

**THIRD PARTY**  
**CUSTODY IN VIRGINIA**

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**I. Introduction**

Given the demographics regarding non-nuclear family structures in America over the last thirty to forty years, it is not surprising that we have many cases in Virginia involving custody claims by nonparents. This article addresses the law in Virginia, statutory and case law, dealing with nonparent custody claims. This article does not address social services cases.

**II. Statutory Basis**

The statutory basis for third party custody is set forth at Code of Virginia Section 20-124.2.B. (“The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest.”)

“‘Person with a legitimate interest’ shall be broadly construed and includes, but is not limited to grandparents, stepparents, former stepparents, blood relatives and family members provided any such party has intervened in the suit or is otherwise properly before the court. The term shall be broadly construed to accommodate the best interest of the child....” Code of Virginia Section 20-124.1.

**III. *Bailes v. Sours*, 231 Va. 96, 340 S.E.2d 824 (1986)**

In *Bailes*, the Virginia Supreme Court established the parental presumption standard. The child was born in May 1972, the parents separated in June 1973, and the child lived with his father. In February 1974, the trial court awarded custody to the father and the mother was

granted reasonable visitation rights. In October 1975, the father remarried and the boy lived with his father and stepmother until his father's death in 1983. The boy thereafter resided with his stepmother. The mother would visit her son but he expressed reservations, and she said that she would not force the visits on him. He also experienced bedwetting and psychological problems in connection with the visits. The mother visited her son only eight or ten times in a nine-year period. In the meantime, the boy continued to have a close and loving relationship with his stepmother. The mother sought custody. The trial court found both women to be fit and proper persons to have custody. The mother asked for the parental presumption. The trial court found the presumption rebutted by clear, cogent and convincing evidence that the best interests of the boy demanded that he remain in the stepmother's custody.

The Virginia Supreme Court agreed. Although the presumption favoring a parent over a nonparent is a strong one, it is rebutted when certain factors are established by clear and convincing evidence. These factors are (1) parental unfitness, (2) a previous order of divestiture, (3) voluntary relinquishment, (4) abandonment, and (5) special facts and circumstances constituting an extraordinary reason for taking a child from its parent. Here the presence of extraordinary circumstances rebutted the presumption. The mother was virtually a stranger to her son. The boy had known no other home than with the stepmother. The boy, twelve years old at the time of trial, expressed a strong desire to stay with the stepmother. The psychologist concluded that to transfer the boy's custody would have a significant, harmful, long-term impact on him.

#### **IV. Other Reported Decisions**

- a. *Ferris v. Underwood*, 3 Va. App. 25, 348 S.E.2d 18 (1986).

In *Ferris*, the parents were married in March 1979 and a daughter was born in March 1981. In March 1982, the mother and child left the marital home. In January 1983, custody was granted to the paternal grandmother. The court order cited the youthfulness of the parents as a reason to grant custody to the grandmother, and provided that "neither parent has waived, abandoned, or in any other manner relinquished the relationship of the natural child to its natural parent." The parents were divorced in 1985. The mother remarried and petitioned for custody, which was granted. The grandmother appealed. The grandmother, in her brief, contended that the

issue was whether the best interests of the child would be served by the transfer of custody to the mother. She maintained that the trial court applied the wrong test in reaching its determination of the best interests of the child.

The Virginia Court of Appeals disagreed and affirmed the trial court ruling. It noted that the Virginia Supreme Court has recognized that the law presumes that the child's best interests will be served when in the custody of his or her parent unless that presumption is rebutted by clear and convincing evidence of certain facts. The grandmother argued that the January 1983 order constituted divestiture. The court disagreed. The juvenile court order of January 1983 preserved the parental presumption for future hearings on the merits as to the custody of the child. Both the mother and the grandmother were fit. The grandmother did not rebut the parental presumption by clear and convincing evidence.

b. *Smith v. Pond*, 5 Va. App. 161, 360 S.E.2d 885 (1987).

