

Jurisdiction: The Word of Too Many Meanings

by Charles E. Powers



Charles E. Powers is a partner with the Richmond law firm of Batzli, Wood & Stiles which focuses exclusively on family law and related matters. He has devoted his practice to family law for his entire career and is a fellow of the American Academy of Matrimonial Lawyers and has served as president of the Metro Richmond Family Law Bar Association. He currently sits on the board of governors for the Family Law Section of the Virginia State Bar.

Jurisdiction sounds easy. It is a simple word and the concept, ultimately, is pretty straight forward. Yet, well into the third century of this commonwealth, it still presents great potential for disaster. As our Supreme Court of Virginia recently noted, “jurisdiction is a word of many, too many, meanings.”¹

Too often, litigants get tripped up by jurisdictional issues, whether it is bringing the matter in the wrong place or asking the wrong court to take action. Jurisdictional traps are everywhere and can be sprung at any time, even long after a case is decided on the merits. While defects in some jurisdictional requirements can be overlooked, others can be fatal and raised at any time, even for the first time by an appellate court *sua sponte*.² Thus, it is important to make sure that the case can actually be heard. For if the court is called upon to “plumb the murky depths of the sea of ‘jurisdiction,’”³ a lot of time and effort may be wasted and litigants left without remedies. In the area of family law, a delay in obtaining access to the courts can have devastating results.

The Elements of Jurisdiction

Jurisdiction “is the power to adjudicate a case upon the merits and dispose of it as justice may require.”⁴ In order for a court to have the power to actually adjudicate a case, however, it must have “active” jurisdiction which consists of several elements, all of which must be present in order for a court to have the ability to “proceed to a valid judgment”:

- “Subject matter jurisdiction,” which is the authority granted to a court by the Constitution or by statute to adjudicate a class of cases or controversies;
- “Territorial jurisdiction,” which is the authority of a court over persons, things or occurrences located in a defined geographic area;
- “Notice jurisdiction,” which is effective notice to a party or, if the proceeding is *in rem*, seizure of the *res*; and

- “The other conditions of fact [that] must exist which are demanded by the unwritten or statute law as the prerequisites of the authority of the court to proceed to judgment or decree.”⁵

There is a critical distinction between the first element, namely the “power of a court to adjudicate a specified class of cases,” and the other elements which provide the “authority” to a court to actually exercise that power.⁶ That distinction is that the lack of subject matter can never be waived under any circumstance while the “other jurisdictional elements generally will be considered waived unless raised in the pleadings filed with the trial court and properly preserved on appeal.”⁷

What Cannot Be Waived (Subject Matter Jurisdiction)

Subject matter jurisdiction is often referred to as “potential” jurisdiction: a court is given the authority by the constitution or by statute to hear a certain type of case (e.g., a circuit court has the “potential” to grant an equitable distribution of a divorcing couple’s property based on the authority granted to it by Virginia Code § 20-107.3). However, unlike the other elements of jurisdiction, a lack of subject matter jurisdiction cannot be waived and cannot be conferred on the court by the agreement of the parties.⁸ Any judgment made, even those made on the merits, without subject matter jurisdiction is null and void as is any subsequent proceeding based upon that defective judgment.⁹ Most importantly, not only can the lack of subject matter jurisdiction not be waived, it can be raised at any time, even for the first time on appeal by the court *sua sponte*.¹⁰

In Virginia, jurisdiction over divorce matters is purely statutory.¹¹ The General Assembly has given the authority to the circuit courts to grant a divorce pursuant to Virginia Code § 20-96. The General Assembly has given additional authority to the circuit courts as part of those divorce proceedings to divide the parties' property (Virginia Code § 20-107.3), award spousal support (Virginia Code § 20-107.1) and determine the custody, visitation and support of the parties' children (Virginia Code § 20-107.2). Absent a divorce, the General Assembly, in Virginia Code § 16.1-241, has also given the authority to the juvenile and domestic relations district courts (for ease, such courts will be referred to as the "juvenile courts") to make determinations related to the custody, visitation and support of minor children or award spousal support (along with at least 20 other authorized actions).¹² These statutes provide the listed courts with the authority to adjudicate these matters, namely the subject matter jurisdiction to hear these cases.

