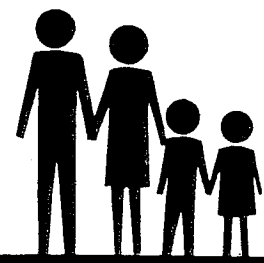


# Family Law News



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Editor: Richard E. Crouch  
Assistant Editor: John Crouch

There is also Charlottesville lawyer Steve Raynor's dissertation on third-party custody litigation, and David Duff's masterful catalogue of family law malpractice traps, told from the viewpoint of a very active legal malpractice plaintiffs' lawyer especially qualified in family law.

And while you're thinking about expressing your thanks to these hard-working authors during this great time of giving, why don't you give a bit of thought to Giving Back yourself? This is your newsletter, Gentle Readers, and without your gifts in the form of authorship, it would fade quite away. Your recent and not-so-recent experiences with Virginia practice, and any research that a case has made you do, are almost always raw material for a potential article, just waiting to be shared. Think about it.



## *The Impact of Driving Under the Influence Charges on Visitation*

By Craig Sampson, Chesterfield

If you handle enough visitation cases, at some point the need to assess the impact of a driving under the influence charge will arise. The charge may belong to the primary custodian, or it may belong to the non-custodial parent. The charge may be against your client, or it may be against the opposing party. In any instance, a conviction for driving under the influence can change the game considerably.

This article does not address the technical or procedural defenses associated with defending a driving under the influence (DUI) case. This article outlines the statutory penalties that flow from a driving under the influence conviction and discusses them in the context of a visitation case. First, it will briefly address incarceration and its impact on visitation. Second, it will address the DUI penalty that probably will have the most extensive impact on a visitation case, namely the suspension of driving privileges. Along the way, this article will point out a few aspects of the drunk driving statutes that may be of particular interest to family law practitioners.

### **INCARCERATION**

Driving under the influence is a Class 1 misdemeanor punishable by up to twelve months in jail. §18.2-270. A third or subsequent conviction within a ten year period is a Class 6 felony punishable by up to five years in prison. §18.2-270. The amount of incarceration given to a particular offender is a function of three factors: 1) the minimum mandatory sentence associated with the blood alcohol content (BAC) of the defendant as measured by an analysis of the offender's breath or blood; 2) the minimum mandatory sentence associated with the number of prior convictions for driving under the influence; and 3) the sentencing discretion given to the Judge beyond the mandatory minimums prescribed by law.

Virginia Code §18.2-270 spells out the minimum required periods of incarceration associated with DUI convictions. The chart below summarizes the incarceration scheme set forth in the Code. Keep in mind three things when reviewing this chart. First, the mandatory minimum sentences are both mandatory (meaning the court has no discretion but to impose at least that amount) and only a minimum (meaning the court is free to go higher up to the statutory maximum). Second, because the statute requires these minimum sentences, there is no time reduction for good behavior; the offender must serve all the mandatory minimum days prescribed. Third, mandatory minimum punishments imposed pursuant to this section are cumulative and to be served consecutively (provided they don't exceed the applicable statutory maximum). Virginia Code §18.2-270(F).

Offense Number and Maximum	Blood Alcohol Level	Mandatory Minimum
<b>CLASS 1 MISDEMEANOR</b>		
(up to twelve months in jail)		
1st offense	less than .15	no minimum mandatory
1st offense	.15 to .20	five days
1st offense	.21 or greater	ten days
2nd offense w/in 5 years	less than .15	twenty days
2nd offense w/in 10 years	less than .15	ten days
2nd offense w/in ten years	.15 to .20	add an additional ten days
2nd offense w/in ten years	.21 or more	add an additional twenty days

<b>CLASS 6 FELONY</b>		
(up to 5 years prison)		
3rd offense w/in ten years		ninety days
3rd offense w/in five years		six months
4th or more w/in ten years		one year



Obviously, jail time can have a serious impact on one's ability to exercise visitation with one's children. As is evident from the chart above, however, the jail time associated with a first or second offense will likely only present a temporary inconvenience to visitation. An unpleasant and embarrassing inconvenience, but a temporary one nonetheless. The lengthier prison times associated with third, fourth and subsequent convictions, however, can mean significant, or terminal, disruptions of one's visitation schedule.

