

## IMPROPER DELEGATION OF JUDICIAL AUTHORITY IN CHILD CUSTODY CASES: FINALLY OVERTURNED

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*“The appellate courts of this Commonwealth are not unlit rooms where attorneys may wander blindly about, hoping to stumble upon a reversible error.”*<sup>1</sup>

These words of Judge Humphreys, denying a 2016 child custody appeal, are cogent.<sup>2</sup> Yet four months later, in another appeal, Judge Humphreys joined a unanimous decision overturning a common provision in a custody order.<sup>3</sup> In *Bonhotel v. Watts*, the Court of Appeals of Virginia held that judges cannot delegate judicial decision making power in child custody cases to outside professionals.<sup>4</sup> This sounds obvious, but such delegation is actually ordered

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1. *Coe v. Coe*, 66 Va. App. 457, 470, 788 S.E.2d 261, 267 (2016) (internal quotation marks omitted).

2. *Id.* at 463, 470, 788 S.E.2d at 264, 267–68. Trial court decisions rarely get overturned at the appellate level, and appeals on the merits of custody cases rarely even reach the court of appeals. *See infra* Part II.

3. *Bonhotel v. Watts*, No. 0040-16-3, 2016 Va. App. LEXIS 327, at \*8 (Ct. App. Dec. 6, 2016) (unpublished decision).

4. *Id.* at \*8–9.

all the time. In final orders, Virginia's trial court judges frequently give discretion to guardians ad litem ("GALs"), as well as therapeutic counselors, to determine issues such as the frequency, length, and substance of parent-child visitation.<sup>5</sup>

This practice, whereby the best interests of the child are decided outside of a courtroom, should have been dispensed with long ago. The Virginia Code makes this clear.<sup>6</sup> Delegation orders also run afoul of the United States Constitution. Delegation violates the fundamental right to parent and can violate an individual's physical liberty when that individual is held in contempt of court orders made by a non-judicial decision maker. Other states have banned the practice for years.<sup>7</sup> Delegation is simply a cultural relic of the Virginia trial courts that has never had any legal basis.

Part I of the article describes the *Bonhotel* and *Reilly v. Reilly* decisions and defines delegation of judicial authority in child custody matters. Part II of the article explains why Virginia trial court judges have ordered delegation for decades despite the lack of case law actually upholding the practice. Part III explores why delegation is such a common part of custody orders given the extraordinarily discretionary nature of custody matters and the statutory use of GALs. Part IV of the article describes the problems with delegation from both legal and non-legal perspectives. Part V part of the article details the leading decisions in other states, some decades old, that have overturned delegation and discusses the repercussions of these decisions. Finally, the article concludes by suggesting that, given the rarity of custody cases reaching the appellate level in Virginia, the trial courts could very easily continue issuing delegation orders. However, it is up to Virginia lawyers, including GALs, to extinguish the practice of delegation in the wake of *Bonhotel* and *Reilly*.

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5. Based on the author's experience. In one extreme example, the author had a case where a mother's visitation schedule was essentially determined not by the GAL but by the administrative assistant to the GAL. *See* case on file with author.

6. *See* VA. CODE ANN. § 20-124.3 (Repl. Vol. 2016 & Supp. 2017) (highlighting that the court should consider the factors pertaining to a child's best interests).

7. *See infra* Part V.

## I. *BONHOTEL, REILLY*, AND OTHER EXAMPLES OF DELEGATION OF JUDICIAL AUTHORITY

### A. Bonhotel

In *Bonhotel v. Watts*, the Circuit Court for the City of Roanoke issued a common type of provision in a final custody order with regard to a child's therapeutic counselor.<sup>8</sup> The circuit court ordered, in part, "[t]he child shall continue in counseling with [the counselor] until he releases her or until he recommends some other course. The parents shall fully cooperate with the child's counselor and shall follow his or her recommendations."<sup>9</sup>

In an unusual move,<sup>10</sup> the father appealed this ambiguous aspect of the order, arguing that the trial court erred in delegating to the child's counselor "unlimited, unfettered discretion over any and all parenting decisions to which both parents have to adhere or be subject to the contempt power of the court."<sup>11</sup> The court of appeals agreed, making a profound statement about the father's constitutional rights.<sup>12</sup> In sum, the overly broad clause hurts the parents' Due Process rights by infringing upon the Due Process Clause of the Fourteenth Amendment.<sup>13</sup> The court of appeals said the trial court's order was an improper delegation of the court's "unique authority"<sup>14</sup> and reversed and remanded to the circuit court to address the constitutional "overbreadth."<sup>15</sup>

The reversal of the trial court was surprising because the reversal rate for the Court of Appeals of Virginia is only thirteen percent.<sup>16</sup> In addition, traditionally, the United States Constitution is

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8. 2016 Va. App. LEXIS 327, at \*7.

9. *Id.* (second alteration in original).

10. *See infra* Part II (explaining the rarity of appellate court appeals in custody matters).

11. *Bonhotel*, 2016 Va. App. LEXIS 327, at \*8.

12. *Id.* at \*9–10 ("The problem with the circuit court's language is its lack of limitation . . . . When a court fails to draw limits on the circumstances under which a parent must follow a third party's recommendations, those recommendations become orders themselves . . . . The overly-broad language of Paragraph 11 impinges upon parenting decisions protected by the *Due Process Clause of the Fourteenth Amendment*. The unlimited requirement that the parents follow the counselor's recommendations affects not only father, but mother as well (although she is the appellee here).").

13. *Id.* at \*10.

14. *Id.* at \*9.

15. *Id.* at \*8.

16. L. Steven Emmert, *A Quick Read on Appellate Statistics*, VA. APP. NEWS &

rarely used in domestic relations and custody cases in the states, even at the appellate level.<sup>17</sup>

But most importantly, the reversal in *Bonhotel* was notable because the Roanoke judge's order was actually quite standard for Virginia custody cases. The order is ambiguous—it is not clear here what the parents would have to do to comply with the counselor, nor is it clear how long the child will continue counseling—but this is completely normal in custody matters.<sup>18</sup> First, there is always some level of uncertainty in custody decisions because they can be modified until a child turns eighteen.<sup>19</sup> Res judicata does not exist in child custody cases.<sup>20</sup> Second, it is par for the course in a custody decision for a judge to issue an order that requires at least one party, or non-party, to take post-decree discretionary actions.<sup>21</sup> In other words, the remedies in custody matters are not simply payment of money or cessation of action. Custody orders frequently require future decision-making on the part of at least one player.<sup>22</sup> *Bonhotel* reads like a run-of-the-mill order to a Virginia domestic relations attorney.<sup>23</sup>

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ANALYSIS, <http://virginia-appeals.com/a-quick-read-on-appellate-statistics/#.WYCKwU2pXcs> (last visited Sept. 27, 2017).

17. See Linda D. Elrod, *The Federalization of Family Law*, 36 HUMAN RIGHTS MAG. No. (2009), [https://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol36\\_2009/summer2009/the\\_federalization\\_of\\_family\\_law.html](https://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol36_2009/summer2009/the_federalization_of_family_law.html) (“Historically, family law has been a matter of state law. State legislatures define what constitutes a family and enact the laws that regulate marriage, parentage, adoption, child welfare, divorce, family support obligations, and property rights.”).

18. *Bonhotel*, 2016 Va. App. LEXIS 327, at \*8 (calling the custody order “overly broad”). These custody orders are common in the author’s experience.

19. See VA. CODE ANN. § 20-108 (Repl. Vol. 2016 & Supp. 2017) (explaining that custody decrees may be modified); see also *id.* § 20-146.1 (Repl. Vol. 2016) (defining “child” under Virginia child custody laws as someone who is not yet eighteen). Custody decrees may apply to children over eighteen in limited circumstances under Virginia Code section 20-124.2. *Id.* § 20-107.2 (Repl. Vol. 2016 & Supp. 2017); *id.* § 20-124.2 (Supp. 2017).

20. See, e.g., *Ford v. Ford*, 371 U.S. 187, 192–94 (1962) (holding that, in light of Virginia’s strong policy of protecting the best interests of the child, the courts would not apply res judicata to custody agreements).

21. See, e.g., *Heffron v. Heffron*, No. CJ11-89 & 95, 2013 Va. Cir. LEXIS 8, at \*6 (Cir. Ct. Feb. 20, 2013) (Roanoke County) (unpublished decision) (describing a custody order in which parents had to cooperate with the post-decree decisions of the clinician offering counseling to their son); *Van Dyke v. Van Dyke*, 50 Va. Cir. 604, 605 (1998) (Fairfax County) (giving the mother discretion over the father’s visitation rights after the order was issued). These orders are common in the author’s experience.

22. These custody orders are common in the author’s experience.

23. This observation is based on the author’s own experience and from interviews with other family law firms in Virginia.