In this case the Virginia Court of Appeals reversed the trial court's custody award to a third party. In doing so, the appellate court noted that, if the presumption favoring parental custody is rebutted, as it was in this case (based upon voluntary relinquishment), the best interests of the child still must be considered.

The trial court erred in holding that a child's medical problems alone, which consisted of a cleft palate with resulting nutritional problems, skin disease, and eye problems, constituted special facts and circumstances sufficient to take the child from her parents. While those conditions constituted extraordinary circumstances that would justify taking a child from his or her natural parents if the natural parents were unwilling or unable to provide adequate medical care, or refused, neglected or failed to do so, the record established that the parents were aware and concerned about the child's medical problems, and that they had taken actions to see that the medical needs were met.

c. *Mason v. Moon*, 9 Va. App. 217; 385 S.E.2d 242 (1989).

In *Mason*, the parents were married in 1981 and their daughter was born in 1984. The daughter was mainly cared for by her paternal grandmother while her parents worked. The parties separated in July 1986 and entered into a separation agreement that granted custody to the mother. Several weeks later the parties signed an amended agreement transferring custody to the

father. When delivering the daughter to the mother for visitation, the father assaulted the mother's boyfriend and the boyfriend killed the father. The boyfriend was ultimately acquitted based on self-defense. Thirteen days later the mother and the boyfriend wed. The mother and the paternal grandmother both filed petitions for custody, and the grandmother was granted temporary custody. The evidence indicated that the mother was a suitable parent capable of rearing her daughter, and that her home provided an adequate environment in which to raise a child. There was no psychological evaluation of the child to determine what effect living in the home of her father's killer might have on her. The trial court awarded custody to the grandmother.

The Court of Appeals reversed, awarding custody to the mother. In custody disputes between a parent and a nonparent, the law presumes the best interest of the child will be served by an award of custody to the parent. Based on this presumption, "the rights of the [natural] parents may not be lightly severed but are to be respected if at all consonant with the best interest of the child." *Wilkerson v. Wilkerson*, 214 Va. 395, 397, 200 S.E.2d 581, 583 (1973). To overcome the strong presumption favoring a parent, the nonparent must adduce by clear and convincing evidence that one of the *Bailes* factors applies. The grandmother failed to produce clear and convincing evidence of either a voluntary relinquishment by the mother, or circumstances constituting an extraordinary reason to rebut the presumption in favor of the mother having custody. The trial court's concern about possible adverse psychological effects upon the child as a result of living with a stepfather who killed her father was not clear and convincing evidence sufficient to deprive the mother of the parental presumption.

d. *Walker v. Fagg*, 11 Va. App. 581; 400 S.E.2d 208 (1991).

The father did not voluntarily relinquish custody and thereby relinquish his natural parent presumption by filing petitions asking the court to award temporary custody of his children to his mother. In filing the petitions, the father asked the trial court to approve terminable, temporary custody agreements that the father had made with his mother in anticipation of his prosecution and incarceration for the death of his wife. Requesting the court to approve the temporary agreement constituted neither a divestiture of his rights as a natural parent nor an approval of his relinquishment of those rights.

The trial court properly concluded that the father was unfit for purposes of rebutting his natural parent presumption, based on the evidence that the father was under indictment for the murder of his wife, the father's own admission that he had "lived with the devil for 16 years," and the father's history of alcohol abuse, spousal abuse, unemployment and general family neglect. Upon the rebuttal of the parental presumption, the father stood on equal footing with the grandparents, with no presumption in favor of either, regarding the determination of the best interests of the children. The trial court did not err in awarding temporary custody to the father, with temporary physical custody to the father's mother, subject to supervision by the local Department of Social Services, based on evidence that the father had experienced a complete turnaround after the bringing of criminal charges against him in the death of his wife, and testimony by expert witnesses that the children were supportive of their father and that they felt that they were playing an important role in the family and in their father's rehabilitation.

e. *Elder v. Evans*, 16 Va. App. 60, 427 S.E.2d 745 (1993).

