School Choice in Joint Custody Cases:

Tips to Help the Judge Decide

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by Shelly James

With the increased scrutiny that public schools receive today, and the increasing number of options that parents have for educating their children, disagreements between divorcing or divorced parents over where to enroll their children are likely to become more common. When parents cannot reach an agreement, they can petition the courts for resolution of the disagreement. An attorney representing such a parent is faced with a difficult task when advising the parent, because the law in Virginia does not provide clear guidance on the factors a court will consider to determine which school a child should attend.

In custody cases in general, the Virginia courts' priority is to determine what action is in the best interest of the children. The Supreme Court emphasized the importance of the best interest principle over fifty years ago in *Mullen v. Mullen,* 188 Va. 259, 269, 49 S.E.2d 349, 354 (1948), when it stated, "In Virginia, we have established the rule that the welfare of the infant is the primary, paramount, and controlling consideration of the court in all controversies between parents over the custody of their minor children. All other matters are subordinate." The Court of Appeals recently acknowledged the importance of this principle in *Brown v. Spotsylvania Dep't of Soc. Serv.*, 43 Va. App. 205, 211, 597 S.E.2d 214, 217 (2004), noting, "When addressing matters concerning the custody and care of a child, this Court's paramount consideration is the child's best interests." Therefore, in cases involving enrollment, the courts must consider which school is in the best interest of the children. However, the law in Virginia provides little guidance for the application of this standard in such cases.

As in other custody cases, *Virginia Code* §§ 20-124.2(B) and 20-124.3 prevent the courts from applying a presumption that favors the custodial parent's educational choice over the other parent's wishes. Some states have legislated a presumption in favor of the decision of the parent with primary physical custody. For example, Louisiana statute R.S. 9:335(B)(3) requires that courts presume the decisions of the "domiciliary parent," even where the parents have joint custody, are in the best interest of the child. In Virginia, the courts may not presume that the physical custodian knows which school will best meet the interests of the child.[1]

Instead, the courts must consider the general factors listed in *Code* § 20-124.3 when determining which action is in the best interest of a child. This list emphasizes factors important in determining where a child should live, but includes many factors that seem irrelevant or unimportant in determining where a child should be schooled. For example, the age and health of a parent, the child's relationship with the parent and a history of abuse, while very relevant in determining which parent should have primary physical custody, are not generally important in deciding where a child should be educated. However, some of the factors listed in the *Code* are potentially relevant.

Factors one and four of *Code* § 20-124.3, which relate to the developmental needs of a child, are obviously relevant at a basic level to determining which school a child should attend. If the child has special needs and only one school meets those needs, then the court should have a relatively easy decision. If the child is not yet five years old or needs to wait a year before attending kindergarten, then the court could decide that the child should not be enrolled in school at all.

However, most of the controversy in this area will focus on which school best meets the developmental needs of the particular child, not whether the child needs to

attend school. For this reason, an attorney attempting to litigate such a case will need to present evidence about the quality of the schools. Such evidence may include test scores of the students, Standards of Learning rates, curriculum, graduation rates, future success of graduates, parent and student testimonials, news articles, and anything else that suggests which school is "better."

Sometimes, however, the "obviously" better choice is not in the best interest of the child. For example, the Richmond Circuit Court found in a 1992 case that attending a public school in Henrico County was in the best-interests of a child, rather than attending Collegiate School, a well-regarded private school in the city.[2] This judge was convinced that the public school met a need that the private school did not. This case highlights an important aspect of the best interest standard—the courts must determine the best interests of the particular child, not children in general. Attorneys therefore should focus their evidence, where they can, on factors that relate to the particular circumstances of the case. General information should be presented, but the argument should discuss this evidence as it relates to the particular child.

Factor eight in *Code* § 20-124.3 requires that the courts consider the preference of the child, if the child is old enough to develop an informed preference. However, when deciding which school best meets the needs of a child, the court might be suspicious of a child's preference.

The final consideration listed in the *Code* section is "[s]uch other factors as the court deems necessary and proper."[3] While the appellate courts have not defined these other factors in the specific context of school choice, three Virginia Court of Appeals cases have discussed school choice when one parent is asking that support amounts be increased to pay for attendance at a particular school.

In *Solomond v. Ball*, 22 Va. App. 385, 470 S.E.2d 157 (1996), the Court of Appeals found that a trial court erred in increasing a previously ordered child support award. The appellate court mentioned several factors, "such as the availability of satisfactory public schools, the child's attendance at private school prior to the separation and divorce, the child's special emotional or physical needs, religious training, and family tradition," as elements that a trial court should consider when determining if a "demonstrated need has been shown for the child to attend private" school and determining if "there is justification for requiring a parent to pay." *Id.* at 391-92, 470 S.E.2d at 160. The Court of Appeals ruled that the increased expense was not a "change in circumstances" allowing the trial court to order the father to pay more child support than previously ordered. *Id.* at 394, 470 S.E.2d at 161.

Although listing several factors that can be helpful in determining the best interest of a child, *Solomond* occurred in the context of a petition to change an existing order, which required the mother to prove that a "change in circumstances" occurred before the court could amend the existing order. *Id.* at 392, 470 S.E.2d at 160.[4] Therefore, while *Solomond* is helpful, attorneys relying on this case should be careful that they do not argue for application of the wrong burden of proof. *Solomond*, 22 Va. App. at 394, 470 S.E.2d at 161 (reversing the trial court's finding that a change of circumstances had occurred).