## LICENSE SUSPENSION

While incarceration is serious, the real impact from a DUI upon custody or visitation cases usually comes from the suspension of driving privileges. Except in cases of those who get three or more convictions, the jail time will come and go relatively quickly and the visitation schedule can be resumed. The loss of driving privileges, however, continues long after the jail time is completed.

The suspension of driving privileges comes in two forms at two different times. First, a person arrested on suspicion of driving under the influence will have his license administratively suspended at the time of his arrest. Later, a person convicted of driving under the influence will again have his license suspended as part of his punishment.

### Administrative Suspension at Time of Arrest

Virginia Code §46.2-391.2 provides for the immediate administrative suspension of driving privileges for anyone arrested for driving under the influence of alcohol or other drugs, including juveniles. The suspension is put into effect by the arresting officer, who will seize the suspect's license and turn it over to the clerk of the general district court. The officer will also serve official notice to the suspect that his license is being administratively suspended. The length of the administrative suspension depends upon the number of prior convictions for driving under the influence, as is set forth in the chart below:

<b>Number of Offenses</b>	<b>Length of Administrative Suspension</b>
First offense	seven days
Second offense	sixty days (or day of trial, if more than seven days of suspension have elapsed)
Third or subsequent offense	suspended until the day of trial

See Virginia Code §46.2-391.2(A).

Virginia Code §46.2-391.2(C) does provide a mechanism whereby a suspected offender can challenge the administrative suspension in court. If the person proves to the court by a preponderance of the evidence that there was no probable cause for the arrest or no probable cause for the issuance of the warrant, then the court shall rescind the suspension. The court's findings are without prejudice to the person contesting the suspension or to any other potential party as to any proceedings, civil or criminal, and shall not be evidence in any proceedings, civil or criminal.

While this mechanism exists, it is probably rarely invoked and even more rarely done so successfully. Generally speaking, it is not difficult for the Commonwealth to demonstrate that there was sufficient probable cause for the arrest. Still, this provision does exist for the appropriate set of facts. For example, if a person is arrested for a second offense and the defendant can prove he does not have a prior conviction, his administrative suspension would be reduced from sixty to seven days.

The administrative suspension is in addition to any later license suspension that may come from conviction at trial. There is no credit given for the license suspension already experienced by the offender. If the arrestee is acquitted at trial, there is no compensation for the fact that he was administratively without his license for a period of time.

Obviously, the administrative suspension of driving privileges can immediately impact visitation rights. Assuming probable cause can be established, there is no opportunity for a person to get any driving privileges, however limited, during the period of administrative suspension.

If it comes to your attention that a party in a visitation dispute has been arrested on suspicion of driving under the influence, there is a simple way to find out whether or not the person has a license and should be driving at all – pull the court file. The court file will contain the administrative notice of suspension which will succinctly outline the period of suspension. Visitation might still occur, but it will have to be with someone other than the offender driving.

**Suspension of Driving Privileges Upon Conviction**

The primary means of punishment for driving under the influence is the curtailment of driving privileges. The length of suspension depends upon the number of prior offenses and the length of time during which those offenses occurred.

The chart below summarizes Virginia Code §§18.2-271 and 18.2-271.1(E) and shows the length of license suspension that corresponds with a first or subsequent violation. The first column states the offense number (how many times he has been convicted of driving under the influence in toto); the second column shows the amount of license suspension that must be imposed by the court (no discretion to increase or decrease the amount of suspension is given to the court); and the third column shows how long the convicted defendant must wait before he is eligible for restricted driving privileges. Note that the court cannot shorten or lengthen the period of suspension or the amount of time that must pass before the defendant is eligible for restricted privileges. Also note that the court is never required to give restricted privileges, though it is commonly done in cases of first and second offenses.

