

# General Practice

Summer 2013

# Practice



Published by the General Practice Section  
of the Virginia State Bar for its members

# NEWS

## The Rights of Grandparents to Custody and Visitation in Virginia

<b>p.2</b> Editor's Message	<b>p.4</b> Completing Proofs of Claim in U.S. Bankruptcy Court	<b>p.6</b> Ellen F. Brown: From Attorney to Writer	<b>p.7</b> W. Joseph Owen, III Awarded	<b>Back Cover</b> <b>Board of Governors 2013</b>
--------------------------------	---	---	---	---

The law in Virginia with respect to the rights of third party non-parents to custody and visitation is well-defined. Yet, it is an area replete with confusion. This two-part article will provide a basic review of the applicable law and some helpful tips for your grandparent clients.

This first part will focus on the rights of grandparents to obtain custody of their grandchild.

The law in Virginia is clear that “in a custody dispute between a parent and a non-parent, ‘the law presumes that the child’s best interest will be served when in the custody of its parent.’” *Bailes v. Sours*, 231 Va. 96, 100, 340 S.E.2d 824, 827 (1986) (quoting *Judd v. Van Horn*, 195 Va. 988, 996, 81 S.E.2d 432, 436 (1954)). This presumption in favor of the parents was codified in Va. Code § 20-124.2 to require “due regard to the primacy of the parent-child relationship.” So for a grandparent to secure custody, they must clear two hurdles; they must rebut the legal presumption favoring the parents and they must still prove that the award of custody to them is in the best interest of the child.

The Court of Appeals in *Brown v. Burch*, 30 Va. App. 670, 685-86, 519 S.E.2d 403, 410-11 (1999) has made clear that “the **initial burden** is on the nonparent to introduce **clear and convincing evidence** . . . which constitute[s] an “extraordinary reason” for depriving a natural parent of custody of her or his child. Such evidence . . . must be **cogent and con-**

**vincing.** (Emphasis added).

In *Bailes v. Sours*, 231 Va. 96, 340 S.E.2d 824 (1986), the Supreme Court of Virginia sets forth the **five circumstances** under which the legal presumption favoring natural parents may be rebutted.

Although the presumption favoring a parent over a non-parent is a strong one, it is rebutted when certain factors are established by **clear and convincing evidence**. We have held that such factors include: (1) parental unfitness; (2) a previous order of divestiture; (3) voluntary relinquishment; and (4) abandonment. Finally, we have recognized a **fifth factor** that rebuts this presumption: a finding of “special facts and circumstances . . . constituting an extraordinary reason for taking a child from its parent, or parents.”

*Bailes*, 231 Va. at 100, 340 S.E.2d at 827

You should note that a specific jurisprudence has developed in Virginia regarding these circumstances and reference to applicable case law would be sound if you believe the facts of your case may come within one of these circumstances. A great resource would be the CLE materials written by Dennis M. Hottell and Melanie Hubbard for the 31<sup>st</sup> Annual Family Law Seminar, *Challenging Issues*

*The Rights of Grandparents — cont'd on page 3*

# Editor's Message

*At our most recent meeting of the Board of Governors, one of the topics discussed was Mentorship. Young lawyers can only learn the cornerstones of our profession from the older generation of the Bar, including professionalism, ethics, and civility. As a young attorney, I went straight into practice in a "family" law firm with my father and brother. My father, who began practicing law in 1971, taught me the nuances of extending professional courtesies and was (and is) my mentor. Most attorneys learned the ropes of our profession from a Senior Partner in their firm or a Judge who took them under their wing. But with so many new and young attorneys joining the Bar, quite a few of these attorneys are starting off on their own without the benefit of any guidance. Mentoring young attorneys is a time honored practice here in Virginia. It doesn't have to be a formal mentor relationship. Take an attorney out to lunch. Chat with them while waiting for your case to be called. I urge the members of our Bar that when you see a young attorney, to pass on your wisdom and experience. Teaching the next generation of attorneys professionalism, civility and graciousness will only make our Bar stronger and continue the traditions of our predecessors.*

Matthew J. Zwerdling  
Newsletter Editor  
5020 Monument Avenue  
Richmond, VA 23230  
804-355-5719  
mzwerdling@zandolaw.com

All article submissions for future newsletters welcome.