What Can Be Waived

While a lack of subject matter jurisdiction cannot be waived at any time, the other elements of jurisdiction can be waived by failure to object. This is likely what creates the "murky depths" that must be navigated by an appellate court. By claiming a lack of subject matter jurisdiction, litigants hope to find one last way to bypass an unfavorable result. "One consequence of the non-waivable nature of the requirement of subject matter jurisdiction is that attempts are sometimes made to mischaracterize other serious procedural errors as defects in subject matter jurisdiction to gain an opportunity for review of matters not otherwise preserved."¹³ For example, if a litigant chooses to ignore a jurisdictional defect (for example, equitable distribution in a matter where the specific elements of Virginia Code § 20-107.3(J) [i.e., exercise of jurisdiction after a divorce is entered in another jurisdiction] may not have been met¹⁴) hoping to achieve a better result, that litigant cannot later claim that there was no jurisdiction in order to challenge any adverse result. They are stuck with the outcome.

Territorial Jurisdiction (Venue)

As noted, "territorial jurisdiction" is the authority of a court over persons, things or occurrences located in a defined geographic area and is synonymous with venue.¹⁵ In Virginia, a divorce case can be instituted in the circuit court in the locality where the parties last cohabited or, at the

option of the plaintiff, where the defendant resides. If the defendant is not a Virginia resident, however, it may also be instituted where the plaintiff resides.¹⁶ While filing in an improper venue is subject to objection, by statute, venue is not jurisdictional and any action taken by a court in an improper venue is merely voidable and not void.¹⁷ As such, any defects are waived if not properly and timely raised.¹⁸

Similarly, in situations where a divorce cannot yet be filed, cases involving custody, child support and spousal support can be instituted in the juvenile court in certain localities as set forth in Virginia Code § 16.1-243 (e.g., where the children's home is, where the respondent resides, etc.). These, too, are subject to objection and a case may be transferred on the motion of a party or of the court. However, if there is no objection or the court does not raise the issue itself, the case can proceed.

Notice Jurisdiction

Courts have long held that "[n]otice and opportunity to be heard are essential elements of due process of law, and the sentence or judgment of a court without hearing the party or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to any respect in any other tribunal."¹⁹ However, once a party is given notice, the right of the moving party to bring the action "must be properly and seasonably challenged."²⁰ A failure to provide proper notice results only in a voidable order which is waived if that defect is not timely raised.²¹

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"Other Conditions of Fact" (i.e., Prerequisites)

Time and time again, courts have listed the last required element for a court to obtain active jurisdiction (i.e., the ability to actually make a determination) as "[t]he other conditions of fact [that] must exist which are demanded by the unwritten or statute law as the prerequisites of the authority of the court to proceed to judgment or

decree.”²² These are the things that must first occur before the court can take any action. The statutory provisions related to divorce are full of these prerequisites.

For example, a circuit court can only make an equitable distribution award under Virginia Code § 20-107.3 if it (1) decrees the dissolution of a marriage or (2) decrees a divorce from the bond of matrimony or (3) receives a filing of a certified copy of a divorce decree from another jurisdiction. The court’s authority will not be active unless one of these conditions is met.²³

By filing a divorce action, the authority to exercise jurisdiction over issues of custody, visitation or child support or for spousal support are based on specific statutory authority.

Similarly, a circuit court can only award spousal support under Virginia Code § 20-107.1 or make a determination of custody, visitation or child support under Virginia Code § 20-107.2 if it (1) decrees the dissolution of a marriage or (2) decrees a divorce from the bond of matrimony or (3) decrees that neither party is entitled to a divorce or (4) enters an order for separate maintenance.