## B. Reilly

A few days after *Bonhotel*, in *Reilly v. Reilly*, a mother made a similar claim regarding an improper delegation of judicial authority in a custody order.<sup>24</sup> The circuit court order stated, the “Mother shall enjoy Supervised Visitation . . . . Supervision can be altered IN WRITING by the Guardian *ad Litem* based upon [the] Mother’s strict compliance with the conditions and other provisions set forth in this Order.”<sup>25</sup>

The mother argued that the circuit court “gave the GAL ‘sole discretion over determining visitation’ between [the] mother and the children.”<sup>26</sup> The court of appeals agreed with the mother and said that the plain language of the order gave the GAL “authority to alter supervision without a ruling from or any hearing in the circuit court.”<sup>27</sup> Much like *Bonhotel*, the language in the order is forceful. It was erroneous “for the circuit court to approve such language allowing a third party, even a *guardian ad litem*, total discretion to decide [the] mother’s visitation without providing judicial review because it is inconsistent with the language and purpose of Code § 20-124.2.”<sup>28</sup>

The court of appeals was specifically concerned with the abrogation of the circuit court’s *statutory* duty, quoting the Supreme Court of Virginia:

A court of equity cannot abdicate its authority or powers, nor confide nor surrender absolutely to anyone the performance of any of its judicial functions. It may rightfully avail itself of the eyes and arms of its assistants . . . but in it resides the authority, and to it solely belongs the responsibility, to adjudicate them.<sup>29</sup>

In fact, the court of appeals was so concerned with the trial court’s delegation of statutory authority that it bothered to write this section at all.<sup>30</sup> As the court notes, it did not have to rule on

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24. No. 1369-15-2, 2016 Va. App. LEXIS 343, at \*15–16 (Ct. App. Dec. 13, 2016) (unpublished decision).

25. *Id.* at \*16.

26. *Id.* at \*15.

27. *Id.* at \*16–17.

28. *Id.*

29. *Id.* at \*15–16 (quoting *Raiford v. Raiford*, 193 Va. 221, 230, 68 S.E.2d 888, 894 (1952)).

30. *See id.*

the delegation issue: “Although our decision to remand for a *de novo* trial necessitates the reversal of the circuit court’s final order (and thus its custody and visitation [determination]), we address the assignment of error regarding . . . visitation because of the likelihood that the issue will arise again . . . .”<sup>31</sup>

Clearly, the court wanted to send a message to trial courts across Virginia.

### C. Other Examples of Delegation

#### 1. Delegation to GAL

The trial court orders in *Bonhotel* and *Reilly* are not unusual. The use of GALs to make post-decretal custody decisions is the most common use.<sup>32</sup> Some examples from the author’s own practice include: (1) “visitation to Mother, . . . as agreed by Paternal Grandmother and . . . GAL;”<sup>33</sup> (2) “visitation to [Aunt] . . . from Friday evening to Saturday afternoon at times governed by the GAL;”<sup>34</sup> (3) “Christmas shall be split as decided by the GAL;”<sup>35</sup> (4) “all contact with father is to be supervised by Paternal Grandmother, Paternal Aunt or any other agreed upon adult by [the Paternal Gandmother] and the GAL;”<sup>36</sup> and (5) “the court has suggested that [the paternal grandmother] does not have to supervise [the mother’s] visits if another supervisor can be agreed upon by the [Paternal Grandmother], [the mother], and [the] GAL.”<sup>37</sup>

Often, the orders are extremely vague in what kind of decisions and how decisions are to be made.

#### 2. Delegation to Therapeutic Counselors

In addition to GALs, judges often order therapeutic counselors to make post-decretal decisions. Sometimes the “counselor” in the court order is not even a real person, but a provider to be identified

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31. *Id.* at \*15 n.6.

32. In the author’s experience, this is the most common use of GALs in custody orders.

33. Order on file with author (capitalization in original removed for clarity).

34. Order on file with author (capitalization in original removed for clarity).

35. Order on file with author (capitalization in original removed for clarity).

36. Order on file with author (capitalization in original removed for clarity).

37. Order on file with author (capitalization in original removed for clarity).

some time in the future. For example, orders the author has seen have said, “The court orders mental health evaluation be performed on the parents either through Henrico Mental Health or a private provider, *and follow all recommendations*;<sup>38</sup> and “Until the Mother begins mental health counseling and complied with the recommendations the court will decline any motions to amend visitation.”<sup>39</sup>

Even when a specific counselor is identified in a court order, that person rarely appears in court, at least at the juvenile and domestic relations (“JDR”) level.<sup>40</sup> Occasionally, counselors do submit reports prior to final custody hearings. The parties generally agree to stipulate to the report’s authenticity, because they know that the judge expects any hearsay “information” available to come in to the record.<sup>41</sup> However, this means the report comes in to evidence without any identification and, more importantly, without direct or cross examination.

Moreover, as with GALs, future duties of the counselor are often vague, but nonetheless binding. For example, a case the author worked on said, “Any increases in the visitation shall be made in consultation with the child’s counselor, and shall be confirmed in writing between the parties. No amendments that are therapeutically recommended shall be denied by either parent.”<sup>42</sup>

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38. Order on file with author (italicized portion handwritten by the judge after the printed order was made).

39. Order on file with author (capitalization in original removed for clarity). This is particularly troubling because it suggests the judge was trying to forbid someone from even filing a petition. But every person with a legitimate interest (in the best interests of the child) can file a custody petition and a subsequent motion to amend. *See* VA. CODE ANN. § 20-124.2(B) (Supp. 2017); *id.* §§ 20-108, -124.1 (Repl. Vol. 2016 & Supp. 2017); *see also* Welch v. Wise Cty. Dep’t of Soc. Servs., 84 Va. Cir. 245, 247 (2012) (Wise County).

40. In most cases, having a counselor appear in court costs a tremendous amount of money, and based on the author’s experience, JDR judges often do not require it. *See, e.g.*, Giambanco v. Giambanco, Nos. 1269-00-2 and 2004-00-2, 2001 Va. App. LEXIS 335, at \*9 (Ct. App. June 12, 2001) (explaining that a mother was granted \$3788.75 for expert witness costs).

41. *See* Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 274 (1998) (describing that expert reports are not submitted to the record unless the parties stipulate to their admissibility). Based on the author’s experience, judges often expect this information to be in the record because they do not trust the parties to provide enough information. *See id.* at 288 (describing judges’ mistrust of parents in custody cases).

42. Order on file with author.

In this example, the parents were clearly ordered to follow the counselor's recommendations, yet the court had never even heard from the counselor herself.<sup>43</sup>

### 3. Post-Decretal Mutual Agreement by Parties—Always Permissible

To be clear, the actual parties to a custody case (mother, father, and third party who has standing to petition for visitation or custody)<sup>44</sup> can mutually agree to deviate from a final court order on visitation and other terms.<sup>45</sup> Judges make this statement in open court and often explicitly include it in orders.<sup>46</sup> In other words, parties are free to make mutual post-decretal decisions about the best interest of their children, because parents have a fundamental right to parent.<sup>47</sup>

But non-parental, non-interested third parties, such as GALs and counselors, do not have any such rights.<sup>48</sup> Moreover, non-parties are not under the jurisdiction of the court, as are parents.<sup>49</sup> A GAL or counselor cannot be “show caused” for failing to comply with part of a court order.<sup>50</sup> In the author's experience, the worst that can happen when a GAL or counselor fails to comply is that the parties can file a motion to modify the order, appear in court, and testify that the third party failed to do her duty. The court can

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43. Order on file with author.

44. See VA. CODE ANN. § 20-124.1 (Repl. Vol. 2016 & Supp. 2017).

45. See, e.g., *Bonhotel v. Watts*, No. 0040-16-3, 2016 Va. App. LEXIS 327, at \*2 (Ct. App. Dec. 6, 2016) (unpublished decision) (discussing how the parents' custody order from the court “did not address visitation” so the parties managed visitation by mutual agreement); *Mattingly v. McCrystal*, No. 2556-04-4, 2006 Va. App. LEXIS 75, at \*3, \*8–11 (Ct. App. Feb. 28, 2006) (unpublished decision) (explaining that parents can change a pre-existing custody agreement by entering their private agreement into the record).

46. The author has heard this expression on numerous occasions and has seen it in custody orders.

47. See *Bonhotel*, 2016 Va. App. LEXIS 327, at \*8–10 (finding that parents have a protected right to parent and a court cannot force them to follow the orders of a third party); see also discussion of parents' fundamental right to parent *infra* Part IV.

