

**Fact Pattern:**

Father and Step-Mother have no children together. Father has one 7 year old child from a previous relationship, who has lived with him and Step-Mother for most of the child's life. Biological Mother of child does not exercise visitation and neither parent ever filed a custody or visitation petition.

Step-Mother has ended the relationship with Father and has filed for custody and visitation of the child. Biological Mother supports Step-Mother's petition for visitation, but not for custody.

**Issues:**

1. What burden must a nonparent with a legitimate interest overcome to be awarded custody when the biological parents object to the petition?
2. What burden must a nonparent with a legitimate interest overcome to be awarded visitation when a biological parent objects to the petition, but the other biological parents supports the petition?
3. Does a nonparent who is awarded custody or visitation have to rebut the parental presumption in favor of the biological parent in a modification proceeding?

**Short Answers:**

1. A nonparent may be awarded custody upon a showing by clear and convincing evidence that there are special facts and circumstances to rebut the presumption favoring a biological parent. *Bailes v. Sours*, 231 Va. 96 (Va. 1986)
2. A nonparent, who has the support of one biological parent, may be awarded visitation over the objection of the other biological parent upon a showing by clear and convincing evidence that such an award is in the best interests of the child. A finding of actual harm is not required. *Dotson v. Hylton*, 29 Va. App. 635 (Va. Ct. App. 1999); *Yopp v. Hodges*, 43 Va. App. 427 (Va. Ct. App. 2004)
3. No. The trial court must determine only that: 1) there has been a material change of circumstances since the entry of the previous order and (2) that a modification would be in the best interests of the children. *Rhodes v. Lang*, 66 Va. App. 702, 708-09 (Va. Ct. App. 2016)

## Law and Analysis:

The presumption in favor of a parent arises in cases where an initial petition for custody or visitation is filed by a nonparent without support by a natural parent. 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." *Bailes v. Sours*, 231 Va. 96 (Va. 1986)

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."

In 2009, the Virginia Supreme Court reaffirmed the holdings in *Bailes*. The Court specifically reaffirmed the five factors that can rebut the presumption favoring a parent over a nonparent in determining custody. The Court further reaffirmed that the presumption favoring a natural parent can be rebutted upon a showing by clear and convincing evidence that special facts and circumstances warrant a custody award to a nonparent with a legitimate interest. *Florio v. Clark*, 277 Va. 566 (Va. 2009)

For further legal analysis concerning the determination of custody between a parent and a nonparent, refer to the City of Norfolk Circuit Court case *Brown v. Hawkins*. The Circuit Court discusses the issue in depth and 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*." City of Norfolk Circuit Court: *Brown v. Hawkins* (2017); Docket No. CJ17-0130-00

In visitation cases where neither parent actively supports the nonparent's petition, the "actual harm" standard is used and must be shown by clear and convincing evidence. The high burden is to preserve the constitutional rights of the parents. *Williams v.*

*Williams*, 256 Va. 19, 501 S.E.2d 417 (1998); *Griffin v. Griffin*, 41 Va. App. 77 (Va. Ct. App. 2003); *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)

However, in cases where one parent supports a nonparent's petition over the other parent's objection, the trial court is not required to find actual harm to the child's health or welfare. Rather, the nonparent is required to show by clear and convincing evidence that nonparent visitation is in the child's best interests. The rationale is that the best interest test is used when there is a dispute between two fit parents. *Dotson v. Hylton*, 29 Va. App. 635 (Va. Ct. App. 1999); *Yopp v. Hodges*, 43 Va. App. 427 (Va. Ct. App. 2004)

Once a nonparent is awarded custody or visitation in a court order, none of the above cases regarding parental presumption or using the 'actual harm' standard apply. When there is an existing custody order, the parent is no longer "clothed in parental presumption." *Denise v. Tencer*, 617 S.E.2d 413 (Va, 2005)

The analysis used in determining custody or visitation for a nonparent against the objection of a natural parent in a modification matter is the same analysis that is used for all modification cases, i.e. best interest. The court only determines if there has been 1) a material change in circumstances and 2) whether the modification is in the child's best interest. *Albert v. Ramirez*, 45 Va. App. 799 (Va. Ct. App. 2005); *Rhodes v. Lang*, 66 Va. App. 702, 708-09 (Va. Ct. App. 2016)

### **Conclusion:**

To preserve a parent's constitutional rights, natural parents are 'clothed' in parental presumption for custody. A nonparent bears the high burden of showing by clear and convincing evidence that there are special facts and circumstances to warrant an award of custody over the objections of the natural parents. Virginia considers five factors: 1) Parental unfitness; 2) Previous order of divestiture; 3) Voluntary relinquishment; 4) Abandonment; and 5) Finding of "special facts and circumstances . . . constituting an extraordinary reason for taking a child from its parent, or parents."

When a parent supports a nonparent's petition for visitation, the Court may award visitation to the nonparent upon a showing by clear and convincing evidence that such evidence is in the child's best interest. The Court is not required to find actual harm, which is required when neither parents supports the nonparent's petition for visitation.

Once a nonparent is awarded custody or visitation, the Court will treat a subsequent modification proceeding the same as any other modification proceeding. The Court will amend the existing order upon a finding that there has been a material change in circumstances and that the modification is in the child's best interest. Any additional findings, such as for actual harm or for special facts and circumstances, are not required.

**Cited Cases:**

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

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

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

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