



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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September 20, 2017

RETIRED JUDGES

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Re: [REDACTED] JA-2017-169

Dear Counsel:

This case is before the Court upon the Defendant, [REDACTED], Motion to Dismiss for lack of subject matter jurisdiction. A child custody and visitation dispute regarding their minor child is pending in this Court. The Plaintiff, [REDACTED], appealed a May 19, 2017 Custody and Visitation Order entered by the Fairfax County Juvenile and Domestic Relations District Court ("JDR").

[REDACTED] filed a Petition for Child Support in the JDR court on May 9, 2016, but subsequently requested and was granted a nonsuit. On July 24, 2017, [REDACTED] declined to refile the matter in JDR, and filed a Petition for Child Support ("Petition") in this current appeal of the custody order pending in Circuit Court. [REDACTED] requests that her Petition for Child Support is to be considered in conjunction with her custody and visitation appeal. [REDACTED] moves to dismiss the Petition, arguing that this Court does not have subject matter jurisdiction. This motion raises two questions:

- A. Was there good cause to bring this case before this Court after taking a nonsuit in the JDR court?

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B. Is the Child Support Petition incidental to the custody and visitation case, such that this Court, as opposed to the JDR court, has subject matter jurisdiction to make a ruling?

After considering the pleadings, memorandums, and oral arguments presented by Counsel, the Court finds that it does not have subject matter jurisdiction over the Petition, and thus Defendant's motion to dismiss the Petition is hereby granted.

**I. BACKGROUND**

[REDACTED] and [REDACTED], who are not married to each other, have a minor child. On May 15, 2017, the parties had a custody and visitation trial in the JDR court. The JDR court subsequently entered a Custody and Visitation Order, which resolved issues of legal and physical custody, as well as visitation. [REDACTED] appealed the JDR court's Order to this Court, and almost two months later, [REDACTED] filed the Petition for Child Support in this Court. As previously mentioned, [REDACTED] dismissed her petition for child support pursuant to Va. Code § 8.01-380. [REDACTED] has not refiled a petition for child support in the Juvenile and Domestic Relations Court. This Court is set to hear the custody and visitation trial commencing on January 22, 2018.

**II. STANDARD OF REVIEW**

Under Virginia law, once a proceeding has been nonsuited, "no new proceeding on the same cause of action or against the same party shall be had in any court other than that in which the nonsuit was taken, unless that court is without jurisdiction, or not a proper venue, or other good cause is shown for proceeding in another court." Va. Code § 8.01-380(A). When a petition is improperly refiled following a nonsuit in another court, it is proper for that court to dismiss the refiled petition for lack of subject matter jurisdiction. *See Davis v County of Fairfax*, 282 Va. 23, 30 (2011) (holding that after a nonsuit in circuit court, the petition should have been refiled in circuit court, and not in the general district court).

In Virginia, juvenile and domestic relations district courts have "exclusive original jurisdiction ... over all cases, matters and proceedings involving ... [t]he custody, visitation, support, control or disposition of a child ... [w]hose custody, visitation or support is a subject of controversy or requires determination." Va. Code § 16.1-241(A)(3). Jurisdiction is concurrent with, not exclusive of, courts having equity jurisdiction in the determination of "custody, guardianship, visitation or support of children when such custody, guardianship, visitation or support is incidental to the determination of causes pending in such courts." Va. Code § 16.1-244(A).

**III. ARGUMENTS**

A. Defendant's Argument

[REDACTED] argues that the Petition cannot be heard by this Court because this Court does not have jurisdiction over child support matters except where an action has been filed in circuit court for divorce, annulment, or for suits to affirm a marriage. Further, [REDACTED] argues that this

Court has jurisdiction to modify, revise, and enforce child support orders that have previously been entered by the Court. The particular circumstances, however, do not apply in this case.

While circuit courts may have concurrent jurisdiction with JDR courts over issues incidental to custody and visitation, the Petition here is not incidental to the custody and visitation case before the Court. Finally, there is no good cause for this Court to hear this matter and it should have been refiled in the JDR court after [REDACTED]'s nonsuit.