48. See *infra* Part IV.A (discussing how parents have fundamental right to parent).

49. See VA. CODE ANN. § 16.1-241 (Cum. Supp. 2017).

50. Compare *id.* § 16.1-278.16 (Repl. Vol. 2015) (explaining that a party can be show caused for failing to comply with a court order), with *id.* § 16.1-266 (Repl. Vol. 2015 & Cum. Supp. 2017) (explaining that the GAL represents the best interest of the child and thus is not a party to the suit).



take the GAL's failure into consideration when making further rulings, but the court cannot directly sanction the third party.<sup>51</sup>

## II. RARITY OF CUSTODY APPEALS

### A. Numbers

As noted above, delegation orders are extremely prevalent in Virginia trial courts. But according to the definitive language of *Bonhotel* and *Reilly*, many of these orders have never been lawful because they improperly delegate judicial authority.<sup>52</sup> How can these orders have continued unfettered for so long? The answer is simple. Less than 0.004% of custody matters get appellate review in Virginia.<sup>53</sup>

There are 124 JDR courts in Virginia.<sup>54</sup> In 2016, these courts heard 287,024 matters of custody and visitation.<sup>55</sup> There are 120 circuit courts in Virginia.<sup>56</sup> Circuit courts hear all custody petitions filed concurrently with divorces.<sup>57</sup> Circuit courts also hear appeals

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51. *Fleming v. Asbill*, 42 F.3d 886, 888–89 (4th Cir. 1994) (finding that even if the GAL lied to the judge in open court, she was entitled to quasi-judicial immunity as a GAL); *Cok v. Cosentino*, 876 F.2d 1, 3 (1st Cir. 1989) (declaring that the GAL “shared in the family court judge’s absolute immunity”); *Bullock v. Huster*, 554 N.W.2d 47, 49 (Mich. Ct. App. 1996) (holding that the state legislature included GALs within the immunity shield if their acts fell within the scope of their authority); *Bird v. Weinstock*, 864 S.W.2d 376, 385–86 (Mo. Ct. App. 1993) (recognizing absolute quasi-judicial immunity for GALs).

52. *Reilly v. Reilly*, No. 1369-15-2, 2016 Va. App. LEXIS 343, at \*16–17, \*19 (Ct. App. Dec. 13, 2016) (unpublished decision); *Bonhotel v. Watts*, No. 0040-16-3, 2016 Va. App. LEXIS 327, at \*8–9 (Ct. App. Dec. 6, 2016) (unpublished decision).

53. The author conservatively estimates that 12 out of every 300,000 appeals are custody matters. Based on author’s calculations as described below.

54. *Individual Juvenile and Domestic Relations District Court Homepages*, VA’S JUD. SYS., <http://www.courts.state.va.us/courts/jdr.html> (last visited Sept. 27, 2017).

55. VA’S JUD. SYS., COMMONWEALTH OF VIRGINIA CASELOAD STATISTICS OF THE J&DR DISTRICT COURTS (2016) [hereinafter VIRGINIA JDR CASELOAD STATISTICS], [http://www.courts.state.va.us/courtadmin/aoc/judpln/csi/stats/jdr/ei01\\_2016.pdf](http://www.courts.state.va.us/courtadmin/aoc/judpln/csi/stats/jdr/ei01_2016.pdf).

56. VA’S JUD. SYS., THE CIRCUIT COURT (2011), <http://www.courts.state.va.us/courts/circuit/circuitinfo.pdf>.

57. VA. CODE ANN. § 20-96 (Repl. Vol. 2016); *id.* § 20-107.2 (Repl. Vol. 2016 & Supp. 2017).

de novo from JDR courts on custody matters.<sup>58</sup> In 2013,<sup>59</sup> all of Virginia's circuit courts heard 7045 appeals from JDR courts<sup>60</sup> and 34,002 divorces.<sup>61</sup>

So, conservatively, circuit and JDR courts in Virginia hear nearly 300,000 custody and visitation cases a year at the trial level.<sup>62</sup> Of that 300,000, in 2016, only twelve custody cases reached the court of appeals.<sup>63</sup>

### B. *Systemic Reasons for the Lack of Appeals*

There are a number of systemic reasons for the lack of appellate cases in the area of custody. Historically, domestic relations, particularly custody, is not a rich area of appellate law. Prior to the mid-twentieth century, divorce was rare and fault-based.<sup>64</sup> The spouse who did not cause the divorce would usually be awarded everything: the children, property, and alimony.<sup>65</sup> The appellate courts had little need to address nuances regarding the placement of children or parenting abilities under this approach, which focused on the cause of the divorce and not the repercussions, especially for the children.<sup>66</sup>

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58. *Id.* § 16.1-296 (Repl. Vol. 2015 & Cum. Supp. 2017).

59. According to the Virginia Supreme Court's administrator, the most recent caseload report available where JDR appeals and divorces are differentiated is from 2013. *See Caseload Statistical Information*, VA.'S JUD. SYS., <http://www.courts.state.va.us/courtadmin/aoc/judpln/csi/home.html> (last visited Sept. 27, 2017).

60. VA.'S JUD. SYS., VIRGINIA CIRCUIT COURT CASELOAD REPORTING SYSTEM (2013) [hereinafter VIRGINIA CIRCUIT COURT 2013 CASELOAD STATISTICS], [http://www.courts.state.va.us/courtadmin/aoc/judpln/csi/stats/circuit/cr01annual/cr01\\_2013.pdf](http://www.courts.state.va.us/courtadmin/aoc/judpln/csi/stats/circuit/cr01annual/cr01_2013.pdf). This number is larger than the number of custody appeals alone because JDR appeals include child and spousal support cases as well. *See Juvenile and Domestic Relations District Court*, VA.'S JUD. SYS., <http://www.courts.state.va.us/courts/jdr/home.html> (last visited Sept. 27, 2017).

61. The number of divorces is far greater than the number of JDR cases because not all divorces involve custody disputes.

62. *See* VIRGINIA JDR CASELOAD STATISTICS, *supra* note 55; VIRGINIA CIRCUIT COURT 2013 CASELOAD STATISTICS, *supra* note 60.

63. Using the Supreme Court of Virginia's data, the author calculated that 250 domestic relations cases made it to the appellate level. Additionally, the author read through every single published and unpublished domestic relations appeal. *See Opinions*, VA.'S JUD. SYS., <http://www.courts.state.va.us/opinions/home.html> (last visited Sept. 27, 2017). The other domestic relations cases heard by the court of appeals involved equitable distribution, grounds for divorce, child support, and/or spousal support.

64. Lidman & Hollingsworth, *supra* note 41, at 288.

65. *Id.*

66. *Id.* at 288–89.

In Virginia, there is an even stronger reason for the lack of appellate review in the twenty-first century. Custody litigants are entitled to two trials for every custody matter. This is because, shockingly, JDR courts are not courts of record.<sup>67</sup> This means that the facts put forth at a JDR custody trial do not legally exist. The trial takes place entirely anew, based on the same original petition, a second time in circuit court. This is called de novo appeal, and every custody litigant is entitled to one as long as he files a simple notice of appeal to the circuit court within ten days of the JDR trial.<sup>68</sup> This proceeding is not an appeal on a matter of law; it is a do-over of the trial.

However, despite being an appeal of right, in reality relatively few people appeal custody matters de novo,<sup>69</sup> and, therefore, even fewer appeal to the court of appeals. There are a number of reasons for this. JDR litigants are often low income<sup>70</sup> and/or pro se.<sup>71</sup> Pro se parties may not know they have an appeal of right or they do not have the time or ability to exercise this right (for example, because they cannot take off from work for more court appearances).<sup>72</sup> Even parties who have attorneys and can afford another

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67. Statutes governing JDR courts are found under Title 16.1, “courts not of record.” See VA. CODE ANN. §§ 16.1-226 to -361 (Repl. Vol. 2015 & Cum. Supp. 2017).

68. See *id.* § 16.1-296 (Repl. Vol. 2015 & Cum. Supp. 2017) (“From any final order or judgment of the juvenile court affecting the rights or interests of any person coming within its jurisdiction, an appeal may be taken to the circuit court within 10 days from the entry of a final judgment, order or conviction and shall be heard de novo.”).

69. As noted earlier, there were 287,024 matters of custody and visitation heard in JDR courts and about 7000 get appealed per year. See *supra* Part II.A.

70. See, e.g., Joy S. Rosenthal, *An Argument for Joint Custody as an Option for All Family Court Mediation Program Participants*, 11 N.Y.C.L. REV. 127, 132–33 (2007) (citing OFFICE OF THE DEPUTY CHIEF ADMIN. JUDGE FOR JUSTICE INITIATIVES, SELF-REPRESENTED LITIGANTS IN THE NEW YORK CITY FAMILY COURT AND NEW YORK CITY HOUSING COURT 3–4 (2005)) (“It is well documented that most people who appear in New York City’s Family Courts are poor people of color. According to the New York State Unified Court System’s Office of the Deputy Chief Administrative Judge for Justice Initiatives (DCAJ-JI), 84% of self-represented litigants in New York Family and Housing Courts are people of color, and 83% reported a household income of under \$30,000 and 57% reported household income of under \$20,000.”); Warren R. McGraw, *Family Court System Awarded \$1.3 Million Federal Grant to Help Families*, W. VA. LAW., Oct. 2001, at 8 (describing that in West Virginia in 2001, some estimate that 90% to 95% of family law litigants fell below the poverty level).