## First Day in Practice & Beyond Seminar

Sponsored by the  
General Practice Section  
of the VSB

**December 3, 2013**

Richmond Convention Center  
Richmond, Virginia

## 27th Tradition of Excellence Award

Sponsored by the VSB  
General Practice Section

**page 7**

The award recognizes an outstanding lawyer who embodies the highest tradition of personal and professional excellence in Virginia, and in doing so, enhances the image and esteem of attorneys in the Commonwealth.

in *Today's Family Law Practice*, recently presented around the Commonwealth and available through Virginia CLE.

Once the presumption favoring parental custody has been **rebutted**, the parental and non-parental parties stand equally before the court, with no presumption in favor of either, and the question is the determination of the **best interests** of the child according to the **preponderance of the evidence**.

*Brown v. Burch*, 30 Va. App. 670, 685-86, 519 S.E.2d 403, 410-11 (1999) (citations omitted, emphasis added).

Virginia Code § 20-124.3 set forth the factors which must be considered by the Court in determining the best interests of the child. These will be equally applicable in the grandparent custody case as in any case between natural parents.

In Part Two we will tackle the issue of grandparent visitation rights and differences which appear between custody and visitation cases for grandparents in Virginia.

### The Rights of Grandparents to Custody and Visitation in Virginia - Part Two

The United States and Virginia Supreme Courts have arguably established a higher burden of proof for third-parties seeking visitation than those seeking custody. As we discussed in Part One, a grandparent seeking custody is on equal footing with a parent after overcoming the parental presumption by clear and convincing evidence under the *Bailes* factors and must then demonstrate that the best interests of the child are served by awarding custody to the grandparent. However, a grandparent seeking visitation over the objection of a parent must demonstrate that the child would suffer “actual harm” if the visits were not ordered.

“For the constitutional requirement to be satisfied, before visitation can be ordered over the objection of the child’s parents,

a court must find an actual harm to the child’s health or welfare without such visitation. A court reaches consideration of the ‘best interests’ standard in determining visitation only after it finds harm if visitation is not ordered.”

*Williams v. Williams*, 256 Va. 19, 22, 502 S.E.2d 417, 418 (1998) (quoting *Williams v. Williams*, 24 Va. App. 778, 784-85, 485 S.E.2d 651, 654 (1997)) (internal citation omitted).

What is important to note is that the facts in the *Williams* case involved a visitation dispute between the parents of a child in an intact family unit and the child’s paternal grandparents. Different factual scenarios present different results. So, if both parents object to the grandparent’s request for visitation (*Williams v. Williams*, 256 Va. 19, 22, 502 S.E.2d 417, 418 (1998)), or the sole surviving parent objects to the grandparent’s request for visitation (*O’Leary v. Moore*, 2003 Va. App. LEXIS 391 (July 8, 2003), the actual harm standard will apply. However, where only one parent objects to the grandparent’s request for visitation, or one parent objects and the other supports the request (*Dotson v. Hylton*, 29 Va. App. 635, 513 S.E.2d 901 (1999); *Yopp v. Hodges*, 43 Va. App. 427, 598 S.E.2d 760 (2004)) the actual harm standard does not apply. Instead the burden is on the grandparent to prove **by clear and convincing evidence** that the requested visitation would be in the best interests of the child using the factors set forth in Virginia Code § 20-124.3.

Additional information regarding proving actual harm and case citations can be found in the CLE materials written by Dennis M. Hottell and Melanie Hubbard for the 31<sup>st</sup> Annual Family Law Seminar, *Challenging Issues in Today’s Family Law Practice*, recently presented around the Commonwealth and available through Virginia CLE.

Hottell and Hubbard provide a great to-do list for grandparents. They suggest that at the first sign of

*The Rights of Grandparents — cont'd on next page*

marital discord among natural parents, grandparents would be wise to take the following steps:

- a. Avoid taking sides. (“Never an unkind word.”)
- b. Maintain a good relationship with the children’s mother, as she usually holds the key to the children.
- c. Acknowledge and celebrate the children’s birthdays, holidays, and other special occasions with cards, gifts, and through personal involvement.
- d. Visit the children whenever possible, but make sure to call in advance and respect the parents’ authority. No surprise visits!
- e. Make it hard, in a non-forceful manner, for either parent to cut you out of the children’s life.
- f. At all times, make nice!