B. Plaintiff's Response

[REDACTED] argues that her Petition is properly before this Court because it is incidental to the custody and visitation case, and therefore within this Court's concurrent jurisdiction under the Virginia Code. The amount of support to which [REDACTED] is entitled "flows directly from" the custody and visitation matters to be decided by this Court in January. [REDACTED] further states that both the custody and support disputes will involve overlapping and similar evidence, and thus should be heard together by this Court. Finally, there is good cause for this Court to hear this matter because it would be more efficient for the Petition to be heard with the custody trial, rather than refile the matter in the JDR court.

**IV. ANALYSIS**

A. There is No Good Cause for this Court to hear this case.

The JDR court was not "without jurisdiction" to hear a petition for child support. Va. Code § 8.01-380(A). In Virginia, juvenile and domestic relations district courts have "exclusive original jurisdiction ... over all cases, matters and proceedings involving ... support." Va. Code § 16.1-241(A)(3). When [REDACTED] nonsuited her Petition for Child Support in the JDR court, she could not bring a new petition on the same cause of action and against the same party in any court other than the JDR court.

The JDR court was not "without jurisdiction" and there was no good cause to bring it before this Court instead. [REDACTED]'s efficiency argument is flawed on the grounds that her Petition for Child Support would require a second subsequent hearing after custody has been determined by this Court. Discovery on child support issues is drastically different than custody matters. Furthermore, the witnesses would be required to testify twice. Any perceived convenience for the parties does not amount to "good cause," especially when the JDR court retains jurisdiction to hear the Petition. Therefore, [REDACTED]'s "good cause" argument fails.

B. The Child Support Petition is not incidental to the custody and visitation case, and therefore, this Court does not have subject matter jurisdiction to hear the Petition

The Virginia Supreme Court has construed Virginia Code §§ 16.1-241 and -244 to mean that circuit courts have "no original jurisdiction to entertain a petition for custody, support and visitation, unless such matters were incidental to a cause properly within the court's jurisdiction." *Rochelle v Rochelle*, 225 Va. 387, 391 (1983). Generally, JDR courts in Virginia

have exclusive original jurisdiction in custody cases “unless and until the circuit courts assume jurisdiction.” *Peple v. Peple*, 5 Va. App. 414, 418 (1988). A circuit court can assume jurisdiction by an appeal from a JDR court or by the direct filing of an “appropriate proceeding.” *Id*

Here, because [REDACTED] nonsuited the petition for child support in the JDR court, the current Petition is not before this Court on an appeal. Therefore, this Court does not have jurisdiction over the Petition in that manner. Moreover, the filing of the Petition in this Court is not an appropriate proceeding because child support is not incidental to the custody trial this court will hear in January. While “incidental” matters do exist in some lawsuits, that is not the case here. An example of an incidental matter that the Virginia Code contemplates is when a divorce suit has been filed in the circuit court. In that instance, if custody, visitation, or support of the children are at issue, the JDR court is “divested” of its power and the circuit court makes further determinations. *Id* at 418-19 (internal quotations omitted).

The Virginia Court of Appeals has held that custody is incidental to visitation, which is consistent with the Virginia Code’s factors that a court must evaluate. *See Cintron v. Long*, 2000 Va. App. LEXIS 487, \*10 (2000) (unpublished); Va. Code § 20-124.3 (discussion of best interest factors to determine custody and visitation). Child support, however, is evaluated separately by courts, and utilizes different factors and a different statutory scheme. *See generally* Va. Code § 20-108.2. Finally, a child support determination often happens after custody has been decided.

While it may be convenient for the parties to have this Court hear both the custody trial and the Petition for child support, the statute is clear on subject matter jurisdiction. The JDR court is not without jurisdiction to hear the Petition and that is where the Petition should be brought.

## V. CONCLUSION

For the foregoing reasons, the Court grants Defendant’s motion to dismiss for lack of subject matter jurisdiction, and dismisses the Petition without prejudice to refile in the proper forum.

Sincerely,

[REDACTED]  
Daniel E. Ortiz  
Circuit Court Judge

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