71. See Rosenthal, *supra* note 70, at 132–33; see also Jona Goldschmidt, *The Pro Se Litigant’s Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 36 (2002) (footnotes omitted) (“The surge in pro se litigation, particularly in the family courts of every common law country, is reported in official reports and anecdotally by judges and court managers and in systematic studies.”); Hon. Gerald W. Hardcastle, *Adversarialism and the Family Court: A Family Court Judge’s Perspective*, 9 U.C. DAVIS J. JUV. L. & POL’Y 57, 121 & n.152 (2005) (“The family court has invited the pro se litigant. The pro se litigant has accepted the invitation in droves.”).

72. Based on the author’s experience and interviews with pro se litigants, these are

trial rarely appeal because the likelihood of winning is small compared to the costs to the client.<sup>73</sup> If the parties lose again in circuit court, the chances of them having the money and energy to appeal are even slimmer.

The nuances of custodial law rarely come up in the JDR courts of Virginia,<sup>74</sup> and most custody matters originate in JDR courts.<sup>75</sup> Parties make arguments based on only one statute—best interests of the child—which governs custody.<sup>76</sup> Judges, if they make oral or written findings, base them on the ten factors in the statute.<sup>77</sup>

If a JDR court order is appealed to a circuit court, the circuit court hears the case *de novo*, but if an argument was unsuccessful in the JDR court, the party may not have success bringing it up again.<sup>78</sup> When a circuit court order is appealed to the Court of Appeals of Virginia, the court of appeals considers the circuit court's order, but does not consider any prior JDR court orders *or any of the arguments* that were made in the JDR court.<sup>79</sup>

### C. *What This Means in Terms of Delegation of Judicial Authority*

Every day, in thousands of cases, JDR courts make all kinds of rulings that are never reviewed at any level. Cultural practices can develop and continue in JDR courts for decades, even if they are not lawful. This provides one explanation for why delegation orders are so common yet the lawfulness of delegation orders had never been heard by the court of appeals before 2016.

The delegation issue did not reach the court of appeals until 2016 for another very specific and important reason: most delegation orders mandate a GAL to take affirmation action. GALs can

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common reasons for failing to appeal.

73. See Lidman & Hollingsworth, *supra* note 41, at 289–90 (noting that widespread discretion at the trial level has “nearly exempted” custodial matters from appellate review). Additionally, based on the author’s own experience and interviews with other lawyers, it is unlikely to win an appeal.

74. Based on the author’s experience.

75. Compare VIRGINIA JDR CASELOAD STATISTICS, *supra* note 55, with VIRGINIA CIRCUIT COURT 2013 CASELOAD STATISTICS, *supra* note 60.

76. See VA. CODE ANN. § 20-124.3 (Repl. Vol. 2016 & Supp. 2017).

77. See *id.* In the author’s experience, most judges only issue orders and not findings. Furthermore, JDR court judges never issue opinions because JDR courts are “courts not of record.” See *id.* §§ 16.1-226 to -361 (Repl. Vol. 2015 & Cum. Supp. 2017).

78. See *id.* § 16.1-296(A) (Repl. Vol. 2015 & Cum. Supp. 2017).

79. See *id.* § 16.1-297 (Repl. Vol. 2015) (establishing that the circuit court opinion shall “become the judgment of the juvenile court”).

appeal cases,<sup>80</sup> but GALs also rely on their courts for appointment.<sup>81</sup> It is not in the GAL's interest to object to what a judge has ordered them to do because those judges determine how much work a GAL receives.<sup>82</sup> This is not to lay blame on GALs for failing to bring appeals on delegation orders; it is simply reality. Judges do not want to be overturned and are less likely to appoint a GAL who appeals their orders. Judges also rely heavily on GALs for guidance,<sup>83</sup> and want to appoint GALs that will do thorough investigations and comply with orders to make post-decretal decisions.

### III. WHY DELEGATION IS A COMMON PRACTICE IN CUSTODY CASES

#### A. *Nature of JDR Courts*

JDR courts<sup>84</sup> have a stigma throughout the country as the “step-children” of the legal system.<sup>85</sup> In Virginia, they are at the district court level and are often a first appointment for a judge before moving up to circuit court.<sup>86</sup> JDR courts are located in separate buildings in Virginia, and many use open docket calls (as opposed to time-certain trials) which can create an atmosphere of chaos.<sup>87</sup> JDR courtrooms are informal; forms are used instead of formal

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80. OFFICE OF THE EXEC. SEC'Y, SUPREME COURT OF VA., ADVOCACY IN MOTION 36 (2011), [http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/advocacy\\_in\\_motion.pdf](http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/advocacy_in_motion.pdf).

81. See *infra* notes 112–14 and accompanying text.

82. See *infra* notes 112–14 and accompanying text.

83. See Lidman & Hollingsworth, *supra* note 41, at 276.

84. VA. CODE ANN. § 16.1-241 (Cum. Supp. 2017) (establishing the jurisdiction of JDR courts to hear dependency, delinquency, custody, paternity, child in need of services, person in need of services, and other juvenile matters). In the author's experience, other states call these courts “Family Court” or “Juvenile Court.”

85. Catherine J. Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 FAM. L.Q. 3, 3 (1998); see also Michel Marriott, *Family Court Is Struggling with Caseload, Experts Say*, N.Y. TIMES (Nov. 15, 1987), <http://www.nytimes.com/1987/11/15/nyregion/family-court-is-struggling-with-caseload-experts-say>.

86. For instance, Judge Robbins of the Chesterfield County Circuit Court began as a JDR court judge. Mark Bowes, *Chesterfield Bar Endorses 11 to Succeed 2 County Judges*, RICH. TIMES-DISPATCH (Mar. 3, 2012), [http://www.richmond.com/news/chesterfield-bar-endorses-to-succeed-county-judges/article\\_8a2e6051-d48d-592d-a007-5fd2e3d71298.html](http://www.richmond.com/news/chesterfield-bar-endorses-to-succeed-county-judges/article_8a2e6051-d48d-592d-a007-5fd2e3d71298.html).

87. Ross, *supra* note 85 (“Family courts in most states conjure up overcrowded facilities lacking the veneer of civility, let alone majesty, whose chaotic site itself speaks volumes to the frequently downtrodden and almost always traumatized families that pass through them.”). In the author's experience, Henrico JDR courts use open docket call as opposed to time-certain trials in Henrico Circuit Court.

pleadings,<sup>88</sup> and in some venues, litigants stand around the judge instead of at counsel table.<sup>89</sup> Courts frequently use non-legal professionals such as social workers and Court Appointed Special Advocates<sup>90</sup> to “evaluate” families and children and provide information to the court.<sup>91</sup> Additionally, many civil matters in JDR courts are quasi-criminal, but are adjudicated using civil procedures.<sup>92</sup> Scholars have written extensively about these issues.<sup>93</sup>

### B. *Discretionary Nature of Custody Matters*

“[J]udicial decision-making in [private child custody] cases is viewed as extremely difficult.”<sup>94</sup> Disputes between parties often last for years before trial, resulting in emotional and vindictive litigants.<sup>95</sup> They walk in to the courthouse angry and come out even angrier. “You don’t go to family court to get justice. You go to get answers,” is a common statement made by child custody lawyers

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88. See Matthew I. Fraidin, *Decision-Making in Dependency Court: Heuristics, Cognitive Biases, and Accountability*, 60 CLEV. ST. L. REV. 913, 972 (2013) (“[T]he use of ‘form orders’ discourages reason-giving. These orders are primarily forms with check-boxes and fill-in-the-blank spaces. Where space is allowed for explanation and reason-giving, it is very limited.”).

89. For example, the author has experienced this in Richmond JDR court.

90. See VA. CODE ANN. § 9.1-153 (Repl. Vol. 2012).

91. See Leah A. Hill, *Do You See What I See? Reflections on How Bias Infiltrates the New York City Family Court—The Case of the Court Ordered Investigation*, 40 COLUM. J.L. & SOC. PROBS. 527, 537–38 (2007).

92. For example, family abuse protective orders, which are “civil,” are issued every day in JDR courts, but violations of the orders often result in jail time. See VA. CODE ANN. § 18.2-60.4 (Cum. Supp. 2017); see also *Child Support and Incarceration*, NAT’L CONFERENCE OF STATE LEGISLATURES (Feb. 10, 2016), <http://www.ncsl.org/research/human-services/child-support-and-incarceration.aspx> (discussing that non-custodial parents are regularly incarcerated for failure to pay civil child support orders).

93. See, e.g., Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People’s Courts*, 22 GEO. J. POVERTY L. & POL’Y 473, 487 (2015) (footnotes omitted) (“[T]oday there remain many variations among family courts in terms of organization and administration, there nonetheless exists a shared institutional history and culture among family courts. This includes a common origin and philosophy that manifest in three interrelated features: interventionism (e.g., use of social workers and medical and mental health professionals to conduct evaluations of litigants), informalism (e.g., simplification of procedures and forms, and efforts to resolve disputes outside of the litigation process), and intersecting systems, including the enduring interrelationship of criminal and civil procedures in family courts.”).