An award of custody to one parent in a contest between the parents does not, in the absence of some other intervening custody order, eliminate the natural parent presumption of the noncustodial parent in a subsequent custody dispute between the noncustodial parent and a third party. As between two parents of a child, a decree granting one of them custody is not the same as an adjudication that the parent not receiving custody is unfit, nor does such an award amount to a severance of the parent/child relationship.

The trial court erred in awarding custody of a child to a third party without applying the parental presumption. Although the court had previously awarded custody of the child to the mother, and the mother had then left the child in the third party's care, the father was still entitled to the presumption accorded parents over nonparents in the subsequent dispute with the third party.

"This case fits within the established rule that 'the parent prevails unless the non-parent bears the burden of proving, by clear and convincing evidence, both that the parent is unfit and that the best interest of the child will be promoted by granting custody to the non-parent.' *Rocka*, 215 Va. At 518, 211 S.E.2d at 78. '[A] fit parent with a suitable home has a right to the custody of his child superior to the right of others.' *Judd*, 195 Va. at 995-96, 81 S.E.2d at 436."

f. *Bottoms v. Bottoms*, 249 Va. 410, 457 S.E.2d 102 (1995).

In this case involving a lesbian mother versus a grandmother, the Supreme Court of Virginia reversed the Court of Appeals and upheld the trial court's award of custody to the grandmother, based upon the mother's unfitness. The Supreme Court listed the evidence of the mother's unfitness, including specific examples of irresponsibility, neglect, violence, and immoral behavior. The guardian *ad litem's* recommendation was also cited. Though a lesbian mother is not *per se* an unfit mother, conduct inherent in lesbianism is a Class 6 felony and that conduct is an important consideration in determining custody.

g. *Brown v. Burch*, 30 Va. App. 670, 519 S.E.2d 403 (1999).

In *Brown*, the mother and the stepfather were married in 1989 when the boy was three-years-old. The stepfather testified that he had frequent contact with the boy from the time the boy was one, and described himself as the primary caretaker. In January 1992 the mother moved in with a man that the father and stepfather believed was abusing the child. The father and stepfather sought permanent joint custody, which was awarded in August 1992. The mother filed an appeal but sought no further action until November 1996. The evidence at trial was that the boy excelled in academics, music and athletics, and was a participant in band, scouting and organized sports. A psychologist testified that the boy was stable, reliable, hardworking, and well-adjusted. The boy testified he wanted everything to stay same. The trial court found the boy to be extremely well-cared-for and granted joint custody to the father and stepfather.

The Court of Appeals noted that the stepfather, a nonparent, had primary custody, and, as a nonparent, the stepfather had the burden of establishing by clear and convincing evidence that the mother should be denied custody. He met that burden. The boy had been in the stepfather's custody for seven years. The boy was thriving and his relationship with his father had flourished. The stepfather did not interfere with the mother's visitation. The record contained clear and convincing evidence of special and unique circumstances that justified the trial court denying the mother custody. The Court of Appeals held that the trial court did not err when it found that the boy's best interests were served by an award of joint custody to the stepfather and the father, with the stepfather retaining physical custody.

- h. *Carter v. Carter*, 35 Va. App. 466, 546 S.E.2d 220 (2001).

Once an adoption is final, there is no distinction in law between the biological parent and the adoptive parent. The presumption ordinarily available to a biological parent in a custody dispute against a third party does not apply when the third party has legally adopted the child and become a parent.

- i. *Albert v. Ramirez*, 45 Va. App. 799, 613 S.E.2d 865 (2005).

In *Albert*, the child's father died before she was born. The parties married in June 1999 when the child was three-years-old. The stepfather never adopted the child, but he was the only father figure she ever had. The couple later had their own child before separating in June 2001. The trial court entered a consent decree whereby the parties shared joint legal and physical custody of both children. In May 2003 the mother filed a petition to modify custody, visitation and support. The juvenile court ruling was appealed to the circuit court, and the circuit court found the stepfather to be a nonparent and ruled that in a dispute between a parent and stepparent where there has been no showing by clear and convincing evidence that actual harm would result to the child by reason of lack of visitation, the mother's request for sole custody and no visitation should be granted.

