent petitioning the court to modify an existing order. Where this case differed is that Mother never agreed for the grandparents to have visitation after the Father died.

The Ohio court ruled against Mother’s wishes and ordered visitation with the grandparents, the primary purpose of which was, “to reconcile the relationship between Delmar and Susan and the children.” Mother appealed that decision to the Ninth District Court of Appeals in Ohio, which upheld the decision of the lower court.

Mother moved to Virginia, registered the Ohio order, and filed a motion to amend the Ohio order to deny the grandparents visitation. She argued, under *Troxel*, *Williams*, and *Griffin* that the actual harm standard should be used in determining visitation to a nonparent against the objection of the natural parent.

However, the Virginia Court of Appeals held that *Albert* applied to this case since this was a matter involving the modification of an existing order and no parties argued that the order was not final, valid, and enforceable.

The court held that:

Because of the existence of a final, valid, and enforceable order establishing the visitation rights of the parties, the circuit court was required by our decision

in *Albert* to apply the material change of circumstances and best interests analysis. In short, in Virginia, when a party seeks to *modify an existing visitation order*, that party must demonstrate that (1) there has been a material change of circumstances since the entry of the previous visitation order and (2) that a change in visitation would be in the best interests of the children. In this instance, the parties all agreed that mother's relocation of the children from Ohio to Virginia was a material change in circumstances. Therefore, given the relevant case law, the *only* issue remaining before the circuit court was whether *modification* of the visitation as set forth by the *existing* Ohio visitation order was in the best interests of the children. Consequently, we reject mother's contention that the circuit court committed reversible error by failing to apply the "actual harm" standard on a motion to *amend* the grandparents' visitation with the children.

### **Cases regarding VISITATION with nonparents where one parent agrees:**

#### **Dotson v. Hylton, 29 Va. App. 635 (Va. Ct. App. 1999)**

The Virginia Court of Appeals held that when only one parent objects to the grandparent's visitation and another parent supports it, the trial court is not required to find actual harm. "The parent-relationship has primacy, but the trial court may award visitation to a grandparent upon a showing, by clear and convincing evidence, that the best interests of the child would be served."

This case is distinguished from *Williams* because in this case, one parent requested visitation.

#### **Yopp v. Hodges, 43 Va. App. 427 (Va. Ct. App. 2004)**

The Virginia Court of Appeals upheld *Dotson* that when one parent supports a grandparent's petition for visitation, pursuant to Code § 20-124.2(B), the court may award custody or visitation to a person with legitimate interest upon a showing by clear and convincing evidence that such an award is in the best interests of the child.

This case is distinguished from *Williams* and *Troxel* because in this case, one parent supported the visitation petition and one parent did not. The Court cited *Griffin*, finding that trial courts may use the best interest test when there are custody and visitation disputes between two fit parents.

## Cases regarding CUSTODY with nonparents where neither parent agrees:

### City of Norfolk Circuit Court: *Brown v. Hawkins* (2017); Docket No. CJ17-0130-00

The City of Norfolk Circuit Court discussed in depth the legal analysis concerning the determination of custody between a parent and a nonparent. The Circuit Court found that, "the proper test to determine custody between a parent and nonparent is the test outlined by the Virginia Supreme Court in *Bailes v. Sours* and *Florio v. Clark*."

### *Bailes v. Sours*, 231 Va. 96 (Va. 1986)

The Virginia Supreme Court held that, "An award of child custody to a non-parent (stepmother) is affirmed where the presumption favoring a natural parent was rebutted by presenting clear and convincing evidence that special facts and circumstances warranted the award."

The Court described five factors that can rebut the presumption favoring a parent over a nonparent in determining custody:

1. Parental unfitness
2. Previous order of divestiture
3. Voluntary relinquishment
4. Abandonment,
5. Finding of "special facts and circumstances . . . constituting an extraordinary reason for taking a child from its parent, or parents."

### *Florio v. Clark*, 277 Va. 566 (Va. 2009)

*Florio* was decided after *Troxel* and reaffirmed the holdings in *Bailes* that there are five factors that can rebut the presumption favoring a parent over a nonparent in determining custody. This case found by clear and convincing evidence that the facts of the case did rebut by special facts and circumstances the presumption favoring a parent over a nonparent. Custody was awarded to the aunt and uncle over the objection of the mother after the father died.

## Cases regarding VISITATION with nonparents where no parent agrees:

### Williams v. Williams, 256 Va. 19, 501 S.E.2d 417 (1998)

In this case, BOTH parents disagreed with visitation with the grandparents. The lower courts found by clear and convincing evidence that it was in the children's best interest to have visitation with the grandparents. However, the Virginia Supreme Court found for the parents and dismissed the grandparent's petition. In doing so they held that, "For the constitutional requirement to be satisfied, before visitation can be ordered over the objection of the child's parents, a court must find an actual harm to the child's health or welfare without such visitation."

### Griffin v. Griffin, 41 Va. App. 77 (Va. Ct. App. 2003)

This case focused on one biological parent who was silent and one biological parent disagreeing with visitation with a non-parent. In other words, neither of the parents explicitly supported visitation. The court cited *Williams* and *Troxel* in upholding that before visitation can be granted to a non-parent over the objections of a parent, actual harm to the child's health or welfare must be found by clear and convincing evidence.

### Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)

*Troxel* is the seminal case decided by the US Supreme Court holding that a Washington State statute allowing the court to order visitation with grandparents over a fit parent's objection was unconstitutional. A parent has a due process and fundamental right to make decisions concerning the care, custody, and control of their children. The Court held that, "the Federal Constitution permits a State to interfere with this right only to prevent harm or potential harm to the child..."