94. Hill, *supra* note 91, at 534; see also Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 373 (2008) (noting that the best interests of the child standard often does not give the judge any guidance for her ruling and therefore the judge’s decision-making process is “unbridled” and “subjective”).

95. Hill, *supra* note 91, at 534.

when trying to encourage potential litigants to avoid trial.<sup>96</sup> When a stranger makes personal decisions for a family, no party is ever completely happy.

Judges struggle to trust the parties involved in custody matters.<sup>97</sup> “There is an almost knee-jerk reaction by the judges that parents cannot be trusted to provide the court with all the information necessary to reach the best resolution of disputes involving children.”<sup>98</sup> Thus, judges often prefer to avoid custody cases.<sup>99</sup>

### C. *Best Interests of the Child Standard*

States began including what are known as “best interests of the child” (“BIC”) tests in their statutes during the mid-twentieth century to deal with complex custody disputes.<sup>100</sup> Virginia’s statute delineates ten factors, all subject to interpretation, and ends with a catch-all factor under which almost anything can be considered.<sup>101</sup>

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96. See Pauline Gaines, *7 Things Never to Say to Someone Going Through a High-Conflict Divorce*, HUFFINGTON POST (Sept. 14, 2012), [http://www.huffingtonpost.com/pauline-gaines/5-things-never-to-say-to-\\_b\\_1653823.html](http://www.huffingtonpost.com/pauline-gaines/5-things-never-to-say-to-_b_1653823.html) (internal quotations omitted).

97. See Lidman & Hollingsworth, *supra* note 41, at 288.

98. *Id.*

99. Frederica K. Lombard, *Judicial Interviewing of Children in Custody Cases: An Empirical and Analytical Study*, 17 U.C. DAVIS L. REV. 807, 812 & n.31 (1984). A case in Alabama, in which six judges wrote seven different opinions, illustrates the difficulty of custody cases for judges. *Ex parte G.C., Jr.*, 924 So. 2d 651 (Ala. 2005). Justice Parker, in his dissent, noted, “After considerable reflection, I have concluded that the primary cause of the Court’s varied and often conflicting opinions in this case is disagreement over foundational issues that underlie the more visible custody issues.” *Id.* at 674 (Parker, J., dissenting).

100. See Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 ST. LOUIS U.L.J. 113, 117 & n.19 (2009). Every state now has a BIC statute. *Id.*

101. VA. CODE ANN. § 20-124.3 (Repl. Vol. 2016 & Cum. Supp. 2017). The statute lists the factors as follows:

In determining best interests of a child for purposes of determining custody or visitation arrangements including any pendente lite orders pursuant to § 20-103, the court shall consider the following:

1. The age and physical and mental condition of the child, giving due consideration to the child’s changing developmental needs;
2. The age and physical and mental condition of each parent;
3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child’s life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child;
4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members;
5. The role that each parent has played and will play in the future, in the

Many have written about states' BIC statutes, including Virginia's. The BIC standard has been described as

a highly indeterminate test. It is often devoid of significant legislative guidelines and instead invites the court to explore the fullest range of the family's prior history and philosophy of child-rearing. The courts [become] embroiled in the sifting and winnowing of a multitude of factors and [are] called upon to exercise exceedingly broad discretion on a case-by-case basis. At the same time this wide discretion has nearly exempted the trial court from appellate review. Many authors have argued cogently that the best interest standard should be revised.<sup>102</sup>

Cases often result in inherently biased judgments based on the vague guidance of BIC statutes.<sup>103</sup>

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upbringing and care of the child;

6. The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child;

7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child;

8. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference;

9. Any history of family abuse as that term is defined in § 16.1-228 or sexual abuse. If the court finds such a history, the court may disregard the factors in subdivision 6; and

10. Such other factors as the court deems necessary and proper to the determination.

The judge shall communicate to the parties the basis of the decision either orally or in writing. Except in cases of consent orders for custody and visitation, this communication shall set forth the judge's findings regarding the relevant factors set forth in this section.

*Id.*

102. Lidman & Hollingsworth, *supra* note 41, at 289–90 (footnotes omitted).

103. See MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 40 (2005) ("The best interests standard necessarily invites the judge to rely on his or her own values and biases to decide the case in whatever way the judge thinks best. Even the most basic factors are left for the judge to figure out."); June Carbone, *Child Custody and the Best Interests of Children—A Review of From Father's Property To Children's Rights: The History of Child Custody in the United States*, 29 FAM. L.Q. 721, 723 (1995) (reviewing MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES (1994)) ("Even putting aside the possibility of judicial bias, judges lack a basis on which to evaluate the best interests of a particular child in the absence of guiding principles."). For example, Virginia's statute lists factors with no other guidance in how to use or rank them. See VA. CODE ANN. § 20-124.3 (Repl. Vol. 2016). Others have also critiqued the factor-based BIC approach. See, e.g., Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987); Linda Jellum, *Parents Know Best: Revising Our Approach to Parental Custody Agreements*, 65 OHIO ST. L.J. 615 (2004); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226 (1975).



#### D. *Prevalence of GALs*

Virginia, like other states, uses GALs as a way to deal with the challenges of custody cases.<sup>104</sup> However, the use of GALs is controversial;<sup>105</sup> people do not agree about the role GALs should play or how they should advocate.<sup>106</sup>

Virginia statutory law states that “discreet and competent attorneys-at-law may be appointed” as GALs by the court.<sup>107</sup> To become a GAL in Virginia, an attorney must complete a seven-hour continuing legal education course and demonstrate she is familiar with the court system and has experience in juvenile law by either (1) shadowing one qualified GAL in two cases involving children in the JDR court or (2) participating as counsel in at least four cases, including traffic cases, in JDR court.<sup>108</sup> Then, to get on a particular JDR court’s “list” for appointments, the attorney must make herself known to JDR judges and clerks,<sup>109</sup> agree to accept assignments, do a satisfactory job, and continue to make herself available

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104. See VA. CODE ANN. § 16.1-266 (Repl. Vol. 2015 & Cum. Supp. 2017); see also Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 109–12 (2002) (discussing the history and development of the use of GALs across the country).

105. See, e.g., Ducote, *supra* note 104, at 110–11; Lidman & Hollingsworth, *supra* note 41, at 292–94; Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U.L. REV. 76, 77 (1984).

106. See, e.g., JEAN K. PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 40–41 (3d ed. 2007) (“I had expected to find a discrete number of prevailing models on representing children and thought that I might be able to present sets of minority and majority views on how the role had spontaneously evolved in the different states as a result of the sudden requirement of guardians *ad litem* in CAPTA. In the end we could find no trends; not even two states matched in theory and practice.”); Barbara A. Atwood, *Representing Children Who Can’t or Won’t Direct Counsel: Best Interests Lawyering or No Lawyer at All?*, 53 ARIZ. L. REV. 381, 386–403 (2011); Linda D. Elrod, *Client-Directed Lawyers for Children: It Is the “Right” Thing To Do*, 27 PACE L. REV. 869, 876–85 (2007).

107. VA. CODE ANN. § 16.1-266(F) (Repl. Vol. 2015 & Cum. Supp. 2017).

108. See OFFICE OF THE EXEC. SEC’Y, SUPREME COURT OF VA., STANDARDS TO GOVERN THE APPOINTMENT OF GUARDIANS *AD LITEM* PURSUANT TO § 16.1-266, CODE OF VIRGINIA 1 (2015), [http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal\\_standards\\_children.pdf](http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal_standards_children.pdf).

109. In the author’s experience, in some courts, like courts in Richmond, judges conduct a group interview of candidates.

and accept assignments.<sup>110</sup> The more a GAL takes on appointments, “the more likely that the trial court will rely on him [or her] as if he [or she] were an expert.”<sup>111</sup>

In Virginia, GALs are more likely to be appointed for poor and pro se litigants. In contested custody cases, the court may automatically appoint a GAL unless “each of the parents or other persons claiming a right to custody is represented by counsel.”<sup>112</sup> If both interested parties are represented, the court may appoint a GAL *only* if it finds the child’s best interests were “not otherwise adequately represented.”<sup>113</sup> This means that parties who can afford counsel are given an extra level of judicial review to determine if a GAL is necessary,<sup>114</sup> but pro se litigants are routinely forced to work with GALs because by statute judges can automatically appoint them when the parties are not represented.<sup>115</sup> In fact, in certain venues in Virginia with low income populations, GALs are appointed in almost every custody case.<sup>116</sup>

The Rules of the Supreme Court of Virginia require GALs to investigate and recommend to the court at trial what should be done to protect the best interests of the child.<sup>117</sup> However, GALs are not considered witnesses, their oral reports are not testimony, and therefore nothing they say can be cross-examined.<sup>118</sup> In addition, sometimes they submit written reports prior to a hearing, which

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110. This is the author’s experience of “getting on the list” as a court appointed attorney in Virginia and has been reported by the author’s colleagues in many other states.