However, because only the lack of subject matter jurisdiction is a nullity, these statutory prerequisites can be waived. “If a party does not object to the trial court’s authority ... based on an alleged failure to satisfy the prerequisites ... in a particular divorce case, that party has waived the right to raise that objection on appeal.” If a party has objections that the statutory elements are not being met, they are obligated to bring it to the court’s attention.²⁴

Jurisdiction Must Be Invoked

One additional aspect of the final element of jurisdiction is that the relief must be requested. As it relates to spousal support, custody or child support and attorney’s fees or costs, Virginia Code § 20-79(b) provides that “[i]n any suit for divorce, the court in which the suit is instituted or pending when either party to the proceedings so requests, shall provide in its decree for the maintenance, support, care or custody of the child or children..., support and maintenance for the spouse, if the same be sought, and counsel fees

and other costs, if in the judgment of the court any or all of the foregoing should be so decreed.”

Because jurisdiction over divorce matters is purely statutory and there is no inherent power of a court to dissolve a marriage, “unless the prerequisites necessary for exercising that jurisdiction are specifically pled,... the proceedings are a nullity.”²⁵ Thus, the failure to specifically request an award of spousal support can “preclude the court from obtaining jurisdiction over the subject matter.”²⁶ The exercise of the court’s power is “dependent upon the pleadings having raised the issue.”²⁷ “When a special statutory jurisdiction is being exercised, the factual prerequisites must be pled and proven.”²⁸

What About Concurrent Jurisdiction?

As noted, the General Assembly has given the authority to both the circuit courts and to the juvenile court to hear certain matters. For example, custody can be determined by both a circuit court as part of a divorce or as a separately filed action in a juvenile court.²⁹ The same is true for spousal support³⁰ and child support.³¹ The statutory provisions granting the authority to the juvenile courts, however, specifically note that the authority of that court is “concurrent” with that of a circuit court.³² Disputes over jurisdiction can develop because of this concurrent jurisdiction.

First, Virginia Code § 16.1-241 initially provides that the juvenile court has the “exclusive original jurisdiction” over the matters listed in that statute (e.g., custody, visitation and child support and spousal support). However, the authority of the juvenile court regarding custody, visitation and child support is “concurrent with and not exclusive of” a circuit court.³³ Further, a circuit court is to “have concurrent original jurisdiction” with the juvenile court over the issue of spousal support.³⁴

By filing a divorce action, the authority to exercise jurisdiction over issues of custody, visitation or child support or for spousal support are based on specific statutory authority. However, absent a divorce case, a circuit court can still have jurisdiction to determine these types of issues if it is “incidental to the determination of causes pending” in that court.³⁵ For example, the filing of a suit for separate maintenance opens the door for the issues of custody, visitation and child support to be addressed.³⁶ The issue of custody can be determined by a circuit court if the issue of the termination of parental rights is before it.³⁷ Similarly, the issue of custody can be determined if the issue of visitation is before a circuit court

on appeal from a juvenile court.³⁸ More recently, in a matter in which the statutory criteria for awarding child support as part of a divorce matter were absent (because the divorce was entered in another jurisdiction), the court of appeals approved the exercise of jurisdiction over child support as an “equitable concomitant to its jurisdiction over child custody.”³⁹

A pending action in the circuit court is, of course, required. Thus, for example, a proceeding to terminate parental rights or for custody cannot be filed in the circuit court if there is no pending action to which it would be “incidental.”⁴⁰ Nothing in either Code § 16.1-241 or § 16.1-244 permits the juvenile court to “waive” its jurisdiction and allow a party to bring an original action in the circuit court without meeting the statutory requirements.⁴¹

The definition of “pending” has been expanded to allow for the continuation of the jurisdiction of a circuit court, even if it has “transferred” jurisdiction to a juvenile court. Virginia Code § 20-79(c) provides for the transfer of a matter to a juvenile court for “the enforcement of its orders” and “any other matters” pertaining to custody, visitation and support of the parties’ children and spousal support. Virginia Code § 20-108, however, provides a circuit court the authority to modify custody, visitation and child support after a final decree has been entered. Similarly, Virginia Code § 20-109 provides a circuit court the authority to modify spousal support after a final decree has been entered. Because these courts have concurrent jurisdiction, a circuit court is not “divested” of its jurisdiction to consider those matters when it transfers jurisdiction to the juvenile court. Rather, both courts have the authority to consider such matters.⁴²