Peter W. Buchbauer, Esquire is a principal in the Winchester firm of Buchbauer & McGuire, P.C. He is a Fellow of the American and International Academies of Matrimonial Lawyers and a Past Chair of the Family Law Section of the Virginia State Bar. He thanks Dennis M. Hottell and Melanie Hubbard for their fine outline for the 31<sup>st</sup> Annual Family Law Seminar, *Challenging Issues in Today’s Family Law Practice*, from which much of the material here was taken.

# Completing Proofs of Claim in U.S. Bankruptcy Court

Ronald A. Page, Jr. of Ronald Page, PLC \_\_\_\_\_

## Introduction

A proof of claim is a form filed in a bankruptcy case which details a claim against or interest in a bankrupt debtor. The following describes completion of the proof of claim form, answers the question of who must file a proof of claim, and describes when the proof of claim must be filed.

Proofs of claim and interest are governed by 11 U.S.C. §§ 501 and 502 and the Federal Rules of Bankruptcy Procedure (“FRBP”) 3001, 3002, 3003, 3005, 3006, 3007 and 3008. Different rules and requirements are described below based on the different bankruptcy code chapters. The proof of claim is completed using Official Form B10 which is available at the website of the bankruptcy court if a copy is not provided to you as part of the bankruptcy proceedings.

## Completion of Official Form B10

Read the Instructions: In filling out Official Form B10 pay careful attention to the attached instructions and definitions. Additionally, carefully review the cited bankruptcy code sections in order to correctly fill out the form. Specifically, the portion of the form governing priority claims only provides five (5) of the most common priority claims under §507(a) and is not an exclusive list of priority claims.

Make Sure to File in the Proper Case: The proof of claim must be filed against the proper debtor. If this is in doubt, it may require that the proof of claim be filed against multiple debtors. This is commonly done in cases with several related debtors filing in one jointly administered case.

Reserve Your Client’s Rights: It is good practice to expressly reserve the right to amend and supplement the proof of claim. Also, reserve your client’s the right to setoff. This protects your client if the debtor later

---

asserts a claim against them.

**Documentation:** It is recommended that copies of all necessary documentation underlying the claim should be attached to Official Form B10 and redacted as needed. Originals of documents should not be provided as these may be destroyed after the form is scanned.

**Filing:** Official Form B10 should be filed with the bankruptcy court or claims agent as directed. In large bankruptcy cases, a claims agent is often employed to process claims. The proof of claim or interest should be filed electronically or mailed to the proper party. In most cases, a fax or email will not be accepted.

### **Who Needs to File a Proof of Claim?**

In chapter 13, a proof of claim must be filed by an unsecured creditor in order to participate in the claims process.

In chapter 9 and chapter 11, any creditor or equity security holder whose claim or interest is not listed on the debtor's schedules or is scheduled as disputed, contingent, or unliquidated must file a proof of claim in order to participate in the claims process. Conversely, in chapter 9 and chapter 11, any creditor or equity security holder whose claim or interest is listed on the debtor's schedules and is not scheduled as disputed, contingent, or unliquidated need not file a proof of claim.

In chapter 7 a proof of claim is not required to be filed as there are usually no funds available for distribution. However, a notice to file a proof of claim will be generated if it is determined that there are funds available for distribution. In such a case, a claim *must* be filed in order to participate in the claims process.

### **Deadlines**

In chapter 7, chapter 12, and chapter 13, a proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors called under § 341. A proof of claim filed by a governmental unit, with an exception described in § 1308, is timely filed if it is filed not later than 180 days after the date of the order for relief. These deadlines are described in the Notice sent out by the court upon the initiation of the case or in the Notice sent out upon the determination that there are assets to be administered in chapter 7.

