

THE ADVOCATE

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SPECIALIZING IN:

- Personal injury
- Medical malpractice
- Family law
- Wrongful death
- Nursing home litigation

TO MOVE OR NOT TO MOVE:

Legal issues for divorced parents in Virginia

In our mobile society, where divorce seems the rule rather than the exception, divorced or separated individuals often have a need or desire to move to another area. When children are involved, this can create problems with custody and visitation arrangements.

In recent years, there has been a great deal of litigation regarding the relocation of unwed or divorcing parents. Most of the reported cases involve a proposed relocation outside the Commonwealth of Virginia. Virginia's appellate courts have sketched out a framework for courts and parties to consider in this context. However, the general propositions outlined by these cases are equally applicable to relocations within Virginia.

Notice requirement

The law of Virginia states that courts entering custody or visitation orders must require a parent to give 30 days' advance notice of his or her intended change of address. The notice must be in writing, and made to the nonrelocating parent and the court. The only exception is when the court shows good cause to order otherwise. The law requires this notice so that the non-relocating parent may go to court to object to the relocation or to petition for a change either in the custody arrangement or visitation.

Substantive provisions

After working with and studying these cases, I offer the following observations about relocation issues.

- The ultimate determination will be based upon the child's best interests, taking into account the circumstances existing at the time of the decision.
- The burden of proof is on the parent intending to relocate.
- A court may consider a parent's benefit from the move only if the move also benefits the child.
- Courts are urged to consider the following factors:
 - The economic advantages and disadvantages of the two locations;
 - The educational and cultural opportunities

available at both locations;

—The availability of extended family members or support persons to assist the parent at both locations;

—The physical, emotional, and cognitive development of the child in his or her present location;

—The current involvement of the parents in the care, education, and development of the child; and

—The effect on visitation by the noncustodial parent if the relocation is allowed.

• On appeal, the decision of the trial court will be overturned only if it can be shown that the judge's decision was plainly wrong or an abuse of his or her discretion. In effect, this high standard on appeal means that—except in extraordinary circumstances—the trial judge will have the final say on relocation.

A trend?

Some court observers feel that language from recent reported cases documents a trend disfavoring relocation. However, the actual decisions don't give parents or their attorneys any clear guidance. What one judge considers sufficient evidence to grant relocation, another judge may consider insufficient. In the final analysis, each case will turn on its merits.

Relocation planning

A relocation petition's success or failure often hinges on the parent's advance planning. Even before the required 30 days' notice, a parent must develop support showing why the relocation is best for the child. A parent should gather evidence on the factors listed above to show, from the child's perspective, why the proposed location is more advantageous than the current location. It is also extremely important that the parent make every effort to minimize any adverse impact on the nonrelocating parent's visitation with the child.

The best legal thinking gets the best results

Americans and their courts

Most Americans recognize the value of preserving the right of each citizen to a trial in court by a jury of their peers. They also know that our civil justice system can force businesses or individuals behaving irresponsibly to compensate those they injure. Each of us is entitled to our own measure of justice.

But did you ever wonder just how and why many Americans actually go to court? *American Demographics* magazine reported a 1999 National Center for State Courts survey in which respondents gave answers.

- ★ 40 percent went to trials as observers just to see what happened.
- ★ 27.5 percent were called as defendants or plaintiffs in civil lawsuits.
- ★ 32 percent were summoned to traffic court.
- ★ 22 percent were embroiled in criminal proceedings.
- ★ 32 percent said they had not made an appearance in court in five years.
- ★ Only 17 percent could correctly name the Chief Justice of the United States Supreme Court.
- ★ **80 percent felt the U.S. justice system was the best in the world.**



Testing the waters— MTBE warning

Clean water is one of our nation's most precious commodities, and it is under siege by methyl tertiary butyl ether (MTBE).

MTBE is an organic chemical that manufacturers add to gasoline to improve air quality. Although it improves octane and reduces dangerous car exhaust emissions, MTBE has another effect which is harmful. It has been seeping into America's underground water supply since 1979, when it was first used.