The Court of Appeals held that the trial court erred in applying the wrong standard, and it erred in entering an order terminating the stepfather's custody and visitation rights based on a finding that he had not proven by clear and convincing evidence that harm would occur if visitation were to end. Since there was an existing order, the trial court should have determined whether a material change of circumstances had occurred warranting a change in the custody and visitation arrangement.

- j. *Denise v. Tencer*, 46 Va. App. 372; 617 S.E.2d 413 (2005).

In *Denise*, the father was never married to the mother who died of cancer four years after the birth of the child. Before her death, the mother moved for termination of the father's parental rights. A South Carolina consent order gave the mother custody until her death, awarded the father liberal visitation rights, and provided that upon the mother's death joint custody was to be assumed by grandfather and father, with the grandfather having primary physical custody, with

the goal being to eventually unite the father and child. The termination action was dismissed with prejudice. Subsequently, a second consent order was entered that provided for the parties to continue joint legal custody of the child, and awarded physical custody to the grandfather. The third proceeding was not resolved by consent. The trial court, applying a best interests test, awarded physical custody to the father, and awarded joint legal custody to the father and grandfather. Both parties appealed.

The Court of Appeals affirmed the trial court. It held that *Troxel*, *Williams*, and *Griffin* did not support the father's argument because those cases involved situations in which a nonparent with no custodial rights requested visitation against the wishes of parents whose constitutional right to child-rearing autonomy had not been altered. In this case, the father had twice consented to the grandfather sharing joint legal custody and having primary physical custody. *Troxel* did not define the burden of proof to be applied, nor the factors to be established and considered when the court is faced with a custody dispute between a grandparent and a parent, both of whom have custodial rights. The trial court properly applied the best interests test to determine the child's custody in this case.

## **V. Unpublished Decisions**

a. *Bennett v. Bennett-Smith*, 2008 Va. App. LEXIS 395; Va. Ct. of Appeals Rec. No. 1852-07-1 (August 12, 2008).

The mother did not intend a permanent relinquishment of custody by petitioning a court for Letters of Co-Guardianship pursuant to an agreement with her parents that the parents would care for the daughter while the mother was at boot camp. When the mother returned from boot camp, the parents executed a Consent of Termination of Co-Guardianship, and had the court enter an order terminating the co-guardianship and reuniting the daughter with her mother. The grandparents later sought custody when the mother married and exposed her daughter to a registered sex offender. The trial court did not err in holding that the grandparents had not proven that the mother was unfit, nor that she had voluntarily relinquished custody of her daughter. Accordingly, the parental presumption was not rebutted.



b. *Florio v. Clark*, 2007 VA. App. LEXIS 400; Va. Ct. of Appeals Rec. No. 2633-04-1 (October 30, 2007).

The trial court did not err in finding clear and convincing evidence of special and unique circumstances rebutting the presumption in favor of the father and awarding custody to the child's maternal aunt and uncle based on the following evidence: the father had failed to document his employment or verify the stability and dependability of his income; he had no home of his own; he previously did not support the child financially and had only limited contact with the child; he was not involved in the child's schooling, activities, or general upbringing; and he had shown no ability to deal with the child's emotional, educational, and health needs. (*aff'd en banc*, 52 Va. App. 18 (2008); *aff'd*, 277 Va. 566 (2009)).

c. *Micus v. Mitchell*, 2006 Va. App. LEXIS 81; Va. Ct. of Appeals, Rec. No. 0964-05-2 (March 7, 2006).

The trial court awarded custody to the grandmother, over the father's objection, applying the actual harm standard applicable in third party visitation cases. The appellate court affirmed, holding that there were special facts and circumstances constituting an extraordinary reason for taking a child from her parent pursuant to *Bailes*. The evidence established that the father had acted violently toward the grandmother, was unable to accurately perceive reality, and was incapable of putting the child's needs before his own.