In cases under chapter 9 and chapter 11, a proof of claim must be filed by the time set by the court pursuant to FRBP 3003(c). The court sets this time automatically per its local rules or upon a debtor's motion or the motion of another party in interest. Once a bar date is set, a Notice is sent to all creditors and parties in interest of the deadline to file a proof of claim.

### **Conclusion**

With the exceptions noted above, filing a proof of claim is necessary to protect your client's right to participate in the bankruptcy claims process. Additionally, the filing a proof of claim causes a creditor to submit itself to the bankruptcy court's jurisdiction and waives its right to a jury trial. *In re Ha-Lo Industries*, 326 B.R. 116 (Bankr. N.D. Ill. 2005). Finally, one must be vigilant to timely respond to any objections which may be filed in response to the proof of claim.

# Ellen F. Brown: From Attorney to Writer

After ten years of practicing law, I had had enough of the recurring twitch that had taken up in my left eye. I quit my job as a corporate environmental lawyer—a dream job in many respects even with the twitch—to become a writer. I had only a vague idea of what that meant but decided to try my hand at freelance writing for magazines.

One of the first jobs I landed was to write a profile of a book collector named John Wiley, whose passion in life is all things *Gone With the Wind*. I was dubious about the topic. Wasn't *Gone With The Wind* a politically incorrect melodrama? I'd never actually read the book and had only a vague recollection of seeing the movie version on TV as a child, but that hadn't stopped me from forming some fairly harsh opinions about author Margaret Mitchell and her famous characters Scarlett and Rhett.

After interviewing Wiley, I realized that I'd entirely misjudged Mitchell's work and, more importantly, her. I was impressed to learn that *Gone With the Wind* had been critically acclaimed the world over at its 1936 release—it even won both the National Book Award and the Pulitzer Prize. But what really impressed me was Mitchell herself. She was a savvy business woman and a generous philanthropist. And, as it turns out, one hell of a writer. I finally read *Gone With the Wind* and came away in awe. It's a historically rich document with well-developed characters and a pacing that left me nearly breathless. Does it fall short in presenting the horrors of slavery? Yes, but it is no apologia for the ways of the old South. It's a thought-provoking, terrific read.

I also was impressed by Wiley, who had devoted most of his adult life to preserving documentation and memorabilia relating to Mitchell's legacy. What especially caught my eye was information he had acquired about Mitchell's legal woes in managing her publishing contract, the sale of her movie rights to David O. Selznick, and her copyright outside of the United

States. I told Wiley he was crazy if he didn't write a booktelling this previously untold side of the Mitchell story. It was a fundamental part of American literary and legal history that deserved to be known. Wiley agreed a book needed to be written but suggested that I be the one to tackle the project. Ultimately, we decided to work on the project together.

*Margaret Mitchell's Gone with the Wind: A Bestseller's Odyssey from Atlanta to Hollywood*, was released in 2011. We describe it as a biography of *Gone With the Wind*, including everything from how the book was written to its status today as a pop culture icon that still generates impressive profits. A key part of the story is the relationship between Margaret Mitchell and her brother, Stephens Mitchell, an estates and trusts lawyer in Atlanta, who helped her navigate the legal complexities associated with being the author of the world's most popular novel. Stephens didn't know a thing about publishing or movie contracts but ultimately turned his sister's literary rights into a veritable money-making machine. It's a David v. Goliath story that I think will appeal to any lawyer whose ever felt out of his or her element.

The four plus years of work that went into writing and promoting *A Bestseller's Odyssey* were a fascinating experience. To my surprise, the pressure was often worse than practicing law. There were weeks on end that I didn't get more than two or three hours of sleep a night. There was plenty of grueling travel. Sure, no partners, clients, or judges were breathing down my neck but agents, editors, and critics had plenty of demands to make. Even so, I loved every minute of the project. There wasn't a day I was bored. I couldn't wait to get up in the morning to get back to work and often had to tear myself away to do basic things like feed my children. (They only recently have gotten used to dinner that does not involve cereal or frozen waffles.) And no matter how crazy things got, that eye never twitched once.

