Senator Barbara A. Favola, Chair
Commission on Youth
900 East Main Street, 11th Floor
Richmond, VA 23219

RE: Concept of Juvenile and Domestic Relations District Courts Becoming Courts of Record for Cases Involving Child Custody and Involuntary Termination of Parental Rights

Dear Senator Favola and Commission on Youth Members:

The Virginia Bar Association's Commission on the Needs of Children (the Commission) was asked to consider the following:

- The implications of the removal of the right to appeal, to Circuit Court from Juvenile and Domestic Relations District Court, certain cases involving termination of parental rights. (§ 16.1-296 (D))
- The concept of having the Juvenile and Domestic Relations District Courts become courts of record for matters involving child custody and termination of parental rights. This could be accomplished by requiring court reporters to be present in these specific proceedings with appeals going directly to the Virginia Court of Appeals.

The Commission appreciates being asked for its input on these important issues. In response, the Commission has reviewed the current statutes related to termination of parental rights, examined prior efforts by the Commonwealth to implement a family court system and have appeals go directly to the Virginia Court of Appeals, and highlighted a number of issues for the Commission on Youth to consider in its deliberations.

VIRGINIA BAR ASSOCIATION'S COMMISSION ON THE NEEDS OF CHILDREN

As background, the Commission is a multi-disciplinary group established by the Virginia Bar Association, a voluntary organization of Virginia lawyers committed to serving the public and the legal community by promoting the highest standards of integrity, professionalism, and excellence in the legal profession. The Commission's membership includes lawyers, judges, academicians, physicians, and child advocates. Its mission is to improve the lives of children through advances in law, justice, knowledge, practice, and public policy.

RELEVANT CODE SECTIONS

Va. Code §16.1-283 addresses involuntary termination of residual parental rights. To terminate parental rights of a parent(s), a petition specifically requesting such relief must be filed with the juvenile and domestic relations district court. No petition seeking termination of residual parental rights will be accepted prior to the filing of a foster care plan, pursuant to Va. Code §16.1-281(see below), which documents that the termination is in the child's best interests. The court may hear and adjudicate, i.e., decide, "a petition for termination of parental rights in the same

proceeding in which the court has approved a foster care plan which documents that termination is in the best interests of the child." The rights of one parent may be terminated without affecting the rights of the other parent. It is unnecessary for the local board of social services or a licensed child-placing agency to have identified an available and eligible family to the adopt the child prior to entry of the order terminating parental rights.

Va. Code §16.1-283 further provides that any order terminating residual parental rights shall be accompanied by an order continuing custody or granting custody to a local board of social services, to a licensed child-placing agency, or granting custody to a relative or other interested individual. Any order transferring custody to a relative or interested party can only be issued after an investigation, as directed by the court, shows by a preponderance of the evidence that the relative or interested party meets four qualifications: the individual is willing and qualified to receive and care for the child; is willing to have a positive, continuous relationship with the child; is committed to providing a permanent, suitable home for the child; and is willing and has the ability to protect the child from abuse and neglect. All of these criteria must be stated in the order as having been met. The order should further provide, as appropriate, for any terms and conditions which would promote the child's interest and welfare.

Summons for the hearing shall be provided to the child, if s/he is twelve or older; at least one parent, guardian, legal custodian or other person standing in loco parentis; and such other persons as the court deems proper and necessary parties to the proceedings. Va. Code §16.1-263. Written notice shall also be given to foster parents, a relative providing care for the child, and any pre-adoptive parents informing them that they may appear as witnesses at the hearing to give testimony and participate in the hearing. The summons or notice of hearing shall clearly state the consequences of a termination of residual parental rights. Service shall be made pursuant to Va. Code §16.1-264.