111. Lidman & Hollingsworth, *supra* note 41, at 276–77.

112. VA. CODE ANN. § 16.1-266(F) (2005) (Repl. Vol. 2015 & Cum. Supp. 2017).

113. *Id.*

114. *Id.*

115. Under Virginia law indigent parties in JDR court are entitled to have counsel appointed only in cases brought by the state. *See* VA. CODE ANN. § 16.1-266(D)(2)–(3) (Repl. Vol. 2015 & Cum. Supp. 2017). However, there may also be persons who proceed pro se because they do not meet the indigence threshold, but are nonetheless unable to afford private counsel. *See* VA. CODE ANN. § 19.2-159 (Repl. Vol. 2015 & Cum. Supp. 2017); *see also supra* notes 70–72 and accompanying text (discussing how JDR litigants are frequently poor and pro se).

116. This is consistent with the author’s experience, especially in the City of Richmond JDR Court.

117. *See* VA. SUP. CT. R. 8:6. (Repl. Vol. 2017).

118. OFFICE OF THE EXEC. SEC’Y, SUPREME COURT OF VA., STANDARDS TO GOVERN THE PERFORMANCE OF GUARDIANS AD LITEM FOR CHILDREN S-1 (2003), [http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal\\_performance\\_standards\\_children.pdf](http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal_performance_standards_children.pdf) (“The GAL acts as an attorney and not a witness, which means that he or she should not be cross-examined and, more importantly, should not testify.”).

are automatically admitted in to the record.<sup>119</sup> Because formal discovery is not guaranteed in JDR courts,<sup>120</sup> GALs are also permitted by the court to wait to give their recommendation until the conclusion of the trial, after they have heard all of the “evidence.”<sup>121</sup> This makes it even more difficult for parents’ attorneys to prepare to respond to the GAL’s recommendation.

GALs basically become court employees with the autonomy to investigate families. The supreme court approves of this role:

It is the guardian *ad litem* who retains the ultimate responsibility and accountability to the court in carrying out his or her role in the manner required by the court, as well as the applicable statutory and judicial mandates . . . . [W]e find no error in the court’s order directing [parents] to permit the guardian *ad litem* and a member of his staff to visit their homes on an unannounced or announced basis, for the purposes stated in the court’s order.<sup>122</sup>

Although debating the correct use of GALs is beyond the scope of this article, it is important to note that statutory and case law clearly permit GALs to make judgments for families every day in the courtroom.<sup>123</sup> So it is not surprising that judges ask GALs to make post-decretal decisions about them as well.

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119. *Id.* at S-9–S-10 (2003), [http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal\\_performance\\_standards\\_children.pdf](http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal_performance_standards_children.pdf).

120. See R. 8:15 (Repl. Vol. 2017); see also *Discovery in Civil Cases in Virginia’s Juvenile & Domestic Relations Court*, NAT’L L. REV. (Mar. 17, 2014), <https://www.natlawreview.com/article/discovery-civil-cases-virginia-s-juvenile-domestic-relations-court> (“Leave of court is required in order for one party to propound discovery upon another party, and a court must find good cause before allowing the discovery or inspection of evidence. It is not permissible for an attorney to simply propound discovery upon the other side as would occur in Circuit Court civil litigation.”).

121. Lidman & Hollingsworth, *supra* note 41, at 286.

122. See *Ferguson v. Grubb*, 39 Va. App. 549, 561, 574 S.E.2d 769, 775 (2003).

123. See Lidman & Hollingsworth, *supra* note 41, at 270.

## IV. THE PROBLEMS WITH DELEGATION

A. *Due Process*

The Supreme Court has long held that parenting is a fundamental right,<sup>124</sup> though the state may intervene under the doctrine of *parens patriae* or “police power” to protect the interests of a child.<sup>125</sup> This liberty right has evolved to encompass a range of activities. One of the first parental activities analyzed by the Court was the right of parents to make fundamental decisions about the education of their children in *Meyer v. Nebraska*.<sup>126</sup> The *Meyer* Court characterized this right as a liberty right under the Due Process Clause of the Fourteenth Amendment.<sup>127</sup> While refraining from defining what, exactly, the liberty right is, the Court held that it at least includes the right to “establish a home and bring up children.”<sup>128</sup> The Court concluded that a state statute that interferes with this right cannot be “arbitrary and without reasonable relation” to the state’s powers.<sup>129</sup>

The Court affirmed this liberty right in *Pierce v. Society of Sisters*, where an Oregon law mandating parents to send their young children to public schools “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>130</sup> The Court instructed that “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>131</sup> The Court found that the Oregon law had “no reasonable relation to some purpose within the competency of the State.”<sup>132</sup>

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124. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (“The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents.”); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (“[A]ll Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody.”).

125. See *Bowen v. Am. Hosp. Ass’n*, 476 U.S. 610, 627 (1986).

126. 262 U.S. 390, 400 (1923).

127. *Id.* at 399.

128. *Id.*

129. *Id.* at 403.

130. 268 U.S. 510, 534–35 (1925).

131. *Id.* at 535.

132. *Id.*

In these early cases, the Court carved out the rights to establish a home, to bring up children, and to control their education. These rights were afforded protection from government interference without a showing of some reasonable relation to the state's police powers. In *Prince v. Massachusetts*, the Court recognized the substantive rights of parents and affirmed the state's power to properly intervene to protect youths from the dangers of "emotional excitement and psychological or physical injury."<sup>133</sup>

This still left open the question: Is the liberty right analogous to a property right or is it something more? In *May v. Anderson*, decided in 1953, this fundamental right was declared more than a property right in that a state must obtain personal jurisdiction before deciding any parental rights.<sup>134</sup> In *Armstrong v. Manzo*, the Court held that due process requires notice to a biological parent before an adoption can take place.<sup>135</sup>

Having established procedural due process, the Court finally wrestled more deeply with substantive due process. In 1972, in *Stanley v. Illinois*, the Court restated that the rights to create and raise a family are "essential" and should be free from technical restraints such as a legal definition based on a marriage ceremony.<sup>136</sup> The Court held that Stanley, an unmarried father, because of the Due Process and Equal Protection Clauses, was entitled to a hearing on his parental fitness before his children could be taken away from him.<sup>137</sup> While Stanley's interests were cognizable and substantial, the state's interest in the children was "de minimis" without a finding that Stanley was unfit.<sup>138</sup> This was reiterated in *Quillion v. Walcott*, where the Court held that the Due Process Clause "would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole

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133. 321 U.S. 158, 166, 170 (1944).

134. 345 U.S. 528, 534 (1953) (holding that a custody order is not entitled to full faith and credit if the state in which the order originated did not have personal jurisdiction). However, *May v. Anderson* was superseded by the Parental Kidnapping Prevention Act and the Uniform Child Custody Jurisdiction Act. See *Brown v. Brown*, 847 S.W.2d 496, 499 (Tenn. 1993).

135. 380 U.S. 545, 551–52 (1965).

136. 405 U.S. 645, 651 (1972) (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)) ("[T]he law [has not] refused to recognize those family relationships unlegitimized by a marriage ceremony.").

137. *Id.* at 658.

138. *Id.* at 657–58.

reason that to do so was thought to be in the children's best interest."<sup>139</sup>

The Constitution today requires due process before a court can use its *parens patriae* power to make decisions on behalf of a parent regarding his child's best interest. When non-judicial authorities, outside of the courtroom, make decisions regarding the fundamental rights of parents, there is, by definition, no due process.

### B. *Physical Liberty*

The *Stanley* Court did not imagine that actual physical liberty would be implicated when it invoked a due process analysis for parental rights.<sup>140</sup> But in the implementation of private custody orders, physical liberty is also at stake. Private custody orders are only enforceable by one party filing a civil show cause motion for contempt of court against the other party.<sup>141</sup> Civil show causes in Virginia custody cases (for example, for missing one visit) carry a potential penalty of incarceration.<sup>142</sup> Parties (usually pro se) file show cause motions every day in JDR courts, much to the chagrin of judges, who do not want to be involved with every missed visit or other co-parenting impasse.<sup>143</sup>

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139. 434 U.S. 246, 255 (1978) (Stewart, J., concurring) (alterations in original) (quoting *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 862-63 (1977)).

140. See *Stanley*, 405 U.S. at 658. Here, the Court explains that the due process issue is one of avoiding dismemberment of a family unit, which does not involve a physical restraint of liberty. *Id.*

141. VA. CODE ANN. § 16.1-292(A) (Cum. Supp. 2017). This contrasts with enforcement of child welfare matters, where the government itself intervenes with the family, often removing the children from their parents. See VA. CODE ANN. § 63.2-1502 (Repl. Vol. 2017). In these matters, by statute, the court can enforce orders through the Child-Protective Services Unit. *Id.* The court can also choose to not return the children to the parents if they do not comply with orders.

142. *Id.* § 6.1-292 (Cum. Supp. 2017).