The trouble with MTBE is that the U.S.

Environmental Protection Agency classified it as a potential human carcinogen, but is unsure about its potential health risk. What is certain is that MTBE at concentrations as low as five parts per billion gives pure water a turpentine taste and odor, rendering it unfit for consumption. Studies in Maine showed high concentrations of MTBE in groundwater where no gasoline infiltration was found.

MTBE class-action litigation to help protect and clean up groundwater supplies is under way in California, Connecticut, Florida, New Jersey, and New York. If research is valid, MTBE may be contaminating thousands of wells in the nation and compromising public and private water supplies. If you suspect contamination in your water supply, please contact an attorney as well as local environmental protection agencies.

Medical examinations...and privacy

Doctors and their patients have a set of expectations about medical examinations. Physicians expect their patients to arrive on time and to bring requested records or specimens. They want patients to honestly answer questions about symptoms or how they are feeling, and to understand all care, including diagnosis, treatment, and medical consequences. Doctors expect patients to comply with medical counsel or prescription directions. They also want patients to make arrangements to pay promptly.

Patients also have expectations. During routine or emergency medical examinations, they want to be treated with concern and respect, and obtain timely medical care in an appropriate medical setting. They expect their physician to provide all the care and treatment benefits that their medical coverage contract permits. They expect privacy during the examination and confidentiality regarding medical record access or release approval. They also want to be able to comment, complain, and seek redress when care doesn't meet their reasonable expectations.

Invasion of privacy

During an appointment, an oncologist permitted a pharmaceutical salesperson to sit in on the examination of a patient being treated for breast cancer. After the embarrassed patient sued for invasion of privacy, a state appellate court held that a salesperson's presence during the examination was sufficient to support a claim for intrusion based on a violation of a patient's right to, and expectation of, privacy.



All-terrain vehicle safety

Four-wheeled all-terrain vehicles (ATVs) are heavy, motorized machines designed for off-road riding. They are powerful and fun, but can be dangerous to children. According to the most recent U.S. Consumer Product Safety Commission report, which covers 1985 through 1997, 3,200 people died from ATV accidents and children under age 16 accounted for about 40 percent of the 887,000 ATV-related injuries.

Parents should encourage ATV safety by encouraging their children to

- ✓ observe manufacturer safety guides.
- ✓ take safety courses and wear helmets with face protection.
- ✓ ride only with adult supervision.
- ✓ obey traffic and safety laws and ordinances.
- ✓ never ride with passengers.
- ✓ drive at safe speeds and avoid taking risks.
- ✓ ride only during daylight and stay off paved roadways.

Parental supervision

On the basis of *negligent entrustment*, a state appeals court ruled that a parent who owned an ATV was liable for serious injuries sustained by a girl who rode as a passenger. The judge made this ruling even though the injured teenager was riding with a driver, unrelated to the owner, who had received permission to drive the ATV from the owner's son.

SAVE YOUR BREATH

Most of us usually take breathing for granted, since our lungs run on autopilot pretty much all the time. We notice breathing when we over-exert ourselves, breathe poor-quality air at work, or suffer colds or other illnesses that affect our ability to fill our lungs with air.

The American Lung Association (www.lungusa.org) and other organizations that promote lung health encourage us all to become aware of special issues and practice good respiratory health.

Asthma—Sufferers need to understand their chronic disease, know what triggers attacks, and take medications faithfully and carefully.

Tobacco use—Everyone needs to live as smoke-free a life as possible. Smokers can work at quitting smoking through counseling, nicotine replacement, and other therapies.

Environmental considerations—We can stay indoors on high ozone days; reduce radon gas, asbestos dust, and particulates in home and work air; and support local lung health associations.

Medical care—Cardiopulmonary assessments should always be included in doctors' checkups.