Residual parental rights of a parent(s) can be terminated where a child is: (1) abused or neglected and placed in foster care as a result of court commitment; an entrustment agreement entered into by the parent(s), or other voluntary relinquishment by the parents (Va. Code §16.1-283 B); (2) placed in foster care as a result of court commitment, an entrustment agreement entered into by the parent(s), or other voluntary relinquishment by the parents (Va. Code §16.1-283 C); (3) abandoned (Va. Code §16.1-283 D); or (4) placed in the custody of a local board or licensed child-placing agency and the residual parental rights of the child's sibling have previously been involuntarily terminated, the parent has been convicted of certain offenses, or the parent has subjected the child to "aggravated circumstances," such as torture or chronic or severe physical or sexual abuse (Va. Code §16.1-283 E).

Before terminating parental rights, the court must first find by clear and convincing evidence that such termination is in the child's best interests and satisfies the necessary statutory grounds for termination. In cases of abuse and neglect, the grounds for termination include: (1) the abuse and neglect suffered by the child presents a serious and substantial threat to the child's life, health or development, and (2) it is not reasonably likely the conditions can be substantially corrected or eliminated to allow the child's return home within a reasonable period of time, despite agency efforts to rehabilitate the parent(s). Va. Code §16.1-283 B. In cases of children placed in foster care as a result of court commitment, an entrustment agreement entered into by the parent(s), or

other voluntary relinquishment by the parents, the grounds for termination include a court finding that the parent(s) has, without good cause, either (1) failed to maintain continuing contact with the child and to provide or substantially plan for the child's future for a period of six months after placement in foster care, or (2) has been unwilling or unable within a reasonable period of time not to exceed twelve months from the date the child was placed in foster care to remedy substantially the conditions which led to or required continuation of the child's foster care placement, despite agency efforts to rehabilitate the parent. Va. Code §16.1-283 C. In abandonment cases, the grounds for termination include: (1) the identity or whereabouts of the child's parent(s) cannot be determined; (2) the child's parent(s), guardian, or relatives have not come forward to identify the child and claim a relationship to the child within three months following the issuance of a court order placing the child in foster care; and (3) diligent efforts have been made to locate the child's parent(s). Va. Code §16.1-283 D.

Once an order terminating parental rights is entered, the local board or licensed child-placing agency having authority to place the child for adoption shall file a written adoption progress report with the court on the progress being made to place the child in an adoptive home. Va. Code §16.1-283 F.

Residual parental rights cannot be terminated if a child is fourteen years or older, or otherwise is of an age of discretion, and objects to the termination. An exception is provided if the child has a disability that reduces the child's developmental age and the child is not otherwise of an age of discretion. Va. Code §16.1-283 G.

Children whose parents' rights are terminated must have been placed in foster care. See Va. Code § 16.1-283, which states, "No petition seeking termination of residual parental rights shall be accepted by the court prior to the filing of a foster care plan, pursuant to Va. Code § 16.1-281. Va. Code § 16.1-281 provides: "In any case in which (i) a local board of social services places a child through an agreement with the parents or guardians where legal custody remains with the parents or guardian, or (ii) legal custody of a child is given a local board of social services or child welfare agency, the local department of social services or child welfare agency shall prepare a foster care plan for such child. . . ." Within ten months of the dispositional hearing where the juvenile court reviews the foster care plan, a permanency planning hearing is to be held if the child was placed by the parents or guardians as outline above or the child is under the legal custody of the a local board of social services or child welfare agency and has not had a petition to terminate parental rights filed on the child's behalf; has not been placed in permanent foster care; or is age sixteen or over where the plan for the child is not independent living. One option for achieving permanency is to petition the court for a termination of parental rights pursuant to Va. Code §16.1-283.

Va. Code § 16.1-296 (D) provides: "When an appeal is taken in a case involving termination of parental rights brought under § 16.1-283, the circuit court shall hold a hearing on the merits of the case within 90 days of the perfecting of the appeal. An appeal of the case to the Court of Appeals shall take precedence on the docket of the Court."