If civil contempt is sought for a violation of a court order § 16.1-292 allows for a disposition that might include incarceration until the contempt is purged (for example the support arrearage or a portion of it is paid or the child returned to the lawful custodian, or as ordered in each particular case). In this court the time that a person can be held in jail cannot exceed 12 months on a finding of guilt of contempt.

*Lynchburg Juvenile and Domestic Relations District Court: Show Cause Contempt-Custody, Visitation, Support*, VA.'S JUD. SYS., <http://www.courts.state.va.us/courts/jdr/Lynchburg/show.html> (last visited Nov. 27, 2017).

143. The author has "defended" against approximately fifty show cause motions and represented clients "prosecuting" approximately twenty-five show cause motions (usually after the client files them pro se). Most attorneys advise their clients to file show cause motions

### C. Statutory

When the state acts as *parens patriae* in a custody matter, state law mandates it adhere to a BIC standard, as discussed.<sup>144</sup> Virginia's custody statutes are clear that only judges have the authority to make such a best interest determination.<sup>145</sup> Therefore, when a judge delegates any decision regarding best interests, it violates the strict letter of the law.

### D. Therapist Perspective

Lastly, it is important to note, though beyond the scope of this article, that court-involved therapists universally agree that those therapists should *not* be making judicial decisions.<sup>146</sup> There are entire peer-reviewed journal volumes in the discipline of child custody dedicated to helping therapeutic professionals navigate court appointments in child custody cases.<sup>147</sup> Although viewpoints vary on the precise boundaries, the most salient theme is that therapists *must* leave best interest judgments to judges and the judicial process.<sup>148</sup> Doing otherwise can actually run afoul of professional guidelines and get the therapist into trouble.

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only when all other efforts to get the other party to comply with the order have been exhausted. JDR and circuit court judges are adverse to hearing show cause motions, but clerks' offices must allow parties to file if any aspect of a custody order is violated. See VA. CODE ANN. § 16.1-278.16 (Repl. Vol. 2015).

144. See *id.* § 20-124.3 (Repl. Vol. 2016 & Supp. 2017).

145. See *id.* § 20-124.2 (Repl. Vol. 2016 & Supp. 2017).

A. In any case in which custody or visitation of minor children is at issue, whether in a circuit or district court, the court shall provide prompt adjudication, upon due consideration of all the facts, of custody and visitation arrangements, including support and maintenance for the children, prior to other considerations arising in the matter . . . . The procedures for determining custody and visitation arrangements shall insofar as practical, and consistent with the ends of justice, preserve the dignity and resources of family members . . . .

B. In determining custody, the court shall give primary consideration to the best interests of the child.

*Id.*

146. See, e.g., ASS'N OF FAMILY & CONCILIATION COURTS, GUIDELINES FOR COURT INVOLVED THERAPY 29 (2010) (recommending that court-involved therapists not offer opinions on "psycho-legal issues").

147. See Matthew J. Sullivan & Lyn R. Greenberg, *Introduction to the Special Issue on Court Involved Therapy*, 9 J. CHILD CUSTODY 1, 1 (2012).

148. See, e.g., Lyn R. Greenberg et al., *Keeping the Development Frame: Child-Centered Conjoint Therapy*, 9 J. CHILD CUSTODY 39, 47 (2012).

In an atmosphere of limited resources, it is often tempting to vest the therapist with the power to make recommendations on psycho-legal issues, such as the best schedule . . . . This can be fatal to the treatment process, and the therapist may be in jeopardy of licensing board actions and ethical complaints.<sup>149</sup>

The therapist should be “able to say, ‘[t]he judge decided; I’m just here to make it work.’”<sup>150</sup>

#### V. OTHER STATES

In addition to Virginia, eleven other appellate courts in New

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149. *Id.*

150. *Id.*



York,<sup>151</sup> Vermont,<sup>152</sup> North Dakota,<sup>153</sup> Florida,<sup>154</sup> Georgia,<sup>155</sup> Maryland,<sup>156</sup> California,<sup>157</sup> Nebraska,<sup>158</sup> North Carolina,<sup>159</sup> South Carolina,<sup>160</sup> and Colorado<sup>161</sup> have said that delegation of judicial authority in custody cases is unlawful. By the author's count of the cases

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151. See *In re Alisia M.* 973 N.Y.S.2d 831, 833 (N.Y. App. Div. 2013) (finding that there was an improper delegation of the court's authority because the order made the recommendation of a therapist a prerequisite for any visitation); *Sloand v. Sloand*, 16 N.Y.S.2d 603, 606 (N.Y. App. Div. 2006) (holding that the Family Court improperly delegated the court's authority to the child's therapist "regarding the expansion or reduction of the mother's access to the child"); *Henderson v. Henderson*, 779 N.Y.S.2d 282, 283 (N.Y. App. Div. 2004) (finding that the Family Court "impermissibly delegated its authority to determine the best interests of the child" when "directing that the daughter's mental health counselor structure the terms of the father's visitation"); *Fisk v. Fisk*, 710 N.Y.S.2d 473, 475-76 (N.Y. App. Div. 2000) (finding that the Family Court "improperly delegated its authority to a counselor to determine the best interests of the children in the structure of supervised visitation"); *Millett v. Millett*, 703 N.Y.S.2d 596, 598 (2000) (finding that although the Family Court's determination that visitation be supervised was also supported by the record, the court impermissibly delegated its authority by ordering the therapist to arrange visitation); *Gadomski v. Gadomski*, 681 N.Y.S.2d 374 (N.Y. App. Div. 1998) (finding it was improper delegation for the family counselor to determine what length of visitation would be in the best interest of the children).

152. See *DeSantis v. Pegues*, 35 A.3d 152, 160 (Vt. 2011) (finding that the court cannot precondition the father's future visitation on working collaboratively with a therapist); *Fenoff v. Fenoff*, 578 A.2d 119, 121 (Vt. 1990) (implying that delegating complete authority to the counselor to determine if visitation should occur at all is an improper delegation of judicial authority, but holding that did not occur in this case when the court allowed the counselor to choose the start date for visitation); *Cameron v. Cameron*, 398 A.2d 294, 296 (Vt. 1979) (holding that the court did a sufficient independent evaluation of the facts without improperly delegating authority to the Department of Social Welfare to find facts and make decisions).

153. See *Paulson v. Paulson*, 694 N.W.2d 681, 691 (N.D. 2005) ("[T]he trial court impermissibly delegated its authority, under the circumstances, by allowing [the therapist] to set the visitation schedule, carte blanche.").

154. See *Larocka v. Larocka*, 43 So. 3d 911, 913 (Fla. Dist. Ct. App. 2010) (reversing "the part of the final judgment that delegates that responsibility to a counselor and remand[ing] this case to the trial court so it can comply with its judicial responsibility [to establish a visitation schedule]"); *Roski v. Roski*, 730 So. 2d 413, 414 (Fla. Dist. Ct. App. 1999) (cautioning "trial judges against abdicating their decision-making responsibility to a guardian ad litem"); *Scaringe v. Herrick*, 711 So. 2d 204, 205 (Fla. Dist. Ct. App. 1998) (Blue, J., concurring) (encouraging trial judges "remain vigilant that they not abdicate their fact-finding and decisional responsibilities to a guardian ad litem").

155. See *Wrightson v. Wrightson*, 467 S.E.2d 578, 581 (Ga. 1996) (holding that the trial court's responsibility for making the custody and visitation decision "cannot be delegated to another, no matter the degree of the delegatee's expertise or familiarity with the case").

156. See *In re Mark M.*, 782 A.2d 332, 342 (Md. Ct. Spec. App. 2001) ("[T]he trial court's order constituted an improper delegation of judicial authority to the child's therapist and thus was legally incorrect."); *Shapiro v. Shapiro*, 458 A.2d 1257, 1261 (Md. Ct. Spec. App. 1983) (finding that the "denial of visitation until such visitation is recommended by the child's physician and then only upon such terms, guidelines and at such places as the physician may recommend constitutes an improper delegation of judicial responsibility to the physician").

157. *In re Donovan J.*, 68 Cal. Rptr. 2d 714, 716 (Cal. Ct. App. 1997) (concluding that

just discussed, there are at least twenty-five that recognize as such. These state courts clearly state that delegation of judicial authority is either unconstitutional, contrary to state law, or both. Over and over again, the courts are clear. For example,

In its final order, Family Court appears to have improperly delegated to the child's therapist the court's authority regarding the expansion or reduction of the mother's access to the child. Any such modification which is not agreed to by the parties shall be made only by the court on the formal application of either parent or the Law Guardian. That aspect of Family Court's order should be reversed.<sup>162</sup>

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the juvenile court improperly delegated to a therapist the determination of whether visitation is appropriate); *De Guere v. Universal City Studios, Inc.*, 65 Cal. Rptr. 2d 438, 447 (Cal. Ct. App. 1997) ("The California Constitution, article VI, section 22, prohibits the delegation of judicial power except for the performance of subordinate judicial duties."); *In re Moriah T.*, 28 Cal. Rptr. 2d 705, 706–07 (Cal. Ct. App. 1994) (holding that a juvenile court may delegate to a county social worker the responsibility to manage details of visitation such as the time, place, and manner thereof, but it may not delegate absolute discretion to determine whether any visitation occurs); *In re Jennifer G.*, 270 Cal. Rptr. 326, 326–27 (Cal. Ct. App. 1990) (finding that "the trial court improperly delegated the power to determine visitation" to a social services department); *In re Marriage of Matthews*, 161 Cal. Rptr. 879, 882 (Cal. Ct. App. 1980) ("[T]hat provision authorizing [the family counselor] to alter the visitation schedule in any way she deemed reasonable and necessary constituted an improper delegation of judicial power to a subordinate court attach e.").