LUNG DISEASE

No matter how well we pay attention to our breathing and lung care, we can still run into difficulties. After a man passed away from lung cancer, his wife and estate won a medical negligence suit against a family doctor for failing to diagnose the cancer in a timely manner. The plaintiff's attorney alleged that the physician failed to examine suspicious x-rays or read radiology reports warning of possible cancers.

Insurance fraud and the elderly

We live in a time when our elderly are prime targets of fraud and misleading sales pitches. Criminal wrongdoers often victimize seniors by luring them into money-stealing scams involving charities, sweepstakes, home mortgages, investments, and many other dishonest schemes.

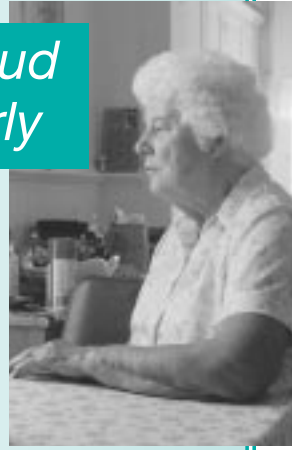
Increasingly, the elderly are falling for fraudulent insurance policy con games. One is surrendering years-old, high-cash-value whole life insurance policies for *low-value, final-expense life insurance* that allegedly pays higher benefits. Unscrupulous agents tell the elderly that this will reduce debts for their heirs. Known as "churning," this sales practice serves only to generate multiple commissions for agents and increase insurance coverage costs.

Another fraudulent practice is defrauding older policy owners with so-called viatical settlements. Originally created to help sick patients raise cash for medical and other expenses, viatical settlements let a third party purchase an insurance policy from someone who is terminally ill and then collect the death benefits at their death. Full of scam potential, viaticals rank among the top ten frauds, according to The North American Securities Administrators Association.

A third scam is sale of insurance to the elderly that purports to have fixed premiums, but in actuality rapidly rises in cost over time. Cagy agents lowball initial premiums, but as premiums rise, so do policy cancellations. Agents collect commissions and companies benefit from canceled policies.

Advocates for the elderly

State insurance commissions and consumer advocates are fighting fraud through monitoring and education. In many cases, trial lawyers bring class- and individual-action lawsuits on behalf of seniors and their families to seek compensation for fraudulent practices. If you suspect an elderly relative or friend has suffered losses due to suspicious insurance coverages, please contact legal counsel.



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Police questioning Q & A

Q: Must people stopped by police show personal identification?

A: *Police officers usually have the right to request identification documents, and it's always in your best interests to provide identification when you are asked.*

Q: What's the Miranda Warning?

A: *The Miranda Warning is a constitutional protection anyone in police custody has against saying anything that might incriminate them, and to have an attorney.*

Q: Do people have to answer police questions?

A: *No, particularly if answers may result in the police charging the individual with committing a crime.*

Q: What should someone do if read a Miranda Warning and questioned by police?

A: *Be polite, answer no questions, and ask for legal counsel.*

LEGAL LEXICON

Many clients find the legal terms used in court puzzling. From time to time, we'll offer some easy-to-understand definitions to help clear things up. These will help you to better understand our jury system. This time it's "damages," or compensation for injury or economic loss.

- **Economic damages**

Economic losses can easily be measured in terms of money. Examples include lost wages, medical expenses, burial costs, and loss of business or employment opportunities.

- **Noneconomic damages**

Noneconomic losses are harms that are not easily measured in terms of money, such as the losses associated with physical impairment or other losses such as loss of companionship.

- **Nominal damages**

When no real damage is done, a judge may make a point by awarding \$1.00 in nominal damages.

- **Special damages**

Often, this is reimbursement for related out-of-pocket costs, such as parking or meals, that a winning party can justify.

- **Punitive damages**

Jurors award these when they feel defendants behaved maliciously or without concern for others.

- **Statutory damages**

In many cases, laws and regulations prescribe specific damages. In some cases, judges may triple monetary penalties under statutory law.