FAMILY COURT STUDIES

In 1989, the Virginia General Assembly enacted legislation directing the Judicial Conference of Virginia ("Council") to establish an experimental family court program (Chapter 641, 1989 Acts of Assembly). The Family Court Project enabling legislation

> placed jurisdiction and responsibility for child and family-related court issues in one court, a family court. The pilot family courts were authorized to hear not only cases normally within the jurisdiction of the juvenile and domestic relations district courts but also suits for annulling or affirming a marriage and for divorce that were referred to them by designated circuit courts. The designated circuit courts were required to refer to the family courts no less than 20% nor more than 50% of all suits for annulment or affirmation of a marriage and for divorce filed in the circuit court. The addition of divorce suits to the jurisdiction of the juvenile court which is traditionally charged with responsibility for child and family-related cases provided an opportunity in the family court to consolidate related family issues.
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> Final orders of the family court were appealed on the record to the Court of Appeals in any case involving [marriage, annulment, divorce, support, custody, visitation] . . . and termination of residual parental rights and responsibilities. . . This statute excluded the use of de novo appeals to the circuit court for the pilot family courts in these specified case types.

The Family Court Pilot Project, Senate Document No. 22 (1993).

The program operated from January 1, 1990 until December 31, 1991. There were ten pilot courts. The judges who served on these courts were drawn from both the circuit courts and the juvenile and domestic relations district courts in urban and rural areas. All had a special interest in children and family law.

At the conclusion of the project the Council, pursuant to Va. Code § 20-96.2, was charged to report "its findings concerning the impact of the experimental family court program on the Commonwealth's judicial system" to the Governor and the General Assembly. The Council found disputes were resolved in a timely, comprehensive, effective manner, resulting in greater litigant satisfaction. It noted, "Litigants in the family courts consistently rated their court experiences more positively on questions reflecting their satisfaction with the court process and their case results, their assessment of the quality of justice which they were afforded and on the psychological impact of the proceedings on themselves and, where applicable, their children." The Council further observed, "Providing an appeal de novo in family law matters allows the adversarial process to protract already emotionally-charged issues and to delay the restoration of the reorganized family unit. These cases should be tried on the record so that the litigants and their children can adjust their relationships and resume their lives without the fear of another court reordering the scheme of things."

Among its final recommendations, the Council said there should be one trial court with comprehensive jurisdiction over child and family related matters, and decisions "should be

appealed on the record as a matter of right to the Court of Appeals. The right of a trial de novo in such cases should be abolished."

The Council's report outlined a comprehensive plan for implementation of the new court system. During the 1993 General Assembly session, legislation was enacted to establish a family court for Virginia effective January 1, 1995. The legislation also required the Council to make recommendations to General Assembly during the 1994 session regarding the financial and personnel requirements needed for the family court system. See Senate Document 42 (1994) for the Council's report. Funds for the new court system were never appropriated.

In 2004, the General Assembly re-visited the issue of family courts. It asked the Judicial Council to evaluate and make recommendations on the funding, resources, and statutory changes needed to implement a system of family courts pursuant to the 1993 enabling legislation. The first phase of the study in 2004 involved updating the original enactment in light of Code changes as well as re-examining the numbers needed for judges, court personnel, and funding. Preliminary findings were completed in December 2004. The following year, an advisory committee of judges, clerks and domestic relations lawyers were appointed by the Chief Justice to review data, study the issue, and make recommendations. In October 2005, a report was submitted to the Chief Justice, who decided after careful review not to move forward at that time with implementation of the family court system.

CONSIDERATIONS AND ISSUES IDENTIFIED BY THE COMMISSION

The Commission is committed to a fair, affordable, accessible system of justice for Virginia's children and families. Disputes need to be resolved with timely, comprehensive, quality decisions. When custody or placement determinations are involved, speedier resolutions can be beneficial to children's mental health and stability. For these reasons, the Commission has long supported a family court system in Virginia that would consolidate proceedings in one forum with a direct right of appeal to the Virginia Court of Appeals. While the Commission on Youth's approach for handling termination of parental rights cases would promote these goals, the Commission is concerned with singling out one particular type of case to the exclusion of other equally important family law matters. The Commission recommends further study be undertaken before seeking to effectuate procedural changes related to termination of residual parental rights cases and broader systemic reforms. If the Commission on Youth chooses to pursue a study, the Commission has identified a number of issues for consideration below.