Additionally, a circuit court’s jurisdiction can be invoked to divest the juvenile court of any further jurisdiction to hear the matter. First, if a divorce action is filed which raises the issue of custody, visitation or child support or spousal support and a hearing is set for a “date certain or on a motions docket to be heard within 21 days of the filing” of the divorce, the juvenile court is divested of the right to enter any further orders.⁴³ The mere filing of the divorce suit is insufficient.⁴⁴ Second, once a circuit court exercises its concurrent jurisdiction in a matter which had previously been transferred to the juvenile court, the jurisdiction of the juvenile court ceases. In that instance, the jurisdiction of the juvenile court “exists only as a result of action taken by a circuit court” and the circuit court’s assumption of juris-

diction “conclusively determines that the matter will be litigated in a court of record.”⁴⁵

Conclusion

While the concept of jurisdiction may be murky, it ultimately consists of two simple points. First, the statutory authority for a court to take an action (i.e., subject matter jurisdiction) must be present. Second, all the other prerequisites for the court to be able to actually exercise that authority must also be met. The first point can never be ignored. The second point can be ignored if the parties desire or simply forget to make the appropriate challenge.

Endnotes:

- 1 *Ghameshlouy v. Commonwealth*, 279 Va. 379, 388, 689 S.E.2d 698, 702 (2010).
- 2 *Prizzia v. Prizzia*, 58 Va. App. 137, 161, 707 S.E.2d 461, 472 (2011).
- 3 *Ghameshlouy* at 388, 689 S.E.2d at 702.
- 4 “*Board of Supervisors v. Board of Zoning Appeals*,” 271 Va. 336, 343, 626 S.E.2d 374, 378 (2010).
- 5 *Id.* at 343-44, 626 S.E.2d at 379.
- 6 *Prizzia* at 160, 707 S.E.2d at 472.
- 7 *Id.*
- 8 *Virginia-Pilot Media Companies v. Dow Jones*, 280 Va. 464, 478, 698 S.E.2d 900, 902 (2010).
- 9 *Prashad v. Copeland*, 55 Va. App. 247, 274, 685 S.E.2d 199, 212 (2009).
- 10 *Prizzia* at 161, 707 S.E.2d at 472.
- 11 *Prizzia* at 172, 707 S.E.2d at 478.
- 12 Virginia Code § 16.1-241(A) (custody, visitation and child support) and Virginia Code § 16.1-241(L) (spousal support).
- 13 *Morrison v. Bestler*, 239 Va. 166, 169-70, 387 S.E.2d 753, 755-56 (1990).
- 14 In *Prizzia*, one party claimed that the specific statutory requirements were not met. However, because she did not raise that objection in the trial court, that objection was waived. The court of appeals did not even have to determine whether the statutory requirements were met. *Prizzia* at 161-62, 707 S.E.2d at 472-73.
- 15 *Kelso v. Commonwealth*, 282 Va. 134, 139, 710 S.E.2d 470, 473 (2011).
- 16 Virginia Code § 8.01-261(19).
- 17 Virginia Code § 8.01-258.
- 18 *Porter v. Commonwealth*, 276 Va. 203, 229, 661 S.E.2d 415, 427 (2008).
- 19 *Moore v. Smith*, 177 Va. 621, 627-28, 15 S.E.2d 48, 50 (1941).
- 20 *Id.* at 624, 15 S.E.2d at 48-49.
- 21 *Nelson v. Warden of Keen Mountain Correctional Center*, 262 Va. 276, 285, 552 S.E.2d 73, 78 (2001). See also *Angel v. Commonwealth*, 281 Va. 248, 261-62, 704 S.E.2d 386, 394 (2011).