The father did not lose his parental presumption when temporary custody was awarded to the grandmother in an *ex parte* proceeding.

d. *South v. South*, 2005 Va. App. LEXIS 96; Va. Ct. of Appeals Rec. No. 0700-04-2 (March 8, 2005).

The trial court's failure to apply the correct legal standard in ruling on a mother's motion to strike the evidence presented by the grandparents was harmless error. In order to survive the motion to strike, the grandparents had to establish a *prima facie* case that the child might suffer actual harm if custody was granted to the mother. The trial court incorrectly sustained the motion based on the grandparents' failure to prove either that custody with them would be in the child's best interests, or that the mother was unfit. The Court of Appeals held that the

grandparents failed to make a *prima facie* case as they presented no evidence of any actual harm to the child if placed in the mother's custody.

e. *Long v. Holt-Tillman*, 2004 Va. App. LEXIS 239; Va. Ct. of Appeals Rec. No. 1434-03-3 (May 25, 2004).

The trial court did not err in holding that the parents had voluntarily relinquished custody of the child by entering into a consent order granting joint legal custody to the mother and the grandmother, but sole physical custody to the grandmother. The consent order was not merely *pro forma*, but was an adjudication on the merits by the court in a proceeding where both parties were contesting custody. The parents were not entitled to the natural parent presumption, but instead had the burden to prove that circumstances had changed to such an extent that placing the child in their custody was in the child's best interests.

The trial court did not abuse its discretion by holding that, for the time being, custody should remain with the child's grandmother rather than with the parents. Despite the fact that the parents had made concerted efforts to stabilize and improve their own lives in an attempt to provide a suitable home for the child, the child had known no other home than the grandmother's, and the child enjoyed a strong relationship and a stable living environment with the grandmother.

f. *Cooner v. Cooner*, 2004 Va. App. LEXIS 179; Va. Ct. of Appeals, Rec. No. 1570-03-4 (April 20, 2004).

The trial court did not err in granting custody of four children, including two of which were the mother's by a previous marriage that had not been adopted by the stepfather, to the stepfather. The court found that the mother's physical and emotional abuse of the children were special facts and circumstances constituting extraordinary reasons to overcome the natural parent presumption, and that the abuse itself, the preferences of the children, and the fact that the children had been thriving in the stepfather's sole custody for over a year evidenced that the interests of the children were best served by remaining in the stepfather's custody.

g. *Ramsey v. Clements*, 2003 Va. App. LEXIS 409; Va. Ct. of Appeals, Rec. No. 2988-02-3 (July 22, 2003).

In this case involving the mother versus the father, the trial court did not err in refusing to apply the law applicable in custody and visitation disputes between parents and third parties, despite the court's finding that that the child was spending over half of her time with the grandparents and was being primarily raised by the grandparents. Legal and physical custody had remained with the father since he and the mother entered into a separation agreement. The grandparents had never been awarded custody or visitation by a court, and were not parties to this action.

h. *Switzer v. Smith*, 2001 Va. App. LEXIS 454; Va. Ct. of Appeals, Rec. No. 0779-00-3 (July 31, 2001).

The trial court did not err in determining that a couple unrelated to the child had a "cognizable and reasonable, legitimate interest" pursuant to Va. Code §20-124.1. The child's parents separated after the mother suffered significant physical abuse at the hands of the father, and the mother subsequently asked the couple to care for the child. At the time of the hearing in the trial court, the child had been living with the couple for almost two years and had been thriving under the couple's care. The couple had a close relationship with the child and a reasonable interest in maintaining that relationship.

As a matter of first impression in Virginia, the Court of Appeals held that all non-parents, whether relatives or not, come before the court equally in custody cases. The grandparents had argued that they should be favored by law over the non-relative couple that was granted custody.

i. *Hurren v. Epperson*, 1999 Va. App. LEXIS 331; Va. Ct. of Appeals, Rec. No. 2167-98-3 (June 8, 1999).

The trial court erred in holding that, rather than creating a presumption in favor of a parent over a nonparent, the law establishes an "inference that the...parents come first...in so far as...custody is concerned." The case was remanded for review of the evidence under the proper legal standard. The Court of Appeals set forth the applicable legal standard as follows.