1. If the juvenile and domestic relations district courts become courts of record, such a change would require the parties to create a record. As noted by the Commission on Youth, one way of creating a record would be to arrange for court reporters to be present in these specific proceedings. The use of court reporters could result in a fiscal impact. Also, while the use of court reporters would be the preferred method for creating a record, it should be noted that pursuant to Virginia Supreme Court Rule 5A:8, the record may be a transcript or a written statement of facts in lieu of a transcript.

2. Juvenile and domestic relations district courts currently lack the necessary staff to handle the direct appeal of termination cases to the Virginia Court of Appeals. Further study is needed to determine adequate staffing levels and related costs.

3. Juvenile and domestic relations district court staff currently lack the necessary training to handle appeals to the Virginia Court of Appeals. A training program would need to be designed.

4. Technology needs may require examination with updates and changes implemented.

5. Procedural safeguards need to be in place to protect the rights of parents and children. Lawyers and guardians *ad litem* who primarily appear in juvenile and domestic relations district courts, where the application of the rules of evidence are sometimes more relaxed, may require additional training on evidentiary matters.

6. While a greater number of appeals to the Virginia Court of Appeals could occur in the short term, these could moderate with time.

7. Lawyers and guardians *ad litem* who primarily practice in the juvenile and domestic relations district courts may require additional training on the appellate process. The courts may also need to identify counsel who have appellate practice experience to add to their court appointed lists.

8. To provide staff, resources, and training will require additional funding. Budgetary issues will need to be considered.

9. If the juvenile and domestic relations district courts become courts of record in termination cases, additional funding may also be needed for the use of expert witnesses.

10. The foster care process is involved. It requires numerous hearings to protect the rights of parties and to safeguard the best interests of children before parental rights can be terminated. Final orders are entered in these cases by the juvenile and domestic relations district courts, which are currently appealable to the circuit courts. Commission members questioned whether these orders would now be appealable directly to the Virginia Court of Appeals. In addition, various members questioned only allowing direct appeals to the Court of Appeals once a parent's rights are terminated.

11. Termination cases have a lifelong impact on the parties as well as extended family members. They are often difficult to decide A decision reached in the circuit court upon de novo review may differ from the one rendered in the juvenile and domestic relations district court. Reasonable minds differ. In addition, parents sometimes need additional time or motivation to resolve the problems that initially prevented them from being able retain parental rights. Some Commission members felt the additional appeal to the circuit court was worthwhile for these reasons.

12. Some termination of parental rights cases involve incarcerated parents. As they are deemed persons under a disability, a guardian *ad litem* must be appointed. Sometimes, the incarceration, which may not be lengthy, is the cause for the termination. As one member noted, many of these individuals, particularly mothers, strongly object to termination petitions. If the Commission chooses to study this issue further, it is recommended that a lawyer who regularly represents the interests of incarcerated parents be included as part of any study group.

13. Lawyers who represent the interests of respondent parents and serve as guardians *ad litem* for children should be included among the members of any study group.

14. If available, it would be helpful to: (a) collect and study any statistics regarding current timelines for termination of parental rights cases; (b) obtain feedback from lawyers and other professionals involved in these cases; and (c) seek input from mental health professionals regarding how earlier resolution of cases could impact the well-being of children and families.

15. As noted in this report, other studies have recommended the juvenile and domestic relations district courts become courts of record. Although these reports have often looked at the court system more broadly, concerns have been raised by various stakeholders. These concerns need to be anticipated and addressed. Also, if the Commission seeks to pursue this jurisdictional exception, some in the General Assembly may view it as an attempt to resurrect the family court system. Finally, if the Commission on Youth was successful in carving out a jurisdictional exception in termination of parental rights cases, the General Assembly might be disinclined to consider further exceptions in the future. The interests of all concerned, therefore, need to be weighed

Again, the Commission appreciates the opportunity to address this important issue. If we can provide any further assistance, please do not hesitate to contact us. Thank you for your consideration.

Sincerely,

Professor Margaret Ivey Bacigal
Chair, The Virginia Bar Association Commission
on the Needs of Children