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In *Ragsdale v. Ragsdale*, 30 Va. App. 283, 516 S.E.2d 698 (1999), reviewing a final divorce decree, the Court of Appeals affirmed a trial court's upward deviation from the child support guidelines, based on the tuition for private school for the parties' children. The court noted that the presumed amount of support can be rebutted by evidence regarding "the ability of each party to provide child support, the best interests of the child, the standard of living enjoyed by the family during the marriage, and other factors 'necessary to consider the equities for the parents and children.' *Code* § 20-108.1(B)." *Id.* at 295, 516 S.E.2d at 703-04. The court concluded that the guidelines' presumption was rebutted by evidence that the children attended private school before the divorce and that changing schools would unnecessarily disrupt the children's education and lives. *Id.* at 295, 516 S.E.2d at 704. The court also pointed to the children's success at the private school and the desire to "avoid the inequitable result of penalizing them as a consequence of their parents' separation and divorce." *Id.* at 296, 516 S.E.2d at 704. In *Ragsdale*, the court held, among the factors "relevant to determining whether there is a need for private education, the court may consider the child's 'attendance at private school prior to the separation and divorce' and the family's tradition." 30 Va. App. at 295, 516 S.E.2d at 704 (quoting *Solomond*, 22 Va. App. at 391, 470 S.E.2d at 160).

Again, while the opinion lists several important factors, *Ragsdale* discusses them in the context of a presumption that does not exist where the parents disagree about the place to enroll the children but not how much each parent should pay. No guidelines, legislative or otherwise, exist in Virginia establishing a presumption that children should attend a particular school or type of school.

The most recent case decided by the Court of Appeals is *Joynes v. Payne*, 36 Va. App. 401, 551 S.E.2d 10 (2001), which also involved a deviation from the child sup-

port guidelines. The *Joynes* opinion affirms the trial court's ruling, noting that a commissioner is required to consider the factors listed in *Ragsdale* when deciding if the presumptive amount of child support is rebutted. *Id.* at 424, 551 S.E.2d at 21. However, the opinion does not list the factors involved in the case and does not discuss the evidence presented at trial.

These three cases list several factors that a trial court could consider when deciding where a child should be educated, such as the quality of the schools, the schools previously attended by the child, family tradition, special needs of the child, the standard of living established during the marriage, and the equities involved. *Solomond*, 22 Va. App. at 391, 470 S.E.2d at 160; *Ragsdale*, 30 Va. App. at 2959 6 , 516 S.E.2d at 703-04; *Joynes*, 36 Va. App. at 424, 551 S.E.2d at 21. While these discussions center on controversies over the cost of education, these additional factors seem relevant to determining which school, regardless of cost, is in the best interest of the child.

Another unnamed factor may also hold some influence in these cases. Although not mentioned explicitly, the opinions suggest that stability is important in a child's life and an important factor to consider when determining what action is in the best interest of a child. The appellate courts have mentioned this factor in other contexts, such as in *Yopp v. Hodges,* 43 Va. App. 427, 440, 598 S.E.2d 760, 766 (2004), where the Court of Appeals affirmed a lower court's decision to allow visitation with grandparents who were a source of stability for a child. Other states have explicitly applied this factor in cases involving education decisions.[5]

Some people have argued that *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), sets forth another factor for the trial courts to consider when faced with disagreements over children's education. In *Pierce*, the United States Supreme Court ruled that a state infringes upon fundamental liberties when it forces children to attend public schools. While an important case when government actors and parents are the parties, the situations confronting courts today involve disagreements between parents. No state actor is advocating that the child attend one school or another in these custody disputes. As the holding in *Pierce* addresses a legislative body's attempt to require that all children attend public schools, not an attempt by a parent to enroll a child in a school of his/her choice, the analysis does not apply in custody cases. The state is not infringing upon a parent's liberty when resolving these controversies.

Custody disputes are often bitter and difficult. If the parties are in agreement on the schools that the children should attend, then those agreements should be memorialized in written agreements and consent orders. If the parties do not agree, attorneys should consider raising the issue with the court at the time of the divorce to avoid future litigation.

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Endnotes:

1 The statute does not prevent the parent with primary physical custody from claiming more credibility on the issue of schooling, as that parent spends more time with the child and has a better sense of the child's needs.

2 *Hickman v. Hickman,* Richmond Circuit Court Case No. N-6594-D (October 9, 1992).

3 *Code* § 20-124.3(10).

4 For further discussion of this burden of proof, see *Hatloy v. Hatloy,* 41 Va. App. 667, 672, 588 S.E.2d 389, 391 (2003).

5 The Missouri Court of Appeals noted in *in re: Marriage of Manning,* 871 S.W.2d 108, 111 (Mo. App. 1994), a case involving determination of child support, that "Dissolution is difficult for a child. Not allowing the child to continue at the school she has been attending would make it more so. Allowing children to continue at a private school can be 'a condition essential to the welfare of the [child].' *See Margolin v. Margolin,* 796 S.W.2d 38, 43 (Mo. App. 1990)." In *Matter of Marriage of Debenham,* 896 P.2d 1098, 1100-01 (Kan. App. 1995), the Kansas court held the evidence was sufficient for the trial court to find "the stability of continuing Cortney at Cair Paravel, at the time, was in the child's best interest . . . ." although the child had attended the school only one year.