*Ellen F. Brown is an award-winning freelance writer. Her first book, Margaret Mitchell's Gone With the Wind: A Bestseller's Odyssey from Atlanta to Hollywood, was a Publisher's Weekly "top pick" for spring 2011 and was featured in the New York Times and USA Today and on NPR and the CBS Early Show. Before embarking on a writing career, she practiced law at Hunton & Williams, the Office of the Attorney General, and Dominion.*

# W. Joseph Owen III Named Recipient of the Tradition of Excellence Award

W. Joseph Owen III, whose work as a general practitioner is enhanced by extensive involvement with the Fellowship of Christian Athletes, has been named the 2013 recipient of the Tradition of Excellence Award by the Virginia State Bar's General Practice Section.

The award recognizes a lawyer who embodies the highest tradition of personal and professional excellence and who has benefitted a community and enhanced the esteem of general practice attorneys in Virginia. It will be presented on June 15 during the VSB annual meeting at Virginia Beach.



Owen, of Midlothian, Virginia, is the founding partner of Owen & Owens.

Law firm partner Sam Kaufman described Owen as the quintessential general practitioner. "It is not uncommon for him to handle a felony criminal matter and a complex civil dispute in the same week," Kaufman wrote. Owen & Owens co-founder Mary Burkey Owens wrote that Owen is "able to handle a vast array of legal issues and handle them all well."

Owen serves the community as state chair and member of the national board of trustees for the Fellowship of Christian Athletes and locally for the FCA chapter at Armstrong High School in Richmond. He is a founding member of Northstar Community, a Christian-based organization that assists families struggling with addiction. He is also a member of the University of Richmond's Athletic Council; he is a speaker for the Strike Out Substance Abuse program; he created the Grayson Owen Firearm pledge in memory of his late son; and he is vice chair of the Chippenham Place Community Development Authority Board.

Owen also is chair of the Chesterfield County Drug Court Foundation, a past member of the board of directors of Virginia Association of Defense Attorneys, and past president of the Midlothian Rotary Club.

He received his law degree from the University of Virginia Law School in 1976 and his B.S. from the University of Richmond in 1972. He and his wife Lori have two sons. One son, Grayson, died as a teenager in a gun accident.

Virginia State Bar  
Eighth & Main Building  
707 East Main Street, Suite 1500  
Richmond, Virginia 23219-2800



PRST STD  
U.S. POSTAGE  
PAID  
PERMIT NO. 709  
RICHMOND

## Virginia State Bar General Practice Section Board of Governors 2013



**Grayson S. Johnson, Esq.**  
*Chair*  
Rockville, VA  
(T) 804-749-3241

**Mary Louise Costello Daniel, Esq.**  
*Vice Chair*  
Winchester, VA  
(T) 540-678-4731

**Ryan Seth Marion, Esq.**  
*Secretary*  
Newport News, VA  
(T) 757-873-6620

**Jeffrey Cansino Flax, Esq.**  
*Immediate Past Chair*  
Virginia Beach, VA  
(T) 757-499-9601

**Board of Governors**  
**Scott Ivars Bemberis, Esq.**  
Richmond, VA  
(T) 804-379-2119

**Lewis McCauley Chenault, Esq.**  
Mechanicsville, VA  
(T) 804-730-7175

**Marc Daniel Janney, Esq.**  
Luray, VA  
(T) 540-743-6593

**John Chadwick Johnson, Esq.**  
Roanoke, VA  
(T) 540-725-3363

**John Randolph Nelson, Esq.**  
Lynchburg, VA  
(T) 434-528-1078

**Ronald Allen Page, Jr., Esq.**  
Richmond, VA  
(T) 804-562-8704

**Philip Lee Russo, Jr., Esq.**  
Virginia Beach, VA  
(T) 757-499-6020

**Matthew Jordan Zwerdling, Esq.**  
*Newsletter Editor*  
Richmond, VA  
(T) 804-355-5719

**Hon. Bonnie Christell Davis**  
*Ex-Officio Judicial*  
Chesterfield J&DR Court

**Hon. Robert A. Pustilnik**  
*Ex-Officio Judicial*  
John Marshall Court Building

**Mrs. Catherine D. Huband**  
*Liaison*  
Virginia State Bar  
(T) 804-775-0514