<b>Number of Offense</b>	<b>License Suspension</b>	<b>Eligible for Restricted License</b>
First	one year	Immediately
Second w/in 5 years	three years	after one year
Second w/in 10 years	three years	after four months
Third or subsequent	Indefinite	must petition Circuit court

After a third or subsequent conviction, there is a lengthy and expensive process that must be undertaken before an offender can drive for any reason. For the purposes of this article, suffice it to say that it will likely be years before such an offender will legally drive a car again.

**Restricted Driving Privileges**

An offender can request the court to authorize restricted driving privileges (after the passage of time as outlined above) for certain statutorily enumerated reasons set forth in Virginia Code §18.2-271.1(E). Those reasons include 1) to and from one’s place of employment, 2) in the course of employment, 3) to and from an alcohol rehabilitation or safety action program, substance abuse counseling or treatment, 4) to and from court, and 5) and to and from school if such person is a student and can provide written verification thereof. They also may get restricted privileges for certain types of medically necessary travel.

Over the years additional restricted privileges have been added that are particularly useful to family law practitioners. For example, the court may allow travel necessary to

transport a minor child under the care of such person to and from school, day care, and facilities housing medical service providers. The court may also allow travel to and from court-ordered visitation with a child of such person. Note that the Code only allows for travel to and from *court-ordered* visitation, which means that visitation that is done by agreement (even an agreement reduced to writing) does not technically qualify the person for driving for child visitation. If a client exercises visitation but has no court order, that person may have to go to family court and get an order so that he can then take it to the traffic court judge and ask for matching driving privileges.

### **Ignition Interlock**

Virginia Code Section 18.2-270.1 states that the court 1) may for a first offense, 2) shall for a second or subsequent offense, and 3) shall for a first offense where an offender's blood alcohol content is 0.15 percent or greater, place an ignition interlock on the offender's car as a condition of a restricted license. An "ignition interlock system" is a contraption that is installed into the offender's car. The offender must blow into it before the car will start and may have to provide additional breath samples as he or she drives (called a "rolling retest"). It measures a driver's blood alcohol content and kills the vehicle's engine if alcohol is detected. The ignition interlock is used in conjunction with, not in place of, the restriction of driving privileges.

With respect to a visitation case, the presence of the ignition interlock system gives rise to conflicting arguments. It can be argued that the presence of the ignition interlock system is 1) proof that the party has a substance abuse problem and 2) serves as a glaringly bad example to the child(ren) each time they ride in the car with the offending parent. The counterarguments can be made, however, that 1) the non-offending party can be assured that the offending party cannot drive drunk with the child(ren) in the car as long as the interlock system is in place, and 2) the presence of the interlock system serves as a means for the offending parent to demonstrate to the child that actions have consequences.

### **Penalties for Violating the Terms of Restricted Privileges**

While the chances of getting caught driving outside of one's privileges may be relatively small, the penalty for doing so can be severe. Most judges take a dim view of persons who refuse to adhere to a court order. Virginia Code Section 18.2-272 states that any person any person who drives or operates any motor vehicle, engine or train in the Commonwealth during the time for which he was deprived of the right to do so, or in violation of the terms of a restricted license, is guilty of a Class 1 misdemeanor (up to twelve months in jail). Any jail time that the court suspended on condition of good behavior as part of the original DUI sentence may be re-imposed. Perhaps even worse is the fact that any restricted driving privileges will likely be revoked entirely for the remainder of the suspension period.



### **CONCLUSION**

A DUI conviction is expensive, embarrassing and inconvenient on many levels. If your client gets a DUI, refer him or her to a competent traffic attorney, then communicate with that attorney so that your client can continue to enjoy the most liberal visitation possible. Keep in mind as well that the Virginia legislature loves to tinker each year with the DUI laws, and the particulars of the statutes as outlined above are subject each year to change.