- 22 The first appearance of this quote appears to have been in a 1924 case, *Farant Investment Corp. v. Francis*, 138 Va. 417, 427-28, 122 S.E. 141, 144 (1924). This appears to have been quoted numerous times since. In the past three years, see *Prizzia* at 160, 707 S.E.2d at 472; *Smith v. Commonwealth*, 56 Va. App. 351, 359, 693 S.E.2d 765, 769 (2010), *Ghameshlouy* at 389, 689 S.E.2d at 703; *Green v. Virginia State Bar*, 278 Va. 162, 175, 677 S.E.2d 227, 233 (2009); *Hitt Construction v. Pratt*, 53 Va. App. 422, 426, 672 S.E.2d 904, 905 (2009); *Porter* at 227, 661 S.E.2d at 426.
- 23 *Prizzia* at 161, 707 S.E.2d at 472-73. See also *Parra v. Parra*, 1 Va. App. 118, 124, 336 S.E.2d 157, 160 (1985).
- 24 *Prizzia* at 161-62, 707 S.E.2d at 473.
- 25 *Reid v. Reid*, 24 Va. App. 146, 150, 480 S.E.2d 771, 773 (1997).
- 26 *Id.*
- 27 *Boyd v. Boyd*, 2 Va. App. 16, 19, 340 S.E.2d 578, 580 (1986).
- 28 *Erickson-Dickson v. Erickson-Dickson*, 12 Va. App. 381, 388, 404 S.E.2d 388, 392 (1991).
- 29 Virginia Code § 20-107.2 and Virginia Code § 16.1-241(A).
- 30 Virginia Code § 20-107.1 and Virginia Code § 16.1-241(L).
- 31 Virginia Code § 20-107.2 and Virginia Code § 16.1-241(A).
- 32 Virginia Code § 16.1-241(A)(3) (“In such cases jurisdiction shall be concurrent with and not exclusive of courts having equity jurisdiction, as provided in § 16.1-244”) and Virginia Code § 16.1-241(L) (“A circuit court shall have concurrent original jurisdiction in all causes of action under this subdivision”). The opposite is also true: the termination of parental rights can be heard if the issue of custody is before the court. *Etzold v. Loudon County*, Record No. 2050-90-4 (Virginia Court of Appeals (unpublished), September 28, 1993), 1993 WL 381456.
- 33 Virginia Code § 16.1-241(A)(3).
- 34 Virginia Code § 16.1-241(L).
- 35 Virginia Code § 16.1-244(A).
- 36 *Rochelle v. Rochelle*, 225 Va. 387, 391, 302 S.E.2d 59, 61-62(1983).
- 37 *Fauquier County Department of Social Services v. Ridgeway*, ___ Va. App. ___, ___ S.E.2d ___ (2011). The citation to this case decided on December 6, 2011, was not provided prior to the publication of this article. See Virginia Court of Appeals Record No. 2490-10-4 and No. 2550-10-4, 2011 WL 6027416.
- 38 *Cintron v. Long*, Record No. 2169-99-2 (Virginia Court of Appeals (unpublished), July 5, 2000), 2000 WL 943745.
- 39 *Prizzia* at 157, 707 S.E.2d at 470-71.
- 40 *Willis v. Gamez*, 20 Va. App. 75, 80, 455 S.E.2d 274, 277 (1995) and *Poole v. Poole*, 210 Va. 442, 444, 171 S.E.2d 685, 687 (1970).
- 41 *Willis* at 80, 455 S.E.2d at 277.
- 42 *Crabtree v. Crabtree*, 17 Va. App. 81, 86-87, 435 S.E.2d 883, 887 (1993). See also *Calfee v. Calfee*, 29 Va. App. 88, 94, 509 S.E.2d 552, 555 (1999) and *Romine v. Romine*, 22 Va. App. 760, 763, 473 S.E.2d 99, 101 (1996).
- 43 Virginia Code § 16.1-244.
- 44 *Peple v. Peple*, 5 Va. App. 414, 422, 364 S.E.2d 232, 237 (1988).
- 45 *Romine v. Romine*, 22 Va. App. 760, 764-66, 473 S.E.2d 99, 101-02 (1996).