In child custody matters, the best interests of the child are paramount. See *Bailes v. Sours*, 231 Va. 96, 99, 340 S.E.2d 824, 826 (1986). However, in custody disputes between a parent and a non-parent, the law presumes that awarding custody to the parent serves the best interests of the child. See *Bottoms*, 249 Va. at 413, 457 S.E.2d at 104; *Rocka v. Roanoke County Dept. of Welfare*, 215 Va. 515, 518, 211 S.E.2d 76, 78 (1975); *Elder v. Evans*, 16 Va. App. 60, 65, 427 S.E.2d 745, 747 (1993). The presumption in favor of the parents is ‘strong’ and ‘may not be lightly severed but [is] to be respected if at all consonant with the interest of the child.’ *Mason v. Mason*, 9 Va. App. 217, 220, 385 S.E.2d 242, 244 (1989); see *Bottoms*, 249 Va. at 413, 457 S.E.2d at 104.

A party may rebut the presumption in favor of the parent by establishing by clear and convincing evidence various circumstances including parental unfitness. See *Bailes*, 231 Va. at 100, 340 S.E.2d at 827. If the non-parent rebuts the presumption favoring parental custody, the parent then bears the burden of showing that the child’s best interest will be served nevertheless, by the child’s custody being awarded to the parent. See *Mason*, 9 Va. App. at 220-21, 385 S.E.2d at 244.

[A] finding that the parent is unfit is not sufficient to support an award of custody to the non-parent. The trial court must also determine that it would be in the best interest of the child to be in the custody of the non-parent. This follows from the unfortunate fact that the custody-seeking non-parent could be less fit for parenting than the unfit parent. See *Rocka*, 215 Va. at 518, 211 S.E.2d at 78 (stating that the parent prevails unless the non-parent proves *both* that the parent is unfit and that ‘the best interests of the child will be promoted by granting custody to the non-parent’).

j. *Carter v. Brown*, 1998 Va. App. LEXIS 536; Va. Ct. of Appeals, Rec. No. 3078-97-4 (October 13, 1998).

The trial court did not err in holding that the child’s mother was not clothed with the parental presumption generally accorded parents in custody disputes with nonparents, given the fact that the court had previously divested the mother of custody in favor of the child’s paternal grandmother. The presumption favoring a parent over a nonparent is rebuttable if the non-parent adduces clear and convincing evidence that a court has previously granted an order of divestiture, (*citing Smith v. Pond*, 5 Va. App. 161 (1987)). Due to the prior divestiture, the mother had the burden of proving that circumstances had so changed since the divestiture that the child’s best interests would be served by a transfer of custody back to her.

k. *Wadford v. Wadford and Redford*, 1998 Va. App. LEXIS 342; Va. Ct. of Appeals, Rec. No. 3011-97-2 (June 16, 1998).

Although the trial judge erred in refusing to grant the child's father the parental presumption in a dispute between the father and the former stepfather, the error was harmless as to the former stepfather as it actually decreased the former stepfather's burden and required that he only prove custody with him would be in the child's best interests. A prior order granting the stepfather custody and the mother visitation was not an order of divestiture with regard to the mother.

l. *King v. King*, 1997 Va. App. LEXIS 596; Va. Ct. of Appeals, Rec. No. 2452-96-3 (October 7, 1997).

The trial court did not err in awarding custody of the child to the mother, over the objection of the child's grandparents, despite the fact that the mother's boyfriend killed the child's father. The grandparents failed to prove by clear and convincing evidence that contact between the child and his father's killer, by itself, constituted an extraordinary reason sufficient to overcome the natural parent presumption and to deny the mother custody of her son. The court declined to adopt a *per se* rule prohibiting a child from contact, visitation or custody with the killer of the child's parent.

m. *Boyce v. Bush*, 1997 Va. App. LEXIS 270; Va. Ct. of Appeal, Rec. No. 2044-96-3 (April 29, 1997).