158. *Deacon v. Deacon*, 297 N.W.2d 757, 762 (Neb. 1980) ("[T]hat portion of the trial court's order placing in a psychologist the authority to effectively determine visitation, and to control the extent and time of such visitation, is not the intent of the law and is an unlawful delegation of the trial court's duty. Such delegation could result in the denial of proper visitation rights of the noncustodial parent.").

159. *Peters v. Pennington*, 707 S.E.2d 724, 738 (N.C. 2011) (acknowledging that trial courts "should hesitate in delegating decision-making authority" but affirming the trial court's decision to vest neutral third parties with such authority).

160. *Stefan v. Stefan*, 465 S.E.2d 734, 736 (S.C. Ct. App. 1995) (reversing the "portion of the family court order which required the husband to attend sessions with a parenting professional and to undergo additional referrals in the parenting professional's discretion").

161. *In re Marriage of McNamara*, 962 P.2d 330, 334–35 (Colo. App. 1998) (finding that it is an improper delegation of authority for the court to grant an appointed GAL the power to modify the parenting time schedule without having the parties return to court); *In re Marriage of Elmer*, 936 P.2d 617, 620 (Colo. App. 1997) (stating that the trial court's order temporarily postponing the father's rights to overnight visitation of his daughter on advice of the child's psychiatrist improperly delegated the court's authority).

162. *Sloand v. Sloand*, 816 N.Y.S.2d 603, 606 (N.Y. App. Div. 2006); *see, e.g., In re Donovan J.*, 68 Cal. Reprtr. 2d 714, 716 (Cal. Ct. App. 1997) ("Under this order, the therapists, not the court, have unlimited discretion to decide whether visitation is appropriate. That is an improper delegation of judicial power."); *In re marriage of McNamara*, 962 P.2d 220, 334–35 (Colo. App. 1998) ("[T]he statutory scheme requires the trial court itself to make decisions regarding parenting time, and *it may not delegate this decisional function to third parties*. Hence, we conclude that this delegation of authority [to a GAL] to modify parenting time was error.") (emphasis added); *In re marriage of Elmer*, 936 P.2d 617, 621 (Colo. App. 1997) ("We know of no authority that would authorize the trial court to defer indefinitely the decision for exercise of overnight visitation and to delegate that decision to the child's psychiatrist."); *Roski v. Roski*, 730 So.2d 413, 414 (Fla. Dist. Ct. App. 1999) ("[W]e have previously cautioned trial judges against abdicating their decision-making responsibility to a guardian

It is notable that many of these states have banned delegation for years—some cases go back as far as 1980.<sup>163</sup> Moreover, these high courts repeatedly rule as such *whenever* a trial judge tries to delegate authority and the order makes its way to appellate level.<sup>164</sup>

Why has Virginia been behind the ball? As discussed throughout this article, Virginia has a trial system for custody cases that makes it uniquely susceptible to cultural practices that never get appealed. In other words, it is easy for trial court judges to keep ordering something over and over again, with or without even realizing it is not lawful. This is not to lay blame on trial court judges per se; as discussed, they are faced with some of the most difficult decisions they will ever make in private custody cases, and they have few reliable sources of information. So even if a judge has a suspicion that she may be over-delegating, in the absence of clear direction from the court of appeals, it is understandable why she tends to do so.

Moreover, JDR judges should not be wholly blamed for this phenomenon because it is a product of Virginia's bizarre court system. As discussed, Virginia's JDR courts are not courts of record.<sup>165</sup> Custody litigants are statutorily entitled to two trials.<sup>166</sup> Parents who are *not* married must go to JDR court first to adjudicate their custody disputes.<sup>167</sup> Then, they can appeal them de novo to circuit court.<sup>168</sup> Parents who are married can file their custody petitions concurrently with their divorce petitions,<sup>169</sup> but in reality, most

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ad litem . . . . We strongly encourage trial judges to jealously guard the court's authority in such matters."); *Gadomski v. Gadomski*, 681 N.Y.S.2d 374, 376 (N.Y. App. Div. 1998) ("It is now well settled that . . . a court [cannot] delegate (as was done here) to a mental health professional its authority to resolve these issues in the best interests of the children.").

163. *See, e.g.*, *In re Marriage of Matthews*, 161 Cal. Rptr. 879, 882 (Cal. Ct. App. 1980) (holding a court order delegating authority to unilaterally modify a visitation schedule was improper).

164. Based on the author's experience.

165. VA. CODE ANN. §§ 16.1-226 to -361 (Repl. Vol. 2015 & Cum. Supp. 2017) (establishing the JDR courts as "courts not of record").

166. *See id.* § 16.1-241(A) (Cum. Supp. 2017) (declaring that JDR courts have original jurisdiction over custody matters); *id.* § 16.1-296(A) (Repl. Vol. 2015 & Cum. Supp. 2017) (explaining that after JDR court the parties may appeal the custody order).

167. *See id.* § 16.1-241 (Cum. Supp. 2017) (establishing exclusive original jurisdiction for JDR courts over issues relating to the custody of children).

168. *Id.* § 16.1-296(A) (Repl. Vol. 2015 & Cum. Supp. 2017).

169. *Id.* § 20-107.2 (Repl. Vol. 2016 & Supp. 2017).

parents begin in JDR court because of the one-year separation period that is required before filing for a divorce.<sup>170</sup> So, almost all custody litigants have to go through *two* expensive and emotionally draining steps before review on matters of law.

Other states have courts “not of record.”<sup>171</sup> Across the country, as in Virginia, these courts proceed according to statutory jurisdiction and are considered inferior courts.<sup>172</sup> But other states’ inferior courts do *not* hear matters regarding child custody. Everywhere else in this country, private child custody matters are given one trial in a court of record<sup>173</sup> whose judgments are “as conclusive on all the world as the judgment of [the Supreme Court] would be. It is as conclusive on [the Supreme Court] as it is on other courts. It puts an end to inquiry concerning the fact by deciding it.”<sup>174</sup> This makes it far more likely that questionable trial court orders will be reviewed as matters of law in other states.

### CONCLUSION

We are at a watershed moment for custody law in Virginia. We can go in the direction of other states and begin chipping away at the inveterate, but unlawful, practice of delegating judicial authority in private child custody cases. Or not. Delegation orders will most certainly continue unless family lawyers in Virginia make a concerted effort to educate trial level judges. We lawyers must also be mindful of the concept of delegation when arguing for clients

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170. See *id.* § 20-91(A)(9) (Repl. Vol. 2016 & Supp. 2017).

171. See, e.g., N.Y. JUD. LAW § 2 (Consol. 2017).

172. Compare *Walker v. Dep’t Pub. Welfare*, 223 Va. 557, 562, 290 S.E.2d 887, 890 (1982) (“The jurisdiction, practice, and procedure of the juvenile and domestic relations district courts are entirely statutory . . .”), with *People ex rel. Walsh v. Ashworth*, 56 N.Y.S.2d 791, 793 (N.Y. Sup. Ct. 1945) (“Inferior courts not of record do not possess [a particular] power, unless conferred by statute . . . ; inferior courts are established by the Legislature and are essentially statutory courts and hence as a general rule possess and may exercise only such powers as are expressly conferred upon them.”) (citation omitted); *Nobles v. Piollet*, 16 Pa. Super. 386, 389 (1901) (“[W]e think it safe to assume that the framers of the constitution had in contemplation the courts not of record directed to be established in Philadelphia and similar inferior courts not of record that might be established under the power reserved to the legislature . . .”).

173. In conducting research for this article, the author called at least one court in every single state in the country and asked how their custody matters were heard. Although some courts hear custody matters at a district level, no states have *de novo* trials for every single custody case by right, as in Virginia.

174. *Schneekloth v. Bustamonte*, 412 U.S. 218, 254 (1973) (Powell, J., concurring) (quoting *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202–03 (1830)).

2017]

CHILD CUSTODY

209

and reviewing orders. Even if litigants are rarely able to file appeals at the appellate or even de novo level, the number of delegation orders issued by the trial courts can gradually decrease. But this process is in the hands of a relatively small community of domestic relations lawyers and GALs who toil in the JDR and circuit courthouses of Virginia every day.