The abandonment of a child without justification establishes parental unfitness. When a parent has voluntarily relinquished custody to a nonparent, the natural parent presumption is considered rebutted for purposes of future proceedings, and the general best interests of the child standard applies. Here the trial court did not err in granting custody of the child to the former stepparent, based upon clear and convincing evidence that doing so would be in the child's best interests.

n. *Weig v. Weig*, 1997 Va. App. LEXIS 46; Va. Ct. of Appeals, Rec. No. 0756-96-2 (February 4, 1997).

The trial court did not err in finding that the following constituted clear and convincing evidence of special facts and circumstances sufficient to overcome the natural parent presumption: the child's mother left the child in the stepfather's care upon leaving the marital residence; the child had resided with the stepfather for over two years; the stepfather had arranged for counseling for the child's emotional problems; the stepfather had provided all day-to-day care for the child since the mother left; the stepfather had exhibited excellent parenting skills; the mother had visited the child only twice per month since leaving the child with the stepfather; and the mother had provided little if any emotional and financial support for the child during this two year period.

o. *Bonds v. Anderson*, 1996 Va. App. LEXIS 504; Va. Ct. of Appeals, Rec. No. 2445-95-1 (July 16, 1996).

The trial court did not err in finding that, despite the grandmother's testimony that the father had violent tendencies, had personally and financially neglected the child since he and the child's mother stopped dating, and was cohabiting with a woman to whom he was not yet married, the grandmother did not provide sufficient evidence to overcome the father's natural parent presumption. The father's evidence showed that he had obtained employment in another state, was pursuing an education, and had been regularly involved in the child's care and support since the death of the child's mother.

p. *Roberts v. Williams*, 1996 Va. App. LEXIS 103; Va. Ct. of Appeals, Rec. No. 0303-95-3 (February 13, 1996).

The trial court did not err in finding that the mother's first cousin was unable to rebut the father's natural parent presumption, due to her failure to prove by clear and convincing evidence that the father had voluntarily relinquished custody of the child. The child's mother left the father, taking the child to live with the mother's first cousin while the mother stayed in a shelter. Although the cousin was awarded temporary custody of the child by the juvenile court, that ruling was made without notice to the father. When the father did learn of the temporary custody order, he made repeated attempts through the court system to gain custody of the child.

q. *Nicklaus v. Strong*, 1995 Va. App. LEXIS 787; Va. Ct. of Appeals, Rec. No. 0076-95-2 (October 31, 1995).

The trial court did not err in finding that the mother's abuse of the child, evidence suggesting that the mother's current husband had sexually and physically abused the child, the mother's and the current husband's failure to abide by court orders to obtain counseling, and the mother's voluntarily relinquishing of custody to her sister-in-law for one year constituted clear and convincing evidence of unfitness sufficient to overcome the natural parent presumption otherwise available to the child's mother. The trial court also relied upon evidence that, despite blood tests indicating otherwise, the former stepfather was listed as the father on the child's birth certificate, and was generally considered by both himself and by the child as the child's father.

r. *Terrell v. Terrell-Hackett*, 1993 Va. App. LEXIS 487, Va. Ct. of Appeals, Rec. No. 1701-92-3 (October 13, 1993).

The trial court erred in awarding legal custody of and restricted visitation with the child to the mother, on condition that the child continue to reside with the mother's foster parents. Although the imposition of special conditions on custody normally lies within the sound discretion of the trial court, this ruling essentially gave custody of the child to nonparents over the objection of the child's father, without first making explicit findings regarding father's fitness or special circumstances sufficient to rebut his natural parent presumption.

## **VI. Conclusion**

Parental rights have long been recognized by the common law and by constitutional law. In the twentieth century, persons with a legitimate interest (grandparents, stepparents, etc.) received legislative standing to seek custody of or visitation with children not their own under certain circumstances. As the conflicts between parents and third party claimants have played out over the last thirty years, Virginia has developed a detailed, but separate, jurisprudence regarding third party custody and third party visitation.